FGM/C

Arlington Asylum Office
1 of 46
May 15, 2015

Arlington Asylum Office
May 15, 2015
2:00-3:30pm

Learning Objectives

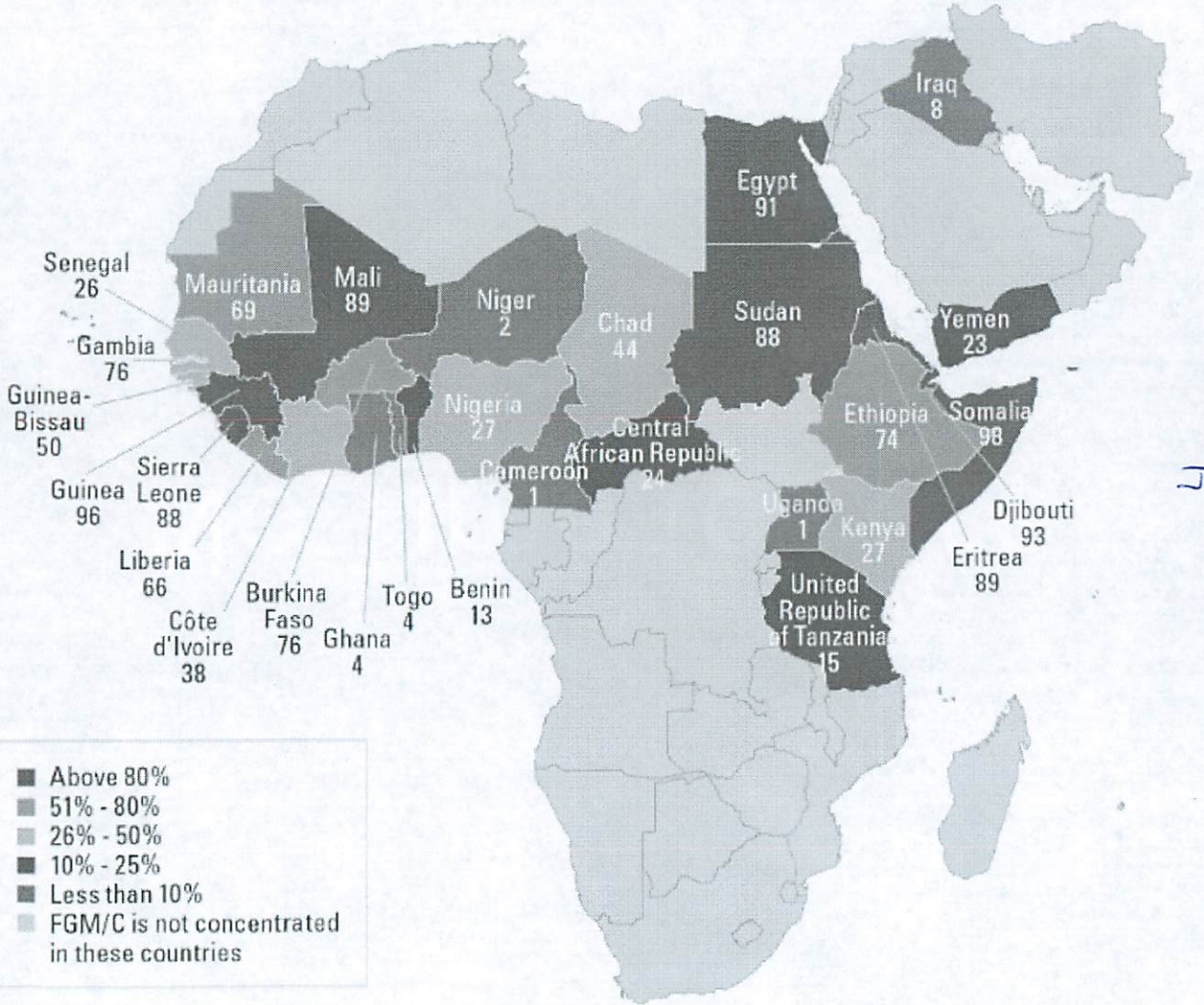
Participants will…

- acquire a general understanding of FGM and associated statistics
- practice varying ways to elicit testimony during the interview
- understand the principle that FGM *could* be sufficiently serious to rise to the level of persecution
- gain knowledge about writing a legally sufficient and properly structured assessment
- understand the principle that *testimony alone* is sufficient to adjudicate all asylum claims to include FGM
- understand how to analyze whether an applicant can receive a discretionary grant of asylum based on past persecution alone because of severity of harm or other serious harm.

