

Female genital mutilation and the best interests of the child principle

D Giorgi

 **orcid.org/0000-0001-5036-1371**

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Supervisor: Dr AF van den Berg

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Student number: 27239470

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ABSTRACT

Female genital mutilation (FGM) involves all procedures that partially or completely removes the external female genitalia for non-medical reasons. This research describes the current prevalence of FGM as a traditional practice from the perspective of the overarching best interests of the child principle. It illustrates the global prevalence of the occurrence by analysing it in different contexts and showing the notable differences in regional factors. FGM constitutes a violation of a broad category of rights: non-discrimination, highest attainable standard of health, culture and tradition, as well as education and information. The overall legal framework regulating FGM and its impact is studied, with specific reference to the obligations of States.

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
B.C.	Before Christ
CBT	Cognitive behavioural therapy
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CM	Centimetres
CRC	Convention on the Rights of the Child
DBWRF	Dawoodi Bohra Women's Association of Religious Freedom
DHS	Demographic Health Survey
FC	Female circumcision
FGC	Female genital cutting
FGM	Female genital mutilation
FIGO	Federation of Gynaecology and Obstetrics
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MICS	Multiple Indicator Cluster Survey
NGO	Non-governmental organization
ONIC	National Indigenous Organization of Colombia
PTSD	Post-traumatic stress disorder
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFPA	United Nations Population Fund
UNHRC	United Nations Human Rights Council
UNICEF	United Nations International Children's Emergency Fund
WHA	World Health Assembly
WHO	World Health Organization
WMA	World Medical Association

Chapter 1 Introduction and problem statement

1 Introduction and problem statement

Female genital mutilation (FGM) is a deep-rooted traditional practice that encompasses procedures that deliberately alter, remove, or manipulate the external genitalia in young girls.¹ Although this is a known practice, its impact only started receiving attention in the 1950s. It was not until the 1990s that FGM was elevated to an internationally recognised problem.² It sparked an international outcry and caught the attention of social activists and feminists around the globe as it links directly with many aspects of modern international policies and law systems, for instance as human rights, which includes sexual and reproductive health, gender equality, and cultural rights, amongst others.³

According to the World Health Organization (WHO), FGM is broadly defined as:

...all procedures that involve partial or total removal of the external female genitalia, or other injuries to the female genital organs for non-medical reasons.⁴

The term "FGM" is considered to be a generic term, but it is important to note that it cannot be isolated from the global nature of the problem. According to the United Nations Children's Emergency Fund (UNICEF), an estimated 200 million girls in a total of 30 countries have been victims of the practice. Of these, 91.5 million girls

¹ Klein *et al* 2018 *Obstetrics and Gynecology International* 1; Rushwan 2000 *International Journal of Gynecology & Obstetrics* 99.

² Khan, Shekhani and Jafarey 2018 *Indian Journal of Medical Ethics Online* 1.

³ Schmeer 2002 *Oxford University Press* 1665. See Chapters 2, 3, and 4 for a discussion on the rights associated with FGM.

⁴ Anon 2018 <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>. See also Munir 2014 *International Review of Law* 2 and Serour 2013 *African Journal of Urology* 147, which state that FGM is often performed without antibiotics, antiseptics, or anaesthesia by traditional health practitioners or other members of society who do not have any medical training, in an unsterilised environment with glass, stones, or razors. In rare cases, it may be done by medical professionals, an occurrence referred to as the "medicalisation" of FGM.

live in Africa and are over the age of nine.⁵ Although most of the cases involving FGM occur in Africa, an increase in international migration caused a spread of FGM practices.⁶ Frequently, the international debate includes all types of FGM in all countries where it is evident, despite the differences in its extent and severity.⁷ There are significant variations in the regional prevalence of FGM and the factors associated with the various practices performed in different regions.⁸

In an effort to understand the global extent of the problem, this study includes a brief overview of FGM in countries on different continents, i.e. Somalia, India, the United Kingdom, and Colombia, which were selected based on the fact that they represent different ideals, cultures, religions, and demographics, which ought to confirm that FGM is not exclusive to one region. While these countries' legislation and legislative processes differ, the human rights violated by FGM exceed national boundaries.⁹ There is also a notable difference in the regional factors associated with FGM and its various reasons for continuation. The most common are cultural and religious beliefs, economic reasons, social status, and psychosexual reasons.¹⁰ What is clear, however, is that FGM is either considered a horrendous practice in a society and victims and those at risk are hesitant to resolve it or, in the alternative, is so deeply ingrained in society that they simply choose not to disclose it. As a result, authorities and other institutions are either unaware of the practice or choose to simply disregard it. A prominent and common determiner of FGM statistics is

⁵ UNICEF 2016 https://www.unicef.org/Spanish/protection/files/00-FMGC_infographiclow-res.pdf; Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283; Paliwal *et al* 2014 *Midwifery* 282.

⁶ Para 10 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014); Dustin 2010 *European Journal of Women's Health* 8.

⁷ Khan, Shekhani and Jafarey 2018 *Indian Journal of Medical Ethics Online* 1.

⁸ Setegn, Lakew and Deribe 2015 *PLoS One* 1.

⁹ Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Svanemyr *et al Reproductive Health Journal* 1.

¹⁰ UNFPA 2018 <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#>).

young populations, as the practice is commonly performed on girls before the onset of puberty, therefore in the age range from birth to 15 years of age.¹¹ Occasionally, it is performed on adult and married women, although this is the exception. This is only evident in some groups associated with FGM.¹²

The *Convention on the Rights of the Child*, 1989 (CRC) underscores the importance of ensuring the protection and care of children. Its rationale is based on the fact that children are a vulnerable group and thus need special protection. This is enshrined in the preamble, stating that "childhood is entitled to special care and assistance".¹³ The CRC stipulates that the primary consideration in all matters regarding children shall be the best interests of the child.¹⁴ Determining what the best interests of a child in the case of FGM entails, requires an assessment of their identity, which includes their "nationality, upbringing, ethnic, cultural and linguistic background" and specific vulnerabilities.¹⁵ Furthermore, the CRC places the ultimate obligation on states to ensure that the fundamental rights of children are protected. The state has the responsibility to:

...take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation...¹⁶

¹¹ Richter Female Genital Mutilation (FGM) In: Human Rights Education Through Ciné Débat 38; United Nations Population Fund 2016 [https://sustainabledevelopment.un.org/content/documents/19961027123_UN_Demographics_v3%20\(1\).](https://sustainabledevelopment.un.org/content/documents/19961027123_UN_Demographics_v3%20(1).)

¹² Richter Female Genital Mutilation (FGM) In: Human Rights Education Through Ciné Débat 38; United Nations Population Fund 2016 [https://sustainabledevelopment.un.org/content/documents/19961027123_UN_Demographics_v3%20\(1\).](https://sustainabledevelopment.un.org/content/documents/19961027123_UN_Demographics_v3%20(1).)

¹³ Freeman 1992 *International Journal of Law and the Family* 54; A 28 of the Universal Declaration of Human Rights (1945).

¹⁴ A 3(1) of the Convention on the Rights of the Child (1989).

¹⁵ Para 20 of the Committee on the Rights of the Child, General Comment No. 6 on the Treatment of Unaccompanied and Separated Children outside their Country of Origin (2005).

¹⁶ A 19(a) of the Convention on the Rights of the Child (1989).

There is, of course, an interdependence between article 3 and article 24, which reads that the child has the right to:

...the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.¹⁷

The CRC mandates all state parties to abolish "traditional practices prejudicial to the health of children".¹⁸ According to UNICEF, "harmful traditional practices" are defined as:

...discriminatory practices committed regularly over such long periods of time that communities and societies begin to consider them acceptable.¹⁹

FGM as a harmful traditional practice has become a recognised problem in the international community as it concerns the human rights and status of female children. Regrettably, the CRC does not specifically and directly ban or make provision all harmful traditional practices, including FGM, and, simultaneously, it is argued that the fundamental principle of equality is undermined due to the fact that some provisions ensure more protection for male children than is the case for female children.²⁰ The CRC cannot be fully applied to the African continent and other Third World countries where these harmful practices generally occur, because some role players and academics believe that a majority of Westerns countries were present in its drafting.²¹ Doek also concedes this by referring to the "...related complaint that the CRC is based on Western concepts...", which means that it does not make provision for issues that are frequently evident in developing countries and, as a

¹⁷ Convention on the Rights of the Child (1989); A 12 of the International Covenant on Economic, Social and Cultural Rights (1976).

¹⁸ A 24(3) of the Convention on the Rights of the Child (1989). See also A 21(1)(b) of the African Charter on the Rights and Welfare of the Child (1989).

¹⁹ UNICEF 2020 <https://www.unicef.org/protection/harmful-practices>.

²⁰ Khosla *et al* 2017 *Reproductive Health* 3; Paras 4, 6 and 49 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

²¹ Doek 2009 *Child Abuse & Neglect* 771.

result, it remains imperative that additional treaties, protocols, and comments be drafted.²² Consequently, various international law treaties have aimed to address this issue, including the *African Charter on the Rights and Welfare of the Child*, 1990 (ACRWC). It states that state members have to abolish all harmful cultural and social practices that affect a child's dignity, welfare, normal growth, and development, particularly those practices that are "discriminatory to the child on the grounds of sex or other status".²³

The obligation of states to ensure a girl's enjoyment of human rights without discrimination based on equality is enshrined in various other international human rights instruments.²⁴ The first noteworthy provision is article 2(2), which states that parties shall:

...undertake all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.²⁵

The cornerstone of this provision is non-discrimination, which is also seen as one of the four guiding principles of the Convention.²⁶ Furthermore, one of the UN's sustainable goals is to empower all females to ensure gender equality, with the goal to "eliminate all harmful practices, such as...female genital mutilation".²⁷ FGM is a

²² Doek 2009 *Child Abuse & Neglect* 771.

²³ A 21(1)(b) of the African Charter on the Rights and Welfare of the Child (1990).

²⁴ See A 1 of the Convention on the Elimination of All Forms of Discrimination against Women (1979), A 2 of the Universal Declaration of Human Rights (1945), A 2 of the Convention on the Rights of the Child (1989), A 3 of the Declaration on the Elimination of Violence against Women (1993), and A 3 of the African Charter on the Rights and Welfare of the Child (1990), amongst others.

²⁵ Convention on the Rights of the Child (1989).

²⁶ The four guiding principles of the Convention on the Rights of the Child (1989) is non-discrimination (A2), the best interests of the child (A3), the right to life, survival and development (A6), and respect for the views of the child (A12).

²⁷ United Nations 2017 <https://www.un.org/sustainabledevelopment/gender-equality/>. See A 24(3) of the Convention on the Rights of the Child (1989) and A 21 of the African Charter on the Rights and Welfare of the Child (1990). See also A 37(a) of the Convention on the Rights of

form of violence that results in negative consequences for girls, including the perpetuation of gender inequality, which results in the continuation of unequal gender roles.²⁸ According to article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 (CEDAW) "discrimination against women" can be defined as:

...any exclusion...made on the basis of sex which has the effect or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The Committee on the Elimination of Discrimination against Women supports the principle that FGM constitutes a form of gender discrimination by noting the cultural belief that girls are somehow inferior to boys and the severe health consequences for child victims subjected to it.²⁹ Several contextual factors of FGM originate from gender inequality, including unequal societies where gender roles demand a girl's virginity before marriage and forced child marriages, her virtue and monogamy in marriage, her sexual availability to her male partner and the production of legitimate heirs to further the patrilineage.³⁰ The most evident barrier to gender equality is a girl's lack of control over her own body, including violations of sexual and reproductive health and rights.³¹ Similar to other forms of gender-based violence,

the Child (1989), stating that no child shall be subjected to "torture or other cruel inhuman or degrading treatment or punishment".

²⁸ Khosla *et al* 2017 *Reproductive Health* 2; A 3 of the International Covenant on Economic, Social and Cultural Rights (1976).

²⁹ CEDAW General Recommendation No. 14: Female Circumcision (1990). See also a 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women (1979).

³⁰ Khosla *et al* 2017 *Reproductive Health* 2; Akinsulure-Smith and Chu 2016 *Journal of Immigrant and Minority Health* 679; Rembe and Odeku 2009 *Journal of Psychology in Africa* 63.

³¹ A 19, 24 and 34 of the Convention on the Rights of the Child (1989); A 3 of the Universal Declaration of Human Rights (1945); A 9 of the International Covenant on Civil and Political Rights (1966).

FGM constitutes a violation of a child's right to life, security, liberty, dignity, equality, and physical and mental integrity.³²

Furthermore, as children are exposed to FGM by their parents, legal guardians, or members of the broader community, the subject of parental authority must also be placed within the ambit of this discussion. The CRC seeks to balance the best interest of the child principle with the respect for a child's capacity to involve him or her in decisions and exercise his or her rights with their relative lack of experience by stating that:

State parties shall respect the responsibilities, rights and duties of parents, or...the members of the extended family or community as provided for by local custom, legal guardians...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.³³

This article, together with article 18 of the CRC, is the basis for the relationship between the child, parents, and the state.³⁴ While the notion of parental autonomy and authority over children is undoubtedly present in the relevant communities, one must critically analyse the extent to which state signatories can interfere with parental rights and duties and to what extent parents are regarded as accomplices in the act of FGM.

³² See also A 1 and 2 of the Universal Declaration of Human Rights (1945), stating that "All human beings are born free and equal in dignity and rights" and "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction any kind, such as...sex..." respectively, which reaffirms the importance of gender equality.

³³ A 5 of the Convention on the Rights of the Child (1989). See also A 3(2) of the Convention on the Rights of the Child (1989), which states that "State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures".

³⁴ A 18 of the Convention on the Rights of the Child (1989) states that "...Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern".

Several international bodies and state governments have taken steps to eliminate FGM, which include international treaties, laws criminalising FGM, outreach and education programmes, and the use of administrative regulations and civil remedies.³⁵ Although the legal measures to eliminate the practice are assumed to be commendably progressive, two main matters come to the fore from the question of why it has not proliferated into action. The first refers to the extent of the effectiveness of the measures taken and the effect they have on the discontinuation of the practice. Secondly, there is the question if state parties can take further steps to ensure the realisation of human rights and to protect children who are victims or at risk of being subjected to FGM.

1.1 Research question

The purpose of this dissertation is not to condemn or criticise this cultural practice. The aim is to convey sufficient information to discuss the legal ambiguities and possible solutions to legal concerns. The overarching research question is whether FGM, as a cultural practice, is considered acceptable given the international requirement to promote and realise the best interests of the child principle by evaluating the overall impact of the custom on the said principle. The primary objective is to evaluate the present incidence of FGM as a traditional practice, gender equality, and parental authority against the overarching best interests of the child principle. The underlying supposition is that the practice is unreservedly prohibited by international law, regional law, and some jurisdictions' domestic law, but continues to subsist due to insufficient or ineffective legislative and governmental action. The second objective is to investigate the impact of legal measures on regulating FGM.

³⁵ Williams-Breault 2018 *Health and Human Rights Journal* 227-229.

1.2 Framework of the study

What follows is a preliminary framework of the proposed research, which seeks to achieve certain aims and objectives - all of which are concisely discussed.

- 1 Introduction and problem statement³⁶
- 2 Female Genital Mutilation: a global perspective³⁷
 - 2.1 Introduction
 - 2.2 FGM in the African context: Somalia
 - 2.1.1 Background
 - 2.1.2 Somalia
 - 2.1.3 Brief summary
 - 2.3 FGM in the Asian context: India
 - 2.3.1 Background
 - 2.3.2 India
 - 2.3.3 Brief summary
 - 2.4 FGM in the South American context: Colombia
 - 2.4.1 Background
 - 2.4.2 Colombia
 - 2.4.3 Brief summary
 - 2.5 FGM in the European context: United Kingdom

³⁶ The introductory chapter encompasses the research question and problem statement and provides the context in which this study will be conducted. It will comprehensively explain FGM in the global context, including definitions and statistics.

³⁷ In this chapter, the prevalence of FGM in several countries on different continents are outlined to illustrate that it is a widespread issue. This is accomplished by creating a framework that examines the prevalence of FGM in the specified country, which includes statistics, the origin, type, health consequences, and rationale thereof.

- 2.5.1 Background
 - 2.5.2 United Kingdom
 - 2.5.3 Brief summary
- 2.6 Chapter summary
- 3 International, and regional legal framework: Protecting children against female genital mutilation
 - 3.1 Introduction
 - 3.2 Female genital mutilation as a harmful cultural practice
 - 3.3 The best interests of the child principle
 - 3.4 Parental responsibility
 - 3.5 Chapter summary
- 4 Evaluation of legislative measures to regulate female genital mutilation
 - 4.1 Introduction
 - 4.2 Chapter summary
- 5 Recommendations and conclusions³⁸

1.3 Research methodology

This study will be guided by a literature study, encompassing relevant primary sources such as international, regional, and domestic legislation and case law. Moreover, secondary sources such as journal articles, textbooks, and electronic texts will be used in the substantiation of the primary sources. The methodology in this research is two-fold. First, it includes a study of the international and regional legislation as a mechanism to provide a descriptive analysis of the rules enshrined in relevant sources, which will be done by describing, commenting and, where

³⁸ This chapter will contain recommendations of the above-mentioned issues and challenges will be provided along with a substantive conclusion.

appropriate, criticise these rules. Secondly, a sociological approach will be utilized to measure the overall impact that these rules - or, in some cases, the lack of rules - have on the relevant societies. It should be noted that this research is not a comparative study, and, consequently, the legal systems and principles of one country will not be compared to that of another or the international position.

1.4 Relevance to the research unit theme

Current discussions on FGM frequently create the idea that is not impossible to draw an unambiguous line between condemnable and admissible practices of female genital cutting.³⁹ In this research, it will be illustrated that the history of FGM in Africa reflects Western beliefs and ideas in specific points in time and that it is intertwined with historical notions of cutting and circumcision in Western countries in different eras.⁴⁰

Although there have been collaborative efforts to eliminate or abandon the custom, and the increase in the need for extensive guidance on the care and treatment of FGM victims, it is clear the current efforts are not effective in curbing the increase in statistics.⁴¹ FGM also reflects a deep-rooted inequality between men and women and it constitutes an extreme form of discrimination against females.

The proposed study falls within the broad focus of the Research Unit of the Faculty of Law of the North-West University's Potchefstroom Campus. The study relates to the legal construct of the best interest of the child and gender equality and how it is justified against the background of cultural relativism - concepts that are important for the realisation of children's rights. As the study will illustrate the

³⁹ Johnsdotter 2012 History and Anthropology (Vol 23) 91.

⁴⁰ Johnsdotter 2012 History and Anthropology (Vol 23) 91.

⁴¹ Khosla et al 2017 Reproductive Health 59.

problem and challenges related to FGM from a legal perspective, it is imperative to consider as children are a vulnerable group easily exposed to this practice.

Chapter 2 Female genital mutilation: A global perspective

2 Female genital mutilation: A global perspective

2.1 Introduction

The traditional and ancient practice of FGM is an international occurrence and international debates include all types of FGM in all countries where it is evident.⁴² The term "female genital mutilation" is frequently substituted for female genital cutting (FGC) or female circumcision (FC) and the challenge of terminology is noteworthy.⁴³ First, practitioners and victims prefer "circumcision", as "mutilation" is a French word defined as "cutting with the intention to hurt".⁴⁴ It is important to note that the practitioners of FGM do not generally intent to hurt the girls who are subjected to it. Their motive usually rises from several cultural beliefs related to the act.⁴⁵ Simultaneously, from a health perspective, "mutilation" is closely related to actions causing "deformity", which demonstrates the removal of healthy tissue for no medical reason.⁴⁶ Additionally, the combined term "female genital mutilation/cutting" (FGM/C) is used to reflect the importance of the use of non-

⁴² Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Khan, Shekhani and Jafarey 2018 *Indian Journal of Medial Ethics Online* 1; Clark 2018 *The Lancet* 401; Steffen 2017 <https://www.dw.com/en/female-genital-mutilation-still-a-global-concern/a-37363059>; United Nations Children's Fund *Female Genital Mutilation/Cutting: A global concern* UNICEF, New York 2016; Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283; Paliwal *et al* 2014 *Midwifery* 282. See Chapter 1 for international statistics on FGM.

⁴³ Richter *Female Genital Mutilation* (FGM) In: Human Rights Education Through Ciné Débat 37; Yerkes and Rink 2010 *Pediatric Urology* 476; Augustyn *et al* 2010 <https://www.britannica.com/story/economic-inequality>.

⁴⁴ Richter *Female Genital Mutilation* (FGM) In: Human Rights Education Through Ciné Débat 37.

⁴⁵ Gibeau 1998 *Journal of Obstetric, Gynecologic & Neonatal Nursing* 85; Richter *Female Genital Mutilation* (FGM) In: Human Rights Education Through Ciné Débat 37; Monahan 2008 *Journal of Immigrant & Refugee Studies* 22.

⁴⁶ Toubia 1994 *The New England Journal of Medicine* 713; Berg 2014 *BMJ Open* 6; Reisel and Creighton 2014 *Maturitas* 48.

judgmental terminology.⁴⁷ However, the use of "circumcision" or "cutting" de-emphasises the pain and long-term effects that victims have to endure and may cause unnecessary confusion between the more common practice of male circumcision and FGM. Consequently, the discriminatory nature of FGM is downplayed.⁴⁸ While these terms demonstrate the essence of the practice, the term "mutilation" is preferred to circumcision and cutting for the reason that it is broader as it includes almost all procedures associated with FGM.⁴⁹

Although the term "FGM" is considered to be a generic term, it is important to note that it cannot be separated from the global extent of the problem, which is demonstrated in this chapter. The prevalence of FGM in several countries on different continents are outlined to illustrate that it is a current and widespread issue. This is accomplished by creating a framework that examines the statistics, the origin, and rationale for the practice in specific countries of concern in each region. The aim is to illustrate the international and/or regional widespread prevalence of FGM, and not to compare the legislation of one country to that of another.⁵⁰

2.2 FGM in the African context: Somalia

2.2.1 Background

FGM is performed in 29 countries on the African continent, ranging from an estimated prevalence of 1% in Uganda to 98% in Somalia.⁵¹ While there are

⁴⁷ Gillespie 2012 <https://www.orchidproject.org/why-do-we-use-the-term-female-genital-cutting-and-not-female-genital-mutilation/>; Berg 2014 *BMJ Open* 6.

⁴⁸ Yusuf and Fessha 2013 *African Human Rights Law Journal* 367; Anon 2011 <https://www.endvawnow.org/en/articles/643-use-of-term-female-genital-mutilation.html>.

⁴⁹ Berg 2014 *BMJ Open* 6; Rashid and Rashid 2007 *The Obstetrician & Gynaecologist* 95.

⁵⁰ Richter *Female Genital Mutilation (FGM)* In: Human Rights Education Through Ciné Débat 39-40.

⁵¹ Eke and Nkanginieme 2006 *The Lancet* 1799; Odukgobe *et al* 2017 *Translational Andrology and Urology* 138.

international and national attempts to eliminate FGM, it is still commonly practiced throughout the African region and, according to WHO, an estimate of three million girls in Africa are subject to the custom every year.⁵² Prior to the disintegration of Somalia's government in 1991, there was support for the elimination of FGM practices, including prohibiting medical professionals from performing the practice and an increase in health research.⁵³ However, due to a civil war, any national efforts to eliminate were discontinued, which caused Somalia to develop the highest rate of FGM in the world.⁵⁴

2.2.2 Somalia

FGM is deep-rooted in African historical tradition and while there are several theories on the exact origin of FGM, it remains unclear why, how or when it started.⁵⁵ The earliest writings with historical references to FGM reported its existence in the 5th century B.C. in ancient Egypt, where Greek hieroglyphs on a stone coffin illustrates a woman being circumcised.⁵⁶ It appears that FGM originated in ancient Egypt and spread by Arabian traders via the African slave trade.⁵⁷ Currently, FGM forms part of Somalia's indigenous cultural system, firmly rooted in beliefs and traditions. It began as a sacrificial ritual to the divine to ensure self-preservation and avoid various curses from gods and ancestors, such as illness, failed crops, lack of rain

⁵² Mitike and Deressa 2009 *Public Health* 264; Jones, Ehiri and Anyanwu 2004 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 144 as cited in Mitike and Deressa 2009 *Public Health* 1.

⁵³ Ford 2001 *Health and Human Rights* 1179; Anon 2001 <https://www.msf.org/tackling-female-genital-cutting-somalia>.

⁵⁴ Ford 2001 *Health and Human Rights* 1179.

⁵⁵ Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Nour 2008 *Reviews in Obstetrics & Gynecology* 135-139; Odukogbe *et al* 2016 *Translational Andrology and Urology* 138-148; Bootwala 2019 *Current Sexual Health Reports* 231.

⁵⁶ Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Bootwala 2019 *Current Sexual Health Reports* 231.

⁵⁷ Bootwala 2019 *Current Sexual Health Reports* 231.

and severe droughts.⁵⁸ In this regard, Mire states that Somalis are not just savage citizens who mutilate young girls to ensure patriarchal dominance, but that there is a "collective existential ideology" behind it.⁵⁹

The rationale for FGM in Somalia is based on several elements and the extent to which they contribute to its continued practice, varies.⁶⁰ First, there is a relative widespread perspective among practitioners that FGM is a religious requirement, and religion rooted in patriarchy creates the social environment this allows this custom to continue.⁶¹ Currently, FGM is predominantly practised among particular Muslim groups – which is the primary religion in Somalia – as well as some Christian and animist groups.⁶² While religion is a persuasive ground to justify FGM, its existence precedes Islam or Christianity and little evidence can be found that these religions require that it be inflicted on women.⁶³ Furthermore, approximately 80% of the world's Muslims do not regard FGM as a religious practice and, consequently, it is regarded to be a regional practice and not a religious custom.⁶⁴ This is supported

⁵⁸ Sipsma *et al* 2012 *Bulletin of the World Health Organization* 120. Mire 2020 <https://www.theguardian.com/commentisfree/2020/mar/09/eradicate-fgm-misunderstanding-history>.

⁵⁹ Mire 2020 <https://www.theguardian.com/commentisfree/2020/mar/09/eradicate-fgm-misunderstanding-history>.

⁶⁰ Rembe and Odeku 2009 *Journal of Psychology in Africa* 63; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Annas 1996 *Journal of Contemporary Health* 331.

⁶¹ Anon 1998 [ncbi.nlm.nih.gov/pubmed/12222527](https://pubmed.ncbi.nlm.nih.gov/pubmed/12222527); Yoder, Wang and Johansen 2013 *Studies in Family Planning* 195.

⁶² Tønnessen 2015 *Strategic Initiative for Women in the Horn of Africa Journal* 1. See also Park 2018 <https://www.britannica.com/topic/animism>, where "animism" is described as a "belief in innumerable spiritual beings concerned with human affairs and capable of harming human interests".

⁶³ Westley 1999 *Electronic Journal of Africana Bibliography* 46 as cited in Annas 1996 *Journal of Contemporary Health* 331; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Mulongo, McAndrew and Martin 2014 *International Journal of Mental Health Nursing* 297.

