



Strasbourg, 17 June 2016

CDDH(2016)R85

Addendum II

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**Analysis of the legal situation at international level and in Council of Europe
member States on combating and preventing female genital mutilation
and forced marriage**

(as adopted by the CDDH at its 85th meeting, 15-17 June 2016)

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I. FOREWORD

1. At their 1241st meeting in November 2015, the Ministers' Deputies decided to give terms of reference of intergovernmental structures for the period 2016-2017. With regard to the Steering Committee for Human Rights (CDDH), the Deputies asked the CDDH under "Specific tasks" in respect of the "Development and promotion of human rights" with regard to:

"Female genital mutilation and forced marriage

(i) Further to work already conducted in the area of human rights and culturally diverse societies, undertake work to combat and prevent female genital mutilation and forced marriage, which are serious violations of human rights. To this end, conduct an analysis of the legal situation at international level and in the Council of Europe member States (deadline: 30 June 2016).

(ii) On this basis, prepare a guide to good national practices aimed at combatting and preventing these affronts and, if necessary, make proposals to (a) ensure coherent policies and better implementation of the legislation aimed at preventing these affronts; (b) reinforce the national and European legal framework as well as co-operation between member States; (c) raise awareness of this issue. These proposals may result in, inter alia the preparation of a draft recommendation of the Committee of Ministers (deadline: 31 December 2017). This activity is to be carried out ensuring appropriate co-ordination and co-operation with the relevant bodies involved, in particular the GEC, GREVIO, GRETA and the CDPC."

2. At its 84th meeting in December 2015, the CDDH had an exchange of views on the "preparation of the CDDH 2016-2017 biennium work" and agreed at the current stage to give priority to the work related to female genital mutilation and forced marriage. To this end, a Drafting Group on female genital mutilation and forced marriage (CDDH-MF) was set up with the following mandate:

"Under the authority of the CDDH, the CDDH-MF is called to:

(i) Further to work already conducted in the area of human rights and culturally diverse societies, undertake work to combat and prevent female genital mutilation and forced marriage, which are serious violations of human rights. To this end, conduct an analysis of the legal situation at international level and in the Council of Europe member States (deadline: 31 March 2016).

(ii) On this basis, prepare a guide to good national practices aimed at combatting and preventing these affronts and, if necessary, make proposals to (a) ensure coherent policies and better implementation of the legislation aimed at preventing these affronts; (b) reinforce the national and European legal framework as well as co-operation between member States; (c) raise awareness of this issue. These proposals may result in, inter alia the preparation of a draft recommendation of the Committee of Ministers (deadline: 15 November 2016)."¹

3. Mr Rob LINHAM (United Kingdom) was appointed Chairperson of the Group and Rapporteur for this activity. Under his instruction the Secretariat on 13 March 2016 sent a questionnaire to CDDH members and CDDH-MF members with a call for submission of national good practices by 10 April 2016. At present, 24 member States and two non-governmental organisations have replied.²

¹ Document CDDH(2015)R84, §§ 39-40, Appendix VI.

² See document CDDH-MF(2016)03.

CDDH(2016)R85 Addendum II**II. INTRODUCTION****a. Definitions**

4. Although there is no internationally recognised definition of either female genital mutilation (FGM)³ or forced marriage (FM), both acts are regarded as among the most serious human rights violations against women and girls as well as violations of the rights of the child.⁴ Moreover, the United Nations has considered these phenomena as “harmful practices”.⁵ Both acts are described in various terms in the different legal instruments at the international and regional level that refer to these phenomena. Furthermore, due to an increased awareness of and concern about these acts, the definitions have developed over time.⁶