No Time to Lose
Video Clip

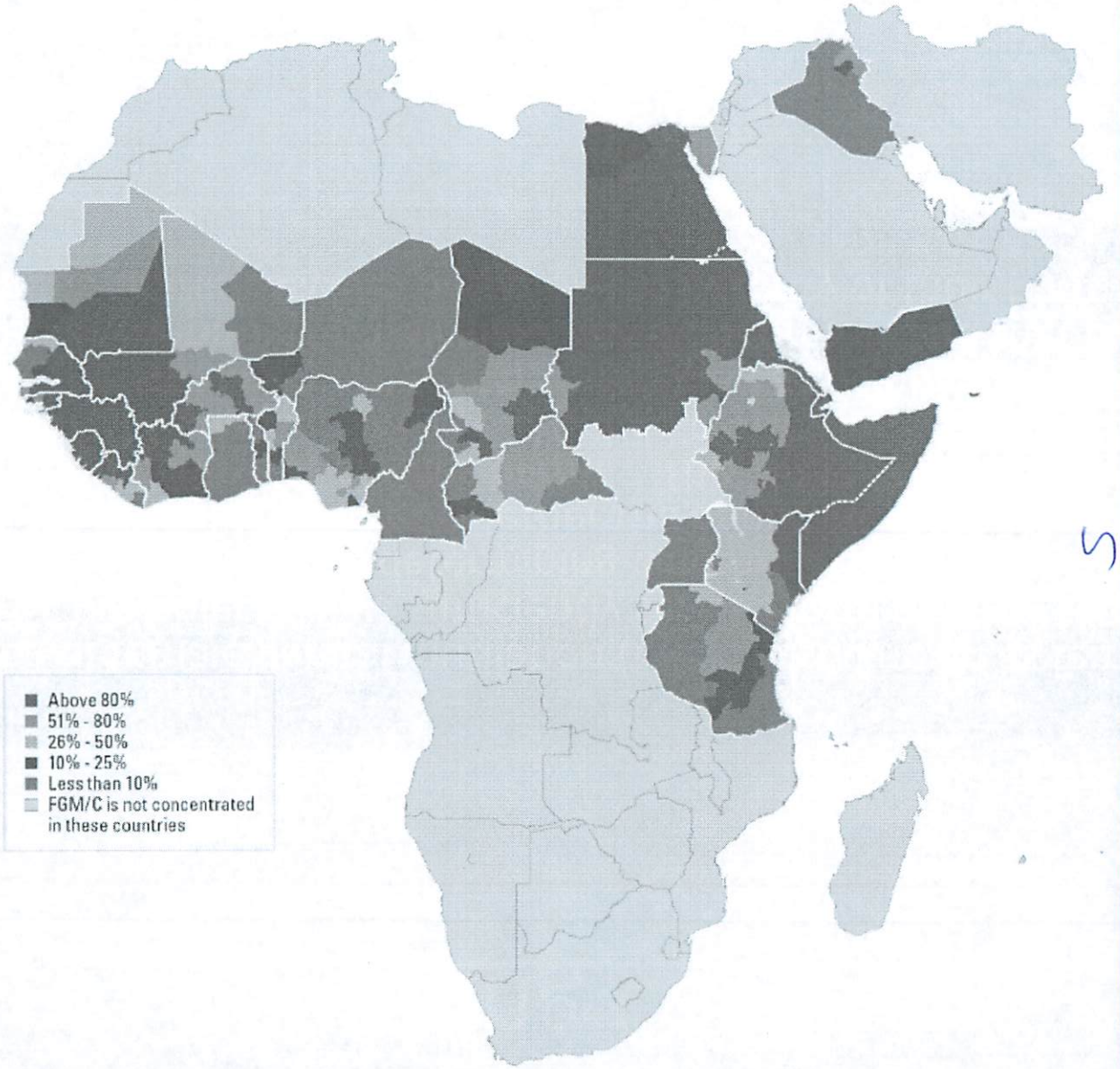
Map 4.1 FGM/C is concentrated in a swath of countries from the Atlantic Coast to the Horn of Africa

Percentage of girls and women aged 15 to 49 years who have undergone FGM/C, by country



Map 4.7 Similar prevalence levels for FGM/C extend across national boundaries

Percentage of girls and women aged 15 to 49 years who have undergone FGM/C, by regions within countries



Grounding Case Law

Matter of Kasinga

The practice of female genital mutilation (FGM), also known as female genital cutting (FGC), is objectively a sufficiently serious form of harm to constitute persecution. [1] Generally, in determining whether FGM is persecution to the applicant, you should consider whether the applicant experienced or would experience the procedure as serious harm. [2] The BIA in *Matter of S-A-K- & H-A-H-* recognized that FGM imposed on a young child constituted past persecution. [3] The BIA held that she and her mother had suffered an atrocious form of persecution that resulted in continuing physical pain and discomfort and that they merited humanitarian asylum based on the severity of their harm. [4]

[1] *See Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)
[1] U.S. Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. The proposed rule did not become a regulation but represents the agency's view on the topic.
[1] *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008)
[1] . at. 465-66.
See Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996)
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Matter of S-A-K- & H-A-H-, 24 I&N Dec. 464, 465 (BIA 2008)
. at. 465-66.

Matter of Chen (LP p. 25)

Severity of Past Persecution

When evaluating when to exercise discretion to grant asylum based on past persecution alone, the factors you should consider include:

- duration of persecution
- intensity of persecution
- age at the time of persecution
- persecution of family members
- conditions under which persecution was inflicted
- whether it would be unduly frightening or painful for the applicant to return to the country of persecution
- whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted
- any other relevant factor

Other Serious Harm

By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution.[5]

- In considering whether there is a reasonable possibility of other serious harm, you should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer.[6] Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."
- Two federal courts that have considered this regulation have noted that the following circumstances might qualify as "other serious harm:"
  - ✓ harm resulting from the unavailability of necessary medical care[7]
  - ✓ debilitation and homelessness due to unavailability of specific medications[8]
- Judge could consider humanitarian factors independent of the applicant's past persecution, such as age, health, or family ties, when exercising discretion to grant asylum.

[1] Matter of L-S-, 25 I. & N. Dec. 705 (BIA 2012).
[1] Ilchuk v. Att'y Gen. of U.S., 642 F.3d 155, 162 (3d Cir. 2011).
[1] Khozhaynik v. Mukasey, 540 F.3d 555, 577 (7th Cir. 2008).
[1] Matter of [illegible], 21 I&N Dec. 337, 347 (BIA 1996).
[5] 65 FR 76121 at 76127; Matter of L-S-, 25 I&N Dec. 705, 714 (BIA 2012).
[6] Matter of L-S-, 25 I. & N. Dec. 705 (BIA 2012).
[7] Ilchuk v. Att'y Gen. of U.S., 642 F.3d 155, 162 (3d Cir. 2011).
[8] Khozhaynik v. Mukasey, 540 F.3d 555, 577 (7th Cir. 2008).
[8] Matter of [illegible], 21 I&N Dec. 337, 347 (BIA 1996).