⁶⁴ Westley 1999 *Electronic Journal of Africana Bibliography* 46 as cited in Annas 1996 *Journal of Contemporary Health* 331; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Mulongo, McAndrew and Martin 2014 *International Journal of Mental Health Nursing* 29.

by the prevalence among ethnic groups and geography.⁶⁵ Clearly, religion does play a major role in the prevalence of FGM, most likely due to an ignorance about religious requirements among members.⁶⁶

Secondly, among African families, social acceptance is an important part of a community and should females refuse to be subjected to FGM, they will be rejected and socially isolated.⁶⁷ FGM is known to increase daughters' prospects of a favourable marriage and by that, the families' probability of obtaining a high price for the brides.⁶⁸ Simultaneously, men married to uncircumcised women will be shamed by the community, which will reflect on the family in its entirety.⁶⁹ Consequently, girls forego healthy sexual tissue in exchange for social acceptability and other guaranteed freedoms associated with marriage.⁷⁰ Frequently, FGM is motivated by what a community deems acceptable sexual behaviour.⁷¹ The notion is that when the clitoris is removed, the girls' libido and their interest in masturbation is reduced and their premarital virginity and marital fidelity is preserved.⁷²

⁶⁵ Westley 1999 *Electronic Journal of Africana Bibliography* 46 as cited in Annas 1996 *Journal of Contemporary Health* 331; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Mulongo, McAndrew and Martin 2014 *International Journal of Mental Health Nursing* 297.

⁶⁶ Østebø and Østebø 2014 *Africa Today* 92; Rembe and Odeku 2009 *Journal of Psychology in Africa* 63; Annas 1996 *Journal of Contemporary Health* 331.

⁶⁷ Karanja *Female Genital Mutilation in Africa Gender, Religion and Pastoral Care* 75; Koukoui, Hassan and Guzder 2017 *Reproductive Health* 8.

⁶⁸ Bullough and Bullough *Human Sexuality: An Encyclopedia* 206; Koukoui, Hassan and Guzder 2017 *Reproductive Health* 8.

⁶⁹ Adinew and Mekete 2017 *Reproductive Health* 4; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Abathun, Gele and Sundby 2017 *Obstetrics and Gynecology International* 2.

⁷⁰ Karanja *Female Genital Mutilation in Africa Gender, Religion and Pastoral Care* 75; Desai 2015 <https://timesofindia.indiatimes.com/life-style/relationships/love-sex/Does-marriage-mean-freedom-for-young-women/articleshow/47662818.cms>.

⁷¹ Lefkowitz *et al* 2014 *Sexuality & Culture* 836; Lefkowitz *et al* 2014 *Sexuality & Culture* 835.

⁷² Burriss 2016 <https://www.psychologytoday.com/za/blog/attraction-evolved/201606/does-fgm-make-women-less-interested-in-sex>; Björk 2017 <https://www.europarl.europa.eu/news/en/headlines/society/20170203STO61016/bjork-female-genital-mutilation-way-to-control-women-s-bodies-and-sexuality>.

Thirdly, FGM is often dictated by various beliefs and traditions that are passed on from one generation to the next. One ubiquitous belief is that women's genitals originate from the remains of the scorpion and it must be removed before marriage and childbirth, because it might poison and kill the groom or the unborn child.⁷³ At the same time, the clitoris is deemed to be a dirty, revolting and threatening to the life and health of a husband or a new-born.⁷⁴ Moreover, it is said that the clitoris will increase in size similar to that of a goose's neck if FGM is not performed, which will result in a rivalry with men's penises.⁷⁵ In these instances, men are so frightened of uncut women that they are hesitant to marry them, and since becoming a wife and a mother is practically the only possibility for traditional African women due to the stereotypical gender roles and inequality, it leaves them with no alternative than to submit themselves to the practice.⁷⁶ Somalis also believe that FGM has certain health benefits, including the prevention of all forms of sickness, genital parasites, the contamination of breast milk and it makes conception and child-bearing easier – all of which are false.⁷⁷

2.2.3 Brief summary

Currently, Somalis support the continuation of FGM and, given their collective beliefs, the regulation and ultimate elimination of FGM will continue to be a complex issue.⁷⁸ Progress in the regulation of FGM can only be made if the wider community

⁷³ Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3.

⁷⁴ McKenzie 2018 <https://www.statnews.com/2018/03/29/female-genital-mutilation-end/>; Bullough and Bullough *Human Sexuality: An Encyclopedia* 206.

⁷⁵ Bullough and Bullough *Human Sexuality: An Encyclopedia* 206; Ghanim *The Virginity Trap in the Middle East* 188.

⁷⁶ Bullough and Bullough *Human Sexuality: An Encyclopedia* 206; Khosla *et al* 2017 *Reproductive Health* 2.

⁷⁷ Wahedi 2019 *Quinnipiac Health Law Journal* 209; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3.

⁷⁸ Mitike and Deressa 2009 *Public Health* 1; Mire 2020 <https://www.theguardian.com/commentisfree/2020/mar/09/eradicate-fgm-misunderstanding-history>.

is involved, because if practising communities collectively decide to abandon the custom, its prevalence may decrease rapidly.⁷⁹ A valuable suggestion is to create new rituals that can satisfy the cultural needs of practising communities and that continued efforts to educate cultural communities might decrease FGM statistics.⁸⁰

2.3 FGM in the Asian context: India

2.3.1 Background

FGM is evident in Asian countries among some Islamic groups.⁸¹ In 2016, the United Nations International Children's Emergency Fund (UNICEF) listed 30 countries where FGM is highly prevalent, including 29 African countries.⁸² However, due to an increase in immigration and globalisation, it is now believed to be evident in almost 45 countries, which includes India, and as a result, official statistical information and data are frequently unreliable.⁸³ FGM is practised among approximately 90% of India's Islamic population, where it is known as "khafz" or "khatna" and is most commonly practised in the Muslim Daudi Bohra community. This community is a subsect of Shia Muslims generally found in the western cities of India, which have an estimate of two million members and nearly 500 000 FGM reports.⁸⁴ Until

⁷⁹ Johansen *et al* 2013 *Obstetrics and Gynecology International* 5.

⁸⁰ Mire 2020 <https://www.theguardian.com/commentisfree/2020/mar/09/eradicate-fgm-misunderstanding-history>.

⁸¹ Cappa, Van Baelen and Leye 2018 *Global Public Health: An International Journal for Research, Policy and Practice* 1145,

⁸² Batha 2016 <https://www.reuters.com/article/us-singapore-fgm-asia-factbox/factbox-the-hidden-cut-female-genital-mutilation-in-asia-idUSKCN12D04E>. See also UNICEF 2016 https://www.google.com/search?q=un+countries+listed+fgm&rlz=1C1EKKP_enZA705ZA718&oq=un+countries+listed+fgm&aqs=chrome..69i57j33.14332j0j7&sourceid=chrome&ie=UTF-8, where Thailand, Pakistan, Indonesia, Somalia, Guinea, Djibouti, Sudan and Sierra Leone, among others, is listed as the UN's top 30 countries.

⁸³ Hassanen, Woldu and Mkuu 2019 *AIMS Public Health* 67-78. Batha 2016 <https://www.reuters.com/article/us-singapore-fgm-asia-factbox/factbox-the-hidden-cut-female-genital-mutilation-in-asia-idUSKCN12D04E>; Macfarlane 2019 *BMJ Clinical Research* 1927.

⁸⁴ Cappa, Van Baelen and Leye 2018 *Global Public Health: An International Journal for Research, Policy and Practice* 1145; Jha 2019 <https://thediomat.com/2019/08/southeast-asias-hidden-female-genital-mutilation-challenge/>; Nair 2018 <https://www.hindustantimes.com/mumbai->

recently, the "khatna" was an unknown practice and due to the Bohra community's collective secrecy, India is not listed in the United Nations' (UN) list of countries where FGM is practised.⁸⁵ Fortunately, in 2015, a group of women from the Bohra community started a movement in India opposing "khatna" called "We Speak Out", which created awareness in the international community that approximately 75% of Bohra girls' between the age of seven and 14 years were subjected to "khatna".⁸⁶

2.3.2 India

"Khatna" is a social "coming of age ritual" that is intertwined with the rest of the Bohra community's culture and traditions.⁸⁷ "Khafd" remains a forbidden topic of conversation in the Bohra community, yet it is a popular topic of international FGM discussions.⁸⁸ There seems to be major polarisation regarding the issue of "khafd" within the Bohra community, because it is an integral part of their culture.⁸⁹ In response to the "We Speak Out" movement, another group of Bohra women formed the Dawoodi Bohra Women's Association for Religious Freedom (DBWRF) in support of the practice.⁹⁰ However, Bootwala states that the fact that most of the available

news/in-india-female-genital-mutilation-is-not-just-restricted-to-bohras-says-study/story-xvSpJinigWyCzH94R37MoN.html.

⁸⁵ Banerji 2017 <https://www.opendemocracy.net/en/5050/indias-female-genital-mutilationj-thousand-year-old-secrect/>; Raja 2017 <https://www.motherjones.com/politics/2017/04/genital-cutting-indian-doctor-women-khatna/>.

⁸⁶ Das 2017 <https://www.thenewsminute.com/article/it-scarred-me-life-dawoodi-bohra-women-speak-out-trauma-female-genital-cutting-57050>; Richter Female Genital Mutilation (FGM) In: Human Rights Education Through Ciné Débat 39-40; Martinez Cantera 2018 <https://www.theguardian.com/global-development/2018/mar/06/study-reveals-fgm-india-female-genital-mutilation>.

⁸⁷ Banerji 2017 <https://www.opendemocracy.net/en/5050/indias-female-genital-mutilationj-thousand-year-old-secrect/>; Mmaka 2016 <https://www.pambazuka.org/gender-minorities/khatna-fgm-global-dawoodi-bohra-community>.

⁸⁸ McCauley and Van den Broek 2019 *International Health* 4; Bootwala 2019 *Current Sexual Health Reports* 231.

⁸⁹ Khan, Shekhani and Jafarey 2018 *Indian Journal of Medical Ethics* 4; Bootwala 2019 *Current Sexual Health Reports* 231.

⁹⁰ Bootwala 2019 *Current Sexual Health Reports* 220; Kanchwala 2019 <https://www.firstpost.com/india/dawoodi-bohra-practice-of-khafz-has-been-wrongly-labelled-as-female-genital-mutilation-by-those-with-an-agenda-6038971.html>.

information regarding "khafd" has been developed from individual testimonials and advocacy organisations, is a challenge. Major, high-quality studies are essential.⁹¹

While FGM has been practised in the Bohra community for centuries, it is not indigenous to Southeast Asia and its cultural groups.⁹² Dating back to 160 B.C., the "khafd" was a highly prevalent practice in ancient Egypt (present-day Egypt and Sudan), and today there's an increased continuation in Egypt, Sudan and Yemen.⁹³ During the 16th century, the Bohra headquarters relocated from Yemen, where FGM is a culturally established practice, to Western India, where 80% of the community's members currently reside.⁹⁴ Clearly, the community's cultural and religious heritage partly originates from Yemen and ancient Egypt and it is thus necessary to briefly discuss the origin of "khafd" in these countries. The first discovery of "khafd" was circumcised mummies 500 B.C. and it is suggested that the custom spread across the globe via the routes of the slave trade.⁹⁵ Due to its widespread prevalence, Llamas proposes a "multi-source origin" and claims that FGM spread from indigenous cores and later merged with existing initiation rituals and circumcision.⁹⁶

There are three prominent reasons for the prevalence of FGM in India, i.e. religion, cultural perception and the moderation of a woman's sexual desires.⁹⁷ The "Syedna",

⁹¹ Bootwala 2019 *Current Sexual Health Reports* 231.

⁹² Jha 2019 <https://thediplomat.com/2019/08/southeast-asias-hidden-female-genital-mutilation-challenge/>.

⁹³ Andro and Leschlingand 2016 *Cairn* 219; Bootwala 2019 *Current Sexual Health Reports* 229; Lorenzi 2012 <https://www.seeker.com/how-did-female-genital-mutilation-begin-1766105357.html>.

⁹⁴ Bootwala 2019 *Current Sexual Health Reports* 231; Banerji 2017 <https://www.opendemocracy.net/en/5050/indias-female-genital-mutilationj-thousand-year-old-secret/>. See also Sullivan 2019 <https://www.healthline.com/health/womens-health/clitoral-hood>, defining a "clitoral hood" as a "fold of skin that surrounds and protects the glans clitoris", which is inside the labia majora and labia minora.

⁹⁵ Bootwala 2019 *Current Sexual Health Reports* 231; Andro and Leschlingand 2016 *Cairn* 219.

⁹⁶ Andro and Leschlingand 2016 *Cairn* 219.

⁹⁷ Khan, Shekhani and Jafarey 2018 *Indian Journal of Medial Ethics Online* 4; Ghadiyally 1992 *Women's Global Network for Reproductive Rights Newsletter* 7.

⁹⁷ Syeed 2019 *International Journal of Social Sciences* 637; Anon 2018 <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

which is the religious and spiritual head, rigidly controls the Bohra community, who is required to swear an "oath of allegiance" to him.⁹⁸ He is in control of all religious issues, professional decisions, family matters, and even personal choices.⁹⁹ In 2016, the "Syedna" stated that religious prescripts specify requirements for acts of religious purity, including FGM, and publicly dictated the Bohra community to proceed with FGM procedures.¹⁰⁰ Although some might compare male circumcision – which is seen as the sign of agreement between God, Abraham and his descendants – with female circumcision, the latter is not a similar commandment.¹⁰¹ Despite the fact that FGM was evident before the introduction and expansion of Islam and that it is not stated in the Koran or any other book of the main monotheistic religions, the Bohra community still considers the custom to be a religious obligation based on "Shariat".¹⁰²

Likewise, FGM is closely associated with sexual control over females, which is evident in male dominance and female independence.¹⁰³ In the Bohra community, the clitoris is called the "haram ki boti" – meaning the "source of sin" – and the procedure is linked with centuries of patriarchy. This goes along with the belief that

⁹⁸ Neerai 2018 <https://thewire.in/women/genital-mutilation-plagues-thousands-of-bohra-women-in-india>; Banerji 2017 <https://www.opendemocracy.net/en/5050/indias-female-genital-mutilationj-thousand-year-old-secret/>.

⁹⁹ Banerji 2017 <https://www.opendemocracy.net/en/5050/indias-female-genital-mutilationj-thousand-year-old-secret/>; Kappal 2019 <https://www.livemint.com/mint-lounge/features/the-battle-for-the-leadership-of-the-dawoodi-bohras-1564140215359.html>.

¹⁰⁰ Banerji 2017 <https://www.opendemocracy.net/en/5050/indias-female-genital-mutilationj-thousand-year-old-secret/>; DeSouza 2017 <https://www.indiatoday.in/magazine/up-front/story/20170612-female-genital-mutilation-india-dawoodi-bohra-community-fbi-khatna-986522-2017-06-03>.

¹⁰¹ Andri and Leschligand 2016 *Cairn* 217.

¹⁰² Batha 2018 <https://www.reuters.com/article/us-india-fgm-study-heartwrenching-study-shows-fgm-prevalent-among-indias-bohra-sect-idUSKBN1FP12D>. See also Elbaum 2018 <https://www.nbcnews.com/storyline/smart-facts/what-is-shariah-law-n859981>, defining *Sharia* as Islam's legal system, which is derived from the rulings of Islam scholars, the Koran and central law.

¹⁰³ Syyed 2019 *International Journal of Social Sciences* 637; Hayes 1975 *American Ethnologist* 623; Hentschel, Heilman and Peus 2019 *Frontiers in Psychology* 2; Dicke, Safavian and Eccles 2019 *Frontiers in Psychology* 2.

if women knew the pleasure that they may receive from it, they might be promiscuous and bring shame to the family and the community at large or go astray during the course of marriage.¹⁰⁴ The consensus on culture among the Bohra community and the desire to curb women's sexual desires are based on limited knowledge and their understanding of the long-term effects and consequences.¹⁰⁵

2.3.3 Brief summary

There is a clear ideology of contextualised cultural practices that goes beyond an outsider's perspective.¹⁰⁶ An outsider might recognise it as a repulsive mutilation that results in the deprivation of females' sexuality, but the Bohra community do not intent to inflict malicious harm and justifies it as a cultural or religious custom.¹⁰⁷ Non-threatening and non-judgmental gestures may be able to start a conversation with the Bohra community's cultural practices, which ought to encompass education on the medical and psychological implications of FGM.¹⁰⁸

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- ¹⁰⁴ Monagan 2010 *Journal of Alternative Perspectives in the Social Sciences* 161; Abrol 2018 <https://www.indiatoday.in/lifestyle/people/story/female-genital-mutilation-india-clitoris-pleasure-muslim-bohra-community-1165219-2018-02-06>; Neeraj 2018 <https://thewire.in/women/genital-mutilation-plagues-thousands-of-bohra-women-in-india>.
- ¹⁰⁵ Syed 2019 *International Journal of Social Sciences* 632; Das Gupta 2017 <https://www.hindustantimes.com/india-news/practise-of-female-genital-mutilation-should-be-banned-in-india-maneka-gandhi/story-kQhNA4rIYOLQTurkN5zAAM.html>.
- ¹⁰⁶ Monahan 2008 *Journal of Immigrant & Refugee Studies* 22; Syed 2019 *International Journal of Social Sciences* 637.
- ¹⁰⁷ Monahan 2008 *Journal of Immigrant & Refugee Studies* 22; Syed 2019 *International Journal of Social Sciences* 637.
- ¹⁰⁸ Bootwela 2019 *Current Sexual Health Reports* 216; Syed 2019 *International Journal of Social Sciences* 640.

2.4 FGM in the South American context: Colombia

2.4.1 Background

FGM has been reported in certain Latin American communities, where it has taken hold of certain indigenous tribes in Latin America.¹⁰⁹ One of these indigenous communities are known as the Amerindian Emberá indigenous community, the second largest indigenous group in Columbia, with a total of approximately 49 686 members.¹¹⁰ Currently, there are no exact figures on the number of victims in the tribe that are annually subjected to FGM, but according to the United Nations Population Fund's (UNFPA) unofficial statistics state that a total of two-thirds of Emberá women have undergone the practice.¹¹¹

2.4.2 Colombia

The Bohra community generally refer to FGM as "curación" or "cutting the callus".¹¹² Prior to 2007, the international community was unaware of the three-century-old custom due to the structural discrimination against indigenous women, the predominantly male regional indigenous councils and the fact that FGM remains a forbidden topic of conversation in the Emberá community.¹¹³ In 2007, it came to

¹⁰⁹ Cappa, Van Baelen and Leye 2018 *Global Public Health* 1139; Moloney 2015 <https://www.reuters.com/article/us-colombia-girls-fgm/colombias-embera-tribe-hopes-to-eradicate-fgm-by-2030-idUSKBN0LA2FX20150206>; Velásquez 2018 <https://thebogatapost.com/cutting-danger-female-genital-mutilation/33434/>.

¹¹⁰ Cappa, Van Baelen and Leye 2018 *Global Public Health* 1139; Moloney 2015 <https://www.reuters.com/article/us-colombia-girls-fgm/colombias-embera-tribe-hopes-to-eradicate-fgm-by-2030-idUSKBN0LA2FX20150206>; Velásquez 2018 <https://thebogatapost.com/cutting-danger-female-genital-mutilation/33434/>.

¹¹¹ United Nations Population Fund 2016 <https://www.unfpa.org/news/silent-epidemic-fight-end-female-genital-mutilation-colombia>; Ford 2020 <https://www.theguardian.com/global-development/2020/mar/17/true-numbers-of-fgm-victims-could-be-far-higher-as-countries-fail-to-record-cases>.

¹¹² Velásquez 2018 <https://thebogatapost.com/cutting-danger-female-genital-mutilation/33434/>; Cosoy 2016 <https://www.bbc.com/news/world-latin-america-37374006>; Rios 2019 *Health & Pharmaceuticals* 1.

¹¹³ Moloney 2015 <https://www.reuters.com/article/us-colombia-girls-fgm/colombias-embera-tribe-hopes-to-eradicate-fgm-by-2030-idUSKBN0LA2FX20150206>; Cappa, Van Baelen and Leye 2018

light that two newborn girls died from FGM related infections and complications, after which medical professionals decided to report the incident to the judicial authorities.¹¹⁴ This incident brought the long-standing and widespread custom to public attention and began international discussions on its nature, extent and possible regulatory methods.¹¹⁵ The National Indigenous Organisation of Colombia (ONIC) indicated that there are no accurate statistics on the number of women and children affected or at risk, nor information about the areas in which it happens. The only reported cases are those that result in infections or deaths.¹¹⁶

The exact origin of FGM in Colombia and the Emberá community remains unknown and its origins are the subject of two main theories. First, it is said that it originated from the African slaves that were brought to Columbia to work in the gold mines during the 18th century.¹¹⁷ Secondly, there is a belief that it was established after the birth of a hermaphrodite by midwives who were concerned that girls' genitalia might grow into those of boys. They used it as a method to remove masculinity in

Global Public Health 1139; Brodzinsky 2015 <https://www.theguardian.com/global-development/2015/nov/19/colombia-embera-female-genital-mutilation-mystery-myth-misgiving>.

¹¹⁴ Castellanos 2008 <https://rewire.news/article/2008/08/18/colombia-confronts-female-genital-mutilation/>; Moloney 2015 <https://www.reuters.com/article/us-colombia-girls-fgm/colombias-embera-tribe-hopes-to-eradicate-fgm-by-2030-idUSKBN0LA2FX20150206>.

¹¹⁵ Moloney 2015 <https://www.reuters.com/article/us-colombia-girls-fgm/colombias-embera-tribe-hopes-to-eradicate-fgm-by-2030-idUSKBN0LA2FX20150206>; United Nations Population Fund 2016 <https://www.unfpa.org/news/silent-epidemic-fight-end-female-genital-mutilation-colombia>.

¹¹⁶ UN News 2017 <https://news.un.org/en/story/2017/02/550882-un-urges-renewed-fight-end-female-genital-mutilation-populations-grow-where>; Edouard, Olaunbosum and Edouard 2013 *African Journal of Urology* 150.

¹¹⁷ Velásquez 2018 <https://thebogotapost.com/cutting-danger-female-genital-mutilation/33434/>; Cosoy 2016 <https://www.bbc.com/news/world-latin-america-37374006>; Anon 2016 <https://www.unfpa.org/news/silent-epidemic-fight-end-female-genital-mutilation-colombia>.

girls.¹¹⁸ In this regard, Cosoy states that although it was not originally their own custom, it became an integral part of their culture.¹¹⁹

The rationale for FGM in the Emberá tribe is mainly based on several traditional beliefs, of which the most significant belief among midwives and grandmothers is that children are born half girl and half boy and in order to prevent them from becoming a man, the growth of the clitoris must be prevented.¹²⁰ Another major belief is that FGM serves as a way to control females' sexuality and sexual desires, mostly due to a common perception that the clitoris may cause them to be promiscuous and they may even succumb to lesbianism.¹²¹ Concurrently, it is said that FGM will enhance the beautification value of girls as well as the sexual pleasure of men, which places a moral obligation on women to submit themselves to the custom before marriage. In this regard, it serves as a method to prevent promiscuity during a marriage and to ensure that women will stay with a single husband.¹²²

2.4.3 Brief summary

The situation in Colombia remains challenging for several reasons. First, the Emberá tribe is an isolated community and changing their social and cultural attitudes

¹¹⁸ Brodzinsky 2015 <https://www.theguardian.com/global-development/2015/nov/19/colombia-embera-female-genital-mutilation-mystery-myth-misgiving>. See also Anon 2020 <https://www.health24.com/Sex/Sexual-diversity/What-is-a-hermaphrodite-20120721>, where "hermaphrodite" is defined as "someone who has some or all of the primary sex characteristics of both genders".

¹¹⁹ Velásquez 2018 <https://thebogatapost.com/cutting-danger-female-genital-mutilation/33434/>; Cosoy 2016 <https://www.bbc.com/news/world-latin-america-37374006>; Anon 2016 <https://www.unfpa.org/news/silent-epidemic-fight-end-female-genital-mutilation-colombia>.

¹²⁰ Brodzinsky 2015 <https://www.theguardian.com/global-development/2015/nov/19/colombia-embera-female-genital-mutilation-mystery-myth-misgiving>; Castellanos 2008 <https://rewire.news/article/2008/08/18/colombia-confronts-female-genital-mutilation/>.

¹²¹ Velásquez 2018 <https://thebogatapost.com/cutting-danger-female-genital-mutilation/33434/>; Castellanos 2008 <https://rewire.news/article/2008/08/18/colombia-confronts-female-genital-mutilation/>.

¹²² Oyefara 2014 *Genus* 11; Simpson *et al* 2012 *BMJ* 1.

toward FGM would be taxing.¹²³ Secondly, the secrecy and privacy surrounding FGM in the Emberá community has made reliable statistic almost impossible to determine. Consequently, international efforts are unable to determine the extent of the custom and to help victims.¹²⁴ It is suggested that in order to sufficiently regulate FGM, the members of the Emberá community must make a collective decision to eradicate the practice and that female leaders be empowered to take part in that decision.¹²⁵

2.5 FGM in the European context: United Kingdom

2.5.1 Background

FGM is also evident in the history of the Western world where there have been attempt to control females' sexuality.¹²⁶ For instance, in ancient Rome, FGM was performed on female slaves as a mechanism to prevent sexual intercourse and pregnancies – all of which would have caused slaves to be unfit to work.¹²⁷ Today, FGM mainly affects the immigrant communities from several countries where FGM is prominent, including Somalia, Sudan, India, Pakistan, Syria, Ukraine, and the

¹²³ Anon 2017 <https://www.unfpa.org/news/colombia-efforts-end-fgm-are-empowering-women-be-leaders>.

¹²⁴ Brodzinsky 2015 <https://www.theguardian.com/global-development/2015/nov/19/colombia-embera-female-genital-mutilation-mystery-myth-misgiving>; Anon 2016 <https://www.unfpa.org/news/silent-epidemic-fight-end-female-genital-mutilation-colombia>.

¹²⁵ Anon 2017 <https://www.unfpa.org/news/colombia-efforts-end-fgm-are-empowering-women-be-leaders>; Mogoatlhe 2020 <https://www.globalcitizen.org/en/content/5-activists-fighting-fgm-in-africa/>.

¹²⁶ Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 3; Njue *et al* 2019 *Reproductive Health* 113. See also Andri and Leschligand 2016 *Cairn* 220, where the chastity belt is also mentioned and defined as "a metal device that locks around a person's genital area to prevent sexual intercourse and masturbation" by Lamoureux 2018 <https://allthatsinteresting.com/chastity-belt>.

¹²⁷ Andro and Leschligand 2016 *Cairn* 220; Meadows 2012 <https://rogueclassicism.com/2012/12/11/female-genital-mutilation-in-rome/>; Rushwan 2013 *African Journal of Urology* 131.

Philippines, among others.¹²⁸ The United Kingdom (UK) hosts the largest immigrant population from countries where FGM is a prominent custom.¹²⁹ An estimated 4,6 million "ethnic minority" migrants reside in the UK, which represents 7,9% of the total UK population.¹³⁰ Currently, there are over 6 000 reported FGM cases per year and an estimated total of 70 000 females in England have been subjected to some form of FGM.¹³¹

2.5.2 United Kingdom

The origin of FGM in the UK is twofold. First, regardless of the assumption that FGM is an exclusively African phenomenon, it also thrived in the historical description of the Western World.¹³² While current debates of FGM frequently present it as a procedure that is non-western in nature and alien to the traditions of the so-called "civilised industrial society", it remains intertwined with their history, with the first recorded case of female circumcision in 1866 in London, England.¹³³ FGM is seated in an ideology that originated in the West's history of female circumcision used by psychiatrists and gynaecologists as a method to cure masturbation and nymphomania and to regulate female sexual practices.¹³⁴ Furthermore, it also

¹²⁸ Bacchi 2018 <https://www.reuters.com/article/us-britian-women-fgm/thousands-of-fgm/thousands-of-fgm-cases-recorded-in-britain-idUSKBN1JV2HS>; Connor and Krogstad 2016 <https://www.pewresearch.org/fact-tank/2016/06/21/5-facts-about-migration-and-the-united-kingdom/>.