5. At present, there exists a diversity of definitions of FGM. The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) requires its Parties to criminalise FGM.⁷ Its primary definition is based on that given by the World Health Organisation (WHO), which defines FGM as the act of excising, infibulating or performing any other mutilation to the whole or any part of the labia majora, labia minora or clitoris, including when performed by medical professionals.⁸ The Explanatory Report to the Istanbul Convention defines the term “excising” as referring to the partial or total removal of the clitoris and the labia majora. “Infibulating”, on the other hand, covers the closure of the labia majora by partially sewing together the outer lips of the vulva in order to narrow the vaginal opening. The term “performing any other mutilation” refers to all other physical alterations of the female genitals.⁹

6. Also the definition of FM varies from one international or regional organisation to another. According to the Istanbul Convention, FM comprises two types of intentional conduct: forcing an adult or a child to enter into a marriage, and luring an adult or a child abroad with the purpose of forcing this person to enter into marriage.¹⁰ The EU Agency for Fundamental Rights (FRA) describes FM as a marriage concluded without the consent¹¹ of one or both

³ The European Institute for Gender Equality (EIGE) recommends developing a common definition of FGM prevalence, ensuring its consistent use at national, regional, European and international levels and guaranteeing regular administrative and population-based data collection, EIGE 2013 *Report on female genital mutilation in the European Union and Croatia: a comprehensive approach to FGM in the EU*, Conclusions and recommendations.

⁴ UN, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, §1.

⁵ In addition to the two above-mentioned, harmful practices include female infanticide and prenatal sex selection, child marriage, dowry-related violence, acid attacks, so-called “honour” crimes, and maltreatment of widows, UN, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, §7.

⁶ For example, “female circumcision” was previously used, see UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 14: Female Circumcision*, 1990, A/45/38 and Corrigendum, CEDAW General Recommendation No. 19: Violence against women 1992, §11. This term, however, draws a parallel with male circumcision and, as a result, creates confusion between these two distinct practices, UN, *Eliminating female genital mutilation – and interagency statement* OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFA, UNHCR, UNICEF, UNIFEM, WHO, Annex 1. The Committee of Ministers has noted, in its reply to Parliamentary Assembly Recommendation 2023 (2013) on “Children’s right to physical integrity”, that it is unacceptable to put this kind of mutilation of girls on an equal footing with the circumcision of young boys for religious reasons, which is not the subject of similar legal provisions. The term used by UNICEF is wider and includes the notion of “cutting” to speak of “female genital mutilation/cutting (FGM/C). This definition takes into consideration that community-based approaches, and therefore less judgmental notions, are sometimes required, UNICEF Innocenti Research Centre: *Changing a Harmful Social Convention, Female Genital Mutilation/Cutting*, Innocenti Digest, Florence, 2005) reprinted in 2008.

⁷ See Art. 38 of the Istanbul Convention)

⁸ WHO World Health Assembly Resolution 61.16 on accelerating actions to eliminate female genital mutilation. A 1997 Joint Statement by the WHO, UNICEF, UNFPA on *Female Genital Mutilation* classifies female genital mutilation into four types:

- Type I - Partial or total removal of the clitoris and/or the prepuce (clitoridectomy);
- Type II - Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision);
- Type 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);
- Type IV - All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterisation.

⁹ §§199-201 of the Explanatory Report to the Istanbul Convention.

¹⁰ See Art. 37 of the Istanbul Convention as well as the relevant paragraphs of its Explanatory Report.

¹¹ According to a Council of Europe study, consent to marry consists of both the psychological intent (inner commitment i.e. the internal inclination leading to the decision to commit oneself) and the formal declaration of intent (external commitment i.e. the declared agreement expressed in the form required by the law) at the time the marriage is contracted, Council of Europe, Edwige Rude-Antoine, *Forced marriages in Council of Europe member States*, 2005. This conceptualisation of the lack of consent does not define by itself what constitutes consent and the degree to which the

partners, and therefore against the will of at least one of them.¹² The United Nations adds to this definition that one or both of the parties is/are unable to end or leave the marriage¹³, including as a result of duress or intense social or family pressure.¹⁴