Common long term medical consequences of FGM:

Common long term medical consequences of FGM:

- Infertility due to chronic pelvic infections and pelvic inflammatory disease result from the progression of acute infections and/or poor wound healing
- Recurrent infections, including: vaginal candidiasis (fungal infection in the vagina), trichomoniasis (parasitic disease in the vagina) and bacterial vaginosis (bacterial disease in the vagina).
- Increased risk of transmission of HIV because the vaginal opening is reduced in size, especially with Type III FGM, increased bleeding, inflammation, or abrasions due to sexual intercourse facilitate the transmission of HIV.
- Significant local and pelvic pain and severe dysmenorrhea (painful menstrual cycles) due to obstructed vaginal outflow of menstrual flu*Id. Id.*
- Accumulation of urine and menstrual blood that facilitates the entry of bacteria into the urinary tract, urethral strictures, meatal obstruction, chronic UTI's, meatitis or inflammation of the opening of the urethra, urinary crystals, and periurethral tears,
- Formation of epidermal inclusion cysts, which may progressively expand over time.
- Foreign bodies and neuromas or tumors in the cut nerves can also form under the scar leading to severe point tenderness.
- Scarring which causes pain and medical complications, such as fibrosis, keloids (hardened tissue), partial fusion, complete fusion, hematocolpos (accumulation of menstrual blood in the vagina), inclusion/sebaceous cysts (fluid filled sacs), and vulvar abscesses (open wounds), which can lead to debilitating keloids that interfere with daily activity, such as walking and dressing.
- Formation of partial or complete labial fusion that obstruct the vaginal opening and become painful cysts or abscesses requiring complete surgical excision and "deinfibulation" (surgical re-opening of the hardened scar tissues).
- Sexual dysfunction b/c of keloid scar formation and damage to the urethra, resulting in urinary incontinence, painful sexual intercourse, and hypersensitivity of the genital area, all of which can be physical causes of sexual dysfunction

Heighted risks to mothers and their children: greater risk of life-threatening complications.

- Increased risk of mother dying in childbirth are substantially increased for women who have been subjected to FGM.
- Increased risk of birth trauma to the infant, need for infant resuscitation, neonatal injury or death, and perinatal death due to scar tissue surrounding the perineum • Increased number of miscarriages due to infections and urinary fistula formations (tears or abnormal formations in urinary tract) which can cause urine to seep into the female organs.
- Increased risk of HIV transmission to infants
- Increased need for blood transfusion
- Increased need for cesarean section, postpartum hemorrhage, episiotomy (cutting between vagina and anus).

Documented psychological trauma frequently accompanying genital mutilation:

- Feelings of incompleteness, anxiety, depression, loss of trust, chronic irritability and fear of intimacy
- PTSD and other psychiatric syndromes than uncut women
- Anxiety, depression, and fear of sexual intercourse
- Negative self image and sexuality from disfigurement and mutilation
- Increased potential for vaginisumus, a physiological response following genital or sexual trauma causing involuntarily flexing of vaginal muscles such that vaginal penetration cannot occur.
- Suicide from inability to consummate marriage due to the pain of intercourse.
- Repressed memories of the traumatic cutting often surface
- Sexual dysfunction due to feelings of anger, helplessness, and fear.

Women are a greater risk of the following long term medical and psychological problems:

- Infertility and miscarriages
- Recurrent fungal, parasitic, and bacterial infections in the vagina
- Risk of transmission of HIV
- Significant local and pelvic pain and painful menstrual cycles
- Entry of bacteria into the urinary tract, urethral strictures, meatal obstructions
- Formation of epidermal inclusion cysts
- Foreign bodies and neuromas or tumors in the cut nerves
- Scarring which causes pain and medical complications
- Partial or complete labial fusion.
- Sexual dysfunction
- Cesarean section, postpartum hemorrhage, and episiotomy,
- Need for resuscitation of the infant, and
- Stillbirth or early neo-natal death
- Mother dying in childbirth
- Prolonged second stage of labor
- Birth trauma to the infant, neonatal injury, or infant death
- Feelings of incompleteness, anxiety, depression, loss of trust, chronic irritability and fear of intimacy
- Significantly higher prevalence of PTSD and other psychiatric syndromes
- anxiety, depression, fear of sexual intercourse, and
- Deleterious effect on a woman's self image and sexuality.
- Increased risk of suicide
- Repressed memories of the traumatic cutting

Eliciting Testimony

Rebuttal of Presumption of WFF

- Ensure the rebuttal encompasses all possible harm within that protected ground

Chen Analysis/OSH

FGM Training Agenda

Learning Objectives: Participants will...

- acquire a general understanding of FGM and associated statistics
- practice varying ways to elicit testimony during the interview
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- understand how to analyze whether an applicant can receive a discretionary grant of asylum based on past persecution alone because of the severity of harm or other serious harm.

General Overview (15 minutes): Introduction

- Two-minute video about FGM (UNICEF)
- World overview objective facts - countries, states, types, reasons
- Case law grounding FGM in the asylum context
- Myths and assumptions about FGM

Credibility (15 minutes)

- Role play (1) –FGM under 18, applicant can articulate past harm and WFF
- Role play (2) – FGM over 18, applicant cannot remember FGM
- Discussion

Rebutting WFF (15 minutes)

- Review of writing a sufficient rebuttal to WFF (i.e., ensuring the rebuttal encompasses all possible harm within that protected ground)
- Provide sample assessment

Chen Analysis/Other Serious Harm (20 minutes)

- Writing a Chen analysis
- Five-minute video (UNICEF)
- Considerations for OSH
- Overall structure of an assessment (provide sample assessment)

Miscellaneous & Q&A (25 minutes)

- Medical documentation

Outstanding questions:

1. Where does the medical documentation guidance come from?
2. It's the applicant's burden to articulate *how* they experienced the past harm to rise to the level of persecution and ours to elicit – is this correct? Where does this guidance come from?
3. Can we share trends found in the review of FGM files at ZAR?
4. How to handle app's who have committed FGM?

Approach to FGM

Guidance for AO:

BIA has found that FGM/FGC is "objectively a sufficiently serious form of harm to constitute persecution"[1]

FGM is widely recognized as a serious human rights abuse, and is clearly objectively serious harm.[2]

Note on credibility issues: If the applicant has difficulty testifying about FGM, but has documentary evidence stating that she was subject to FGM, and country conditions state that the majority of women from the applicant's country and demographic have experienced FGM, then it is not an intellectually honest conclusion to state that the applicant was not credible about having gone through FGM. It is more likely that the difficulty testifying is due to trauma and/or the AO did not build adequate rapport and/or other factors.