¹²⁹ Hassanen, Woldu and Mkuu 2019 *AIMS Public Health* 67-78; Connor and Krogstad 2016 <https://www.pewresearch.org/fact-tank/2016/06/21/5-facts-about-migration-and-the-united-kingdom/>.

¹³⁰ Relph *et al* 2013 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 168 196; Guiné and Fuentes 2007 *Politics & Society* 481; Simpson *et al* 2012 *BMJ* 1.

¹³¹ Feikert-Ahalt 2019 <http://www.loc.gov/law/foreign-news/article/united-kingdom-first-successful-prosecution-for-female-genital-mutilation/>; Bacchi 2018 <https://www.reuters.com/article/us-britian-women-fgm/thousands-of-fgm/thousands-of-fgm-cases-recorded-in-britain-idUSKBN1JV2HS>; Guiné and Fuentes 2007 *Politics & Society* 483.

¹³² Johnsdotter 2012 *History and Anthropology* 95; Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283.

¹³³ Black 1997 *Journal of the Royal Society of Medicine* 403; Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283;

¹³⁴ Studd and Schwenkhagen 2009 *Maturitas* 107; Simpson *et al* 2012 *BMJ* 1; Paterson, Davis and Binik 2012 *Sexologies* 3.

became an admissible treatment for other conditions such as unfeminine conduct and any other behaviour that may pose a threat to marriage, which included a lack of good manners and a dislike for the husbands and marital intercourse.¹³⁵ In the 1800s, the European society attempted to dismiss females' sexuality and there was consensus in the primarily male medical profession that masturbation caused hysteria, which tended to lead to epilepsy and subsequent idiocy and death.¹³⁶ Thus, if any sexual desires existed, it must be meticulously suppressed and, consequently, the clitoris was considered to be a symbol of females' sexual independence and not simply erectile tissue of the female genitals.¹³⁷

Secondly, increased immigration and globalisation had a significant effect on the ethnic composition of UK societies and introduced cultural practices that challenge the original framework of European values.¹³⁸ As a result of unlimited economic, geographic and political barriers, immigrants continue to practise their traditional customs and cultural values, while continuing to interact with the community of their originating country.¹³⁹

Similar to the immigrants' countries of origin, the rationale for FGM in the UK is mainly tradition, the prevention of promiscuity, the preservation of chastity, religious requirements, marriage expectations and the control of females' sexuality.¹⁴⁰ There seems to be a link between the West's history of controlling sexuality in women and

¹³⁵ Black 1997 *Journal of the Royal Society of Medicine* 403; Sakeah 2019 *PLoS One* 1.

¹³⁶ Cott 1978 *Signs* 220; Johnsdotter 2012 *History and Anthropology* 107; Black 1997 *Journal of the Royal Society of Medicine* 402.

¹³⁷ Johnsdotter 2012 *History and Anthropology* 107; Black 1997 *Journal of the Royal Society of Medicine* 402; Cott 1978 *Signs* 220.

¹³⁸ Guiné and Fuentes 2007 *Politics & Society* 477; Johnsdotter 2018 *Current Sexual Health Reports* 18.

¹³⁹ Hassanen, Woldu and Mkuu 2019 *AIMS Public Health* 67-78; Chua 2018 <https://wadi-online.org/2018/11/25/fgm-worldwide-its-worse-than-you-think/>.

¹⁴⁰ Simpson *et al* 2012 *BMJ* 1. See Chapter 2.2–2.4 for a discussion on these elements.

Africa's current attempts to curb women's sexual urges and pleasure.¹⁴¹ In the history of Europe, it is intertwined with the cutting of women's genitalia and time-bound notions in different eras of Western civilisation,¹⁴² whereas the motive in Africa is to ensure the virtue of marriage and sexual control, as women's virginity is the sole requirement for marriageability, enforced by prohibitions of sexual relations outside marriage.¹⁴³

2.5.3 Brief summary

In European countries, especially the UK, FGM is deemed to be a form of gender-based violence and a manifestation of the sexual inequality of women.¹⁴⁴ Frequently, the estimates of risk and prevalence in the immigrant communities are derived by evaluating from prevalence data in their countries of origin, which does not reflect accurate statistics.¹⁴⁵ Consequently, the lack of reliable data in the UK marginalises the issue and extent of FGM.¹⁴⁶

¹⁴¹ Johnsdotter 2012 *History and Anthropology* 107; Black 1997 *Journal of the Royal Society of Medicine* 402; Burriss 2016 <https://www.psychologytoday.com/us/blog/attraction-evolved/201606/does-fgm-make-women-less-interested-in-sex>.

¹⁴² Johnsdotter 2012 *History and Anthropology* 91; Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283.

¹⁴³ Odukogbe 2017 *Translational Andrology and Urology* 139; Burriss 2016 <https://www.psychologytoday.com/za/blog/attraction-evolved/201606/does-fgm-make-women-less-interested-in-sex>; Björk 2017 <https://www.europarl.europa.eu/news/en/headlines/society/20170203STO61016/bjork-female-genital-mutilation-way-to-control-women-s-bodies-and-sexuality>; Moges 2009 *African Women Organization* 4; Oyefara 2014 *Genus* 11; Simpson *et al* 2012 *BMJ* 1.

¹⁴⁴ Simpson *et al* 2012 *BMJ* 1; Bradbury-Jones 2019 *Trauma, Violence & Abuse* 471.

¹⁴⁵ Vogt, Efferson and Fehr 2017 *SSM - Population Health* 286.

¹⁴⁶ Dorkenoo, Morison and Macfarlane 2007 https://openaccess.city.ac.uk/id/eprint/13117/1/PREVALENCE-STUDY_FINAL.pdf; Norris 2019 <https://www.opendemocracy.net/en/5050/special-report-fgm-survivors-more-visible-uk-statistics-and-activism/>.

2.6 Chapter summary

FGM takes place across the world and is evident in at least 92 countries, but only 32 countries have nationwide data on FGM available.¹⁴⁷ Current discussions on FGM frequently creates the idea that is not impossible to draw an unambiguous line between condemnable and admissible practices of female genital cutting.¹⁴⁸ While most of the cases involving FGM are identified in Africa, an increase in international immigration and refugees resulted in first world countries not being excluded from the statistics.¹⁴⁹ This chapter also illustrates that the FGM in Africa are frequently intertwined with traditional notions of cutting and circumcision in Western countries in different eras, which reflect historical Western beliefs and ideas.¹⁵⁰

The current data is an under-representation of the actual number of FGM victims, because it does not count the various countries where nationwide data on FGM is unavailable. Furthermore, since the practice is mainly underreported in countries where it has been declared illegal, reliable data on the extent of the phenomenon is unavailable, and actual reliable statistics remain unknown.¹⁵¹ What is, however, clear from the discussion above, is that FGM is a global phenomenon, which manifests in a variety of different practices in different regions and across culture borders. Globalisation has, however, also ensured that these practices now extend to states and communities previously unaffected by FGM.

¹⁴⁷ Anon 2020 https://www.equalitynow.org/the_official_global_picture_of_fgm_c_is_incomplete; Batha 2020 <https://www.weforum.org/agenda/2020/02/female-genital-mutilation-global/>.

¹⁴⁸ Johnsdotter 2012 *History and Anthropology* 91.

¹⁴⁹ Dustin 2010 *European Journal of Women's Health* 8; Hassanen, Woldu and Mkuu 2019 *AIMS Public Health* 67.

¹⁵⁰ Johnsdotter 2012 *History and Anthropology* 91.

¹⁵¹ Mediterranean Institute of Gender Studies 2015 <https://medinstgenderstudies.org/wp-content/uploads/endFGM-PositionPaper-EN-online.pdf>; Odukgobe *et al* 2017 *Translational Andrology and Urology* 138.

Chapter 3 International and regional legal frameworks: Protecting children against female genital mutilation

3 International and regional legal frameworks: Protecting children against female genital mutilation

3.1 Introduction

Several international and regional human rights instruments recognise FGM as a violation of children's rights, including the ACRWC, CRC, ICESCR and the *Universal Declaration of Human Rights* (1945), among others.¹⁵² While some of these instruments do not make direct reference to FGM, they lay the foundation for FGM-related rights. There is an increasing view that FGM constitutes an infringement of an even broader category of rights, more specifically the right to gender equality, to be protected from violence, the best interests of the child principle and parental authority, and so forth. This chapter outlines the legal protective framework of FGM by asserting that the regulation and ultimate banning of FGM is a standard of customary international law.¹⁵³

3.2 Female genital mutilation as a harmful cultural practice

Harmful cultural practices are expressions of discriminatory religious, cultural and social norms in the form of various kinds violence. Such practices aim to define females' inferior position in their respective communities by taking control over their freedom.¹⁵⁴ All social groups have traditional cultural practices that reflect the beliefs

¹⁵² African Charter on the Rights and Welfare of the Child (1990); Convention on the Rights of the Child (1989), International Covenant on Economic, Social and Cultural Rights (1966); Universal Declaration of Human Rights (1945).

¹⁵³ Quitter 2014 *Social Science Research Network* 1; Fisaha 2016 *Journal of Political Sciences & Public Affairs* 5.

¹⁵⁴ Creighton and Gill 2010 *Injury Prevention* 276. See also A 1 of the Declaration on the Elimination of Violence Against Women (1993), defining such "violence" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering

and values held by its members for extensive time periods.¹⁵⁵ While some practices are beneficial to all its members, others are rather detrimental.¹⁵⁶ Harmful cultural practices are broadly defined by UNICEF as discriminatory practices that are regularly practised over such long periods of time that societies and communities start to consider them to be acceptable, regardless of their harmful nature.¹⁵⁷

The African Union (AU) classified harmful practices as practices and/or attitudes that negatively affect fundamental human rights of females and specifically mentions their right to "life, health, dignity, education and physical integrity".¹⁵⁸ These definitions of what a harmful cultural practice entails adhere to similar criteria: they are traditional and prescribed by social norms, are discriminative in nature, violate fundamental rights, are violent and have negative consequences. Added to this is that these practices are imposed by family members or community members.¹⁵⁹ In order to determine whether FGM qualifies as a harmful practice, it is necessary to determine if it indeed adheres to the necessary elements.¹⁶⁰

to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life".

¹⁵⁵ Nayak, Sharada and Geroge 2012 *Nitte University Journal of Health Science*) 61; Introduction of Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children (1995).

¹⁵⁶ See A 3-4 of Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children (1995), for a list of examples including child marriage forced feeding of women, FGM, female infanticide, early pregnancy and traditional birth practices.

¹⁵⁷ A 3-4 of Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children (1995); UNICEF 2020 <https://www.unicef.org/protection/harmful-practices>.

¹⁵⁸ A 1 of the Protocol to the African Charter on Peoples' Rights on the Rights of Women in Africa (2003).

¹⁵⁹ Paras 15 and 16 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

¹⁶⁰ Take note that "discrimination" is discussed in section 3.2.2.1 in Chapter 3.

3.2.1 The requirement of tradition and a critique of terminology

"Traditional harmful practice" is the generic term used to describe practices that are frequently defended on the grounds of superstition, culture, tradition or religion.¹⁶¹ The term implies that "tradition" is the main culprit, but, as already discussed, other intersecting factors contribute to the continuation of the practice, including patriarchy and other socio-economic circumstances, none of which should be considered in isolation.¹⁶² Therefore, traditional harmful practice is not considered to be the appropriate term, because although there is a "traditional" element that contributes to the manifestation of the custom, it is not the only factor that ought to be considered.¹⁶³ Furthermore, the use of the word "traditional" causes these practices to be compared with the term "modern" and, consequently, implies that if a society is modernised, such practice will naturally cease to exist.¹⁶⁴

The various forms of violence that are most frequently described as traditional harmful practices mainly affect girls and serve as an expression of gender inequality.¹⁶⁵ Le Roux, Bartelink and Palm are of the opinion that the term is not as

¹⁶¹ Kwakye 2019 <https://www.isglobal.org/en/healthisglobal/-/custom-blog-portlet/our-gods-have-failed-us-the-effects-of-traditions-superstitions-and-cultural-practices-on-the-health-of-africans/5083982/10401>; Anon 2012 <http://huiselijkgeweld.ypos3.ypos.nl/feiten/internationaal/violating-children-s-rights-harmful-practices-based-on-tradition-culture-religion-or-superstition>; Paras 15 and 16 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

¹⁶² Monagan 2010 *Journal of Alternative Perspectives in the Social Sciences* 161; Hayford and Trinitapoli 2014 *Journal for the Scientific Study of Religion* 252; Refaei 2016 *Archives of Iranian Medicine* 807; Le Roux, Bartelink and Palm 2017 https://assets.publishing.service.gov.uk/media/5c7d541e40f0b603d7852921/PB_What_is_the_harm_S02_18Dec17.pdf. See Chapters 2.2 - 2.5 and 3.2.2.1 for a further discussion on intersecting factors.

¹⁶³ A 24(3) of the Convention on the Rights of the Child (1989).

¹⁶⁴ Le Roux, Bartelink and Palm 2017 https://assets.publishing.service.gov.uk/media/5c7d541e40f0b603d7852921/PB_What_is_the_harm_S02_18Dec17.pdf.

¹⁶⁵ Khosla *et al* 2017 *Reproductive Health* 3; Paras 4, 6 and 49 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against

inclusive as suggested and it hides the gendered nature of the violence frequently accompany these practices.¹⁶⁶ Still, it is important to take note of Carpenter's criticism that the term "harmful traditional practices" is used as a way of naming the most obvious forms of male domination and, as a result, excludes harm to males from the definition.¹⁶⁷ Should the UN's agenda only consist of harmful cultural practices that are performed on females for the benefit of males, it will cause any other practices affecting males or seemingly for the benefit of women to be neglected.¹⁶⁸ After careful consideration, it is suggested that the most fitting term is simply harmful cultural practices.

3.2.2 Protective provisions within the ambit of a harmful cultural practice

FGM in all its forms is recognised as a gross violation of a series of well-established fundamental freedoms and human rights enshrined in various conventions and treaties.¹⁶⁹ While several rights are violated by the practice, the scope of this discussion is limited to the principle of equality, the child's right to the highest attainable standard of health, the right to education and information and the right to culture and tradition, which serves as protective provisions.

3.2.2.1 The principle of equality and its relation to female genital mutilation

FGM as a harmful cultural practice highlights the gendered dimension of violence that is perpetuated by inequality, bias, power imbalances and discrimination mainly

Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

¹⁶⁶ Le Roux, Bartelink and Palm 2017 https://assets.publishing.service.gov.uk/media/5c7d541e40f0b603d7852921/PB_What_is_the_harm_S02_18Dec17.pdf.

¹⁶⁷ Carpenter 2004 *International Feminist Journal of Politics* 310.

¹⁶⁸ Carpenter 2004 *International Feminist Journal of Politics* 310.

¹⁶⁹ Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989).

based on sex and gender, preserving its widespread existence.¹⁷⁰ It aims to control women's independent sexuality, which reinforces their subordinate role in the cultural, social, political and economical realms as well as the society at large.¹⁷¹ This custom reinforces a system of patriarchy and sustains gender norms, stereotypes, and socially constructed gender norms that reflect the discriminatory beliefs about women and their status in certain cultures, religions, or ethnic groups.¹⁷² According to UNICEF, "gender equality" requires that:

...women and men, and girls and boys, enjoy the same rights, resources, opportunities and protections.¹⁷³

Moreover, an overarching principle of the CRC prohibits discrimination based on gender, which is defined as any "distinction, exclusion or restriction made based on sex", that "violates the principles of equality of rights and respect for human dignity".¹⁷⁴ International law seeks to recognise and guarantee children's equal economic, cultural, social, civil and political rights.¹⁷⁵ The CRC is an all-inclusive, genderblind treaty solely focused on the human rights of children. Nevertheless, despite its numerous achievements, it is alleged that the Convention provides more protection for boy children than girl children, because it excludes violations that

¹⁷⁰ Khosla *et al* 2017 *Reproductive Health* 3; Paras 4, 6 and 49 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

¹⁷¹ Fahmy, El-Mouelhy and Ragab 2010 *Reproductive Health Matters* 182; UNFPA 2020 <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions>.

¹⁷² Para 9 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

¹⁷³ Adegboye 2012 *European Scientific Journal* 217; UNICEF 2020 <https://www.unicef.org/gender-equality>; Abendroth 2014 *Encyclopedia of Quality of Life and Well-Being Research* 3291.

¹⁷⁴ Introduction on the Elimination of All Forms of Discrimination against Women (1979) and A 2 of the Convention on the Rights of the Child (1989); A 3 of the African Charter on the Rights and Welfare of the Child (1990).

¹⁷⁵ Universal Declaration of Human Rights (1945), International Covenant on Civil and Political Rights (1966), Convention on the Elimination of all Forms of Discrimination Against Women (1979), Convention on the Rights of the Child (1989), African Charter on the Rights and Welfare of the Child (1990).

predominantly affect the latter.¹⁷⁶ Accordingly, it is submitted that the CRC undermines the fundamental principle of equality. As a result, other international and regional treaties and international instruments have been drafted in an attempt to address this issue.¹⁷⁷ These documents include important economic and socio-cultural realities of regional experience and especially address the so-called "non-Western" harmful cultural practices.¹⁷⁸ The following discussion distinguishes between sex and gender, while considering the manner in which it stems and materialises in the perpetuation of FGM and gender inequality as a method to illustrate that international law has to take the differences between boy children and girl children into account when drafting conventions and treaties.

3.2.2.1.1 Sex

FGM is a practice exclusively reserved for females solely based on their sex and results in the invalidation of their enjoyment of human rights and fundamental freedoms.¹⁷⁹ The practice falls within the ambit of discrimination, as it meets two primary criteria: first, it is a distinction based primarily on sex, and secondly, it

¹⁷⁶ Convention on the Rights of the Child (1989); Doek 2009 *Child Abuse & Neglect* 771; See also Wadesango, Rembe and Chabaya 2011 *The Anthropologist* 121, listing child marriage, female genital mutilation and virginity testing as practices that predominantly affect girls. See also Campeanu and Huon 2018 <https://www.aljazeera.com/indepth/inpictures/child-soldiers-south-sudan-181024095844282.html>, who states that child soldiers, which are explicitly included in the Convention on the Rights of the Child (1989), mostly include boy children.

¹⁷⁷ Lloyd 2002 *The International Journal of Children's Rights* 179; Rembe and Odeku 2009 *Journal of Psychology in Africa* 63; Le Roux, Bartelink and Palm 2017 https://assets.publishing.service.gov.uk/media/5c7d541e40f0b603d7852921/PB_What_is_the_harm_S02_18Dec17.pdf.

¹⁷⁸ Lloyd 2002 *The International Journal of Children's Rights* 179. See also the African Charter on the Rights and the Welfare of the Child (1990); European Social Charter (1996); General Comment No. 21 on the Right of Everyone to take part in Cultural Life (2009); Commission on the Status of Women on the Challenges and Opportunities in Achieving Gender Equality and the Empowerment of Rural Women and Girls (2018); CEDAW General Recommendation No. 14: Female Circumcision (1990), amongst others.

¹⁷⁹ Rahman and Toubia *Female Genital Mutilation: A Guide to laws and Policies Worldwide* 21; A 1 of the Convention on the Elimination of all Forms of Discrimination against Women (1989).

impairs the equal enjoyment of rights by females.¹⁸⁰ "Sex" refers to the "biological differences between males and females", including genitalia and genetic differences and, according to CEDAW, discrimination based on sex is defined as:

...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁸¹

In several countries where the FGM is evident, there is a preference for male children, because they are regarded as assets for economic, political or ritual reasons, while female children are considered burdensome liabilities.¹⁸² Consequently, harmful cultural practices such as FGM are encouraged due the perception that the girl child is an economic burden on the family, as she cannot significantly contribute in terms of income.¹⁸³ Furthermore, bearing in mind that FGM is seen as a rite of passage that prepares girls for womanhood and marriage, families who are subjected to poverty and a lack of economic opportunities frequently sell their daughters into marriage to make money, settle debts and protect girls from economic and social risk by providing them with the prospect of a financially stable future.¹⁸⁴

¹⁸⁰ A 1 of the Convention on the Elimination of All Forms of Discrimination against Women (1979); A 2 of the Universal Declaration of Human Rights (1945); A 1 and 55 of the Charter of the United Nations (1945); Rahman and Toubia *Female Genital Mutilation: A Guide to laws and Policies Worldwide* 21.

¹⁸¹ Newman 2018 <https://www.medicalnewstoday.com/articles/232363>; A 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979); Rahman and Toubia *Female Genital Mutilation: A Guide to laws and Policies Worldwide* 21.

¹⁸² Dinitz, Dynes and Clarke 1964 *Marriage and Family Living* 128; Debnath 2019 <https://timesofindia.indiatimes.com/readersblog/gogirl/are-girls-a-boon-or-a-burden-6519/>; Gurusamy *Girl Child* 97; Para I(B) of Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children (1995).

¹⁸³ Diamond-Smith, Luke and Mcgarvey 2013 *Culture, Health & Sexuality* 704; Chowdury 2016 <https://www.e-ir.info/2016/09/09/why-infanticide-happens-almost-exclusively-to-girls-and-not-boys/>.

¹⁸⁴ Rembe and Odeku 2009 *Journal of Psychology in Africa* 63. Howden 2014 <https://www.theguardian.com/society/2014/feb/07/female-genital-mutilation-kenya->

3.2.2.1.2 Gender

FGM constitutes gender-specific discrimination that relates to the historical suppression and oppression of females and it is distinctively performed on females.¹⁸⁵ "Gender" is a term that refers to the "social construction of roles allocated to men and women", including the "roles, behaviours, activities, attributes and opportunities" that a society deems appropriate for boys and girls and how they act within those socio-cultural roles.¹⁸⁶ Gender discrimination entails unequal "rights, responsibilities and opportunities of women and men and girls and boys".¹⁸⁷

However, gender is not static, because the definition of femininity and masculinity, as well as the societal expectations and limitations placed on both men and women based on their sex, are changeable.¹⁸⁸ It is predominantly based on stereotyping, which is reinforced by family, friends and the community at large.¹⁸⁹ From an intra-cultural viewpoint, FGM's focus is not essentially on the manipulation of a girls' genitalia, but on the escalation of their status by exposing them to an initiation ritual.¹⁹⁰ Understanding gender and its relationship to FGM, requires a study of girls'

-
- daughters-fgm#maincontent; Anon 2018
https://www.popcouncil.org/uploads/pdfs/2018RH_FGMC-ChildMarriage.pdf; Tristram 2019
<https://www.thoughtco.com/child-marriage-facts-causes-consequences-2353030>.
- ¹⁸⁵ Obiora 1997 *Case Western Reserve Law Review* 286; Muteshi, Miller and Belizán 2016 *Reproductive Health* 2.
- ¹⁸⁶ Davis *Female Genital Mutilation* 13; World Health Organization (2011) <https://www.who.int/gender-equity-rights/knowledge/glossary/en/>; Mascolo 2019 <https://www.psychologytoday.com/za/blog/old-school-parenting-modern-day-families/201907/time-move-beyond-gender-is-socially-constructed>; Para 7 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).
- ¹⁸⁷ Dicke, Safavian and Eccles 2019 *Frontiers in Psychology* 12; Goldberg 2020 <https://blogs.worldbank.org/developmenttalk/legal-inequality-and-womens-economic-opportunity>.
- ¹⁸⁸ Davis *Female Genital Mutilation* 13; Anon 2015 <https://www.sida.se/contentassets/a3f08692e731475db106fdf84f2fb9bd/gender-tool-analysis.pdf>; Brickley 2009 <https://www.cnsnews.com/news/article/un-report-says-gender-not-static-it-changeable>.
- ¹⁸⁹ Davis *Female Genital Mutilation* 13; Hussain *et al* 2015 *Sage Open* 1; Marks, Chun Bun and McHale 2012 *Sex Roles* 221.
- ¹⁹⁰ Finke 2006 *African Journal of Reproductive Health* 13; Schultz and Lien 2013 *International Journal of Women's Health* 166.

division of roles, labour and responsibilities, access to and control over resources due to their position in society.¹⁹¹

First, the practice of FGM is perpetuated by normative gender roles that predict responsibilities, educational aspirations and opportunities, which are detrimental to women.¹⁹² In countries where FGM is prevalent, women's roles are often limited to routine domestic chores, bearing children and taking care of them, whereas men's role is to be the breadwinner and provide financial support.¹⁹³ The Committee on the Elimination of Discrimination against Women notes that the persistence of stereotypical roles contribute to the continuation and rationalisation of the custom.¹⁹⁴ Moreover, these contrasting roles reflect the power inequalities that are in favour of men.¹⁹⁵ In the context of FGM, "power imbalance" relates to the power of males over females' decision making, personal relationships, expectations and childbearing, the extent of the power depending on the culture, religion or ethnic group concerned.¹⁹⁶

¹⁹¹ Anon 2015 <https://www.sida.se/contentassets/a3f08692e731475db106fdf84f2fb9bd/gender-tool-analysis.pdf>.

¹⁹² Mohammed, Seedhom and Mahfouz 2017 *Journal of Public Health and Epidemiology* 1056; Dicke, Safavian and Eccles 2019 *Frontiers in Psychology* 1; Anon 2015 <https://www.sida.se/contentassets/a3f08692e731475db106fdf84f2fb9bd/gender-tool-analysis.pdf>; Dicke, Safavian and Eccles 2019 *Frontiers in Psychology* 1; Wendoh 2018 <https://www.ippf.org/blogs/female-genital-mutilation-fgm-human-rights-violation>.

¹⁹³ Hayes 1975 *American Ethnologist* 623; Hentschel, Heilman and Peus 2019 *Frontiers in Psychology* 2; Dicke, Safavian and Eccles 2019 *Frontiers in Psychology* 2.

¹⁹⁴ Para 20 of the Concluding Observations of the Committee on the Elimination of Discrimination against Women (2012); Khosla *et al* 2017 *Reproductive Health* 3; Bishop 2020 <http://gams.be/en/2020/03/27/endfgmmyths-no-female-genital-mutilation-is-not-an-african-issue/>.

¹⁹⁵ Milazzo 2016 <https://blogs.worldbank.org/developmenttalk/gender-based-violence-power-and-norms>; Hentschel, Heilman and Peus 2019 *Frontiers in Psychology* 2; Finke 2006 *African Journal of Reproductive Health* 14.

¹⁹⁶ Davis *Female Genital Mutilation* 13; Anon 2019 <https://news.un.org/en/story/2019/02/1032061>; Guterres 2019 <https://www.un.org/press/en/2019/sgsm19449.doc.htm>. See also Finke 2006 *African Journal of Reproductive Health* 13 and Howden 2014 <https://www.theguardian.com/society/2014/feb/07/female-genital-mutilation-kenya-daughters-fgm>, where it mentions the imbalance of power that is also evident in that

Women's equal access to and control over financial and economic resources is an integral part of the realisation of gender equality.¹⁹⁷ FGM is regarded as a rite of passage that guarantees social acceptance and, consequently, men frequently refuse to marry women if they have not been submitted to the practice, because they are not considered to be adults.¹⁹⁸ As a result, women's only way to gain a respectable status and a comfortable living standard is to marry a willing partner and take up the occupation of a housewife; this requires that they subject themselves to their partners' sex demands, reproduction aspirations, and devotion to the latter's families and homes.¹⁹⁹ In this regard, Hartmann notes that in these communities, women are dependent on their personal relationships with men in many aspects of life due to the lack of access they have to economic resources.²⁰⁰

It is clear that in communities where FGM is practised, girls have hardly any personal or career expectations for their futures, viewing their life as predictable and determined by those who are in control.²⁰¹ Gender equality is a requisite foundation for a prosperous and sustainable future for children.²⁰² State parties have a duty to ensure transformative change that dismantles discriminatory and patriarchal gender norms as well as the inequalities they encourage that have a disproportionate impact on the girl child.²⁰³ In order to achieve and maintain gender equality, state

circumcisers appreciate the power that the ritual brings about, in that they are placed in a central position that demand their knowledge and skills

¹⁹⁷ Hendriks 2019 *Development in Practice* 1029; Gettu 2018 https://www.undp.org/content/undp/en/home/news-centre/speeches/2018/women_s-economic-empowerment-and-financial-inclusion.html.