7. Some references to FM make a distinction between forced, child and early marriage.¹⁵ Child marriage, also referred to as early marriage, indicates that at least one of the parties is under 18 years of age. The overwhelming majority of child marriages, both formal and informal, involve girls, although at times their spouses are also under 18 years of age. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent. As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances. It has been recommended that the child should be at least 16 years of age and that such decisions should be made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.¹⁶

b. Prevalence and characteristics

8. Harmful practices, such as FGM and FM, are endemic to a wide variety of communities in most countries. Some are also found in regions or countries in which they had not been previously documented, primarily owing to migration, whereas in other countries where such practices had disappeared they are now re-emerging as a result of such factors as conflict situations.¹⁷ The causes are multidimensional and include stereotyped sex- and gender-based roles, the presumed superiority or inferiority of either of the sexes, attempts to exert control over the bodies and sexuality of women and girls, social inequalities and the prevalence of male-dominated power structures.¹⁸ Social norms and cultural beliefs supporting such harmful practices persist and are at times emphasised by a community in an attempt to preserve its cultural identity in a new environment, in particular in destination countries where gender roles provide women and girls with greater personal freedom.¹⁹

9. In most communities, where FGM is practised, it is considered a cultural tradition, which is often used as an argument for its continuation. In some communities, recent adoption of the practice is linked to copying the traditions of neighbouring groups. Sometimes it has started as part of a wider religious or traditional revival movement.²⁰ Within some cultures, it is a requirement for marriage and believed to be an effective method of controlling the sexuality of women and girls.²¹ It is mostly carried out on young girls between infancy and age 15.²² Members of the extended family are usually involved in decision-making about FGM, although women are usually responsible for the practical arrangements for the FGM to be carried out.²³

validity of consent can vary. Although national civil legislation typically declares the nullity of a marriage concluded against the will of at least one of the spouses, the circumstances vitiating the consent may vary, FRA, *Addressing forced marriage in the EU: legal provisions and promising practices*, 2014, 2.2, p. 22.

¹² European Union Agency for Fundamental Rights (FRA), *Addressing forced Marriage in the EU: legal provisions and promising practices*, 2014, Conclusions.

¹³ UN, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, §23.

¹⁴ See OHCHR *Report on "Preventing and eliminating child, early and forced marriage"*, §6.

¹⁵ For example in the OHCHR *Report on "Preventing and eliminating child, early and forced marriage"*.

¹⁶ UN, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, §20.

¹⁷ *Ibid.*, §8.

¹⁸ *Ibid.*, §17.

¹⁹ *Ibid.*, §18.

²⁰ WHO – Media Centre, *Female genital mutilation*, Factsheet No. 241, Updated February 2016.

²¹ *Ibid.*, §19.

²² WHO – Media Centre, *Female genital mutilation*, Factsheet No. 241, Updated February 2016.

²³ UN, *Eliminating female genital mutilation – an interagency statement* OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFA, UNHCR, UNICEF, UNIFEM, WHO.

girl marries within the family's community of origin or may provide extended family members or others with documents to migrate to and/or live in a particular destination country.⁴⁰ Research shows that there seems to be a relationship between FM and poverty⁴¹ and trafficking in human beings.⁴² In some cases, families will agree to the temporary "marriage" of their daughter in exchange for financial gains, also referred to as a contractual marriage, which is a form of trafficking in human beings.⁴³ FM is also increasingly being used by armed groups during conflict or may be a means for a girl to escape post-conflict poverty.⁴⁴ There are indications that FM is connected to gender based violence in conflict situations, emergencies and fragile States.⁴⁵ Europol has also noted an emerging trend whereby women are trafficked in order to be forced into marriage of convenience.⁴⁶

c. Consequences

12. FGM and FM are serious human rights violations which infringe physical integrity and human dignity. They both have a physical as well as a psychological impact on the girls and women concerned. They also violate the rights of children.