"The Attorney General's decision in *Matter of A-T-* makes it clear that the fact that a woman has been subjected to FGM in the past does not preclude a valid claim that she retains a well-founded fear of future persecution if it is established that she would be subject to additional FGM (for example, it may be the practice of a woman's tribe to subject her to a second infibulation after she has given birth; or it may be that the first time she was subject to FGM the procedure was not performed to the extent required by her culture).[3] The possibility of re-infibulation should be considered in determining whether there has been a fundamental change in circumstances."[4]

If the applicant was too young at the time of the FGM to form a view of whether she experienced the FGM as harm or not, the applicant's testimony about her perception of the FGM as an adult can be evidence as to the seriousness of the harm.[5]

> Granting Asylum in the Absence of WFF arising out of the severity of past persecution: When evaluating when to exercise discretion to grant asylum based on past persecution alone, the factors you should consider include:

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[1] Persecution Lesson Plan p.25

[2] Nexus – Particular Social Group (PSG) Lesson Plan p. 26

[3] United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women's Issues, *Female Genital Mutilation* (FGM), p.6 (Washington, DC: Feb. 1, 2000, updated June 27, 2001).

[4] Well Founded Fear Lesson Plan p. 44

[5] *Supra note 2*

- duration of persecution
- intensity of persecution
- age at the time of persecution
- persecution of family members
- conditions under which persecution was inflicted
- whether it would be unduly frightening or painful for the applicant to return to the country of persecution
- whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted
- any other relevant factor[6]

Other Serious Harm. Even where the past persecution suffered by an applicant does not rise to the higher level of severe persecution, a grant in the absence of a well-founded fear may be justified where there is a reasonable possibility that an applicant who suffered past persecution may face other serious harm upon return.[7]

Facts to elicit in the interview:

Did the applicant experience the procedure as harm?

How serious was it:

Applicant's age at the time? (Whether the FGM was voluntary or involuntary is relevant only if the applicant is an *adult*)

How long was the applicant in pain?

Does the applicant mention ongoing pain such as infections, pain, discomfort, incontinence, or sexual dysfunction?

Any other ways that FGM affected the applicant's life such as psychological, emotional harm?

Does the applicant fear repetition of FGM in the future?

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[6] Persecution Lesson Plan p.55

[7] 8 C.F.R. 208.13(b)(1)(iii)(B)

If the applicant does not fear FGM in the future, does she fear any other harm on account of that same protected characteristic – e.g. any other harm because she has membership in a particular social group of Burkinabe women who have not yet undergone FGM as practiced in their culture.

Does she fear harm or have past harm on account of any other protected characteristics?

What does the applicant fear that is not on account of any protected characteristic? (Your questions should explore lack of medical treatment, economic issues, and the mistreatment of women or gender-based discrimination in a patriarchal and/or patrilineal society.)

Explore in the interview whether the applicant 's unwillingness to return is related to the FGM that happened in the past. Eliciting those facts will be necessary for your analyses if WFF is rebutted. How would the applicant be reminded of the FGM? Has the applicant's feelings about the FGM changed since leaving her country such that she is more unwilling to return?

Decision Writing:

In the analysis on past persecution, consideration must be given to the fact that the BIA has found all forms of FGM/FGC to be objectively serious enough to rise to the level of persecution.

In the Well-Founded Fear section, if the applicant testified that she does not fear a repetition of the FGM, you must also include the facts elicited about whether the applicant fears any other harm on account of the same protected characteristic. If the applicant has no fear on account of the same protected characteristic, then WFF has been rebutted and you must address whether the applicant is eligible for a grant of asylum in the absence of WFF.

In the humanitarian section, analyze whether the applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution.[8] Here you would use the facts that you elicited regarding whether her unwillingness to return is related to the FGM.

Other serious harm. Did the applicant indicate a fear of anything else that is not on account of a protected characteristic? All of those facts must be analyzed.

[8] 8 C.F.R. § 208.13(b)(1)(iii)(A)

Typical complications of all types of FGM related to severity of harm:[9]

Severe pain: Cutting the nerve ends and sensitive genital tissue causes extreme pain. Proper anesthesia is rarely used and, when used, not always effective. The healing period is also painful. Type III female genital mutilation is a more extensive procedure of longer duration (15–20 minutes), hence the intensity and duration of pain are more extensive. The healing period is extended and intensified accordingly.

Shock can be caused by pain and/or hemorrhage.

Excessive bleeding (hemorrhage) and septic shock have been documented.

Difficulty in passing urine, and also passing of feces, can occur due to swelling, edema and pain.

Infections may spread after the use of contaminated instruments (e.g. use of same instruments in multiple genital mutilation operations), and during the healing period.

Psychological consequences: The pain, shock and the use of physical force by those performing the procedure are mentioned as reasons why many women describe female genital mutilation as a traumatic event.

Type 11 and 111:

Unintended labia fusion: Several studies have found that, in some cases, what was intended as a Type II female genital mutilation may, due to labia adhesion, result in a Type III female genital mutilation.

Repeated female genital mutilation appears to be quite frequent in Type III female genital mutilation, usually due to unsuccessful healing.

Typical ongoing consequences: (All types of FGM)

Pain: Chronic pain can be due to trapped or unprotected nerve endings.

Infections: Dermic cysts, abscesses and genital ulcers can develop.

Chronic pelvic infections can cause chronic back and pelvic pain.

Urinary tract infections can ascend to the kidneys, potentially resulting in renal failure, septicemia and death.

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[9] World Health Organization, *Sexual and Reproductive Health*, available at: http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/ [accessed on 25 Feb 2015]

An increased risk for repeated urinary tract infections is well documented in both girls and adult women who have undergone FGM.