¹⁹⁸ Almroth *et al* 2001 *Social Science & Medicine* 1459; Dalal, Lawoko and Jansson 2010 *Journal of Injury and Violence Research* 42; Ontiveros 2019 <https://www.bbc.com/news/world-47131052>.

¹⁹⁹ Andersson 2001 *Läkartidningen* 2463; Bergmann The Economic Emergence of Women 4; Bjälkander 2013 *Obstetrics and Gynecology International* 5.

²⁰⁰ Bergmann *The Economic Emergence of Women* 4.

²⁰¹ Davis *Female Genital Mutilation* 14; Althaus 1997 *International Perspectives on Sexual and Reproductive Health* 130.

²⁰² Roseboom 2020 *Journal of Developmental Origins of Health and Disease* 101; UNICEF 2020 <https://www.unicef.org/gender-equality>.

²⁰³ Zaicek and Calasanti 1998 *Gender and Society* 509; Cislighi *et al* 2020 *Culture, Health & Sexuality* 167; Ekval 2019 <https://repub.eur.nl/pub/115563>.

parties must be committed to the recognition and respect for children's rights without discrimination by treating boys and girls fairly, while taking their respective needs into account.²⁰⁴ Therefore, it is in no way suggested that gender equality implies that men and women are indistinguishable, but that their opportunities, responsibilities and rights must not depend on whether they were born male or female.²⁰⁵

3.2.2.2 The right to the highest attainable standard of health

FGM constitutes an invasive procedure performed on otherwise healthy tissue in the absence of any medical necessity or benefit due to its severe physical and mental harm.²⁰⁶ International human rights law proclaim that all humans have the right to live in conditions that enable them to enjoy good health and health care.²⁰⁷ The CRC and CEDAW recognise that children have the right to "the enjoyment of the highest attainable standard of health" and to opportunities that enable them to survive, grow and develop "within the context of physical, emotional and social well-being" in order to reach their full potential.²⁰⁸ In this discussion, the rights of children necessitates specific attention, for instance the right to health within the ambit of the right to sexual and reproductive health.

²⁰⁴ Anon 2018 <https://www.pipelineequity.com/voices-for-equity/gender-equity-vs-gender-equality/>; A 2 of the Convention on the Rights of the Child (1989); A 3 of the African Charter on the Rights and Welfare of the Child (1989).

²⁰⁵ McCulloch 2018 <https://www.personneltoday.com/hr/jordan-peterson-gender-pay-gap-exist/>; Tonkin 2019 <https://www.cornerstoneondemand.com/rework/toward-gender-diversity-men-and-women-are-equal-not-same>.

²⁰⁶ Novakovic 2017 <https://www.medicalnewstoday.com/articles/241726>.

²⁰⁷ Fisaha 2016 *Journal of Political Sciences & Public Affairs* 5. See also the Preamble of the Constitution of the World Health Organization (1946), where WHO defines "health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".

²⁰⁸ A 24(1) of the Convention on the Rights of the Child (1989) and A 12 of the Convention on the Elimination of All Forms of Discrimination against Women (1979). See also A 12(1) of the African Charter on the Rights and Welfare of the Child (1990) and A 12 of the International Covenant on Economic, Social and Cultural Rights (1966).

The Committee on the Rights of the Child recognises that children's right to health include a set of entitlements and freedoms, of which the latter are of great importance in line with growing maturity and capacity. It includes the right to control one's own health and body.²⁰⁹ International law recognises the need to ensure a legal framework that guarantees that adolescents' sexual and reproductive rights are realised.²¹⁰ Accordingly, sexual and reproductive health are defined as:

...a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying sex and safe sex life...²¹¹

Sexual health calls for a constructive and respectful vision to one's sexuality, sexual relations and the prospect of a safe and pleasurable sexual experience free from discrimination, coercion and violence.²¹² The purpose of sexual health rights, which is included within the ambit of children's right to health, is "the enhancement of life and personal relations".²¹³ The girl child is a bearer of rights and are entitled to sexual health rights and to have control over her own body, as well as deciding responsibly and freely on all matters relating to her physical and mental sexual health.²¹⁴ When girls are submitted to FGM, their sexual health rights are violated, because their anatomic structures are damaged, altering their sexual function and causing female sexual dysfunction, a disorder that causes significant personal

²⁰⁹ Para 24 of General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013).

²¹⁰ Para 1 of the United Nations General Assembly, Intensifying Global Efforts for the Elimination of Female Genital Mutilations (2013).

²¹¹ International Conference on Population and Development: Programme of Action (1994) as cited in Strode *et al* 2018 *Agenda* 77.

²¹² Gruskin *et al* 2019 *Sexual and Reproductive Health Matters* 32; See also A 2 and 19 of the Convention on the Rights of the Child (1989).

²¹³ Kismödi *et al* 2015 *Global Public Health* 252; Para 7(2) of the Programme of Action of the International Conference on Population and Development in Cairo, Egypt (1994); Para 1 of the CESCR General Comment No. 22 on the Right to Sexual and Reproductive Health (2016).

²¹⁴ Alsibiani and Rouzi *Fertility and Sterility* 2010 724; Raina *et al* 2007 *Fertility and Sterility* 1273; Para 18-19 of *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); Para 96 of the Beijing Declaration and Platform for Action (1995).

distress due to "sexual desire, orgasm, arousal and sexual pain".²¹⁵ In addition, one must take note of the fact that a child's sexual rights may be temporarily limited, provided that such limitation is justified.²¹⁶ However, due to FGM's long-term consequences, it is necessary to include the girl child's right to sexual health within the ambit of this discussion.²¹⁷

Reproductive health is a state of total "physical, mental and social well-being in all matters related to reproduction", which requires the right to manage the psychological and physical consequences, as well as the prevention and management of pregnancies.²¹⁸ FGM constitutes a serious violation of girl children's reproductive health rights, as it contributes to "maternal mortality, infertility and obstructed labour". They are more likely to have inauspicious obstetric outcomes than those who have not been subjected to the custom.²¹⁹ Furthermore, victims of FGM have an increased HIV risk because they are more likely to have older partners due to child marriages.²²⁰

The Committee on the Elimination of Discrimination against Women admits that the biological factors for girls in comparison with boys differ. This includes their

²¹⁵ Alsibiani and Rouzi *Fertility and Sterility* 2010 724; Raina *et al* 2007 *Fertility and Sterility* 1273; Para 18-19 of *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC).

²¹⁶ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* (CCT 12/13) [2013] ZACC 201 (1) SACR 327 (CC) para 37; General Comment No. 4 of the Committee on the Rights of the Child on Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003), as cited in Strode *et al* 2018 *Agenda* 78, which states that a child's right to a satisfying sex life is subject to two norms, i.e. that state parties are to establish an age at which consent may to sex may be given before adulthood, and that this age of consent must equally apply to both males and females.

²¹⁷ Ismail *et al* 2017 *Reproductive Health* 108; Novakovic 2017 <https://www.medicalnewstoday.com/articles/241726>; Mishra 2019 *Indian Journal of Health & Medical Law* 8; Ghadially 1992 *Women's Global Network for Reproductive Rights Newsletter* 7.

²¹⁸ García-Moreno and Stöckl 2009 *International Journal of Gynecology and Obstetrics* 146; Anon 2010 <https://www.unfpa.org/press/reproductive-health-and-rights-perspectives-further-development-africa>; Hakim 2001 *East African Medical Journal* 255.

²¹⁹ Jungari 2015 *Health & Social Work* 25; Eke and Nkanginieme 2006 *Lancet* 1799-1800.

²²⁰ Jungari 2015 *Health & Social Work* 25; Yount and Abraham 2007 *Studies in Family Planning* 73.

menstrual cycle and reproductive functions.²²¹ Furthermore, some socio-economic factors may also vary for girls, for they are frequently exposed to different forms of violence that may take on the form of some traditional or cultural practices, including FGM, which carries a risk of infection and death.²²² Consequently, the Committee recommends that special attention should be given to the health rights and needs of girl children due to their increased risk of sexual exploitation and abuse, as well as other harmful practices.²²³

3.2.2.3 The right to culture and tradition

FGM continues under the pretext of culture and traditions, which are currently the most cited justification for the manifestation of the practice.²²⁴ Cultures and traditions are ways in which individuals and communities pass on their religion, customs, values and language to the next generation to create a milieu of mutual respect and an understanding of cultural values.²²⁵ The preservation and strengthening of traditions and cultures that are deeply embedded in the heritage of ethnic groups and regions is an integral part of the maintenance of positive social interaction and human dignity in a multicultural world.²²⁶ These traditions and cultures include "indigenous distinct cultures, history, language and a way of life" which serves as an enrichment of the state's cultural identity and promotes its preservation.²²⁷

²²¹ CEDAW General Recommendation No. 24: Article 12 of the Convention (1999).

²²² Para 12(a) and (b) of the CEDAW General Recommendation No. 24: Article 12 of the Convention (1999).

²²³ Para 7 of the CEDAW General Recommendation No. 24: Article 12 of the Convention (1999); Hands *et al* 2016 *Journal of Women's Health Issues Care* 1.

²²⁴ Serour 2013 *African Journal of Urology* 146; Awolola and Ilupeju 2019 *Tzu Chi Medical Journal* 3.

²²⁵ Para 2 of General Comment No. 21 on the Right of Everyone to take part in Cultural Life (2009).

²²⁶ A 11(2)(c) of the African Charter on the Rights and Welfare of the Child (1990); Para 1 of General Comment No. 21 on the Right of Everyone to take part in Cultural Life (2009).

²²⁷ Para 18 of General Comment No. 11 on the Indigenous Children and their Rights under the Convention (2009); Para 4(a) of General Recommendation No. 23: Indigenous Peoples (1997).

Cultural rights should be respected due to the fact that individuals cannot renounce their culturally derived identity. These rights therefore fall within the ambit of human rights that ensure the enjoyment of culture and all its components within the prerequisites of human dignity, non-discrimination and equality.²²⁸ Children's cultural rights are universal, interdependent and an essential part of human rights. They seek to highlight the "importance of the cultural values" of each child's protection, harmonious development and their right to participate in cultural life.²²⁹ Furthermore, Njogu acknowledges that cultural awareness has an important role in helping children build self-esteem, shape valuable experiences and develop a positive sense of identity.²³⁰ The CRC states that a child:

...shall not be denied the right in community with other members of his or her group, to enjoy his or her culture, to profess and practice his or her own religion...²³¹

The right of children to participate in cultural life is also enshrined in the UDHR, which states that "everyone has the right to freely participate in the cultural life of the community", as well as the ICESCR, which recognises "the right of everyone to take part in cultural life".²³² However, Freeman states that "the effect of culture may not be accorded the status of a meta-norm" that has the power to trump other

²²⁸ A 2 and 28(2) of the Convention on the Rights of the Child (1989); Fagan 2017 *Human Rights Quarterly* 324.

²²⁹ Preamble of the Convention on the Rights of the Child (1989); Rembe and Odeku 2009 *Journal of Psychology in Africa* 63; Para 1 of General Comment No. 11 on the Indigenous Children and their Rights under the Convention (2009); A 15(2) of the International Covenant on Economic, Social and Cultural Rights (1966); Para 1 of General Comment No. 21 on the Right of Everyone to take part in Cultural Life (2009).

²³⁰ Njogu 2018 *International Journal of Science and Research* 1268.

²³¹ A 30 of the Convention on the Rights of the Child (1989); Para 2 of General Comment No. 11 on the Indigenous Children and their Rights under the Convention (2009). See also A 27 of the International Covenant on Civil and Political Rights (1966).

²³² A 27 of the Universal Declaration of Human Rights (1945); See also A 2 and 15 of the International Covenant on Economic, Social and Cultural Rights (1996).

human rights.²³³ In this regard, it is submitted that cultural practices that cause harm justifies a limit of legitimate cultural rights.²³⁴

According to Macklin, a cultural practice has to adhere to the so-called principles of liberal modernity, i.e. "respect for persons, beneficence, non-maleficence, and justice".²³⁵ While the violent nature of FGM illustrates that it does not meet the aforementioned requirements, the consideration of and engagement with local perspectives are necessary to ensure that a cultural society accepts these principles as relevant.²³⁶ Renteln states that individuals should be afforded the right to practise their culture and traditions without interference, except if the applicable culture or traditions poses an irreparable physical harm to the community at large or its members.²³⁷ The cultural norms in an patriarchal and unequal society normalise and justify discriminatory practices to which its members are submitted due to the meaning they convey.²³⁸ Moreover, these harmful cultural practices are rationalised according to the cultural norms within an ethnic community and not according to an objective human rights criteria.²³⁹ However, according to Bishop, harmful cultural practices, especially FGM, are not ethically justified and, consequently, the its justification within a traditional context is irrelevant.²⁴⁰

3.2.2.4 The right to education and information

Education is an autonomous right and an important means for the realisation of other human rights, since it enhances "all rights and freedoms when it is guaranteed

²³³ Freeman 2011 *The Family in Law* 16.

²³⁴ Fagan 2017 *Human Rights Quarterly* 320-321.

²³⁵ Bishop 2011 *Journal of Medicine and Philosophy* 486; Macklin Against Relativism: Cultural Diversity and the Search for Ethical Universals in Medicine 708.

²³⁶ Bishop 2011 *Journal of Medicine and Philosophy* 487; Freeman 2011 *The Family in Law* 27.

²³⁷ Renteln *The Cultural Defence* 93; Freeman 2011 *The Family in Law* 29.

²³⁸ Musalo 1997 *Ethics* 1.

²³⁹ Bishop 2011 *Journal of Medicine and Philosophy* 474.

²⁴⁰ Bishop 2011 *Journal of Medicine and Philosophy* 487.

while jeopardising them all when it is violated".²⁴¹ State parties to international conventions agree that everyone has the right to an education and that it must be directed to the "full development of the human personality and the sense of its dignity", while simultaneously strengthening the respect for and promotion of fundamental freedoms and human rights.²⁴² The Committee on Economic, Social and Cultural Rights (CESCR) state that primary education should be "universal, ensure that the basic learning needs of all children are satisfied", while taking the "culture, needs and opportunities of the community" into account.²⁴³ A child's "basic learning needs" include:

...the basic learning content (such as knowledge, skills, values and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions...²⁴⁴

FGM frequently obstructs or even terminates girls' education, because the complications they experience, including health issues, distress and pain, result in irregular school attendance.²⁴⁵ It should also be noted that in societies where a strong patriarchal approach is followed, the education of girls is frequently suppressed and, as a result, the opportunity to teach them about FGM is suppressed.²⁴⁶ This creates a significant challenge in the prevention of the

²⁴¹ Para 1 of the CESCR General Comment No. 13 on the Right to Education (1999); Ruck, Peterson-Badali and Freeman *Handbook of Children's Rights* 364; Halvorsen 1990 *Human Rights Quarterly* 341.

²⁴² A 13(1) of the International Covenant on Economic, Social and Cultural Rights (1966); A 26(2) of the Universal Declaration of Human Rights (1945); CESCR General Comment No. 13: The Right to Education (1999).

²⁴³ A 1 of the World Declaration on Education for All (1990); Para 9 of the CESCR General Comment No. 13: The Right to Education (1999); Birdsall, Levine and Ibrahim 2006 *Global Urban Development Magazine* 1.

²⁴⁴ Para 9 of the CESCR General Comment No. 13: The Right to Education (1999).

²⁴⁵ Njogu 2018 *International Journal of Science and Research* 1269; Pesambili and Mkumbo 2018 *Journal of Youth Studies* 1119.

²⁴⁶ Wood 2019 *HTS Theological Studies* 1; Musalo 1997 *Ethics* 1.

practice.²⁴⁷ There are two primary objectives, i.e. to assess the result of education regarding FGM on the continuation of the attitudes in favour of the practice, and the major constraints that FGM puts on the right to the education of learners, including its influence on their performance and the drop-out rates of female learners.

Educating communities on FGM and its consequences for the lives of victims can provide them with the freedom to make responsible and informed decisions to improve their lives.²⁴⁸ Community-based information, education and communication (IEC) interventions are one of the most important strategies to reinforce behaviours as a method to curb FGM statistics.²⁴⁹ The WHO defines IEC interventions as:

a public health approach aiming at changing or reinforcing health related behaviours in a target audience, concerning a specific problem and within a pre-defined period of time, through communication methods and principles.²⁵⁰

All the IEC interventions should take girls' evolving capacities into account and ought to be evidence-based, respectful, scientifically accurate, non-judgemental and non-prejudicial.²⁵¹ These interventions contain targeted advocacy against harmful cultural practices, campaigns that stimulate public debates regarding FGM and its consequences and educational modules regarding human rights, basic health care, hygiene and problem-solving abilities.²⁵² IEC interventions have the ability to reinforce health-related behaviours through communication principles and methods

²⁴⁷ Njogu 2018 *International Journal of Science and Research* 1269; Pesambili and Mkumbo 2018 *Journal of Youth Studies* 1119.

²⁴⁸ Kontoyannis and Katsetos 2010 *Health Science Journal* 31; Asekun-Olarinmoye 2009 *The European Journal of Contraception & Reproductive Health Care* 297.

²⁴⁹ Balfour *et al* 2016 *BMC Health Services Research* 4; Askew 2005 *Culture, Health & Sexuality* 474.

²⁵⁰ World Health Organization 2014 <http://www.emro.who.int/child-health/community-information/information/Tools/All-Pages.html>.

²⁵¹ Lofland 2014 <https://www.iidc.indiana.edu/irca/articles/evidence-based-practices-for-effective-communication-and-social-intervention.html>;

²⁵² Leye *et al* 2019 *Reproductive Health* 1; Connolly *et al* 2018 *BMJ Open* 5; Balfour *et al* 2016 *BMC Health Services Research* 2.

to reduce women's willingness to enforce FGM on their daughters, and encourage them to discuss the practice among each other and in the community at large.²⁵³

The UN states that IEC interventions as a method of treatment and care of FGM victims should be encouraged and developed in countries where FGM is prevalent.²⁵⁴ These interventions are client-based, and it is essential that its strategy should take the so-called justifications of FGM into account.²⁵⁵ Unfortunately, it seems that programmes aimed at empowering young girls and women by motivating education about their human rights and bodies, are rare.²⁵⁶ While there is an increase in the availability of learning resources in first-world countries, women in developing countries still lack access to basic information on human rights and health complications.²⁵⁷

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) agrees that education must encourage understanding and tolerance for racial, religious and the so-called "minority" groups, while understanding the social values and culture of the entire community.²⁵⁸ In order to ensure that communities are educated on cultural practices from a non-judgmental perspective, intercultural education ought to be incorporated into formal school systems to develop knowledge, generate structured debates and promote documented opinions and

²⁵³ Smith and Stein 2017 *International Journal of Gynecology & Obstetrics* 79.

²⁵⁴ Waigwa *et al* 2018 *Reproductive Health* 2; Finke 2006 *African Journal of Reproductive Health* 13.

²⁵⁵ Njogu 2018 *International Journal of Science and Research* 1268; Yazzie-Mintz 2007 *Journal of American Indian Education* 72.

²⁵⁶ Jones, Ehiri and Anyanwu 2004 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 150.

²⁵⁷ Neuman 2016 *IDS Bulletin* 1; Mutume 2005 <https://www.un.org/africarenewal/magazine/july-2005/african-women-battle-equality>.

²⁵⁸ Para 4 of the CESCR General Comment No. 13: The Right to Education (1999); A 5 of the UNESCO Convention Against Discrimination in Education (1960); A 26(2) of the Universal Declaration of Human Rights (1945). See also Ammoun *Study of Discrimination in Education* 5, wherein Ammoun is correct in his critique that the use of the word "minority" is problematic, because it implies that the scope of this provision is limited; however, the scope of this provision has been enlarged to include all distinct groups of people (i.e. linguistic, ethnic and national).

ideas about FGM.²⁵⁹ Therefore, the form and substance of the school curriculum in countries where FGM is prevalent should be culturally appropriate in order to be acceptable.²⁶⁰

Education and information on FGM and its consequences may have a valuable and sustainable impact on the sexual and reproductive health, the wellbeing, and the overall quality of life of young girls.²⁶¹ While the CRC guarantees every child's fundamental right to seek, receive and impart information, a considerable barrier to girl children's participation in formal basic education is the traditional and cultural values and the reality of poverty that hinders their prospects of education.²⁶² First, girls frequently miss valuable learning hours due to the extensive preparation for the ceremony, following an extended recovering period, which results in further absence.²⁶³ Mbugua observes that there is a notable drop in both school performance and attendance that follows FGM.²⁶⁴ Concurrently, it should be noted that another reason for the poor academic performance of these girls is the negative attitudes they develop towards education. This mainly comes from family members and the community at large, who tend to value cultural activities more and thus

²⁵⁹ Azkona 2014 *Procedia - Social and Behavioral Sciences* 557-559; Kaihlanen, Hietapakka and Heponiemi 2019 *BMC Nursing* 6.

²⁶⁰ Para 6(c) of the CESCR General Comment No. 13: The Right to Education (1999). See also The CEDAW Convention and Harmful Practices Against Women: The Work of the CEDAW Committee (2009).

²⁶¹ Waigwa *et al* 2018 *Reproductive Health* 2; Anon 2017 <https://gemreportunesco.wordpress.com/2017/12/06/fighting-female-genital-mutilation-education-matters/>.

²⁶² Njogu 2018 *International Journal of Science and Research* 1268; Kainuwa and Yusuf 2013 *International Journal of Scientific and Research Publications* 1.

²⁶³ Berg and Denison 2011 *Sexuality Research and Social Policy: Journal of Network Startup Resource Center* 45.

²⁶⁴ Mbugua 1997 *People Planet* 18. See also A 11(3)(d) of the African Charter on the Rights and Welfare of the Child (1990), stating that "State Parties...shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular take measures to encourage regular attendance at schools and the reduction of drop-out rates".

deny girls vital education and information about religion, culture and tradition.²⁶⁵ Also, in some countries, girls are forced to end their education, since their parents had to pay for an expensive FGM ceremony and cannot or are unwilling to continue paying for their education.²⁶⁶ Additionally, UNICEF highlights that FGM is a prerequisite for marriage in several countries; these girls tend to rather engage in relationships with men with the prospect of marriage.²⁶⁷ For this reason, FGM contributes to the dropout rate of girls as most victims of FGM start viewing education as a lesser priority because they deem themselves ready for marriage.²⁶⁸

In summary, it is clear that educational efforts at community level is an integral part of the strategy to reduce FGM, but it is recommended that strategies to regulate and, eventually, eliminate FGM should also be directed at the beliefs, attitudes and behaviours of both men and women.²⁶⁹

3.2.3 The violent nature and negative consequences of FGM

FGM practices may vary in nature according to the culture and region, but it remains a hazing practice in that it involves a ritualic practice that includes two distinct types of violence, i.e. mental violence and physical violence. These are used as a way of

²⁶⁵ Okagaki and Sternberg 1993 *Child Development* 37; A 13(1) of the Convention on the Rights of the Child (1989); Mohammed *et al* 2019 *International Journal of Research and Innovation in Social Science* 503.

²⁶⁶ Sepehr 2018 <https://www.globalcitizen.org/en/content/weibliche-genitalverstummelung-in-deutschland-und/>; Burrage and Clark 2017 <https://www.theguardian.com/lifeandstyle/2017/oct/06/fgm-and-disability-also-hinder-girls-education>.

²⁶⁷ Morzaria and Ahmed 2006 https://www.unicef.org/protection/kenya_35433.html; Wodon 2017 <https://www.globalpartnership.org/blog/child-marriage-and-education-impacts-costs-and-benefits>.

²⁶⁸ Njogu 2018 *International Journal of Science and Research* 1270; Galukande *et al* 2015 *BMC Public Health* 2.

²⁶⁹ Dalal *et al* 2018 *F1000Research* 3; Wodon 2017 <https://www.globalpartnership.org/blog/ending-female-genital-mutilation-why-education-works>; Varol *et al* 2015 *BMC Public Health* 3.

initiating girls, regardless of their consent or willingness to participate.²⁷⁰ From a human rights perspective and against the backdrop of the best interests of the child principle, the violent nature of FGM constitutes discrimination against girls and a violation of the right to dignity, to being free from all forms of torture and inhuman, cruel or degrading treatment, to life, to the highest attainable standard of health as well as to the physical integrity and security of the person.²⁷¹ According to the CRC, every child must be protected from "all forms of physical or mental violence, injury or abuse". They highlight the negative effect that FGM may have on girl children's survival and "physical, mental, spiritual, moral and social development".²⁷² As suggested by the use of the term "harmful", these practices are either a form of serious violence themselves or associated with various forms of violence against girls.²⁷³ Moreover, the short- and long-term health consequences of these harmful

²⁷⁰ Para 7 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014). See also See also Para 29(b) of General Comment No. 13 The Right of the Child to Freedom from all Forms of Violence (2011), where FGM is listed as a harmful practice; Para 21 and 22 of the General Comment No. 13 The Right of the Child to Freedom from all Forms of Violence (2011), defining "mental violence" as "psychological maltreatment, mental abuse, verbal abuse and emotional abuse" and "physical violence" as "fatal and non-fatal physical violence" and specifically includes all forms of "torture, cruel, inhuman or degrading treatment...". See also Anon 2019 <https://hazingprevention.org/home/hazing/facts-what-hazing-looks-like/>, defining "hazing" as "any action taken or a situation created intentionally that causes embarrassment...or ridicule and risks emotionally and/or physical harm to members of a group, regardless of the person's willingness to participate".

²⁷¹ Introduction and A 12 on the Elimination of All Forms of Discrimination against Women (1979); Preamble, A 2, A 6, A 24(1) of the Convention on the Rights of the Child (1989); A 12(1) of the African Charter on the Rights and Welfare of the Child (1990); A 12 of the International Covenant on Economic, Social and Cultural Rights (1966); Para 21 and 22 of the General Comment No. 13 The Right of the Child to Freedom from all Forms of Violence (2011). See also Chapter 3.2, Chapter 3.3, Chapter 3.4 for a full discussion on some of these human rights violations.

²⁷² A 19(1) of the Convention on the Rights of the Child (1989); Para 15 of General Comment No. 13 The Right of the Child to Freedom from all Forms of Violence (2011).