13. The severity and risk of FGM are closely related to the anatomical extent of the cutting, including both the type and amount of tissue that is cut, which may vary between the types (see above footnote 8). The severity and prevalence of psychological (including psychosexual) risks may also vary with characteristics other than the physical extent of tissue removal, such as age and social situation.⁴⁷ Amongst the immediate consequences of FGM are severe pain; shock caused by pain and/or haemorrhage; excessive bleeding (haemorrhage) and septic shock; difficulty in passing urine, and also passing of faeces, due to swelling, oedema 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; human immunodeficiency virus (HIV) by use of the same surgical instrument without sterilisation increasing the risk for transmission of HIV between girls who undergo female genital mutilation together; death caused by haemorrhage or infections, including tetanus and shock; psychological consequences due to the pain, shock and the use of physical force by those performing the procedure; unintended labia fusion; repeated female genital mutilation usually due to unsuccessful healing.⁴⁸ Amongst the long-term effects are chronic pain which can be due to trapped or unprotected nerve endings; infections; keloid; reproductive tract infections and sexually transmitted infections; human immunodeficiency virus (HIV); quality of sexual life due to the removal of, or damage to highly sensitive genital tissue; birth complications; danger to the new-born with higher death rates; and psychological consequences.⁴⁹ The additional risks for complications from Type III are later surgery; urinary and menstrual problems; painful sexual intercourse; and infertility. Most survivors of FGM need help to cope with the short- and long-term consequences of the procedure. Their needs will vary according to their age or their situation.⁵⁰ Many women who have survived FGM may also experience other forms of violence, such as FM or domestic violence.⁵¹

⁴⁰ *Ibid.*, § 23.

⁴¹ FRA, *Addressing forced marriage in the EU: legal provisions and promising practices*, 1.2; UN Women 2013 Inter-agency assessment – Gender based violence and child protection among Syrian refugees in Jordan, with a focus on early marriage.

⁴² EU, *Forced Marriage from a gender perspective*, European Parliament study for the FEMM Committee, 2016.

⁴³ UN, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, §24.

⁴⁴ *Ibid.*, §23.

⁴⁵ UN, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, §18.

⁴⁶ Europol Early Warning Notification, *Marriage of convenience: A link between facilitation of illegal immigration and THB*, March 2014.

⁴⁷ UN, *Eliminating female genital mutilation – and interagency statement* OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFA, UNHCR, UNICEF, UNIFEM, WHO, Annex 2.

⁴⁸ *Ibid.*, Annex 3.

⁴⁹ *Ibid.*

⁵⁰ EU, Communication from the Commission to the European Parliament and the Council, *Towards the elimination of female genital mutilation*, 3.2.

⁵¹ *Ibid.*

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14. FM constitutes a serious threat to multiple aspects of the physical and psychological health of women and girls, including but not limited to their sexual and reproductive health significantly increasing the risk of early, frequent and unintended pregnancy; maternal and new-born mortality and morbidity; obstetric fistula and sexually transmitted infections, including HIV/AIDS; as well as increasing vulnerability to all forms of violence.⁵² In particular where the husband is significantly older than the wife, and where girls have limited education, the girls generally have limited decision-making power in relation to their own lives.⁵³ It often results in girls lacking personal and economic autonomy and attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.⁵⁴ Child marriage also contributes to higher rates of school dropout, especially among girls, forced exclusion from school and an increased risk of domestic violence, in addition to limiting the enjoyment of the right to freedom of movement.⁵⁵ Women who are forced into a marriage are often continually exposed to violence and rape during the marriage.⁵⁶

III. APPLICABLE LEGAL STANDARDS AND NORMS

a. Council of Europe

15. A number of fundamental rights and freedoms recognised by the *European Convention on Human Rights* (ECHR) can be applied to FGM and FM such as Article 2 (Right to life), Article 3 (Prohibition on torture and inhuman or degrading treatment or punishment), Article 4 (Prohibition of slavery), Article 5 (Right to liberty and security), Article 8.1 (Right to private and family life), Article 12 (Right to marry)⁵⁷ and Article 14 (Prohibition on discrimination). Issues may also be raised under Article 2 of Protocol No. 1 which provides a right to education.