Keloid: Keloid scar tissue typically causes ongoing pain and restricts movement

Reproductive tract infections and sexually transmitted infections: An increased frequency of certain genital infections, including bacterial vaginosis has been documented(18). Some studies have documented an increased risk for genital herpes, but no association has been found with other sexually transmitted infections(19).

Quality of sexual life: Removal of, or damage to highly sensitive genital tissue, especially the clitoris, may affect sexual sensitivity and lead to sexual problems, such as decreased sexual pleasure and pain during sex. Scar formation, pain and traumatic memories associated with the procedure can also lead to such problems.

Birth complications: The incidences of caesarean section and postpartum hemorrhage are substantially increased, in addition to increased tearing and recourse to episiotomies. The risks increase with the severity of the female genital mutilation. Obstetric fistula is a complication of prolonged and obstructed labor, and hence may be a secondary result of birth complications caused by female genital mutilation. Studies investigating a possible association between female genital mutilation and obstetric fistulas are under way.

Danger to the newborn: Higher death rates and reduced Apgar scores have been found, the severity increasing with the severity of female genital mutilation.

Psychological consequences: Some studies have shown an increased likelihood of fear of sexual intercourse, post-traumatic stress disorder, anxiety, depression and memory loss. The cultural significance of the practice might not protect against psychological complications.

Human immunodeficiency virus (HIV): An increased risk for bleeding during intercourse, which is often the case when defibulation is necessary (Type III), may increase the risk for HIV transmission. The increased prevalence of herpes in women subjected to female genital mutilation may also increase the risk for HIV infection, as genital herpes is a risk factor in the transmission of HIV.

Type 111 ongoing harm

Later surgery: Infibulations must be opened (defibulation) later in life to enable penetration during sexual intercourse and for childbirth. In some countries it is usual to follow this by re-closure (reinfibulation), and hence the need for repeated defibulation later. Re-closure is also reportedly done on other occasions.

Urinary and menstrual problems: Slow and painful menstruation and urination can result from the near-complete sealing off of the vagina and urethra. may need surgical intervention. Dribbling of urine is common in infibulated women, probably due to both difficulties in emptying the bladder and stagnation of urine under the hood of scar tissue.

Painful sexual intercourse: As the infibulation must be opened up either surgically or through penetrative sex, sexual intercourse is frequently painful during the first few weeks after sexual initiation(30). The male partner can also experience pain and complications.

Infertility: The association between female genital mutilation and infertility is due mainly to cutting of the labia majora, as evidence suggests that the more tissue that is removed, the higher the risk for infection.

FGC Around the World

e and definitions compiled and authored by H. L. DIETRICH

k here to View definitions

COUNTRY	PREVALENCE (%)	TYPE PERFORMED
Benin	16.8	II
Burkina Faso	76.6	II – Performed throughout the country in all but a few prov
Cameroon	1	I, II
Central African Republic	35.9	I, II
Chad	44.9	II – Widely practiced in all parts of Chad. III – Confined to areas bordering Sudan in the eastern part country.
Cote d'Ivoire (Ivory Coast)	44.5	II
Djibouti	90-98	II – Performed on girls of Yemeni origin. III – Most common among the Issa and Afar.
DRC (Congo)	Unknown	II
Egypt	97.3%	I, II, III
Eritrea	88.7	I, II, III

Ethiopia	79.9	II – Most commonly practiced form. The Gurages, some Tigrayans, Oromos and the Shankilas practice this form. III – Practiced in the eastern Muslim regions bordering Sudan and Somalia. IV – Referred to as "Mariam Girz" in Ethiopia, it is practiced mainly in Gojam in the Amhara region.
Gambia	60-90	I – The Sarahulis perform this on girls one week after birth. The Bambaras perform the procedure on girls between 10-15 years of age. II – Nearly all Mandinkas, Jolas and Hausas practice this form on girls 10-15 years old. III – The Fulas perform a procedure similar to Type III that is described as "vaginal sealing" on girls from one week old to 18 years old. IV – The Fulas perform this type on girls from one week old to 18 years old.
Ghana	5.4	I, II, III
Guinea	98.6	I, II, III, IV
Indonesia	100	I, IV
Kenya	32.2	I and II most common. III – found in the far eastern areas bordering Somalia.
Liberia	50	II
Mali	91.6	I, II, III Mauritania 71.5 I, II (Type III practiced in southern areas of country)

Niger	4.5	II
Nigeria	19	I, II, III, IV (Type I and II more prominent in the south; Type III more prominent in north)
Senegal	28.2	II, III (Type II is most common)
Sierra Leone	80-90	II
Somalia	90-98	I – practiced mainly in the coastal towns of Mogadishu, Brava, Merca, and Kismayu. III – Approximately 80% of the circumcisions are this type.
Sudan	90	I, II, III (Type III is most common)
Tanzania	17.7	II, III
Togo	12	II
Uganda	5	No information available.
Yemen	22.6	II, III

Resources:

Amnesty International
Demographic Health Surveys (DHS)
UNICEF
USAID
US Dept. of State
World Health Organization

Type I – *Circumcision* is the excision (removal) of the prepuce (clitoral hood) with or without removal of a part of the clitoris (a.k.a. sunna circumcision).

Type II – *Excision or clitoridectomy* is the excision of the clitoris together with part or all of the labia minora (the inner vaginal lips).

Type III – *Infibulation* is the excision of part or all of the external genitalia (clitoris, labia minora and labia majora) and stitching or narrowing of the vaginal opening, leaving a very small opening, about the size of a matchstick, to allow for the flow of urine and menstrual blood. The girl or woman's legs are generally bound together from the hip to the ankle so she remains immobile for approximately 40 days to allow for the formation of scar tissue (referred to as Sudanese circumcision in Egypt; referred to as Pharaonic circumcision in Somalia).

Type IV – *Unclassified* includes the pricking, piercing or incision of the clitoris and/or labia; also includes symbolic rituals. The application or insertion of corrosive substances into the vagina is also considered Type IV.

Defibulation or deinfibulation – Cutting open the scar tissue that has formed around the vaginal opening to allow penetration by her husband or for the birth of a child.