²⁷³ Para 7 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014). See also Para 4 of General Comment No. 13 The Right of the Child to Freedom from all Forms of Violence (2011), defining "violence" as "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse", as well as A 1 of the Declaration on the Elimination of

practices are widely recognised, which includes physical health problems as well as psychological and emotional consequences.²⁷⁴

In order to demonstrate FGM as a violent act that perpetuates control over and severe consequences for the victims, one must discuss the different types of FGM and their violent natures. The most common type of FGM is Type I, known as "clitoridectomy" or "sunna" – an Arabic word that means tradition – which involves the partial or total removal of the clitoris as well as the clitoral hood. This is deemed to be the mildest form of FGM.²⁷⁵ Type II, a similar procedure, is called excision, which involves the total or partial removal of the labia minora and the clitoris, either with or without the excision of the labia majora.²⁷⁶ During the procedure, the clitoris is held between the index finger and thumb, after which it is amputated with a sharp object.²⁷⁷ In order to stop the bleeding, a pressure bandage is applied.²⁷⁸ Clitoridectomy has several severe consequences, including sexual dysfunction, chronic genital infections, possible infertility, chronic pain, urination dysfunction, sepsis, and frigidity.²⁷⁹

Violence Against Women (1993), defining "violence" as "any act of gender-based violence that results in...physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life".

- ²⁷⁴ Ismail *et al* 2017 *Reproductive Health* 108; Novakovic 2017 <https://www.medicalnewstoday.com/articles/241726>; Mishra 2019 *Indian Journal of Health & Medical Law* 3; Ghadially 1992 *Women's Global Network for Reproductive Rights Newsletter* 7.
- ²⁷⁵ Klein *et al* 2018 *Obstetrics and Gynecology International* 3; See also Mishra 2019 *Indian Journal of Health & Medical Law* 8, where "clitoridectomy" is defined as "the partial or total removal of the clitoris and the clitoral hood".
- ²⁷⁶ Rembe and Odeku 2009 *Journal of Psychology in Africa* 63; Klein *et al* 2018 *Obstetrics and Gynecology International* 3; See also Ford 2001 *Health and Human Rights* 1179 and Clerico, Lari, Mojallal and Boucher 2017 *Aesthetic Plastic Surgery* 717, where "labia" is defined as a pair larger outer of hairless skin folds, with "two upper expansions, one covering the upper part of the clitoris...and a lower one called the clitoral frenulum".
- ²⁷⁷ Mishra 2019 *Indian Journal of Health & Medical Law* 8; Dalal, Lawoko and Jansson 2009 *Journal of Injury and Violence Research* 42.
- ²⁷⁸ Izett and Toubia 2000 *Women and Health* 404; Hayden 2018 <https://www.irishtimes.com/news/world/africa/we-ve-seen-too-many-girls-bleed-to-death-eradicating-fgm-in-uganda-1.3382765>.
- ²⁷⁹ Ismail *et al* 2017 *Reproductive Health* 108; Novakovic 2017 <https://www.medicalnewstoday.com/articles/241726>; Mishra 2019 *Indian Journal of Health &*

Type III, known as "infibulation", is a pre-Islamic custom and the most extreme form of FGM. It requires the removal of the labia majora, labia minora and the clitoris, after which the cut edges of the labia are sewed together. The stitching is usually done using thorns. Only a small opening, scarcely adequate for passing menstrual fluids and urine, remains.²⁸⁰ This practice frequently causes several severe health consequences, including infection, impaired menstrual and urinary function, urinary incontinence, chronic genital discomfort, cysts, and infertility.²⁸¹ In addition, once an FGM victim is married, the infibulation must either be cut open, torn or stretched by the groom and then prevented from healing closed; a process that can take months to conclude.²⁸² This process is called "deinfibulation", which involves the re-exposing of both the vaginal and urethral openings by cutting the infibulation scar. It is often necessary for the improvement of health, intercourse or to facilitate childbirth.²⁸³ While it is commonly referred to as a "reversal", it does not repair the vulva to the pre-FGM condition.²⁸⁴

Medical Law 8; Ghadially 1992 *Women's Global Network for Reproductive Rights Newsletter* 7. See also Margolin 2017 *Journal of Gender Studies* 538 defining "frigidity" as a women's failure to respond to a sexual stimulus.

²⁸⁰ Abathun, Sundby and Gele 2016 *International Journal of Women's Health* 558; Richter *Female Genital Mutilation (FGM)* In: Human Rights Education Through Ciné Débat 39-40; Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 2; Westley 1999 *Electronic Journal of Africana Bibliography* 46 as cited in Annas 1996 *Journal of Contemporary Health* 4. See also Ford 2001 *Health and Human Rights* 1179 and Clerico, Lari, Mojallal and Boucher 2017 *Aesthetic Plastic Surgery* 717, where "labia" is defined as a pair of hairless skin folds, with "two upper expansions, one covering the upper part of the clitoris...and a lower one called the clitoral frenulum". See also Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 2, where "infibulation" is defined as a "custom that requires the removal of the labia majora, labia minora and the clitoris, after which the cut edges of the labia are sewed together".

²⁸¹ Obermeyer 2005 *Culture, Health & Sexuality* 444. See also Ford 2001 *Health and Human Rights* 1179. See also Sharma and Chakrabarti 2018 *Journal of Mid-Life Health* 56.

²⁸² Lightfoot-Klein "Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation" 5; Odukogbe *et al* 2017 *Translational Andrology and Urology* 142.

²⁸³ Brady *et al* 2019 *Archives of Sexual Behaviour* 4; Gupta and Latthe 2018 *Obstetrics, Gynaecology & Reproductive Medicine* 92-92; Dilbaz, Iflazoglu and Tanin 2019 *Turkish Journal of Obstetrics and Gynecology* 129.

²⁸⁴ Brady *et al* 2019 *Archives of Sexual Behaviour* 4; Gupta and Latthe 2018 *Obstetrics, Gynaecology & Reproductive Medicine* 92-92. See also Anon 2020 <https://www.nva.org/what->

The WHO defines Type IV, known as unclassified harmful procedures, as "all other procedures on the female genitalia for non-medical purposes". It includes the elongation of the labia minora or majora until a desired length is reached, scraping or cauterisation of the vaginal orifice's tissues, incising, piercing, pricking or cutting of the female genitalia or placing any herbs and/or substances into the vagina as a way to tighten or narrow it by causing it to bleed.²⁸⁵ Type IV is the most underreported and -researched procedure and, consequently, it may be challenging to understand and identify the various forms it may take on and the complexities involved.²⁸⁶

FGM is increasingly performed by professional healthcare providers in an attempt to reduce the negative health consequences, a practice the WHO refers to as "medicalisation of FGM".²⁸⁷ The main motive among health care providers is to reduce the pain, harm and risks for girls submitted to the procedure by performing it with the required skill and under hygienic conditions, anaesthetic, and analgesic medication.²⁸⁸ Leye states that the medicalisation of FGM might be able to control the "immediate physical consequences of cutting the genitals", including bleeding, infections, and severe pain, but few health care professionals have adequate knowledge of FGM and its long-term health consequences, specifically the mental health complications.²⁸⁹ While the medicalisation of FGM may reduce the immediate

is-vulvodynia/vulvar-anatomy/, where "vulvar" is defined as the "...external part of the female genitalia...that protects a woman's sexual organs, urinary opening, vestibule and vagina and is the centre of much of a woman's sexual response".

²⁸⁵ Reisel and Creighton 2015 *Maturitas* 48-51; Abdulcadir, Irion and De Tejada 2015 *Clinical Case Reports* 979.

²⁸⁶ Abdulcadir, Irion and De Tejada 2015 *Clinical Case Reports* 979; Reisel and Creighton 2015 *Maturitas* 48-51.

²⁸⁷ Leye *et al* 2019 *Reproductive Health* 1-2; Kimani and Shell-Duncan 2018 *Current Sexual Health Reports* 26; Odukogbe *et al* 2017 *Translational Andrology and Urology* 142.

²⁸⁸ Doucet, Pallitto and Groleau 2017 *Reproductive Health* 8; Kimani *et al* 2020 *PLoS One* 1; Kimani and Shell-Duncan 2018 *Current Sexual Health Reports* 27.

²⁸⁹ Leye *et al* 2019 *Reproductive Health* 4; González-Timoneda *et al* 2018 *BMC Health Services Research* 3.

pain and short-term consequences, it has no health benefits and is not a medical justification of the practice that grants a sense of legitimacy to it.²⁹⁰

Type I and II have been formally documented in a total of 28 countries in Africa, as well as a few Asian and Middle East countries, and accounts for 90% of all FGM cases.²⁹¹ The remaining 10% of cases are Type III, which is mostly evident in the North-Eastern parts of Africa, which includes, Somalia, Sudan and Ethiopia.²⁹² While all types of FGM has health effects, the severity of health consequences depend on three major factors, i.e. the type of FGM performed, the physical condition of the victim and the skill of the circumciser, and the sterilisation of their tools and the setting used.²⁹³

3.2.4 Perpetrators of female genital mutilation

FGM is a complex social norm that is deeply rooted in socio-cultural systems that are supported by practicing communities' beliefs.²⁹⁴ It is a so-called "social coordination norm" with an element of social pressure, meaning that no member will deviate from it unless a substantial proportion of their society agrees that the practice should be abandoned.²⁹⁵ Traditions and customs frequently create social coercion to such an extent that individuals surrender their ability to consent, which

²⁹⁰ Serour 2013 *African Journal of Urology* 148; Doucet, Pallitto and Groleau 2017 *Reproductive Health* 8; UNFPA 2018 <https://www.unfpa.org/resources/brief-medicalization-female-genital-mutilation>.

²⁹¹ Odukogbe *et al* 2017 *Translational Andrology and Urology* 144; Al Awar *et al* 2020 *BMC Women's Health* 1.

²⁹² Al Awar *et al* 2020 *BMC Women's Health* 1; Abathun, Sundby and Gele 2016 *International Journal of Women's Health* 558.

²⁹³ Nwaokoro *et al* 2016 *Journal of Public Health and Epidemiology* 1; Lurie *et al* 2020 *PLoS Medicine* 5.

²⁹⁴ Barret *et al* 2020 *Reproductive Health* 2; A 11(2)(c) of the African Charter on the Rights and Welfare of the Child (1990); Para 1 of General Comment No. 21 on the Right of Everyone to take part in Cultural Life (2009).

²⁹⁵ Mackie 1996 *American Sociological Review* 1010; Novak 2016 <https://blogs.worldbank.org/impactevaluations/why-do-harmful-norms-persist-female-genital-cutting-burkina-faso-guest-post-lindsey-novak>.

then undermines the foundation of consent.²⁹⁶ Consequently, due to the fact that community leaders, family members, midwives or older women in the community may coerce and force girls to be submitted to FGM, it is indeed imposed by the former.²⁹⁷ It should be noted that the concept of consent is not a requirement for a custom to qualify as a harmful cultural practice, but there is a strong correlation between girls' so-called "consent" to FGM, the inferior social status of girls in FGM countries and the social pressure that they experience in FGM communities.²⁹⁸ While girls' consent cannot justify FGM, it is submitted that they should be an integral part of the decision-making process, which should be accompanied by relevant information on the practice and its consequences.²⁹⁹

3.3 The best interests of the child principle

The best interests of the child principle is an innovative, dynamic concept that is focused on ensuring the "full and effective enjoyment" and recognition of all child rights, while securing the child's holistic development.³⁰⁰ The CRC and the UN's guidelines provide the generally accepted standard of the best interests of the child

²⁹⁶ Mohammed, Seedhom and Mahfouz 2018 *Reproductive Health* 1; Anon 2019 <https://copfgm.org/2019/09/05/can-adult-women-consent-to-fgm/>; Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children; Anon 2019 <https://copfgm.org/2019/09/05/can-adult-women-consent-to-fgm/>.

²⁹⁷ Pashael 2012 *Health Care* 1; Reid 2018 <https://www.worldvision.org/child-protection-news-stories/female-genital-mutilation-fgm-facts>; Amansanti, Imcha and Momoh 2016 *PLoS Medicine* 3.

²⁹⁸ Mohammed, Seedhom and Mahfouz 2018 *Reproductive Health* 1; Anon 2019 <https://copfgm.org/2019/09/05/can-adult-women-consent-to-fgm/>; Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children; Anon 2019 <https://copfgm.org/2019/09/05/can-adult-women-consent-to-fgm/>.

²⁹⁹ Kontoyannis and Katsetos 2010 *Health Science Journal* 31; Asekun-Olarinmoye 2009 *The European Journal of Contraception & Reproductive Health Care* 297. See also Chapters 3.2.2.4 and 3.3.3 for a discussion on the right to education and information as well as the right to be heard.

³⁰⁰ Zermatten 2010 *International Journal of Children's Rights* 483; Para 4 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

principle and the manner in which it must be applied by State signatories by stating that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.³⁰¹

This principle is enshrined in several international and regional law instruments, but ever since its incorporation as a core principle of the CRC, it serves as a mechanism to guarantee that all decisions that affect children are based on principles that safeguard all their rights.³⁰² Indeed the CRC claims that all children are entitled to the rights set forth in the convention "without any distinction of any kind, such as ... sex" and gender, and the United Nations Human Rights Council (UNHRC) suggests that the principle should be gender-sensitive towards girl children, as it may highlight the distinct responsibilities, roles or vulnerabilities of the two genders and address issues of inequity or inequality.³⁰³ Luckily, the best interests of the child principle is purposely flexible, adaptable and focused on the individual conditions of children's societies and family contexts.³⁰⁴ Therefore, the flexibility of the principle

³⁰¹ Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration; Gisondo 2020<https://gisondolaw.com/what-exactly-is-the-best-interest-of-the-child-standard-defined-and-meaning/>.

³⁰² Zermatten 2010 *International Journal of Children's Rights* 483. See also A 2 of the Declaration on the Rights of the Child (1959); A 5(b) and 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination against Women (1979); A 3 of the Convention on the Rights of the Child (1989); A 2 of the African Charter on the Rights and Welfare of the Child (1990); Paras 2 and 5 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

³⁰³ Preamble and A 3 of the Convention on the Rights of the Child (1989); UNHRC 2008 <https://www.unhcr.org/4566b16b2.pdf>.

³⁰⁴ A 3(1) of the Convention on the Rights of the Child (1989); Para 32 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

allows its scope to be determined on a case-by-case basis in order to be sufficiently responsive to the individual situation of a child.³⁰⁵

The best interests of the child principle must be considered to resolve the conflict between children's right to culture and tradition and the right to the highest attainable health, which implies that the emphasis should be on practicable solutions that are indeed in children's best interest.³⁰⁶ This calls for signatory states to clarify what the best interests of girl children in FGM communities are by taking their specific circumstances and individual characteristics into account.³⁰⁷ This process starts with an assessment of certain elements that make them unique, such as their identity, dignity, and views, which include their "nationality, upbringing, ethnic, cultural and linguistic background" and specific vulnerabilities.³⁰⁸ The implication is that these elements must be briefly discussed and weighed up against each other before deciding what options are best suited for the individual child's circumstances.

³⁰⁵ Para 33 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration; Ferreira 2011 *Journal of Contemporary Roman-Dutch Law* 205.

³⁰⁶ Para 33 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration. See Chapter 3.2.2.3 and 3.2.2.4 for a full discussion on the child's right to culture and tradition and the right to the highest attainable standard of health. This is a balancing of rights, as cultural practices may be harmful to the health of children, but either they do not know better or are indoctrinated by other members of the community to believe in the "value" or the so-called "justification" of the custom.

³⁰⁷ Skelton 2019 *De Jure Law Journal* 561; Paras 33, 48 and 49 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

³⁰⁸ Para 20 of the Committee on the Rights of the Child, General Comment No. 6 on the Treatment of Unaccompanied and Separated Children outside of their Country of Origin (2005). "Specific vulnerabilities" include the girl child's gender, sex, inferior social status and the fact that harmful cultural practices are predominantly performed on them, all of which are discussed in other chapters.

3.3.1 A child's identity

Children's identity involves various characteristics, including sex, gender, nationality, religion as well as ethnic, cultural and linguistic background.³⁰⁹ Their right to preserve their identity is guaranteed in the CRC and recognised as a fundamental human right that enables them to enjoy the entire spectrum of rights.³¹⁰ While children share similar basic needs, the expression of these needs depend on a comprehensive list of "personal, physical, social and cultural aspects" that correlate with their evolving capacities.³¹¹ These diverse characteristics call for the best interests of the child principle to assess the unique situation of children that should be taken into consideration when decisions that significantly affect them are made.³¹²

The best interests of the child standard implies that all children should have access to their culture, which suggests the desirability of continuity in their upbringing as well as their "ethnic, religious, cultural and linguistic background".³¹³ Therefore, cultural and religious identities are integral parts of children's identities.³¹⁴ While the preservation of these cultural and religious values as part of the girl child's self-identity must be considered when determining and assessing the best interests of

³⁰⁹ Oswalt 2020 https://www.gulfbend.org/poc/view_doc.php?type=doc&id=12766; Para 55 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

³¹⁰ A 8 of the Convention on the Rights of the Child (1989); Anon 2020 <https://www.humanium.org/en/identity/>; Ronen 2004 *International Journal of Law Policy and the Family* 147.

³¹¹ Para 55 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration; Mendes and Ormerod 2019 *Psicologia Em Estudo* 13.

³¹² Para 55 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration; Grandi 2018 <https://bettercarenetwork.org/library/separated-children-in-an-emergency/guidelines-on-assessing-and-determining-the-best-interests-of-the-child-2018>.

³¹³ Para 56 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

³¹⁴ Oswalt 2020 https://www.gulfbend.org/poc/view_doc.php?type=doc&id=12766; Hemming and Madge 2012 *Childhood* 38.

the child, harmful cultural practices such as FGM are not consistent or compatible with the rights of children and are indubitably not in her best interests.³¹⁵ Therefore, cultural and religious identities cannot justify the decision makers sustaining and enforcing cultural and traditional values and practices that can potentially violate or deny their guaranteed child rights.³¹⁶

3.3.2 A child's dignity

The concept of human dignity is an integral element and foundational value of international law, with the UDHR recognising the "inherent dignity...of all members of the human family".³¹⁷ It emphasises how paramount human life is, as well as the "inherent value of human beings" and children, who have the right to respect for their human dignity, which is an international concept and a central notion for children's rights.³¹⁸ This right is enshrined in the CRC, with the Preamble stating that

...the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...³¹⁹

It is linked with the right to not be "subjected to cruel, inhuman, or degrading treatment or punishment", among other things, which protects their mental and physical integrity.³²⁰

³¹⁵ Para 57 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration; Abdulla 2018 *The Review of Faith & International Affairs* 109.

³¹⁶ Para 57 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration; Abdulla 2018 *The Review of Faith & International Affairs* 104.

³¹⁷ McGuirk and Mills 2011 https://www.ohchr.org/Documents/Issues/ClimateChange/RightsChild/Dignity_Rights_Projects.pdf; Preamble of the Universal Declaration of Human Rights (1945).

³¹⁸ Baumann and Bleisch *The Nature of Children's Wellbeing* 143.

³¹⁹ Preamble of the Convention on the Rights of the Child (1989).

³²⁰ A 16, 28(2) and 37(a) of the Convention on the Rights of the Child (1989); Freeman 2010 *Law and Contemporary Problems* 215. See also Chapter 3.2.3 for a discussion on the violent nature of FGM.

Against the background of the best interests of the child principle within the ambit of FGM, states are required to create conditions that foster respect for girl children's human dignity, while ensuring their holistic development.³²¹ From a human rights perspective, it is essential that children be granted the same inherent dignity of all human beings, which attempts to address the unequal treatment that girl children in FGM communities are frequently subjected to.³²²

Consequently, Polonko and Lombardo suggest that a child-centred approach is imperative in order to address the area of girl children and their human dignity, as an adult-centred approach "simply assumes that children are inferior to adults" and that inherent dignity does not apply to the former.³²³ In this regard, the CEDAW notes that discrimination against girls violate the basic principles of respect for human dignity and equality of rights, as it remains an obstacle for the development of women's potentialities and their equal participation.³²⁴ Therefore, a child-centred approach that acknowledges the specific challenges of girl children as a group who is being oppressed and who enjoys an inferior status, is the most favoured approach in ensuring that their right to human dignity is respected.³²⁵

3.3.3 The right to be heard

Children's right to be heard and express their views is enshrined in the CRC and the ACRWC, stating that children who are capable of forming their own views, have the right to "express those views freely in all matters affecting" them and such views

³²¹ Para 5 and 42 of the Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

³²² Polonko and Lombardo 2005 *Global Bioethics* 19. See also Chapter 3.2.2.1 for a full discussion on the principle of equality and its relation to FGM.

³²³ Polonko and Lombardo 2005 *Global Bioethics* 20.

³²⁴ Preamble of the Convention on the Elimination of All Forms of Discrimination against Women (1979).

³²⁵ Polonko and Lombardo 2005 *Global Bioethics* 21.

must be "given due weight in accordance with age and maturity".³²⁶ This was an innovative concept in international child law and created a challenge in countries where listening to children was not a norm or found acceptable.³²⁷

An important part of children's right to be heard is child participation, a process during which a child has the opportunity to discuss, influence and even co-decide on all matters that may affect them.³²⁸ The concept of participation must be a starting point for intense engagement between adults and children, where the latter is empowered to take action on various issues that may affect their lives.³²⁹ In this regard, Thoko states that the principle of participation comes into conflict with the practising of FGM due to girls' inferior social status, but culture is not static, and solutions can only be found in consultation with the FGM communities.³³⁰

Views expressed by girl children who are either at risk or have been victims of FGM can add relevant perspectives and experiences to decisions regarding the procedure.³³¹ Nevertheless, in order for these children to express informed views, they must be provided with adequate information about the procedure and its consequences, which ought to be given in a form that is consistent with their age

³²⁶ A 12(1) of the Convention on the Rights of the Child (1989); A 4 of the African Charter on the Rights and Welfare of the Child (1990); A 24 of the Charter of Fundamental Rights of the European Union (2012); Para 1 of the Committee on the Rights of the Child, General Comment No. 12 on the Right of the Child to be Heard (2009).

³²⁷ McCafferty 2017 *Child Care in Practice* 327; Reyneke 2013 *De Jure Law Journal* 231.

³²⁸ Doek 2009 *Child Abuse & Neglect* 779; Para 13 of the Committee on the Rights of the Child, General Comment No. 12 on the Right of the Child to be Heard (2009); Tonucci and Rissotto 2001 *Journal of Community & Applied Social Psychology* 407.

³²⁹ Musinguzi 2018 <https://observer.ug/news/headlines/58768-how-empowerment-of-children-benefits-society>; Para 12 of the Committee on the Rights of the Child, General Comment No. 12 on the Right of the Child to be Heard (2009); Tonucci and Rissotto 2001 *Journal of Community & Applied Social Psychology* 407.

³³⁰ Thoko 2005 *African Human Rights Law Journal* 221; Mohammed, Seedhom and Mahfouz 2018 *Reproductive Health* 1; Anon 2019 <https://defenceforchildren.org/girl-human-rights-defenders/>.

³³¹ Para 12 of the Committee on the Rights of the Child, General Comment No. 12 on the Right of the Child to be Heard (2009); Anon 2016 <https://humanrights.gov.au/about/news/speeches/female-genital-mutilation-conference>.

and evolving abilities.³³² It is important to note that it is not requisite that they must have extensive knowledge of all the aspects of FGM, but they need an adequate understanding in order to be able to form their own views on the matter.³³³ The challenge is that these girls have insufficient knowledge about the procedure and consequences of FGM, resulting in the fact that they can only disclose information about the pain and psychological effects that they have already experienced.³³⁴

Yet, it should be noted that the right of the child to be heard is one of the most challenging provisions to implement and children from marginalised or vulnerable groups are denied the right disproportionately.³³⁵ In this regard, the Committee on the Rights of the Child notes that the implementation of the right to be heard is frequently impeded by cultural values, economic barriers, patriarchal structures and several long-standing practices and attitudes.³³⁶

The decision-making process must include an impact evaluation during which the different elements of the child's specific context are taken into consideration and are weighed up against each other.³³⁷ In the case of FGM, the girl child's right to the highest attainable standard of health and the right to culture and tradition are

³³² Gillett-Swan and Sargeant 2018 *International Journal of Speech-Language Pathology* 120; Varadan 2019 *The Principle of Evolving Capacities under the UN Convention on the Rights of the Child* 306. See also Chapter 3.2.2.4 for a full discussion on the right to education and information.

³³³ Para 21 of the Committee on the Rights of the Child, General Comment No. 12 on the Right of the Child to be Heard (2009); Turkmani, Homer and Dawson 2020 *International Journal of Environmental Research and Public Health* 11.

³³⁴ Ahmed HM, Shadu SA and Shabila NP 2019 *BMC Women's Health* 1; Brink 2017 <https://www.npr.org/sections/goatsandsoda/2017/05/06/526766230/female-genital-mutilation-what-it-does-to-a-woman>.

³³⁵ McCafferty 2017 *Child Care in Practice* 327; Reyneke 2013 *De Jure Law Journal* 231.

³³⁶ Para 4 of the Committee on the Rights of the Child, General Comment No. 12 on the Right of the Child to be Heard (2009); Para 44 of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration.

³³⁷ Para 7(c) of Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration; Wolf 2020 <https://www.a.com/best-interests-of-the-child-standard-overview-2997765>.

weighed up against one another, while taking her identity, views and specific vulnerabilities into account.³³⁸ Costello states that girl children's best interests can only be served by the abandonment of FGM and suggests that one should acknowledge that if FGM communities share their commitment to these children's best interests, it may increase their capacity and willingness to embrace the eradication of the custom.³³⁹

3.4 Parental responsibility

Parents have the primary obligation to ensure that their children have an acceptable environment that enables them to grow and realise their full potential.³⁴⁰ Parental responsibility refers to:

...parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.³⁴¹

Fundamental human rights considerations in the case of parental responsibility require a focus on the position of the child, because the best interests of the child principle forms the theoretical basis for parental responsibility.³⁴²

³³⁸ Renteln *The Cultural Defence* 93; Freeman 2011 *The Family in Law* 29; Para 7 of the CEDAW General Recommendation No. 24: Article 12 of the Convention (1999); Hands *et al* 2016 *Journal of Women's Health Issues Care* 1; Para 20 of the Committee on the Rights of the Child, General Comment No. 6 on the Treatment of Unaccompanied and Separated Children outside of their Country of Origin (2005).

³³⁹ Costello *et al* 2015 *British Journal of Social Work* 1266-1272; Costello 2015 *Risk Management and Health Care Policy* 226.

³⁴⁰ Landry 2014 *Encyclopedia on Early Childhood Development* 2; Arora 2018 <https://parenting.firstcry.com/articles/5-environmental-factors-influencing-early-childhood-development/>; Humble and Dixon 2017 *International Journal of Educational Research* 94.

³⁴¹ A 1(2) of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996).

³⁴² A 24 of the Charter of Fundamental Rights of the European Union (2000); Biagioni 2019 *European Papers* 288-289; Van Krieken 2005 *The Modern Law Review* 25.

The Committee on the Rights of the Child urges state signatories to provide proper "assistance to parents and legal guardians in their performance of their child-rearing responsibilities".³⁴³ Signatory states have a duty to intervene with parental responsibility when parents do not fulfil the responsibilities that parenthood requires.³⁴⁴ Therefore, should parents be unable to guarantee an acceptable environment that recognises children's human rights and fundamental freedoms, the state must intervene and take over their responsibilities, with the CRC stating that the latter has to take measures to protect children "from all forms of physical or mental violence, injury or abuse" while they are "in the care of parent(s), legal guardian(s) or any other person" who cares for them.³⁴⁵

The risk of a girl being subjected to FGM customarily depends on their families, more particularly their parents and extended family.³⁴⁶ As a matter of fact, girls will most likely not be at risk if these parties are not the initiators.³⁴⁷ The risk of FGM being performed or enforced by extended family members depends on various factors, including the girls' age and vulnerability, the location of the family members, as well as the attitude and whereabouts of their parents.³⁴⁸ If the parents of these girls are opposed to the procedure, they would usually be able to guarantee that the girls do not marry into families that are in favour of the practice, despite the attitudes of their relatives.³⁴⁹

³⁴³ A 18(2) of the Convention on the Rights of the Child (1989).

