Notes

1) FGM in view of the legal liability in the Egyptian Law by Counselor Salah Eweiss, Vice President of the Cassation Court – Cairo 1993
2) Hereafter referred to as FGM
4) Note on terminology: The term “female genital mutilation” is most commonly used by advocates for women’s rights and health who wish to emphasize the damage caused by the procedure. However, the term may be offensive to women in communities in which the practice is prevalent and constitutes a form of ethnic identity. Out of respect and sensitivity, many organizations have adopted local terminology or more neutral terms, such as “female circumcision” or “female genital cutting.” Some scholars, such as Adrienne Katherine Wing, have also proposed the nomenclature “female genital surgeries.” In recognition of these varying approaches, this paper will employ the dual term female circumcision / female genital mutilation (FC/FGM).
5) The term “customary law,” as used here, refers to the legal systems that are applicable to particular communities. The term does not necessarily encompass practices that may be viewed as obligatory as a matter of culture, but are not mandated by “law.”
7) Premières Arrestations pour Excision au Sénégal, Agence France Presse, August 5, 1999;
11) Mali, Ordonnance No. 02-053 (June 4, 2002) on the creation of the national program to stop excision.
14) Id.
16) Id., art. 39(2).
28) Id.
30) Edo State of Nigeria, Law no. 4 of 1999, A Law to Prohibit Female Circumcision & Genital Mutilation, art. 4(a), Nov. 4, 1999; Cross River State of Nigeria, Law to Prohibit Girl-Child Marriages
and Female Circumcision or Genital Mutilation in Cross River State, sect. 4(b), 2000.
39) Rahman & Toubia, supra note 30, at 179.
41) See e.g., Legal Information Institute, Criminal Law: An overview, available at www.law.cornell.edu/topics/criminal.html;.
42) Rebecca Cook and Bernard Dickens, WHO, Considerations for Formulating Reproductive Health Laws, Ref. WHO/RHR/00., Chapter 4, Part 1, available at <http://www.who.int/reproductive health/publications/RHR_00_1/RHR_00_1_Chapter4part1htm.htm>.
45) Rahman & Toubia, supra note 30, at 136, 153, 234.
47) Id.
49) Source: Institut National de Statistique et de la Démographie (National Institute of Statistics and Demographics), EDS.
50) The CNLPE (Comité National de Lutte contre la pratique de l’excision, or National Committee for the Fight Against the Practice of Excision) is an institutional structure under the administrative supervision of the Ministry of Social Action and National Solidarity, which enjoys operational autonomy. The main objective of the CNLPE is to abolish the practice of excision in Burkina Faso.

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51) That is, shapers of public opinion (traditional, religious and customary leaders), non-governmental associations and organizations, etc.

52) The second reading of the Burkinese penal code was another factor that encouraged the passage of the law; previously, the penal code of French West Africa had been applied.

53) Assuming that 1 US$ = 700 CFA francs

54) Studies carried out by the CNLPE

55) The program was founded in 1998 in partnership with UNICEF

56) Two cases are worth noting: the case of Kaya, a former excisionist who repeated the offence in March 2003 and is currently serving a prison sentence despite the marches by local women in her defense; and the case of Ouahigouya, which also concerns a repeat offender. Further cases have been reported in Dédougou and Bobo.

57) The difficulty here arises from the lack of documentation available, as only the office of the public prosecutor retains documents concerning the trials, with the exception of those covered by the media.

58) See, in the appendix, the case of the excision nurse from Bobo, the second town in Burkina to be convicted in 2002.

59) VOIX DE FEMMES has just carried out a study entitled “Basic survey on the practice of excision in the province of Balé” (January 2003), one of the provinces of Burkina where the prevalence rate is still quite high (87.2%) amongst women 15 years and older.

60) VOIX DE FEMMES is currently carrying out a 24 month-long project called “Training course in legal tools concerning women’s rights” in three of Burkina’s provinces. This project consists in spreading the various tools (including the law on FGM), training law practitioners, etc.

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63) Ibid at p. 1


65) Leye, E. “The Daphne Project on Female Genital Mutilation in Europe” in Proceedings of the Expert Meeting on Female Genital Mutilation” Ghent, Belgium November 5-7, 1998. Downloaded from http://www.fgm.org/ProceedExpert.html. Numbers are recorded as: “UK(303,454), France (180,997), Italy (133,847 in 1996) and Germany (77,795 in 1997). (at p. 8)

66) Britain has the Prohibition of Female Circumcision Act 1985 whilst France outlaws the practice in its Code Penal, 1992.

67) The positioning of the countries in this way is not to suggest that each adopts one approach and not the other. Clearly the two approaches are part of the same continuum and all countries move between these two positions depending on time (historical) and subject matter.