Refibulation or reinfibulation or recircumcision – The sewing up of a circumcised woman's vaginal opening after childbirth or periodically during her life when she feels as though her opening has gotten too big or loose.

Alternative rituals – An alternative to FGM in which the traditional ceremony takes place without the actual cutting. In Kenya, girls go through a week-long program designed as a coming-of-age workshop. This ritual is called "Ntanira Na Mugambo" or "Circumcision Through Words."

Introcision – A form of FGM/C that is practiced by the Pitta-Patta aborigines of Australia where the vaginal orifice is enlarged by tearing it downward with three fingers bound with an opossum string. The procedure is performed by an elderly man when the girl reaches puberty. In other districts, the perineum is split with a stone knife. Compulsory sexual intercourse with a number of young men usually follows the introcision. Mexico, Brazil, and Peru reportedly practice this form of FGM/C. In Peru, among a division of Pano Indians, an elderly woman uses a bamboo knife to cut around the hymen from the vaginal entrance and severs the hymen from the labia, at the same time exposing the clitoris. Medicinal herbs are applied, followed by the insertion of a phallic clay object into the vagina.

Resources:

Ipu.org

UNHCR
The UN
Refugee Agency

GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION

United Nations High Commissioner for Refugees (UNHCR)
Protection Policy and Legal Advice Section
Division of International Protection Services
Geneva

May 2009

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Note

UNHCR Guidance Notes on thematic legal and/or procedural issues are issued by the Office of the United Nations High Commissioner for Refugees (UNHCR) pursuant to its mandate as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees,* and to the responsibilities as defined in Article 35 of the 1951 *Convention relating to the Status of Refugees* and in Article II of its 1967 *Protocol*. These Notes are prepared in response to emerging legal or operational refugee issues, and are intended to provide guidance on the interpretation or application of the applicable law and legal standards.

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

- Guidelines on International Protection No. 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, (HCR/GIP/02/01);
- Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, (HCR/GIP/02/02);
- Guidelines on International Protection No. 3: Cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees ('Ceased circumstances' clauses), 10 February 2003, (HCR/GIP/03/03); and
- Guidelines on International Protection No. 4: Internal flight or relocation alternative within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 23 July 2003, (HCR/GIP/03/04).

Guidance Notes are issued as public domain documents, and are available on UNHCR's Refworld website (http://www.refworld.org). Any questions concerning this or any other Guidance Note should be addressed to the Protection Policy and Legal Advice Section (PPLAS) of the Division of International Protection Services, UNHCR, Geneva.

Table of Contents

I. INTRODUCTION

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

II. FORMS AND CONSEQUENCES OF FEMALE GENITAL MUTILATION

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

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

(i) partial or total removal of the clitoris and/or the prepuce (clitoridectomy);
(ii) partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision);
(iii) narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation); and
(iv) all other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization.

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

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

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

[2] Ibid.

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

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

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

III. SUBSTANTIVE ANALYSIS

A. WELL-FOUNDED FEAR OF PERSECUTION

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

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

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

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

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

8 UNHCR, *Guidelines on International Protection No. 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, (HCR/GIP/02/01), available at http://www.unhcr.org/refworld/docid/3d36f1c64.html, para. 9.

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

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

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

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

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

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

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

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

14 ICCPR, Article 6; CRC, Article 6.

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

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

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

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

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

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

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

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

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

(i) Child-specific forms of persecution

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

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

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

23 16 October 1997.

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

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

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

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

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

29 See footnote 18 above.

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

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

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

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

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

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

(ii) A continuing form of harm

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

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

[34] Ibid., para. 218.

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

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

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

[38] Ibid., para. 45.

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

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

(iii) Agents of persecution

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

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

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

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

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

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

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

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

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

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

(iv) Availability of State protection

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

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

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

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

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

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

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

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

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

[53] DEVAW, op.cit., Article 4.

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

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

B. CONVENTION GROUNDS

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

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

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

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

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

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

[59] 1951 Convention, Article 1A(2).

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

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

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

23. UNHCR defines a **particular social group** as "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights".[63] Applicants in FGM-related claims will frequently meet either of these tests. Their gender and age are both innate and cannot be changed at a given moment in time. Moreover, their plea not to undergo physical alteration can be considered so integral to their human dignity that it becomes fundamental to the exercise of their human rights.

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

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

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

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[63] UNHCR, *Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, available at: http://www.unhcr.org/refworld/docid/3d36f23f4.html, para. 11.

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

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

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

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

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

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

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

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

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

C. INTERNAL FLIGHT OR RELOCATION ALTERNATIVE

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

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

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

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

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

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

[74] UNHCR, *Guidelines on International Protection No. 4: Internal flight or relocation alternative within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 2003, available at http://www.unhcr.org/refworld/docid/3f2791a44.html.

[75] Ibid., para. 15.

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

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

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

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

IV. PROCEDURAL ISSUES

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

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

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

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

V. CONCLUSION

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

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

FGM applicant profiles:

- Considerations

WFF Rebutted profiles:

Underwent FGM first and only time as part of cultural practice when she was under 18. Does not fear harm in the future on account of the same protected ground.

- Elicit harm at the instance of infliction. Physical/emotional/psychological
- Elicit recovery facts. Physical/emotional/psychological
- How harm manifested later in life

Underwent FGM first and only time as part of cultural practice after the age of 18. Does not fear harm in the future on account of the same protected ground.

- The applicant's consent is relevant in these cases because of the applicant's age.
- Elicit harm at the instance of infliction. Physical/emotional/psychological
- Elicit recovery facts. Physical/emotional/psychological
- How harm manifested later in life
    - remember that the applicant has to subjectively state that they experience what happened as harm.

Underwent FGM first time when she was under 18, and she had FGM again pre-marriage and/or ancillary to child birth. Does not fear harm in the future on account of the same protected ground.

- these will most likely be Chen, focus a lot of effort on soliciting testimony on severity of harm and whether it prevented her from daily activities or anything else. If it did not change anything about her life, then it is less likely to be Chen.
    - remember that the applicant has to subjectively state that they experience what happened as harm.