³⁴⁴ Farrugia 2000 *California Western International Law Journal* 131.

³⁴⁵ *Sudan v Secretary of State for the Home Department* (CG) [2007]; A 19(1) of the Convention on the Rights of the Child (1989).

³⁴⁶ Cappa, Thomson and Murray 2020 *PLoS ONE* 10.

³⁴⁷ Amansanti, Imcha and Momoh 2016 *PLoS Medicine* 3; *Sudan v Secretary of State for the Home Department* (CG) [2007].

³⁴⁸ *Sudan v Secretary of State for the Home Department* (CG) [2007]; Berer 2015 *Reproductive Health Matters* 155.

³⁴⁹ *Sudan v Secretary of State for the Home Department* (CG) [2007]; Rao 2017 <https://www.un.org/africarenewal/magazine/special-edition-youth-2017/who-will-protect-our-girls>.

Currently, the best interest of the child principle is used to determine whether parents meet the requirements of the reasonable provision of the child's protection, care and guidance.³⁵⁰ Parents who submit their daughters to FGM believe that it is indeed in the child's best interests and that its benefits outweigh the risk.³⁵¹ For communities with experiences of "oppressive authoritarian regimes," the obligation to stray from culturally prescribed customs that are believed to be in children's best interests, including FGM, may cause anger, fear, confusion and humiliation, resulting in denial or defensiveness.³⁵² It is imperative that families are given clear information about the suspicions regarding FGM, its consequences, as well as laws regulating it in a manner that is sensitive to their social pressures, rather than confronting the parents about the presumed intended harm that they plan to cause to their child.³⁵³

Parents can be liable for a girl child who has been subjected to FGM if they were aware, or ought to have been aware, that there was a significant risk of being subjected to FGM, but failed to "take reasonable steps to prevent it from happening".³⁵⁴ In this regard, Berer notes that in some countries, the parents of FGM victims "who oversee FGM are treated as accomplices to the crime".³⁵⁵ Parents may be charged and sentenced to prison for enforcing or performing FGM on their

³⁵⁰ Farrugia 2000 *California Western International Law Journal* 133; Matthias 2017 *Social Work* 101.

³⁵¹ Tudge *et al* 2000 *Psicologia: Teoria e Pesquiza* 2; Costello *et al* 2015 *British Journal of Social Work* 1264.

³⁵² Costello *et al* 2015 *British Journal of Social Work* 1271; Turnell and Essex *Working with Denied Child Abuse: The Resolution Approach* 1.

³⁵³ Costello *et al* 2015 *British Journal of Social Work* 1271; Turnell and Essex *Working with Denied Child Abuse: The Resolution Approach* 1.

³⁵⁴ Berer 2015 *Reproductive Health Matters* 152; UNICEF 2020 <https://www.unicef.org/mena/press-releases/sudan-enters-new-era-girl-rights-criminalization-fgm>; Njue *et al* 2019 *Reproductive Health* 14.

³⁵⁵ Willsher 2014 <https://www.theguardian.com/society/2014/feb/10/france-tough-stance-female-genital-mutilation-fgm>; Topping, Laville and Mason 2014 <https://www.theguardian.com/society/2014/jul/22/parents-allow-female-genital-mutilation-prosecuted-cameron-law>; Doyle 2014 <https://www.dailymail.co.uk/news/article-2702220/GPs-teachers-duty-report-forced-marriages-new-rules-parents-prosecuted-daughters-subjected-genital-mutilation.html>. See also Berer 2015 *Reproductive Health Matters* 147, where France and the United Kingdom are specifically mentioned.

daughters, which may contribute to regulation and, eventually, a decline in the incidence.³⁵⁶ Legal processes, prosecution and imprisonment of children's parents may have several negative consequences for the child, their families and communities at large, which includes the stigmatisation and marginalisation of women and girls.³⁵⁷ However, despite these possibilities, FGM victims and those at risk appreciate the existence of human rights and laws that regulate or prohibit harmful cultural practices, but the chances of children reporting their parents or grandparents to the authorities, are slight.³⁵⁸

3.5 Chapter summary

This chapter focused on the international and regional human rights instruments that lay the foundation of FGM-related rights, as well as its interpretation within international customary law.³⁵⁹ FGM is an expression of a discriminatory practice rooted in cultural, religious and social norms that violates several human rights and fundamental freedoms, more specifically the right to the highest attainable standard of health, the right to culture and tradition, as well as the right to education and

³⁵⁶ Guiné and Fuentes 2007 *Politics & Society* 502; Leye *et al* 2007 *Crime, Law and Social Change* 1; Berer 2015 *Reproductive Health Matters* 147.

³⁵⁷ Ierodiaconou 1996 *Melbourne University Law Review* 562; Yusuf and Fessha 2013 *African Human Rights Law Journal* 374; Berer 2015 *Reproductive Health Matters* 145.

³⁵⁸ Johnsdotter *et al* 2009 *Health Care for Women International* 114; Berer 2015 *Reproductive Health Matters* 147-153.

³⁵⁹ Quitter 2014 *Social Science Research Network* 1; Fisaha 2016 *Journal of Political Sciences & Public Affairs* 5. See also African Charter on the Rights and Welfare of the Child (1990); Convention on the Rights of the Child (1989), International Covenant on Economic, Social and Cultural Rights (1966); Universal Declaration of Human Rights (1945).

information.³⁶⁰ After an extensive discussion and careful consideration of the practice, it is clear that FGM indeed constitutes a "harmful cultural practice".³⁶¹

The gendered dimension of FGM, which is perpetuated by the discrimination inherent to patriarchal systems mainly based on sex and gender, cannot be overlooked.³⁶² It should be noted that the difference between sex and gender is frequently ignored, despite its separate contribution to the continuation of FGM. This custom falls within the ambit of discrimination that violates the principle of equality due to the distinction made based on sex and gender and its impairment of the equal enjoyment of females' human rights and fundamental freedoms.³⁶³

The best interests of the child principle is the primary consideration in all matters that may affect children. The aim of this chapter was to give special attention to and assessment of the principle and its relation to FGM victims by taking children's identities, views, special vulnerabilities and the right to be heard into account.³⁶⁴ While the balance and conflict between the FGM victims' right to the highest attainable standard of health and the right to culture and tradition remains

³⁶⁰ Creighton and Gill 2010 *Injury Prevention* 276; Fisaha 2016 *Journal of Political Sciences & Public Affairs* 5. A 24(1) of the Convention on the Rights of the Child (1989) and A 12 of the Convention on the Elimination of All Forms of Discrimination against Women (1979). See also A 12(1) of the African Charter on the Rights and Welfare of the Child (1990) and A 12 of the International Covenant on Economic, Social and Cultural Rights (1966).

³⁶¹ Paras 15 and 16 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

³⁶² Khosla *et al* 2017 *Reproductive Health* 3; Paras 4, 6 and 49 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

³⁶³ A 1 of the Convention on the Elimination of All Forms of Discrimination against Women (1979); A 2 of the Universal Declaration of Human Rights (1945); A 1 and 55 of the Charter of the United Nations (1945); Rahman and Toubia *Female Genital Mutilation: A Guide to laws and Policies Worldwide* 21.

³⁶⁴ A 3 of the Convention on the Rights of the Child (1989); A 4 of the African Charter on the Rights and Welfare of the Child (1990).

challenging, the latter cannot be used as an attempt to justify the continuation of FGM.³⁶⁵

Parents have the primary authority over and responsibility for their children, with the state only permitted to intervene when the court finds that, according to the best interests of the child test, the first mentioned are not reasonably complying with its duties.³⁶⁶ However, the parental responsibility of FGM victims and those at risk requires extensive attention, research and consideration that ought to take its unique challenges and possible repercussions into consideration.³⁶⁷

Chapter 4 Evaluation of legislative measures to regulate female genital mutilation

4 Evaluation of legislative measures to regulate female genital mutilation

4.1 Introduction

States have a variety of obligations as part of an overarching international legal and policy framework to pass, implement and monitor legislation that regulates harmful cultural practices that are of a discriminatory nature or "prejudicial to the health of children".³⁶⁸ Several international human rights instruments and treaties implicitly and explicitly impose duties on state parties to identify, regulate and eliminate

³⁶⁵ Serour 2013 *African Journal of Urology* 146; Awolola and Ilupeju 2019 *Tzu Chi Medical Journal* 3; Novakovic 2017 <https://www.medicalnewstoday.com/articles/241726>.

³⁶⁶ Landry 2014 *Encyclopedia on Early Childhood Development* 2; Arora 2018 <https://parenting.firstcry.com/articles/5-environmental-factors-influencing-early-childhood-development/>; Humble and Dixon 2017 *International Journal of Educational Research* 94.

³⁶⁷ Cappa, Thomson and Murray 2020 *PLoS* 10.

³⁶⁸ A 24(3) of the Convention on the Rights of the Child (1989); A 5 of the Protocol to the African Charter on Peoples' Rights on the Rights of Women in Africa (2003); Tobin 2009 *Human Rights Law Review* 382.

harmful cultural practices.³⁶⁹ The CRC states that state parties "shall take all effective and appropriate measures" in order to abolish harmful traditional practices. The use of the word "shall" indicates the mandatory and immediate obligation to take relevant measures.³⁷⁰ In this context, it is important to note that States are required to only abolish aspects of cultural rituals, customs, and practices that are detrimental to the health of children and not to eradicate it in its entirety.³⁷¹ While states have a notable degree of discretion regarding the specific measures they adopt, the CRC inflicts the qualitative requirement that they should be "appropriate" and "effective".³⁷² However, Tobin recognises that this obligation does not require states to immediately abolish harmful cultural practices and that it is a progressive obligation.³⁷³

There is a notable increase in international, national and regional efforts to combat discriminatory social norms that often lay the basis for harmful cultural practices. These efforts aim to empower parents and communities to abandon such practices.³⁷⁴ In this chapter, the obligations state parties to ensure the realisation of the full spectrum of the girl child's rights, is analysed by determining its scope.³⁷⁵ This is accomplished by critically studying specific obligations within the ambit of

³⁶⁹ Khosla *et al* 2017 *Reproductive Health* 3.

³⁷⁰ A 24(3) of the Convention on the Rights of the Child (1989); Tobin 2009 *Human Rights Law Review* 375.

³⁷¹ Tobin 2009 *Human Rights Law Review* 375; Freeman *The Family Law* 23.

³⁷² A 24(3) of the Convention on the Rights of the Child (1989). See also A 4 of the Convention on the Rights of the Child (1989), stating that "State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention".

³⁷³ Tobin 2009 *Human Rights Law Review* 376; Para 30 of of the Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health.

³⁷⁴ Para 46(h) of Commission on the Status of Women on the Challenges and Opportunities in Achieving Gender Equality and the Empowerment of Rural Women and Girls (2018).

³⁷⁵ Khosla *et al* 2017 *Reproductive Health* 3.

FGM with the focus on the victims. This includes legislative measures, effective remedies, as well as the obligations and requirements of health care measures.³⁷⁶

4.2 Legislative measures

Legislative measures as a mechanism to support the regulation of FGM within the ambit of positive social change stems from the acknowledgement that sustainable legislative frameworks play a vital role in the promotion of human rights and social change.³⁷⁷ These legal measures should not only regulate and eventually prevent this detrimental custom, but also offer guidelines for the support and care of victims while ensuring that perpetrators are held accountable.³⁷⁸ Most state signatories are committed to the protection of and respect for girls' rights by enacting legislation that addresses forms of discrimination and gender-based violence.³⁷⁹ They are urged to adopt, implement and enforce legislation and policies that are aimed at preventing and putting an end to FGM, as well as protecting and supporting victims and those at risk by taking:

...all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.³⁸⁰

This section does not aim to provide detailed information about national FGM laws. Instead, it examines the scope of a holistic and comprehensive reform process that

³⁷⁶ Please note that although legislative measures ought to include sanctions, it will not fall within the ambit of this discussion, as it is solely focused on the victims.

³⁷⁷ Yusuf and Fessha 2013 *African Human Rights Law Journal* 363; Preamble of the Protocol to the African Charter on Peoples' Rights on the Rights of Women in Africa (2003); UNICEF 2010 https://www.unicef.org/policyanalysis/files/UNICEF_-_LRI_Legislative_Reform_to_support_the_Abandonment_of_FGMC_August_2010.pdf.

³⁷⁸ Momoh 2014 *Practice Nursing* 533.

³⁷⁹ Convention on the Rights of the Child (1989); African Charter on the Rights and Welfare of the Child (1990); Convention on the Elimination of All Forms of Discrimination against Women (1979); A 6(2) of the International Covenant on Economic, Social and Cultural Rights (1966).

³⁸⁰ A 2(f) of the Convention on the Elimination of All Forms of Discrimination against Women (1979); Para 2 of the Human Rights Council Resolution 38/6 on the Elimination of Female Genital Mutilation (2018).

maximises and develops the impact of legislation by examining the criteria to assess the impact of legislative measures, the content and extent of effective remedies and the obligations and requirements of appropriate health care measures.³⁸¹

4.2.1 *Criteria to assess the impact of legislative measures*

The ratification of international and regional instruments and the adoption of national legislation that criminalises FGM is one of the most effective steps that states can take to ensure protection for the rights of girls.³⁸² States that have ratified significant international instruments that prohibit FGM have a dual responsibility: first, to ensure the respect for and protection of these rights, and secondly, not to violate them.³⁸³ Key instruments include the CRC (ratified by 195 States), CEDAW (ratified by 189 States), the *Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa*, 2003, also known as the Maputo Protocol (ratified by 15 members of the AU), among others, and specifically *Resolution 67/146 on Intensifying Global Efforts for the Elimination of Female Genital Mutilations* (2012), which urges States to:

...condemn...female genital mutilations, whether committed within or outside a medical institution, and to take all necessary measures, including enacting and

³⁸¹ See also UNICEF 2008 https://www.unicef.org/policyanalysis/files/Comprehensive_and_Holistic_Legislative_Reform_on_Behalf_of_Children_Rights.pdf, where universality of rights, interdependence of rights, non-discrimination and equality, as well as participation and inclusion are identified as core principles of a comprehensive and legislative reform process.

³⁸² Muthumbi *et al* 2015 *African Journal of Reproductive Health* 32; Edouard, Olatunbosun and Edouard 2013 *African Journal of Urology* 151.

³⁸³ Muthumbi *et al* 2015 *African Journal of Reproductive Health* 35. Note that significant international instruments include the Convention on the Rights of the Child (1989); Convention on the Elimination of all Forms of Discrimination Against Women (1979); Protocol to the African Charter on Peoples' Rights on the Rights of Women in Africa (2003); General Assembly, Resolution 67/146: Intensifying Global Efforts for the Elimination of Female Genital Mutilations (2012).

enforcing legislation, to prohibit female genital mutilations and to protect women and girls from this form of violence, and to end impunity.³⁸⁴

Furthermore, the World Health Assembly (WHA) adopted a resolution in which all signatory states agreed to:

...accelerate actions towards the elimination of female genital mutilation, including education and information necessary for full understanding of the gender, health and human rights dimensions of female genital mutilation.³⁸⁵

Although several countries have legal frameworks that prohibit FGM, it has not been sufficiently effective to prevent the custom, and, in order to measure the evidence of the impact of legislative measures, one has to analyse the overall effect on the prevalence of FGM, awareness and knowledge of the legislative framework to bring about changes in societal perceptions and attitudes, as well as the impact on the medicalisation of FGM.³⁸⁶

4.2.1.1 Overall effect on the prevalence of FGM

The prevalence of FGM is evident worldwide, and as most cases occur in Africa, Africa is used as the benchmark to illustrate the effect of legislation of FGM prevalence.³⁸⁷ Data from the Demographic Health Survey (DHS) and the Multiple Indicator Cluster Survey (MICS), as directed by UNICEF, indicates a decline in the overall prevalence estimates in the Eastern, Northern and Western African regions

³⁸⁴ Anon 2015 [https://www.right-to-education.org/news/south-sudan-ratifies-convention-rights-child#:~:text=On%2023%20January%2C%202015%2C%20South,ratified%20international%20human%20rights%20treaty;](https://www.right-to-education.org/news/south-sudan-ratifies-convention-rights-child#:~:text=On%2023%20January%2C%202015%2C%20South,ratified%20international%20human%20rights%20treaty;https://www.everycrsreport.com/reports/R40750.html#:~:text=CEDAW%20has%20been%20ratified%20or,Somalia%2C%20Sudan%2C%20and%20Tonga) Anon 2009 <https://www.everycrsreport.com/reports/R40750.html#:~:text=CEDAW%20has%20been%20ratified%20or,Somalia%2C%20Sudan%2C%20and%20Tonga>.

³⁸⁵ World Health Assembly Resolution 61.16 on Female Genital Mutilation (2008).

³⁸⁶ Muthumbi *et al* 2015 *African Journal of Reproductive Health* 33. See also Batha 2018 <https://www.reuters.com/article/us-africa-fgm-lawmaking-idUSKCN1LT2OQ>, listing Kenya, Uganda, Egypt, Ethiopia and Nigeria amongst the countries that have banned FGM.

³⁸⁷ UNICEF 2016 https://www.unicef.org/Spanish/protection/files/00-FMGC_infographiclow-res.pdf; Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283; Kandala *et al* 2018 *BMJ Global Health* 1; Paliwal *et al* 2014 *Midwifery* 282. See Chapter 1 for a brief discussion on FGM statistics.

over the period between 1990 and 2017, especially among girls aged 0–14 years.³⁸⁸ West Africa had a decrease from 74% in 1996 to 25% in 2017, and North Africa showed a decrease from 58% in 1990 to only 14% in 2017.³⁸⁹ East Africa, on the other hand, had the most significant reduction from approximately 71% in 1995, to only 8% in 2016.³⁹⁰ This can be attributed to successful legislative frameworks, policy intervention, the legal ban on FGM and the effective implementation of significant international instruments.³⁹¹

However, due to a general lack in global research on the prevalence of FGM, Koski and Ieymann warn that while the prevalence of the practice seems to be declining, it remains invasive and they urge international efforts and ratification to continue.³⁹² In this regard, Kandala *et al* are of the opinion that in order to obtain reliable research, "comprehensive intervention efforts" are imperative and that such information would also assist the development of international and national legislation.³⁹³

³⁸⁸ Azeze *et al* 2020 *PLoS ONE* 5; Kandala *et al* 2018 *BMJ Global Health* 2; Ossai *et al* 2018 *Journal of Community Medicine & Health Care* 1.

³⁸⁹ Koski and Heymann 2017 *BMJ Global Health* 4; Anon 2018 https://www.equalitynow.org/fgm_rates_are_falling_in_africa_but_we_mustn_t_be_complacent#:~:text=In%20North%20Africa%2C%20the%20number,mothers%20has%20been%20a%20success.

³⁹⁰ Ratcliffe 2018 <https://www.theguardian.com/global-development/2018/nov/07/fgm-rates-in-east-africa-drop-20-years-study-shows>.

³⁹¹ Williams-Breault 2018 *Health and Human Rights Journal* 228; Kandala *et al* 2018 *BMJ Global Health* 6. Significant instruments include the Convention on the Rights of the Child (1989); African Charter on the Rights and Welfare of the Child (1990); Convention on the Elimination of All Forms of Discrimination against Women (1979); A 6(2) of the International Covenant on Economic, Social and Cultural Rights (1966).

³⁹² Koski and Heyman 2017 *BMJ Global Health* 1; Kandala *et al* 2018 *BMJ Global Health* 1.

³⁹³ Kandala *et al* 2018 *BMJ Global Health* 6; Engelsma, Mackie and Merrell 2020 *World Development* 8; Engelsma, Mackie and Merrell 2020 *World Development* 8.

4.2.1.2 Awareness and knowledge of the legislative framework to ensure changes in societal perceptions and attitudes

Legislative reform embedded in a human rights-based approach seeks to promote a process where information for legislative drafts are distributed in order to achieve acceptance and operationalisation.³⁹⁴ However, Wheeler emphasises that while drafting and adopting legislation is necessary, it is not a solution that can be viewed in isolation, as this process must go beyond drafting and adopting in order to strengthen public consensus and support that encourages widespread implementation of the law.³⁹⁵ The interrelation between positive social change and effective legislative measures is complex.³⁹⁶ Overall awareness and knowledge of FGM laws and its consequences are scarce and limited and, for the purpose of regulating FGM by offering information to girls regarding their human rights and choices, governmental action ought to be focused on affecting sustainable social change by ensuring social justice for females.³⁹⁷

4.2.1.3 Impact on the medicalisation of FGM

The medicalisation of FGM continues to increase in various countries, despite the rise in legislation against the practice.³⁹⁸ According to self-reported DHS data, approximately 26% of FGM victims between the age of 15 and 49 years have been

³⁹⁴ Nabaneh and Muula 2019 *International Journal of Gynecology & Obstetrics* 252; Cornwall and Nyamu-Musembi 2006 *Third World Quarterly* 1417. See also Chapter 3.2.2.4 for a full discussion on the right to information and education.

³⁹⁵ Wheeler 2004 *The International Journal of Children's Rights* 264; UNICEF 2010 https://www.unicef.org/policyanalysis/files/UNICEF_-_LRI_Legislative_Reform_to_support_the_Abandonment_of_FGMC_August_2010.pdf.

³⁹⁶ Barret *et al* 2020 *Reproductive Health* 4; Brown *et al* 2016 *Reproductive Health Matters* 118.

³⁹⁷ Muthumbi *et al* 2015 *African Journal of Reproductive Health* 38; Kontoyannis and Katsetos 2010 *Health Science Journal* 31; Asekun-Olarinmoye 2009 *The European Journal of Contraception & Reproductive Health Care* 297.

³⁹⁸ Leye *et al* 2019 *Reproductive Health* 2. See Chapter 3.2.3 for a brief discussion on medicalisation of FGM. See also Serour 2013 *African Journal of Urology* 147, where Sudan, Yemen, Egypt, Kenya, Nigeria and Guinea are identified as countries where it is substantially present.

subjected to medicalisation — which accounts for an estimate of 16 million females worldwide.³⁹⁹ The WHO, UNICEF, and UNFPA have condemned the occurrence, stating that:

...it is unacceptable to suggest that performing less invasive forms of FGM/C within medical facilities will reduce health complications.⁴⁰⁰

The Committee on Elimination of all Forms of Discrimination Against Women called on states to abolish the medicalisation of FGM and, from a holistic, human-rights based perspective, the abolition is a vital component.⁴⁰¹ The WHA resolution's state signatories expressed their concern about "emerging evidence of an increase" in data conforming FGM carried out by medical personnel, and agreed to take immediate, yet progressive, steps towards the abandonment of FGM by health professionals.⁴⁰² Additionally, from a medical perspective, this practice was reprimanded by the World Medical Association (WMA) as well as the Federation of Gynaecology and Obstetrics (FIGO).⁴⁰³ Consequently, several states have taken various steps towards its elimination, such as the development of comprehensive national action plans and extensive training of health professionals.⁴⁰⁴

However, Muthumbi *et al* are of the opinion that legal measures have had a very limited effect on the medicalisation of FGM.⁴⁰⁵ Simultaneously, Ugboma, Akani and

³⁹⁹ Kimani and Shell-Duncan 2018 *Current Sexual Health Reports* 26; Leye *et al* 2019 *Reproductive Health* 2; General Assembly, Resolution 67/146: Intensifying Global Efforts for the Elimination of Female Genital Mutilations (2012).

⁴⁰⁰ General Assembly, Resolution 67/146: Intensifying Global Efforts for the Elimination of Female Genital Mutilations (2012); Leye *et al* 2019 *Reproductive Health* 2; Serour 2013 *African Journal of Urology* 147.

⁴⁰¹ Khosla *et al* 2017 *Reproductive Health* 2; Leye *et al* 2019 *Reproductive Health* 2.

⁴⁰² World Health Assembly Resolution 61.16 on Female Genital Mutilation (2008). According to Anon 2020 https://www.who.int/choice/demography/by_country/en/, the World Health Assembly has a total of 194 member states.

⁴⁰³ Anon 2008 <https://www.wma.net/news-post/physicians-call-for-zero-tolerance-to-female-genital-mutilation-across-the-world/>; Anon 2019 <https://www.figo.org/news/against-medicalisation-fgmc>.

⁴⁰⁴ Williams-Breault 2018 *Health and Human Rights Journal* 227-229; Wheeler 2004 *The International Journal of Children's Rights* 268.

⁴⁰⁵ Muthumbi *et al* 2015 *African Journal of Reproductive Health* 32.

Babatunde suggest that the enforcement of the WHO legislation that bans the medicalisation of this custom should be advocated.⁴⁰⁶ Against this background, the WHO suggests that states should create supportive legal frameworks, which ought to include corresponding policies to guide health professionals on monitoring and reporting mechanisms.⁴⁰⁷

4.2.2 *Effective remedies*

States have an obligation to ensure that victims have accessible and effective remedies to vindicate their rights, which should be adapted appropriately to enable it to take the latter's particular vulnerabilities into account.⁴⁰⁸ In this context, "victims" refer to people who have suffered physical, mental, emotional or economic harm or any substantial impairment of their fundamental human rights due to acts that constitute a violation of those rights.⁴⁰⁹

The international right to effective remedies for violations of international human rights law are recognised in several international legal instruments.⁴¹⁰ The UDHR states that:

⁴⁰⁶ Ugboma, Akani and Babatunde 2004 *Nigerian Medical Journal* 253.

⁴⁰⁷ Verani, Shayo and Howse 2011 *African Journal of Midwifery and Women's Health* 182.

⁴⁰⁸ Para 2(3) of the Human Rights Committee, General Comment on Remedies for Violations of Covenant by States Parties (2004); General Assembly Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2008).

⁴⁰⁹ Para 8 of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); Bachrach 2000 *Spring* 9.

⁴¹⁰ A 2 of the International Covenant on Civil and Political Rights (1966); A 6 of the International Covenant on the Elimination of All Forms of Racial Discrimination (1969); A 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987); A 39 of the Convention on the Rights of the Child (1989); A 7 of the African Commission on Human and Peoples' Rights (1987).

...everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law.⁴¹¹

Additionally, according to the Maputo Protocol, state signatories are obliged to:

...provide appropriate remedies to any woman whose rights or freedoms - as herein recognised, have been violated.⁴¹²

The effectiveness of remedies is evinced in its potential to prevent the continuations of gross human rights violations, while ensuring appropriate redress for any violation that occurred.⁴¹³ In order to determine the effectiveness of the remedies, it is important to comprehend their scope by evaluating the requirements of the right to an effective remedy, which includes access to justice, access to information about violations, as well as reparation for harm suffered and reparation mechanisms.⁴¹⁴

4.2.2.1 Access to justice

FGM victims' right to non-discrimination, the highest attainable standard of health, culture and tradition, as well as education and information, among other things, are frequently violated and, as a result, they ought to have access to effective judicial remedies as granted by international, regional and national law.⁴¹⁵ Within the scope of effective remedies, the right to access justice includes availability, accountability,

⁴¹¹ A 8 of the Universal Declaration of Human Rights (1948).

⁴¹² A 25(a) of the Protocol to the African Charter on Human and Peoples' Rights on Women in Africa (2003).