69) European Parliament Resolution on Female Genital Mutilation 92001/2035(INI) A5—0285/2001
74) In a House of Lords debate Lord Rea questioned the usefulness of law in trying to modify behaviour pointing to the failure of prohibition in the United States and the difficulty of enforcing drug laws in the United Kingdom. He went on to note the ineffectiveness and non use of law to tackle FGC in the United Kingdom thus seeming to suggest that even where there is majority consensus on values, this may not lead to the law being obeyed or enforced. Although supporting prosecution he noted: “....real progress will come only through education and through that a change in the knowledge and attitudes of the communities wehre it is a problem. And that applies in Britain as well as those countries wehre it is a problem.” Lord Rea, House of Lords Debate on Female Circumcision 1998 column 738
75) However even in African states it may well be that FGM is practiced by minority groups. Rahman and Toubia (2002) note “...when FC/FGC is common among one ethnic group and not another, enacting and applying a criminal law could fuel ethnic animosities.” At p. 62
85) Victoria Climbie was an eight year old girl from the Ivory Coast who had been sent to live with a distant relative and her partner. Together the two adults tortured the child until she died. Although aware of the abuse, though arguably not its severity, the social services department did not intervene to take her into care. Her death led to a public inquiry which condemned social service practice and identified a lack of co-ordination between government bodies responsible for looking after the interests of children.
87) Cottier, M. at pp.109-110
88) Weil Curiel (1998) op cit
89) Leye, E. “The Daphne Project on Female Genital Mutilation in Europe” in Proceedings of the Expert Group Meeting on FGM (1998)op cit at 4.4.6
90) Agence France Presse “Genital Mutilation: African Body Says Practice Dramatically Reduced” 22 March 2003. Downloaded from http://www.coranet.radicalparty.org/pressreview/print_right.php?func=detail&para=2121. The report quotes the IAC Director of Communication as claiming that demographic studies indicate a reduction of a third in many countries. He is quoted as saying “This represents an important step forward…Ten years ago, no country would have dared to introduce legislation against female circumcision. Today it is banned in some 12 countries.”
91) House of Lords Debate on Female Circumcision 10 November 1998-See Baroness Rendell at column 735, Lord Hunt at column 746. See also Lord Rooker, House of Lords Debate on Asylum Seekers: Female Circumcision, Tuesday 10 July 2001 column 1005. However Hunt questions the use of law and points to the difficulty of obtaining evidence with which to bring the prosecutions. Lord Hunt House of Lords Debate on Female Circumcision 1998 column 747. Similarly Baroness Gould urged caution on the cultural condemnation front noting: “Any intervention must therefore be culturally appropriate, tactful and sensitive and in no way make the women feel ashamed or guilty of their culture.” House of Lords Debate on Female Circumcision 1998 Baroness Gould at column 733.
92) House of Lords Debate on Female Circumcision 1998, Baroness Rendell column 734. The European Parliamentary Resolution (2001) provides in para 11 : “pursue, prosecute and punish any resident who has committed the crime of female genital mutilation, even if the offence was committed outside its frontiers (extraterritoriality).”
93) Female Genital Mutilation Bill 2003. This Bill, together with details from the second reading of the Bill, can be downloaded from:
http://www.appg-opdevrh.org.uk/Parli%20News/commons/clwydFGM2ndreading
de
94) The Norwegian and Swedish statutes are examples of the new English approach. Indeed Sweden
was the first country in Europe to enact legislation prohibiting FGM. Both countries have
comprehensive programmes on fgm. For the Norwegian one see Ministry of Children and Family
Affairs “Governmental Action Plan Against Female Genital Mutilation”. Available at
http://odin.dep.no/bfd/engelsk/publ/handbooks/004021-120008/index-hov001-b-n-a.h The law is
covered in chapter 3. I am grateful to Anne Hellum for forwarding this to me.
95) Female Genital Mutilation Bill section 5(a)
96) Womankind Worldwide (2003) at p.1. (Paper collating the views of some NGOs working on the
issue in the UK).
97) Female Genital Mutilation Bill Explanatory Notes. Downloaded from
http://www.publications.parliament.uk/pa/cm200203.cmbills/021/en/03021x--htm at p. 3. Indeed
section 3(2) of the Bill provides “An act is a relevant act of female genital mutilation if--
(a) it is done in relation to a United Kingdom national or permanent United Kingdom resident.”
98) There was a special European Parliament hearing on FGM on 29 November 2000. Africa Online
Com “Europe Impotent in Fighting Female Mutilation Among African Women” afrol.com 30
November 2000. Downloaded from
http://www.afrol.com/Categories/Women/Wom015_fgm_europe2.htm
99) This Resolution reflects the speech made by Commissioner Anna Diamantopoulu on “Female
100) There is however the Daphne Project which, amongst other things seeks to work with immigrant
communities to eradicate the practice. Project title “Towards a Consensus on Female Genital
Mutilation in the European Union” Ref: 97/096/WC; 99/036/WC. Website www.icrh.org. See also
Proceedings of the Expert Group Meeting on Female Genital Mutilation Ghent, Belgium, November 5-
7, 1998. Downloaded from http://www.fgm.org/ProceedExpert.html. Finally AIDOS “Female Genital
101) European Parliament Resolution on Female Genital Mutilation (2001/2035 (INI))
102) ibid paras 4 and 11
103) ibid para Y
104) Ibid. Similar initiatives are underway in the United States. Center for Reproductive Law and
Policy, “Legislation on Female Genital Mutilation in the United States” (1997) Reproductive Freedom
in Focus at p. 3.
105) European Resolution on FGM (2001) at para. 11.
106) ibid para 28.
107) Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in
108) European Resolution on FGM para 23. See also paras 24 and 26.
109) Ibid para. 26. See also Osborne, A. and Boseley, S. “EU May Ban Aid to States that Allow Female
110) See for example the impact of the CNN report on circumcision in Egypt during the 1994
International Conference on Population and Development. Sure the Egyptian government responded, but the people were not carried along, hence the resistance which followed. Boyle, E. and Preves, S. (2000)