Underwent FGM, not part of cultural practices, it was on account of religion or imputed religion or political opinion against FGM. Does not fear harm in the future on account of the same protected ground.

- these cases are rare but we do see them. E.g. a Coptic Christian who believed she was going to a gynecologist appointment for other reasons at the age of 16 was sedated and the doctor performed FGM. When she awoke

the doctor and nurse made comments about how they would be receiving religious rewards in heaven for what they did to her. Applicant's mother was in the waiting room and did not give permission for the procedure. The applicant's family did not believe in FGM.

- Same considerations as the one above.

EXCERPTS:

The practice of female genital mutilation (FGM), also known as female genital cutting (FGC), is objectively a sufficiently serious form of harm to constitute persecution.[1] Generally, in determining whether FGM is persecution to the applicant, you should consider whether the applicant experienced or would experience the procedure as serious harm.[2] The BIA in *Matter of S-A-K- & H-A-H-* recognized that FGM imposed on a young child constituted past persecution.[3] The BIA held that she and her mother had suffered an atrocious form of persecution that resulted in continuing physical pain and discomfort and that they merited humanitarian asylum based on the severity of their harm.[4]

[persecution LP p.25]

Matter of Chen

In *Matter of Chen*, the BIA held that discretion should be exercised to grant asylum to an applicant for whom there was little likelihood of future persecution. The applicant in that case related a long history of persecution suffered by both himself and his family during the Cultural Revolution in China. As a young boy (beginning when he was eight years old) the applicant was held under house arrest for six months and deprived of an opportunity to go to school and later abused by teachers and classmates in school. The applicant was forced to endure two years of re-education, during which time he was physically abused, resulting in hearing loss, anxiety, and suicidal inclinations. In finding that the applicant

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[1] *See* *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)

[2] U.S. Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. The proposed rule did not become a regulation but represents the agency's view on the topic.

[3] *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008)

[4] *Id.* at. 465-66.

was eligible for asylum based on the past persecution alone, the BIA considered the fact that the applicant no longer had family in China and that though there was no longer an objective fear of persecution, the applicant subjectively feared future harm.[5]

Matter of Chen is a leading administrative opinion on asylum eligibility based on past persecution alone; however, the case does not establish a threshold of severity of harm required for a discretionary grant of asylum. In other words, the harm does not have to reach the severity of the harm in *Matter of Chen* for asylum to be granted based on past persecution alone. However, if the harm described is comparable to the harm suffered by Chen, an exercise of discretion to grant asylum may be warranted.

By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution.[6]

In considering whether there is a reasonable possibility of other serious harm, you should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer.[7] Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."

Two federal courts that have considered this regulation have noted that the following circumstances might qualify as "other serious harm:"

harm resulting from the unavailability of necessary medical care[8]

debilitation and homelessness due to unavailability of specific medications[9]

Judge could consider humanitarian factors independent of the applicant's past persecution, such as age, health, or family ties, when exercising discretion to grant asylum.[10]

[Persecution LP p.55]

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[5] *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

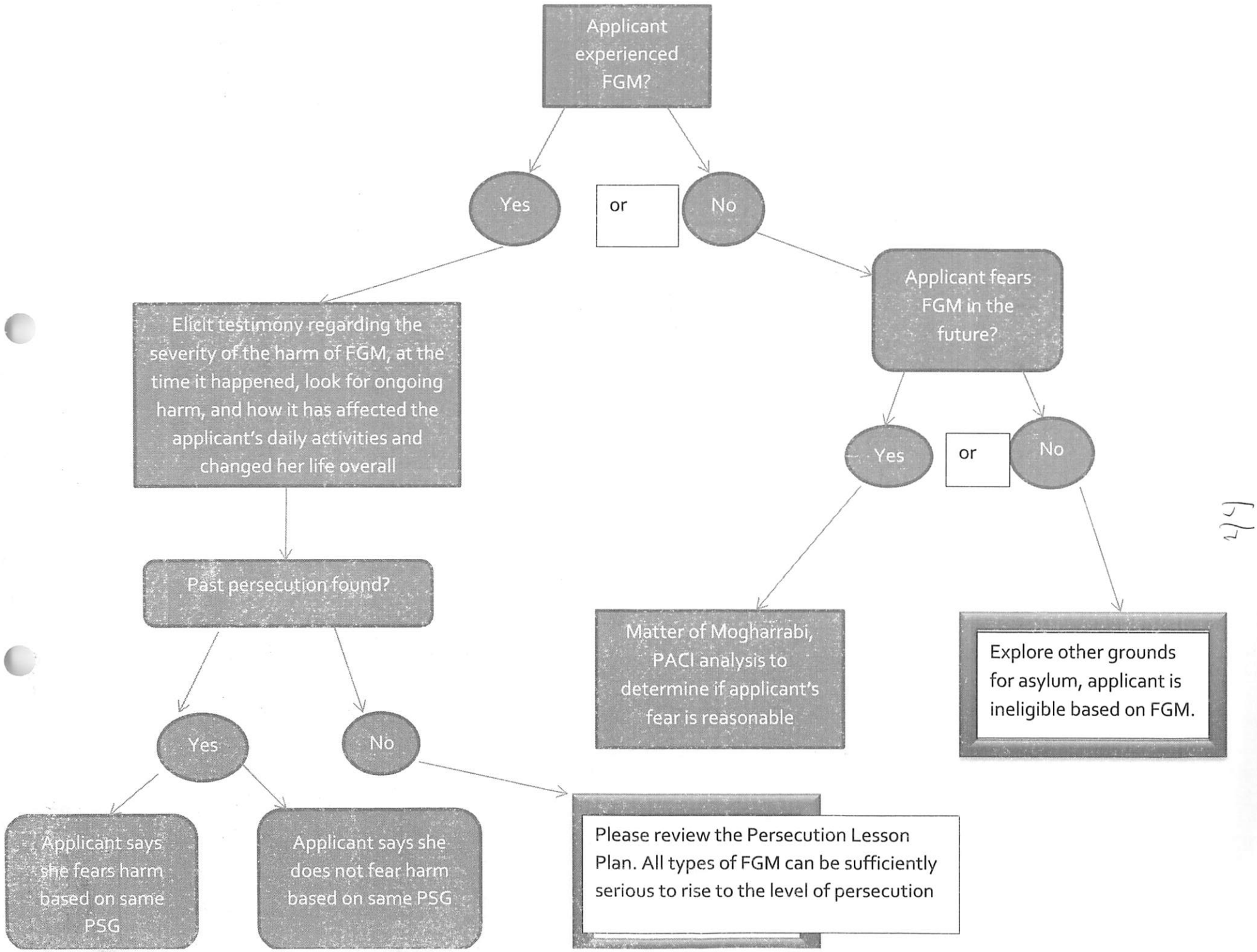
[6] 65 FR 76121 at 76127; *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