⁴¹³ Piątek 2019 *China - European Union Law Journal* 164; Para 15 of the Human Rights Committee, General Comment on Remedies for Violations of Covenant by States Parties (2004); A 47 of the Charter on Fundamental Rights of the European Union (2000).

⁴¹⁴ Para 11 of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); Para 14(e) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015). See Chapters 3.2.2.4 and 4.2.1.2 for a full discussion on the right to education and information as well as awareness and knowledge of legislative frameworks.

⁴¹⁵ Para 12 of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

justiciability, and accessibility.⁴¹⁶ In order to ensure an accessible justice system, such a system should be gender-sensitive by taking note of the increasing need for justice for girls.⁴¹⁷ It requires that all justice systems be "secure, affordable and physically accessible" to girls and, simultaneously, be appropriate to their specific needs.⁴¹⁸

The CEDAW committee highlights the fact that, due to economic, political, cultural or social marginalisation, girls are more likely to be excluded from access to justice.⁴¹⁹ Additionally, financial resources are a hinderance, as judicial authorities are usually located in main cities, resulting in their non-availability in remote or rural areas.⁴²⁰ Due to these obstacles that hinder girls' access to justice and the accompanying fear for stigmatisation, humiliation, and subjection to other forms of violence, they frequently fail to report human rights violations to the appropriate authorities.⁴²¹

State parties should distribute relevant information regarding all the available remedies for such violations and take appropriate measures to minimise the victims' inconvenience and ensure their protection and privacy prior to and during official

⁴¹⁶ Nyenti 2013 *De Jure Law Journal* 904; Para 1 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015); Farrow 2014 *Osgoode Hall Law Journal* 962.

⁴¹⁷ A 2 and 15 of the Convention on the Elimination of Discrimination Against Women (1979); Para 11 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

⁴¹⁸ Andrews 2013 *University of Cambridge Faculty of Law Research* 22; Para 14(c) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

⁴¹⁹ Para 3 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015); De Cesare 2014 *Genus* 1.

⁴²⁰ Smith *et al* 2020 *Journal of Community Health* 1256; Para 13 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

⁴²¹ Gangoli *et al* 2018 *Journal of Aggression, Conflict and Peace Research* 251; Para 10 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

proceedings.⁴²² Also, victims should have legal standing, which must be included in any prompt, adequate and effective remedy.⁴²³

Likewise, proper assistance should be provided to all of these victims who seek justice.⁴²⁴ FC is a constructive factor in the personhood and identity that conveys a morally transformative value beyond the bodily modification.⁴²⁵ It is an existing norm and practice that reflects a prevailing power and authority structure that results in an immense amount of pressure to conform.⁴²⁶ This pressure manifests in both internalised gender norms and unreasonable, negative sanctions imposed on uncut girls.⁴²⁷ Therefore, it is vital that signatory states comprehend the risk involved for survivors if they speak out about their experiences. They should guarantee sufficient support and protection, which may motivate other victims to speak out.⁴²⁸ The committee of CEDAW suggests that, as a mechanism to motivate FGM victims to

⁴²² Para 12(a) and (b) of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); Para 19(b) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015). See also Chapters 3.2.2.4 and 4.2.1.2 for a full discussion on the right to education and information as well as awareness and knowledge of legislative frameworks.

⁴²³ Para 14 of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); 19(g) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

⁴²⁴ Para 12(c) of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

⁴²⁵ Gibeau 1998 *Journal of Obstetric, Gynecologic & Neonatal Nursing* 86; Shell-Duncan *et al* 2018 *PLoS ONE* 8-9; Moges 2009 *African Women Organization* 4.

⁴²⁶ Shell-Duncan *et al* 2018 *PLoS ONE* 1; Musalo 1997 *Ethics* 1; Paras 4, 6 and 49 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014). See also Chapter 3.2.2.1 for a discussion on the principle of gender equality and its relation to FGM for a full discussion on gender norms and patriarchal systems.

⁴²⁷ Shell-Duncan *et al* 2018 *PLoS ONE* 8-9; Para 9 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

⁴²⁸ Baillot *et al* 2018 *International Journal for Equity in Health* 13; Anon 2019 <https://medium.com/we-the-peoples/survivors-speak-women-leading-the-movement-to-end-fgm-ee6ed20ed400>.

report human rights violations, it is imperative to protect girls' privacy during court proceedings to guarantee that only relevant parties gain access to their testimonies.⁴²⁹ This has the potential of resulting in a long-term sustainable investment in the regulation of FGM.⁴³⁰

4.2.2.2 Reparation

State parties are required to provide proportional, effective reparation to victims of international human rights law violations, which consists of five distinctive principles, i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴³¹

Restitution is an established principle of international criminal law and encompasses, whenever possible, the restoration of the victims' original situations prior to the gross international human rights violations, which may include identity, liberty, family life and enjoyment of human rights.⁴³² It is based on the supposition that those responsible for the violation of rights must provide appropriate restitution to those who were victimised.⁴³³ However, restitution in FGM cases is somewhat

⁴²⁹ 19(b) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

⁴³⁰ Baillot *et al* 2018 *International Journal for Equity in Health* 13; Anon 2019 <https://medium.com/we-the-peoples/survivors-speak-women-leading-the-movement-to-end-fgm-ee6ed20ed400>.

⁴³¹ Para 15 and 16 of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005). See Chapter 4.4 below for a full discussion on what rehabilitation in this context entails. In this context, satisfaction entails constructive course of action that terminates the continuation of violations, public apology, effective administrative and judicial sanctions against perpetrators, acceptance and responsibility and assistance in the victims' recovery.

⁴³² Para 75 of the Rome Statute of the International Criminal Court (1998); Bachrach 2000 *Spring* 10; Para 3 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

⁴³³ Bachrach 2000 *Spring* 9; Para 3 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); General Assembly Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and

limited. There are some options to consider, i.e. deinfibulation and reconstructive surgery, both of which are controversial topics and have their own set of limitations.⁴³⁴ While there is a possibility to repair some clitoral function, it does not simply restore female genitals to its original state.⁴³⁵ In this regard, Abdulcadir, Rodriguez and Say state that surgical interventions on FGM victims are not without risk and they recommend that states should first gain a thorough understanding of the impact, effectiveness, safety and the importance of medical follow-ups.⁴³⁶ Also, women rarely have access to and sufficient resources for these options, and they are therefore unable to improve the overall quality of their sexual health.⁴³⁷ In this regard, states are required to create funds to guarantee that women obtain adequate reparation.⁴³⁸

Compensation may be a valuable alternative, as it can enable victims to obtain medical support for short and long-term consequences, physiotherapy and psychotherapy to facilitate healing and recovery from emotional and physical

Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2008).

⁴³⁴ Karim and Dekker 2017 *Clinics in Surgery* 1; Okusanya *et al* 2017 *International Journal of Gynecology & Obstetrics* 14; Brady *et al* 2018 *Archives of Sexual Behaviour* 1. See Okusanya *et al* 2017 *International Journal of Gynecology & Obstetrics* 14, where "deinfibulation" is defined as a surgical correction of infibulation, which is a surgical procedure during which the narrowed vaginal openings of girls who have been infibulated are cut open and the labia majora and labia minora are placed side by side to create a covering seal over the vagina, mainly due to the necessity for the improvement of their well-being and health, while simultaneously making intercourse and the facilitation of childbirth possible. See also Karim and Dekker 2017 *Clinics in Surgery* 1, where "reconstructive surgery", or clitoroplasty, is defined as is formally known as which involves the removal of scar tissue, the pull of the remaining clitoris up to the surface of the vagina and stitching it into its original place

⁴³⁵ Akinbiyi, Langston and Percec 2018 *Plastic and Reconstructive Surgery Global Open* 11; Creighton and Hodes 2015 *Archives of Disease in Childhood* 270.

⁴³⁶ Abdulcadir, Rodriguez and Say 2015 *International Journal of Gynaecology and Obstetrics* 96.

⁴³⁷ Larsson *et al* 2018 *Journal of Obstetrics and Gynaecology* 1005; Creighton and Hodes 2015 *Archives of Disease in Childhood* 270.

⁴³⁸ Para 19(d) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

abuse.⁴³⁹ Unfortunately, provisions that mandate the perpetrators to compensate the victims for the harm caused as a form of sentencing has not been widely used.⁴⁴⁰

International human rights conventions include several measures to ensure effective remedies that prevent the continuation of human rights violations.⁴⁴¹ The challenge is that states must understand the risk to victims who come forward with their FGM experience so that they can ensure proper assistance.⁴⁴² It is notable that while restitution and compensation are considerable options, it remains essential that states provide adequate human and financial resources by investing in proper medical research and facilities as it would enable women to have access to these options.⁴⁴³

4.2.3 Obligations and requirements of psychological measures

The WHO attempts to assist states to achieve the highest attainable standard of health as a mechanism to alleviate the severe psychological health consequences caused by FGM.⁴⁴⁴ From an international human rights perspective, the right to the

⁴³⁹ Anon 2020 <https://www.ibbclaims.co.uk/site/services/child-abuse-and-trafficking/compensation-for-victims-of-fgm/>; Anon 2020 <https://www.criminal-injuries.co.uk/female-genital-mutilation-fgm-compensation-claims/>; Yusuf and Fessha 2013 *African Human Rights Law Journal* 373; Johansen *et al* 2013 *Obstetrics and Gynecology International* 7; Edouard, Olatunbosun and Edouard 2013 *Pan African Urological Surgeons' Association* 151.

⁴⁴⁰ Yusuf and Fessha 2013 *African Human Rights Law Journal* 373; Johansen *et al* 2013 *Obstetrics and Gynecology International* 7; Edouard, Olatunbosun and Edouard 2013 *Pan African Urological Surgeons' Association* 151.

⁴⁴¹ General Assembly Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2008).

⁴⁴² Para 12(c) of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

⁴⁴³ Nabaneh and Muula 2019 *Ethical and Legal Issues in Reproductive Health* 256.

⁴⁴⁴ General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013). See also Chapter 3.2.2.2 for a full discussion on the right to the highest attainable standard of health.

highest attainable standard of health entails the right to a state of total mental, physical and social well-being, which is interpreted to include:

The creation of conditions which would assure to all medical service and medical attention in the event of sickness, both physical and mental, including the provision of equal, timely access to basic preventive, curative, rehabilitative health services...which would also include appropriate mental health treatment and care.⁴⁴⁵

States are required to provide special care that is appropriate to girl children's needs, as girls subjected to FGM are likely to suffer from psychological and other mental conditions. This may include severe depression, phobias, somatic disorders, as well as anxiety-related disorders such as post-traumatic stress disorder (PTSD), which has a negative effect on their psychological status.⁴⁴⁶ In this section, the aim is to briefly explore the general obligations and requirements of appropriate psychological measures within the ambit of FGM.

In accordance with the CRC, state parties are obliged to recognise, respect, and fulfil children's entitlement to their right to health.⁴⁴⁷ Integral components of the overarching right to the highest attainable standard of health is mental health care and sexual health care. Mental health care is defined as an:

...analysis and diagnosis of a person's mental condition, and treatment, care and rehabilitation for a mental illness...⁴⁴⁸

The right to sexual health is defined as:

⁴⁴⁵ A 12 of the International Covenant on Economic, Social and Cultural Rights (1966); A 14 of the Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health.

⁴⁴⁶ Principles 2 and 8(1) of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991); Knipscheer *et al* 2015 *BJPsych Bulletin* 273; Alachkar 2016 *BJPsych Bulletin* 230. See Chapter 3.2.3 for a discussion on the physical consequences that FGM may have.

⁴⁴⁷ Para 71 and 72 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013).

⁴⁴⁸ Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991).

...a state of physical, mental and social well-being in relation to sexuality. It requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.⁴⁴⁹

The fulfilment of these rights necessitates the promotion of knowledge about child health, legislative measures, governance, and investment in children's rights.⁴⁵⁰ First, given the fact that health professionals around the world lack knowledge about FGM-related mental health matters, states are encouraged to adopt an overall strategy designed to educate children and mental health professionals on the children's right to health and how the latter can contribute to its realisation.⁴⁵¹ Within the scope of FGM-related psychological issues, there is a need for international and national guidelines on how to regulate and minimise negative consequences caused by FGM. This demands the improvement of the knowledge, training and skills of psychiatrists and other mental health care professionals, which would ensure and strengthen their capacity to provide care and treatment for FGM victims.⁴⁵² On this subject, Cousins is of the opinion that, with adequate training, this right can be successfully upheld.⁴⁵³

In terms of governance, states must create a cohesive and comprehensive "national coordinating framework" for the physical and psychological health of children. This

⁴⁴⁹ A 12 of the International Covenant on Economic, Social and Cultural Rights (1966); A 14 of the Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health; Anon 2010 https://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/.

⁴⁵⁰ Els *et al* 2008 *European Journal of Contraception & Reproductive Health Care* 187; Paras 93-107 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013); Kmietowicz 2015 *The BMJ* 1; Khosla *et al* 2017 *Reproductive Health* 2.

⁴⁵¹ Para 93 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013). See Chapters 3.2.2.4 and 4.2.1.2 for discussions on the right to education and information and awareness and knowledge of the legislative framework.

⁴⁵² Abdulcadir, Rodriguez and Say 2014 *British Journal of Obstetrics and Gynaecology* 294; Smith and Stein 2017 *International Journal of Gynecology & Obstetrics* 79.

⁴⁵³ Cousins 2016 *BMJ* 1.

ought to include role classification and the facilitation of effective cooperation between all relevant stakeholders.⁴⁵⁴ Also, special attention should be paid to marginalised groups and those at particular risk to discrimination and violence, which, in this case, refers to girls.⁴⁵⁵ Lastly, when states allocate budgets, special investment in children's health should be prioritised to guarantee the quality, acceptability, accessibility, and availability of these health services.⁴⁵⁶ The overall impact of economic factors on the health rights and services, especially those of marginalised groups, should be assessed under the overarching best interests of the child principle.⁴⁵⁷ Extensive investment in human and medical resources remains imperative, as health care specialists and specialised medical equipment is required to adequately care for these victims.⁴⁵⁸

In summary, state parties are encouraged to ratify international human rights instruments relevant to children's health rights and should implement "all appropriate legislative, administrative, and other measures" to guarantee the full implementation of children's health rights without discrimination. This includes the provision of quality health services that are child- and gender-sensitive.⁴⁵⁹ The

⁴⁵⁴ Para 97 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013).

⁴⁵⁵ Para 98 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013). See Chapters 3.2.3 and 3.2.2.1 for a full discussion on violent nature and consequence of FGM as well as its relation to the principle of gender equality to gain an understanding as to why girls are, in this context, deemed to be a marginalised group.

⁴⁵⁶ Stenberg *et al* 2014 *The Lancet* 1333; Para 104 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013).

⁴⁵⁷ A 3 of the Convention on the Rights of the Child (1989); A 4 of the African Charter on the Rights and Welfare of the Child (1989); Para 105 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013). See also Chapter 3.3 for a full discussion on the best interests of the child principle, especially within the ambit of FGM.

⁴⁵⁸ Kapferer 2015 <https://www.weforum.org/agenda/2015/12/the-importance-of-investing-in-health/>; Abdulcadir, Rodriguez and Say 2014 *British Journal of Obstetrics and Gynaecology* 294; Smith and Stein 2017 *International Journal of Gynecology & Obstetrics* 79.

⁴⁵⁹ Wheeler 2004 *The International Journal of Children's Rights* 268; Para 94 of the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard

CEDAW committee notes that since socio-economic factors generally differ for girls and their continued vulnerability to different forms of violence can affect their psychological health, i.e. FGM, their increased risk of psychological harm justifies gender-sensitive health services.⁴⁶⁰ While it is evident that FGM victims may suffer from physical and mental health disorders, it is suggested that further research should be done to establish what treatment would be most beneficial.⁴⁶¹ While it does not fall within the scope of this discussion, states may consider cognitive behavioural therapy (CBT) and sexual health counselling as psychological health care options as a way to abide by their international obligations and requirements of health care measures. Physical health care options, on the other hand, may include deinfibulation or reconstructive surgery.⁴⁶²

4.3 Chapter summary

This chapter focussed on the internationally imposed duties of states from the victims' perspective. The discussion referred to the main human rights instruments that demand a sustainable legislative framework to promote human rights and social

of Health (2013). See Chapters 3.2.2.2 for a brief discussion on the special attention that girls' health requires.

⁴⁶⁰ Para 12(b) of the CEDAW General Recommendation No. 24: Article 12 of the Convention (1999); Hands *et al* 2016 *Journal of Women's Health Issues Care* 1. See Chapter 4.2.1 for a brief reference to significant international human rights instruments.

⁴⁶¹ Anon 2016 <https://www.28toomany.org/blog/the-psychological-effects-of-female-genital-mutilation-research-blog-by-serene-chung/>.

⁴⁶² According to Hofmann *et al* 2012 *Cognitive Therapy and Research* 427; Adelufosi *et al* 2017 *International Journal of Gynecology & Obstetrics* 57; Knipscheer *et al* *BJPsych Bulletin* 273, "cognitive behavioural therapy" is a short-term psychotherapy based on the idea that our psychological distress is caused by inaccurate cognitions and it asserts that our cognitive and emotional functions interact with the manner in which we respond to various situations that we are exposed to. It challenges FGM victims' negative and erroneous thought patterns with the aim to provide them with an understanding of these patterns and assist them to develop improved cognitions and behaviours. Also, according to Palm, Essèn and Johnsdotter 2019 *Sexual and Reproductive Health Matters* 192; Smith and Stein 2017 *International Journal of Gynecology & Obstetrics* 62, "sexual health counselling" is a method used to communicate and negotiate values and norms about body, sexuality, and health, whereby the recipient as well as the provider enter a regulated conversation regarding their own set of assumptions, ideas, and experiences.

change by considering legislative measures, effective remedies, as well as the obligations and requirements of appropriate health care measures.⁴⁶³ States' obligations to establish a reasonable balance between upholding cultural practices and promoting human rights remains challenging, but a legislative reform process manifesting in a human rights-based approach remains the most favourable approach.⁴⁶⁴ The chapter thereafter evaluated the criteria to assess the impact of legislative measures. The criteria comprise three distinct elements.⁴⁶⁵ First, the overall effect on the prevalence of FGM was discussed, with the focus on Africa.⁴⁶⁶ While available data suggests a decline in statistics, new global research should be conducted in order to establish the actual effect.⁴⁶⁷ Secondly, in terms of the awareness and knowledge of the legislative framework to ensure changes in societal perceptions and attitudes, it is suggested that states should invest more in the transformation of the perceptions of and attitude towards FGM as a technique to encourage the overall acceptance and effective operationalisation of legislative frameworks.⁴⁶⁸ Thirdly, medicalisation appears to increase and legislation to abolish

⁴⁶³ Klein *et al* 2007 *The European Journal of Cardiovascular Prevention* 672; Bello *et al* 2017 *International Journal of Gynecology & Obstetrics* 49; Convention on the Rights of the Child (1989); Protocol to the African Charter on Peoples' Rights on the Rights of Women in Africa (2003); Universal Declaration of Human Rights (1945); African Charter on the Rights and Welfare of the Child (1990); Convention on the Elimination of All Forms of Discrimination against Women (1979); International Covenant on Economic, Social and Cultural Rights (1966).

⁴⁶⁴ Asomah 2015 *African Human Rights Law Journal* 135; Lee 2010 *The International Journal of Human Rights* 891; Nabaneh and Muula 2019 *International Journal of Gyencology & Obstetrics* 252

⁴⁶⁵ See Chapter 4.2.1 for a full discussion on the criteria to assess the impact of legislative measures.

⁴⁶⁶ UNICEF 2016 https://www.unicef.org/Spanish/protection/files/00-FMGC_infographiclow-res.pdf; See Chapter 4.2.1.1 for a discussion on the prevalence of FGM.

⁴⁶⁷ Koski and Heyman 2017 *BMJ Global Health* 1; Kandala *et al* 2018 *BMJ Global Health* 1.

⁴⁶⁸ Nabaneh and Muula 2019 *International Journal of Gyencology & Obstetrics* 252; Cornwall and Nyamu-Musembi 2006 *Third World Quarterly* 1417. See also Chapters 2 and 3.2.2.1 for a discussion on the attitudes and perceptions towards FGM.

it seems to have had a minimal effect.⁴⁶⁹ As a result, states should ensure proper supportive documents, as well as proper monitoring and reporting systems.⁴⁷⁰

While international human rights instruments recognise the victims' right to remedies for human right violations, it remains the duty of states to ensure that such remedies are effective and accessible, which serves as a mechanism to prevent the continuation of such violations.⁴⁷¹ For remedies to be effective, there should be adequate access to a justice system that is gender-sensitive, secure and affordable.⁴⁷² Furthermore, appropriate reparation should be provided to victims and, within the scope of FGM, this would include restitution and compensation, both of which have their own set of limitations.⁴⁷³

The overarching right to the highest attainable standard of health, which entails the right to a state of total mental, physical and social well-being, necessitates extensive guidelines on the appropriate psychological measures for adoption at an international, regional and national level, as well as proper training for medical professionals.⁴⁷⁴ In conclusion, while there has been a notable increase in collaborative efforts to eliminate and, eventually, abandon these customs with the use of legislative measures, it is clear that it is not completely effective in curbing

⁴⁶⁹ Leye *et al* 2019 *Reproductive Health* 2. See also Chapter 4.2.1.3 for a discussion on the impact of the medicalisation of FGM.

⁴⁷⁰ Verani, Shayo and Howse 2011 *African Journal of Midwifery and Women's Health* 182.

⁴⁷¹ Para 2(3) of the Human Rights Committee, General Comment on Remedies for Violations of Covenant by State Parties (2004). See Chapter 4.2.2 for a discussion on effective remedies.

⁴⁷² A 2 and 15 of the Convention on the Elimination of Discrimination Against Women (1979); Para 11 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015).

⁴⁷³ Para 15 and 16 of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); Para 75 of the Rome Statute of the International Criminal Court (1998); Anon 2020 <https://www.ibbclaims.co.uk/site/services/child-abuse-and-trafficking/compensation-for-victims-of-fgm/>. See Chapter 4.2.2.2 for a discussion on Reparation.

⁴⁷⁴ Johansen *et al* 2018 *BMC Health Services Research* 2; Balfour *et al* 2016 *BMC Health Services Research* 5.

the increase in the prevalence.⁴⁷⁵ States should invest more in the transformation of the perception of and attitude towards FGM as a technique to encourage the overall acceptance and effective operationalisation of legislative frameworks.⁴⁷⁶

⁴⁷⁵ Khosla *et al*/2017 *Reproductive Health* 59; Introduction of Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children (1995).

⁴⁷⁶ Nabaneh and Muula 2019 *International Journal of Gyencology & Obstetrics* 252; Cornwall and Nyamu-Musembi 2006 *Third World Quarterly* 1417. See also Chapters 2 and 3.2.2.1 for a discussion on the attitudes and perceptions towards FGM.

Chapter 5 Recommendations and conclusions

5 Recommendations and conclusions

FGM is a collective term that refers to a silent, universal occurrence that encompasses all procedures that partially or totally removes the external female genitalia for non-medical reasons.⁴⁷⁷ It is a ritualistic practice that is a manifested form violence. There are four types, i.e. clitoridectomy, excision, infibulation, and all other deliberately harmful procedures.⁴⁷⁸ In this chapter, the discussion is briefly summarised, followed by conclusions and recommendations to answer the research question.⁴⁷⁹

The current research on the effect of demographics related to FGM was explored to gain a general understanding of the cultural rationales and the impact of regional differences.⁴⁸⁰ While most available data indicate that it primarily continues to persist in Africa and the Middle East, further findings revealed a significant increase in migration from regions where FGM is practiced to regions where it is not, which has caused it to be notably evident in Asian, European and South American countries.⁴⁸¹ Considerable regional differences in the custom are evident within the African, Asian, South American, and European contexts, with the rationale as justification

⁴⁷⁷ Anon 2018 <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>. See also Munir 2014 *International Review of Law* 2 and Serour 2013 *African Journal of Urology* 147. See Chapter 1 for a full definition on FGM and the Introduction of Chapter 2 on why this term is favoured.

⁴⁷⁸ Ismail *et al* 2017 *Reproductive Health* 108; Rembe and Odeku 2009 *Journal of Psychology in Africa* 63; Abathun, Sundby and Gele 2016 *International Journal of Women's Health* 558; See Chapter 3.2.3 for a full discussion on the types of FGM.

⁴⁷⁹ See Chapter 1 to view the research question.

⁴⁸⁰ See Chapter 2 for a full discussion on the global nature of FGM.

⁴⁸¹ Eke and Nkanginieme 2006 *The Lancet* 1799; Anon 2016 <https://www.un.org/sustainabledevelopment/blog/tag/fgm/>; Cappa, Van Baelen and Leye 2018 *Global Public Health: An International Journal for Research, Policy and Practice* 1145; Cosoy 2016 <https://www.bbc.com/news/world-latin-america-37374006>; Vogt, Efferson and Fehr 2017 *SSM - Population Health* 283. See Chapters 2.2 - 2.5 for a full discussion on the African, Asian, South American, and European contexts.

mainly based on factors associated with religion, social acceptance, marriage expectations, traditions and beliefs, and the prevention of promiscuity and chastity in predominantly patriarchal systems.⁴⁸² It is recommended that reliable data on the prevalence of FGM in all the countries where it is present – an estimated 90 countries – should become a top priority to ensure a holistic perspective on the occurrence of the custom.⁴⁸³

FGM is a human rights violation that is underscored in numerous international and regional human rights instruments. These instruments were discussed extensively to establish the foundation for the legal framework for girls' rights and protection.⁴⁸⁴ This includes the protective provisions within the scope of a harmful cultural practice, the overarching best interests of the child principle, and parental responsibility.⁴⁸⁵

FGM constitutes discrimination manifested in normative gender roles that are evident in stereotyping and societal expectations that contravene human rights.⁴⁸⁶ The international community has become particularly aware of the urgent need to achieve gender equality and of the fact that it cannot be achieved if girls' fundamental rights are denied or violated, especially with reference to harmful

⁴⁸² Yoder, Wang and Johansen 2013 *Studies in Family Planning* 195; Koukoui, Hassan and Guzder 2017 *Reproductive Health* 8; Banerji 2017 <https://www.opendemocracy.net/en/5050/indias-female-genital-mutilationj-thousand-year-old-secret/>; Khan, Shekhani and Jafarey 2018 *Indian Journal of Medical Ethics Online* 4; Brodzinsky 2015 <https://www.theguardian.com/global-development/2015/nov/19/colombia-embera-female-genital-mutilation-mystery-myth-misgiving>. See Chapters 2.2.2, 2.3.2, 2.4.2 and 2.5.2 for a brief discussion on the rationale of FGM within the African, Asian, South American, and European contexts.

⁴⁸³ Srinivasan 2020 <https://www.euronews.com/2020/02/10/female-genital-mutilation-is-a-chronic-global-problem-it-demands-a-global-respons-view>; Macfarlane 2019 *BMJ Clinical Research* 1927.

⁴⁸⁴ See Chapter 4.2.1 for a short list of key international and regional legal instruments and take note that Chapters 1 - 4 makes reference to other relevant international treaties, comments and protocols.

⁴⁸⁵ See Chapter 3.2, 3.3 and 3.4 for a full discussion on these topics.