112) Article 1A(2), Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150

113) See Immigration Appellate Authority (2000) Asylum Gender Guidelines at p. 6


118) In Islam v. Secretary of State for the Home Department, R v. Immigration Appeal Tribunal, ex parte Shah [1999] INLR 144, Lord Steyn noted: “In 1951 the draftsman of Art 1A of the Convention explicitly listed the most apparent forms of discrimination then known, namely the large groups covered by race, religion, and political opinion. It would have been remarkable if the draftsman had overlooked other forms of discrimination. After all, in 1948 the Universal Declaration [on human rights] had condemned discrimination on the grounds of colour and sex. Accordingly, the draftsmen of the Convention provided that membership of a particular social group would be a further category.” As quoted in Immigration Appellate Authority (2000) at p.39.

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119) See for example Lord Hoffman in Islam case ibid where he noted: “In my opinion the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the [Refugee] Convention. It is concerned not only with cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination...In choosing to use the general term ‘particular social group’ rather than the enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discrimination objectives of the [Refugee] Convention.” As quoted in Immigration Appellate Authority (2000) at p. 39. Three subgroups have been identified as constituting social group. These are “(1) groups defined by an innate or unchangeable characteristic: (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake their association; (3) groups associated by a former voluntary status, unalterable due to its historical permanence” in Vidal, M “Membership of a Particular Social Group and the Effects of Islam and Shah” 11 (1999) Int. J. of Refugee Law 528,528.

120) Although largely considered under the social group category, Crawley notes that FGC could be considered under any of the other Convention grounds. Crawley (2001) 193-196


122) European Resolution 2001 at para 14. See also paras Z and 15. Cf. The Draft Protocol to the African Charter on Human and Peoples’ Rights (2000 draft) which provides in article 6(d) that States Parties undertake to: “protect and grant asylum to those women and girls who are at risk of, or have been, or are being subjected to harmful practices and all other forms of intolerance.”


126) The Minister of State, Home Affairs (Lord Rooker) noted: “…the United Kingdom is quite ready to recognize as refugees those who have been persecuted by non-state agents as well as those persecuted by the state. In order to qualify for asylum, an applicant would have to show that female genital mutilation (FGM) is knowingly tolerated by her government or that the authorities are unable to offer effective protection.” House of Lords, Tuesday 10 July 2001 column 1003. See also Immigration Appellate Authority (2000) at p.23

127) Even if believed it may be that FGM will be held not to fit into the 1951 Refugee Convention categories. The Minister of State, Home Affairs (Lord Rooker) noted that if that happened: “…and it was proved that it was taking place, we would grant exceptional leave to remain, even if refugees status were not granted.” House of Lords, Tuesday, 10 July 2001, column 1005. However, it is important to
note that in the United Kingdom, one is not necessarily entitled to access social security provision if
one has merely been granted exceptional leave to remain. Someone given full refugee status would be
able to access welfare provision immediately thus the categorization does have important practical
considerations. See also the Women’s National Commission of the United Kingdom “Submission to
the United Nations’ Committee on the Elimination of All Forms of Discrimination Against Women”
February 2003 at pp. 7, 12, 22, 23. See especially p. 23 where it is noted (on the government’s dispersal
policy) that: “Government plans for dispersal of and holding centers for asylum seekers will
jeopardize and severely curtail the access to support services that women who have undergone FGM
will have.”
of Europe Parliamentary Assembly “Protection and Assistance for Separated Children Seeking Asylum
Motion for a Recommendation” 12 February 2003. Doc. 9697. The document states that the motion
had not yet been discussed in the Assembly. However it does include FGM as one of the reasons
children may flee their homes. Downloaded from
http://www.assembly.coe.int/Documents/WorkingDocs03/EDOC9697.htm
131) Randall, M “Refugee Law and State Accountability for Violence Against Women: A Comparative
Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution” (2002)
as well, and that receiving states have themselves often failed to protect women from gender based
violence, it throws “into stark relief the paradoxical nature of the implicit assumption operating in
many western states -that the problem has somehow been remedied at home.” At p. 284.
133) However sometimes states use the cultural relativist argument to refuse applicants arguing that it
would be wrong to interfere in other peoples’ cultures. Of this, Crawley (2001:183) notes: “In these
cases, the existence of other normative frameworks is used to undermine the principle of universal
human rights.”