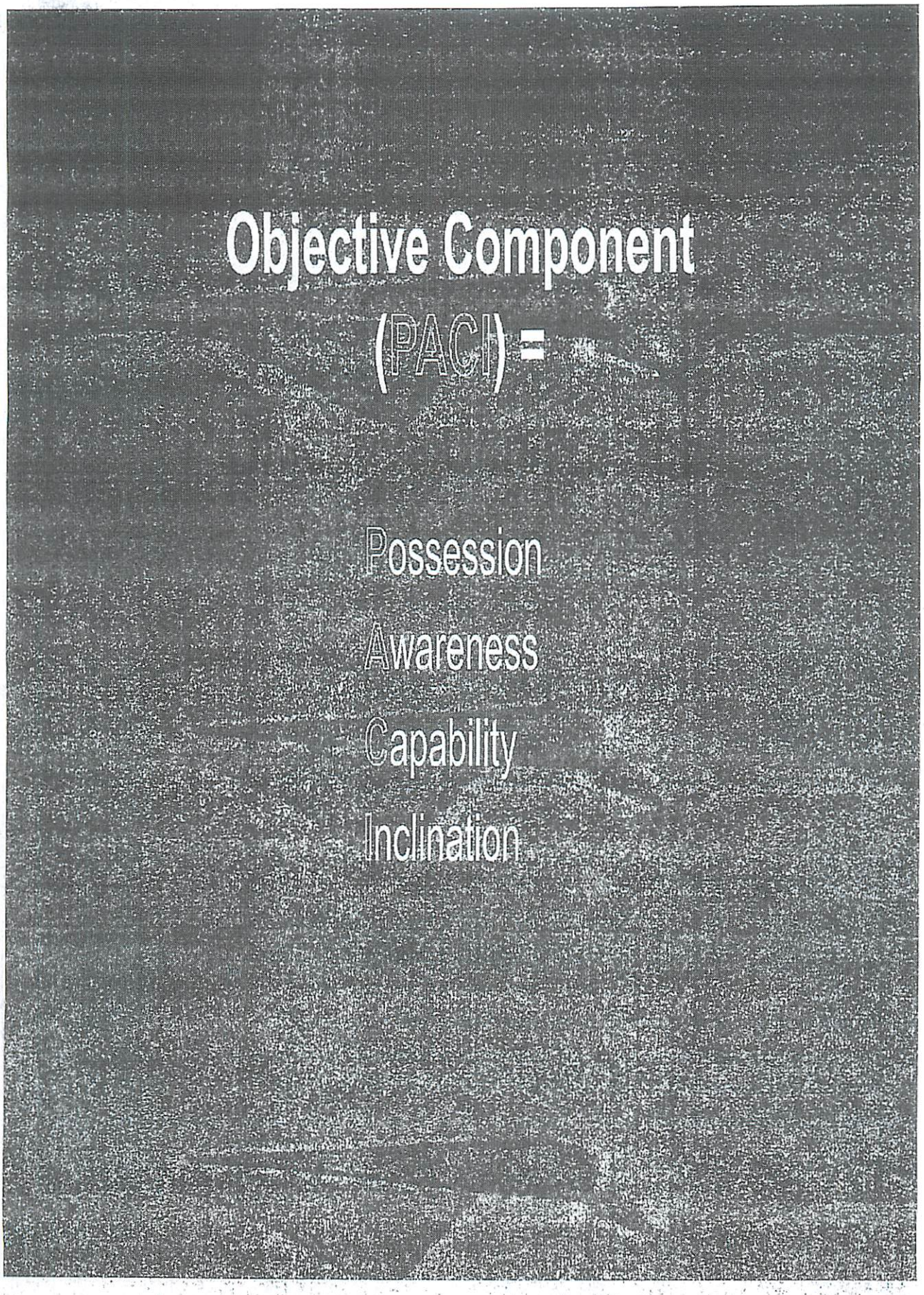
[7] *Matter of L-S-*, 25 I. & N. Dec. 705 (BIA 2012).

[8] *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011).

[9] *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008).

[10] *Matter of H*, 21 I&N Dec. 337, 347 (BIA 1996).


Applicant experienced FGM?
Yes
or
No
Elicit testimony regarding the severity of the harm of FGM, at the time it happened, look for ongoing harm, and how it has affected the applicant's daily activities and changed her life overall
Applicant fears FGM in the future?
Yes
or
No
Past persecution found?
Matter of Mogharrabi, PACI analysis to determine if applicant's fear is reasonable
Explore other grounds for asylum, applicant is ineligible based on FGM.
Yes
No
Applicant says she fears harm based on same PSG
Applicant says she does not fear harm based on same PSG
Please review the Persecution Lesson Plan. All types of FGM can be sufficiently serious to rise to the level of persecution


Objective Component
(PACI) =
Possession
Awareness
Capability
Inclination

WFF based on Mogharrabi "test"

- Possession or imputed possession of a protected characteristic
- Awareness or reasonable possibility the persecutor could become aware the applicant possesses a protected characteristic
- Capability of the persecutor to persecute the applicant
- Inclination of the persecutor to persecute the applicant