⁴⁸⁶ Khosla *et al* 2017 *Reproductive Health* 8. See Chapter 3.2.2.1.2 for a discussion on the normative gender roles within the ambit of FGM.

cultural practices that are detrimental to the health of the latter.⁴⁸⁷ The progress in the elimination of harmful cultural practices has been relatively slow.⁴⁸⁸ As a result, the UN went on to establish a sustainable development goal to achieve gender equality and to empower women and girls by 2030. It is not only unattainable and challenging to quantify and monitor, but also potentially misguided by the lack of relevant and reliable data to measure the progress made towards reaching this goal.⁴⁸⁹ Against the background of this goal and the general nature of harmful cultural practices, it is clear that social norms, discriminatory laws and patriarchal systems remain pervasive.⁴⁹⁰ These co-called goals are also criticised for being "oversimplified" and "too generalised" and if the UN and its signatory states have any hope of promoting the regulation – and eventually, the elimination – of FGM, it is imperative that they acquire a sustainable global response, extensive systematic and coordinated governmental efforts.⁴⁹¹

FGM creates significant obstacles for the realisation of FGM victims' right to the highest attainable standard of health, which includes mental, physical, sexual and reproductive health. Consequently, this right remains a distant goal that is becoming increasingly remote.⁴⁹² The WHO continues to mandate states to alleviate the

⁴⁸⁷ Introduction of Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children (1995). See Chapter 3.2.2.1. for a discussion on principle of gender equality and its relation to female genital mutilation, as well as Chapter 3.2.2 for a discussion of FGM as a harmful cultural practice and Chapter 3.2.2.2 on the right to the highest attainable standard of health.

⁴⁸⁸ Introduction of Fact Sheet No. 23 Harmful Traditional Practices Affecting the Health of Women and Children (1995).

⁴⁸⁹ Ala-Uddin 2019 *SAGE* 215; Anon 2016 <https://www.un.org/sustainabledevelopment/blog/tag/fgm/>. Take note that FGM falls within the ambit of gender equality and women empowerment.

⁴⁹⁰ Para 9 of the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014). See Chapters 3.2.2.1 and 3.2.3 with reference to the social norms within patriarchal systems and the violent nature of FGM, respectively.

⁴⁹¹ Ala-Uddin 2019 *SAGE* 219. See Chapter 4 to learn what such a global response may entail.

⁴⁹² Para 1 of the CESCR General Comment No. 12 on the Right to the Highest Attainable Standard of Health (2000). See Chapters 3.2.2.2 and 4.2.3 regarding the right to the highest attainable standard and obligations and requirements of psychological measures, respectively.

adverse health conditions associated with FGM by restoring and respecting girl children's rights to the highest attainable standard of health.⁴⁹³ It is critical to ensure that the particular health challenges of girls are addressed. States must ensure an environment that enables girls to exercise and enjoy health and mental and sexual rights, and to express their sexuality free from "discrimination, coercion and violence".⁴⁹⁴ To achieve this, states must adopt a human rights-based approach to health, which must provide a set of explicit concepts that can set and evaluate the health policies and service deliveries by targeting discriminatory actions that impair equitable health outcomes.⁴⁹⁵ Due to the variation in girls' and boys' biological factors, their vulnerability to harmful cultural practices and socio-economic factors, it is submitted that state parties must, simultaneously, give special attention to girls' health rights and needs.⁴⁹⁶

Today, culture and tradition remain the most cited justification for the manifestation of FGM.⁴⁹⁷ The international legal framework recognises the value of traditions and cultures and that children have the right to profess, practice and enjoy it within their communities. They frequently form the "ethnic, religious or linguistic minorities or

⁴⁹³ Khosla *et al* 2017 *Reproductive Health* 8. See Chapters 3.2.2.2 and 4.2.3 on the right to the highest attainable standard of health and the obligations and requirements of psychological measures and some international provisions that mandate States to ensure such an environment.

⁴⁹⁴ Khosla *et al* 2017 *Reproductive Health* 7. See Chapters 3.2.2.1, 3.2.2.2, 3.2.3, and 4.2.3 on the principle of gender equality, the right to the highest attainable standard of health, the violent nature of FGM, and the obligations and requirements of psychological measures and some international provisions that mandate States to alleviate the health consequences of FGM.

⁴⁹⁵ Berg and Denison 2013 *Health Care for Women International* 858. See also Chapter 4.2.1.2 for the relevance to ensure awareness and knowledge of the legislative framework as a mechanism to ensure changes in societal perceptions and attitudes.

⁴⁹⁶ Para 7 of the CEDAW General Recommendation No. 24: Article 12 of the Convention (1999); Hands *et al* 2016 *Journal of Women's Health Issues* 1. See Chapters 3.2.2.2 and 4.2.3 regarding the right to the highest attainable standard and obligations and requirements of psychological measures, respectively, especially with regards to the special needs of girl children.

⁴⁹⁷ Althaus 1997 *International Perspectives on Sexual and Reproductive Health* 130. See Chapter 3.2.2.3 for a discussion on children's right to culture and tradition.

persons of indigenous origin" in their respective countries.⁴⁹⁸ Likewise, the CRC and the ACRWC recognise the need to protect the internationally recognised rights and freedom of children while accommodating and respecting cultural differences.⁴⁹⁹ In this regard, it is recommended that states establish a balance between upholding religious or cultural practices and the promotion of human rights, guided by the best interest of the child principle.⁵⁰⁰

The twofold relationship between FGM and the right to education, i.e. the desired effect of education on the continuation of the custom and the obstructive effect that FGM has on the right to education, was discussed extensively.⁵⁰¹ Education is an integral component of any strategy aimed at curbing FGM statistics, because it plays a vital role in changing societal and individual views and perspectives.⁵⁰² In this regard, state parties are urged to adopt public information and educational programmes as a key method to eradicate FGM.⁵⁰³ It is suggested that school

⁴⁹⁸ A 30 of the Convention on the Rights of the Child (1989); A 11(c) of the African Charter on the Rights and Welfare of the Child (1990); A 13(c) of the Convention on the Elimination of All Forms of Discrimination against Women (1979); A 6(2) of the International Covenant on Economic, Social and Cultural Rights (1966). See also Freeman 2011 *The Family Law* 23. See Chapter 3.2.2.3 for a discussion on children's right to culture and tradition.

⁴⁹⁹ Alston 1994 *International Journal of Law, Policy and the Family* 3; Preamble of the Convention on the Rights of the Child (1989); A 1 and 12 of the African Charter on the Rights and the Welfare of the Child (1990). See Chapter 3.2.2.3 for a discussion on children's right to culture and tradition.

⁵⁰⁰ Asomah 2015 *African Human Rights Law Journal* 135; Lee 2010 *The International Journal of Human Rights* 891. See Chapter 3.2.2.3 for a discussion on children's right to culture and tradition.

⁵⁰¹ Kontoyannis and Katsetos 2010 *Health Science Journal* 31; Njogu 2018 *International Journal of Science and Research* 1268; See Chapters 3.2.2.4 and 4.2.1.2 for a discussion on the right to education and information and awareness and knowledge of the legislative framework to ensure changes in societal perceptions and attitudes. See also Chapter 3.2.4 for a discussion on the impact that education may have on the consent of girls to and the decision-making process of FGM.

⁵⁰² Asekun-Olarinmoye 2009 *The European Journal of Contraception & Reproductive Health Care* 297; Kontoyannis and Katsetos 2010 *Health Science Journal* 31. See Chapter 3.2.2.4 for a discussion on the relationship between FGM and education, as well as Chapter 4.2.1.2 to gain perspective on the value of education as a mechanism to change societal perceptions and attitudes.

⁵⁰³ Para 6(c) of the CESCR General Comment No. 13: The Right to Education (1999). See also The CEDAW Convention and Harmful Practices Against Women: The Work of the CEDAW Committee

curriculum developers must design culturally appropriate curricula for learners, especially in areas where harmful cultural practices are evident.⁵⁰⁴ The effect, then, of quality education on FGM is twofold: it creates understanding and tolerance among communities for traditional practices, and, secondly, it is an integral part of questioning the rationale of archaic practices and traditions by formulating arguments against them.⁵⁰⁵

The application of the best interests of the child principle and its relation to FGM's victims received attention and was assessed, especially with reference to the children's identity, dignity, and the right to be heard.⁵⁰⁶ While there are cultural and traditional practices that can be reconciled with the best interests of the child principle, other practices do not fall inside the margins of appreciation.⁵⁰⁷ The general conflict between different values, ideas and norms that belong to various traditions, cultures, religions, and ethnic groups – which will depend on particular contexts – may be resolved by determining what is reasonable according to the best interest of the child principle.⁵⁰⁸ Therefore, the focus is on the applicable social

(2009); Njogu 2018 *International Journal of Science and Research* 1268; Yazzie-Mintz 2007 *Journal of American Indian Education* 72.

⁵⁰⁴ Njogu 2018 *International Journal of Science and Research* 1268; Yazzie-Mintz 2007 *Journal of American Indian Education* 72. See Chapters 3.2.2.4 discussion on the right to education and information.

⁵⁰⁵ Anon 2017 <https://gemreportunesco.wordpress.com/2017/12/06/fighting-female-genital-mutilation-education-matters/>; Harper 2018 <https://www.educationdive.com/news/building-tolerance-for-other-cultures-starts-in-the-classroom/540374/>. See Chapters 3.2.2.4 and 4.2.1.2 for a discussion on the right to education and information and awareness and knowledge of the legislative framework to ensure changes in societal perceptions and attitudes, as well as Chapter 2 for a discussion on the rationale of FGM in different national contexts.

⁵⁰⁶ Para 30 of General Comment No. 11 on the Indigenous Children and their Rights under the Convention (2009); Grandi 2018 <https://bettercarenetwork.org/library/separated-children-in-an-emergency/guidelines-on-assessing-and-determining-the-best-interests-of-the-child-2018>. See Chapter 3.3.1, 3.3.2, and 3.3.3 for a discussion on the child's identity, dignity and the right to be heard within the best interests of the child principle.

⁵⁰⁷ Freeman 2011 *Family Law* 17; Birchley 2015 *Journal of Medical Ethics* 111. See Chapter 3.2.3 for a discussion on the violent nature of FGM, as well as Chapter 3.2.2.2 on the right to the highest attainable standard of health that confirms that FGM does not fall within the margins of the best interests of the child principle.

⁵⁰⁸ Zawati, Parry and Knoppers 2014 *BMC Medical Ethics* 5; Mendes and Ormerod 2019 *Psicologia Em Estudo* 13; Freeman 2011 *Family Law* 17. See Chapter 2 for a discussion on FGM in different

understanding of the context in which FGM as a social practice is sanctioned, and not whether it is justified according to general moral considerations.⁵⁰⁹ From a cultural relativism perspective, the richness and validity of cultural identities and systems are continuously defended, whereas the ethical and health perspectives highlight that these systems frequently threaten the dignity, freedom, rights and physical integrity of children.⁵¹⁰ However, culture and traditions cannot be granted the status of a metanorm that has the ability to trump other fundamental rights, and it is therefore asserted that FGM cannot be harmonised with the best interests of the child principle.⁵¹¹

As the primary caregivers, parents have a fundamental role to guarantee an environment that ensures the holistic development and protection of children.⁵¹² Parental responsibilities were discussed to illustrate the association between the practice of FGM and parental attitudes and the extent to which this increases girls' risk of becoming an FGM victim.⁵¹³ It is clear that the perceptions and views of parents on FGM affects their decision to have girls subjected to it, which is frequently influenced by social norms.⁵¹⁴ It remains valuable for states to not only intervene with parental responsibility if parents are unable to fulfil the duties of

contexts, which illustrates the difference in values, ideas, and norms that belong to these specific cultures, traditions, religions, and ethnic groups.

⁵⁰⁹ Freeman 2011 *Family Law* 16; Zawati, Parry and Knoppers 2014 *BMC Medical Ethics* 5; Mendes and Ormerod 2019 *Psicologia Em Estudo* 13.

⁵¹⁰ Belfield 2012 <https://www.purdueglobal.edu/blog/social-behavioral-sciences/what-is-cultural-diversity/>; Nielsen 1987 *Human Studies* 383. See also Chapters 3.2.2.2, 3.2.2.3, and 3.2.3 to gain perspective on children's right to culture and tradition, the right to education and information, as well as dignity.

⁵¹¹ Freeman 2011 *The Family in Law* 16. See Chapters 3.2.2.3 and 3.3 for a discussion on the right to culture and tradition and the best interests of the child principle.

⁵¹² Landry 2014 *Encyclopedia on Early Childhood Development* 2; Arora 2018 <https://parenting.firstcry.com/articles/5-environmental-factors-influencing-early-childhood-development/>; Humble and Dixon 2017 *International Journal of Educational Research* 94. See Chapter 3.4 for a discussion on parental responsibility.

⁵¹³ Sudan v Secretary of State for the Home Department (CG) [2007]; Berer 2015 *Reproductive Health Matters* 155. See Chapter 3.4 for a discussion on parental responsibility.

⁵¹⁴ See Chapter 3.4 for a full discussion on parental responsibility and Chapter 3.2.2.1 for a brief discussion on the social norms within the ambit of FGM.

parenthood, but to also leverage education as a measure to foster significant parental opposition to the practice.⁵¹⁵ However, parental opposition – which presupposes a change in attitudes, perceptions and views as a valuable step in the elimination of the practice – as a protective factor cannot be viewed in isolation, as it remains evident that it is not sufficient to prevent all instances of FGM.⁵¹⁶ This opposition must form part of a multidimensional approach that contain additional protective factors, including education and information programmes and legislative measures, among others.⁵¹⁷ While it is evident that, in some regions, parents are being treated as accomplices to an illegal practice, it is not proposed that they be imprisoned, as this would not serve the best interest of the child principle.⁵¹⁸ In order to sufficiently regulate this practice, a multidisciplinary approach that requires legislative measures, effective remedies, care and treatment of victims, and the education of communities that emphasise the negative consequences of the practice, is paramount.⁵¹⁹

Numerous international and regional human rights instruments have imposed various duties on states to identify, regulate, and eliminate harmful cultural

⁵¹⁵ Dalal *et al* 2018 *F1000Research* 3; Wodon 2017 <https://www.globalpartnership.org/blog/ending-female-genital-mutilation-why-education-works>; Varol *et al* 2015 *BMC Public Health* 3; Landry 2014 *Encyclopedia on Early Childhood Development* 2. See Chapters 4.2.1.2 regarding the awareness and knowledge of the legislative framework to ensure changes in societal perceptions and attitudes as a valuable mechanism to create parental opposition against the practice.

⁵¹⁶ Cappa, Thomson and Murray 2020 *PLoS ONE* 10.

⁵¹⁷ Cappa, Thomson and Murray 2020 *PLoS ONE* 10. See Chapter 4 as an illustration of the value of legislative measures.

⁵¹⁸ See Anon 2019 <https://www.bbc.com/news/uk-england-london-47502089>; Anon 2020 <https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/parents-jailed-over-female-genital-mutilation-of-daughter-1.4152765>, where Ireland and England are examples of regions where the treatment of parents as accomplices are evident. See Chapter 3.3 for a discussion on the best interests of the child principle.

⁵¹⁹ Okeke, Anyaechie and Ezenyeaku 2012 *Annals of Medical and Health Sciences Research* 72. See Chapter 4 for a discussion on legislative measures, effective remedies and the care and treatment via psychological measures, as well as Chapter 3.2.3, which illustrates the violent nature and negative consequences of the practice.

practices.⁵²⁰ It remains imperative to create and establish effective legislation, policies and interventions at the international, regional and national level to curb the occurrence of FGM. This is the path towards its eventual elimination.⁵²¹ While there have been some significant developments in terms of legislation that aim to regulate or prohibit FGM and hold perpetrators accountable, it is clear that the custom remains widespread and more than legislative action is required.⁵²²

The effectiveness of the legislative measures was briefly evaluated by referring to the criteria to assess the impact of legislative measures, effective remedies and the overall obligations and requirements of health care measures.⁵²³ First, with reference to the overall prevalence of FGM, it seems legislative measures have not translated into remarkable action. This is mostly due to a lack of recent and reliable data. There is an urgent need for comprehensive intervention efforts and targeted policy interventions that are culturally sensitive as a mechanism to prevent FGM, especially in regions that have a high prevalence of FGM.⁵²⁴ Secondly, in terms of awareness and knowledge about the legislative framework to ensure changes in societal perceptions and attitudes, UNICEF recommends that, in order to ensure that legislative measures are effective, national legislation should provide "long-term, accessible, integrated, comprehensive, child-friendly and gender-based" interventions that aim to create awareness of the violation of children's rights. This can change societal attitudes towards the practice, while enabling girls to claim their

⁵²⁰ A 24(3) of the Convention on the Rights of the Child (1989); A 5 of the Protocol to the African Charter on Peoples' Rights on the Rights of Women in Africa (2003); Tobin 2009 *Human Rights Law Review* 382. See Chapter 4.2.1 for a short list of key international and regional legal instruments and take note that Chapters 1 - 4 makes reference to other relevant international treaties, comments and protocols.

⁵²¹ Johansen *et al* 2018 *BMC Health Services Research* 2; Balfour *et al* 2016 *BMC Health Services Research* 5. See Chapter 4 for a discussion on legislative measures.

⁵²² Wheeler 2004 *The International Journal of Children's Rights* 268. See Chapter 1 and 2, which illustrates that the custom remains widespread, which justifies further legislative action.

⁵²³ See Chapter 4 for a full discussion on these topics.

⁵²⁴ Kandala *et al* 2018 *BMJ Global Health* 6. See Chapter 2.2 for an illustration on a region with a high prevalence of FGM and Chapter 4.2.1.1 which makes reference to the lack of reliable data.

rights.⁵²⁵ Thirdly, legislative measures have had a minimal effect on the medicalisation of FGM.⁵²⁶ The WHO continues to highlight the issue that medical professionals are rarely prosecuted and/or sanctioned for engaging in FGM and it is suggested that legislative frameworks should include preventative measures that promote abandonment and correctional measures for those who continue to perform it.⁵²⁷ While health care professionals are the agents that ensure the continuation of the medicalisation of FGM, it is suggested that states, policy makers and interventions should conduct research to establish how their involvement can be used as a mechanism to achieve the solution, which is to reverse the occurrence of medicalisation.⁵²⁸

The provision of accessible, effective remedies against human rights violations is part of the duty of states to establish effective legislative frameworks to protect victims.⁵²⁹ States should determine the effectiveness of remedies within the realm of FGM, the requirements of the right to these remedies, i.e. the access to justice, and reparation for harm suffered.⁵³⁰ Access to justice for FGM victims requires a

⁵²⁵ Berg and Denison 2012 *Studies in Family Planning* 143; Muthumbi *et al* 2015 *African Journal of Reproductive Health* 33. See Chapter 4.2.1.2 for a discussion on the awareness and knowledge of the legislative framework as a mechanism to ensure changes in societal perceptions and attitudes.

⁵²⁶ Leye *et al* 2019 *Reproductive Health* 2. See Chapters 3.2.3 and 4.2.1.3 for a brief discussion on medicalisation of FGM. See Chapter 4.2.1.3 and 3.2.3 for a discussion on the definition of medicalisation of FGM and its prevalence.

⁵²⁷ Mathers and Rymer 2015 *British Journal of General Practice* 282; Laville 2015 <https://www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena>.

⁵²⁸ Kimani and Shell-Duncan 2018 *Current Sexual Health Reports* 26; Leye *et al* 2019 *Reproductive Health* 2.

⁵²⁹ Para 2(3) of the Human Rights Committee, General Comment on Remedies for Violations of Covenant by States Parties (2004); General Assembly Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2008). See Chapter 4.2.2 for a discussion on effective remedies.

⁵³⁰ Para 11 of the Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); Para 14(e) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015). See Chapter 4.2.2 for a discussion

justice system with a gender-sensitive approach that is secure and affordable, while providing proper assistance to those who are particularly vulnerable.⁵³¹ The fact that these girls' justice is hindered because of frequent subjection to marginalisation has been highlighted, so it is recommended that states oppose and eliminate these barriers in order to guarantee girls' unhindered access to legal systems.⁵³²

Within the scope of FGM, the discussion on reparation included two distinct principles, i.e. restitution and compensation. In this case, restitution is limited, because while there are options to consider – such as deinfibulation and reconstructive surgery – these options remain inaccessible to women all over the world and, unfortunately, clitoral function can only be repaired to a certain extent.⁵³³ In this regard, it is suggested that states create funds to guarantee women's access to these options, while also investing in further research on more reliable options.⁵³⁴ Compensation is suggested as a valuable alternative, as it may offer women access to the necessary medical support to treat the health consequences of FGM.⁵³⁵ UNICEF recommends that legislation should entitle victims to compensation from perpetrators only as a complementary measure, but not as a substitution of the

on these requirements. See Chapters 4.2.2.1 and 4.2.2.2 for a discussion on access to justice and reparation within the scope of effective remedies.

⁵³¹ A 2 and 15 of the Convention on the Elimination of Discrimination Against Women (1979); Paras 11 and 13 of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015); Smith *et al* 2020 *Journal of Community Health* 1256.

⁵³² Nyenti 2013 *De Jure Law Journal* 904; Para 15(a) and (b) of the CEDAW General Recommendation No. 33: Women's Access to Justice (2015). See Chapter 3.2.2.1 for an illustration on the marginalisation of girls.

⁵³³ Akinbiyi, Langston and Percec 2018 *Plastic and Reconstructive Surgery Global Open* 11; Creighton and Hodes 2015 *Archives of Disease in Childhood* 270. See Chapter 4.2.2.2 for a discussion on reparation.

⁵³⁴ Larsson *et al* 2018 *Journal of Obstetrics and Gynaecology* 1005; Creighton and Hodes 2015 *Archives of Disease in Childhood* 270; Abdulcadir, Rodriguez and Say 2015 *International Journal of Gynaecology and Obstetrics* 96.

⁵³⁵ Anon 2020 <https://www.ibbclaims.co.uk/site/services/child-abuse-and-trafficking/compensation-for-victims-of-fgm/>; Anon 2020 <https://www.criminal-injuries.co.uk/female-genital-mutilation-fgm-compensation-claims/>; Yusuf and Fessha 2013 *African Human Rights Law Journal* 373; Johansen *et al* 2013 *Obstetrics and Gynecology International* 7; Edouard, Olatunbosun and Edouard 2013 *Pan African Urological Surgeons' Association* 151.

latter's imprisonment.⁵³⁶ Also, in instances where compensation can not possibly be delivered by the convicted, the state must attempt to provide financial compensation to the victims, their dependents and families.⁵³⁷

The realisation of the highest attainable standard of health serves as a mechanism to alleviate the health consequences of FGM, which obliges states to comply with psychological measures.⁵³⁸ Accordingly, the CEDAW states that girls' right to sexual health services, education and information should be ensured without discrimination or prejudice, and sexual health counselling promotes the realisation of this right for girls' living with FGM.⁵³⁹ Since socio-economic factors are generally more detrimental for girls, the CEDAW recommends that states should ensure a "gender perspective" at the core of all legislative programmes and policies that affect girls' health and "gender-sensitive training". This would enable healthcare professionals to detect and manage these physical and psychological health consequences.⁵⁴⁰ Furthermore, Kmietowicz recommends that given the general increase in immigration to countries where FGM is not traditionally evident, further research must be conducted to

⁵³⁶ Yusuf and Fessha 2013 *African Human Rights Law Journal* 379; Krása 2010 *Medicine, Health Care and Philosophy* 273. Please note that imprisonment and other sanctions does not fall within the ambit of the discussion, as the focus is on the victims and not the perpetrators.

⁵³⁷ Bachrach 2000 Spring 9; Miers 2014 *International Review of Victimology* 145.

⁵³⁸ General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013). See also Chapter 3.2.2.2 for a full discussion on the right to the highest attainable standard of health as well as Chapter 4.2.3 regarding the obligations and requirements of psychological measures.

⁵³⁹ A 12 of the Convention on the Elimination of Discrimination Against Women (1979); Para 17 of CEDAW General Recommendation No. 24: Article 12 of the Convention (1999). See Chapter 3.2.2.1 for a discussion on gender equality as well as Chapter 3.2.2.2 on the right to the highest attainable standard of health.

⁵⁴⁰ Para 15(b) of the CEDAW General Recommendation No. 24: Article 12 of the Convention (1999); Hands *et al* 2016 *Journal of Women's Health Issues Care* 1. See Chapter 3.2.2.1.2 for a discussion on gender and Chapter 4.2.3 with the emphasis on the adequate training of medical professionals as a mechanism to detect and manage health consequences, as well as Chapter 3.2.3 on what these health consequences might entail.

determine the educational needs and knowledge gaps with regard to FGM among health professionals.⁵⁴¹

Finally, establishing whether FGM, as a cultural practice, can be acceptable given the international requirement to promote and realise the best interest of the child principle, requires a balance between the subjective view of the cultural health stance and an objective view of the human rights standpoint. From a health perspective, cultural perceptions and the recognised value of children's psychological and physical well health differ substantially from the general measure of wellbeing.⁵⁴² Culture and religion are not just mere belief or habits, but also economic, social, moral, and ethnic values and practices.⁵⁴³ From this point of view, perpetrators of FGM frequently justify the practice based on the belief that it holds certain health benefits and increased sexual pleasure for girls.⁵⁴⁴ Additionally, in terms of mental health, the social isolation that frequently accompanies uncircumcised girls are forwarded as a valid reason for the continuation of the custom.⁵⁴⁵

However, from a human rights perspective, FGM, as a current and pressing issue, remains an invasive practice that is performed on healthy tissue for no medical reason and causes severe health consequences.⁵⁴⁶ With the requirements of the best

⁵⁴¹ Kmietowicz 2015 *The BMJ* 1. See Chapter 3.2.2.3 for a discussion on educational needs within the scope of FGM and Chapter 4.2.3 with the emphasis on the adequate training of medical professionals as a mechanism to detect and manage health consequences.

⁵⁴² Napier *et al* 2014 *The Lancet* 1607. See Chapters 3.2.2.2 and 3.2.2.3 for a discussion on the right to the highest attainable standard of health and the right to culture and tradition to gain insight.

⁵⁴³ Napier *et al* 2014 *The Lancet* 1607. See Chapter 3.2.2.3 for a discussion on the right to culture and tradition, as well as Chapter 2 for an illustration of FGM and traditions within certain contexts.

⁵⁴⁴ Wahedi 2019 *Quinnipiac Health Law Journal* 209. See Chapter 3.2.4 for a discussion on FGM perpetrators and Chapters 2.2.2, 2.3.2 and 2.4.2 for a discussion on the beliefs of health benefits and increased sexual pleasure.

⁵⁴⁵ Koukoui, Hassan and Guzder 2017 *Reproductive Health* 8; See Chapters 2.2.2 and 3.2.2.1 for a discussion on social acceptance and isolation associated with FGM.

⁵⁴⁶ McCauley and Van den Broek 2018 *International Health* 4.

interests of the child principle in mind, i.e. to ensure the holistic development and "full and effective enjoyment" and the recognition of all the rights of the child without any distinction of any kind, FGM constitutes a violation of a spectrum of child rights and cannot be deemed as promoting and realising the said principle.⁵⁴⁷ The regulation and elimination of FGM can only be achieved with a strong, coordinated, and collective approach that is implemented at an international, national, regional, and local level in an attempt fulfil the obligation to promote this principle.⁵⁴⁸

⁵⁴⁷ Zermatten 2010 *International Journal of Children's Rights* 483; Preamble and A 3 of the Convention on the Rights of the Child (1989); A 2 of the Declaration on the Rights of the Child (1959); A 5(b) and 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979). See Chapter 3.3 for a full discussion on the best interests of the child principle.

⁵⁴⁸ Rymer and O'Flynn 2013 *British Journal of General Practice* 516; McCauley and Van den Broek 2018 *International Health* 4.

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