16. However, the European Court of Human Rights (ECtHR) has not as yet issued a conclusive judgement on the issue of FGM. Many of the cases brought have been declared inadmissible not due to the acts of FGM failing to constitute a violation of human rights (specifically Article 3 on degrading treatment), but due to the specific circumstances of each case whereby the applicant failed to prove a real risk of FGM being carried out on them.⁵⁸ However in a number of these admissibility decisions the Court has noted that it was not in dispute that FGM would amount to ill treatment under Article 3.⁵⁹ A currently on-going case on the issue is *Bangura v. Belgium*⁶⁰ in which once again the parties and the Court are not considering whether FGM amounts to a violation of Article 3, but the specific risk to which the applicant is susceptible in her home State.

⁵² UN General Assembly, Resolution 69/L.23 on *Child, Early and Forced Marriage*, 17 November 2014.

⁵³ UN, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, §22.

⁵⁴ *Ibid.*, §23.

⁵⁵ *Ibid.*, §22.

⁵⁶ EU, *Forced Marriage from a gender perspective*, European Parliament study for the FEMM Committee, 2016, 2.1.2.

⁵⁷ A 2011 United Kingdom (UK) Supreme Court decision found that the '[...] forcing of a person into marriage is a gross and abhorrent violation of his or her rights under [...] Article 12 of the European Convention on Human Rights' (ECHR), United Kingdom, *R (Quila and another) v. Sec of State for the Home Department*, 2011, UKSC 45.

⁵⁸ European Court of Human Rights Press Unit, *Factsheet – Violence against women*, January 2016.

⁵⁹ *Collins and Akaziebe v. Sweden* (decision on Admissibility), no. 23944/05, ECHR 2007; *Omeredo v. Austria* (decision on Admissibility), no. 8969/10, ECHR 2011

⁶⁰ *Bangura v. Belgium*, no. 52872/10, Application Communicated to the Belgium Government 15 April 2014, ECHR 2014

17. A number of cases concerning FM have been held admissible by the ECtHR; however they have not resulted in a Court ruling of a violation. In response to a claim that the refusal to recognise marriage with an underage girl as permitted by Islamic law involved an interference with manifestation of belief was deemed not to fall within the scope of Article 9 but as governed by a specific provision of Article 12 which referred to the national laws.⁶¹

18. The *Council of Europe Convention on preventing and combating violence against women and domestic violence* (Istanbul Convention)⁶² is the foremost legally binding instrument in the area of violence against women and so has a specific focus on the acts of violence against women and girls. It contains definite provisions on FGM and FM and sets out a comprehensive framework using a four-sided approach of Integrated Policies, Prevention, Protection, and Prosecution. While the Convention in its entirety is relevant to the issues of FGM and FM, a number of provisions deal with the issues specifically. Articles 37 and 38 require States Parties to criminalise FM and FGM respectively.

Article 37:

1. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

2. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.

19. In the first paragraph “forcing” refers to the physical and psychological force where coercion or duress is employed. The offence is complete when a marriage is concluded to which at least one party has not consented voluntarily due to the circumstance of being “forced”.⁶³ In the second paragraph the marriage does not have to be concluded for the offence to have occurred.⁶⁴ The term “luring” refers to any conduct whereby the perpetrator entices the victim to travel to another country. The intention must cover the act of luring the victim abroad, as well as the purpose of forcing this person to marry abroad.⁶⁵

20. In addition to criminalising FM, Article 32 of the Convention requires that States Parties take the necessary legislative or other measures to ensure that these marriages be voidable, annulled or dissolved under civil law without undue financial and administrative burden on the victim.

Article 38:

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- a. excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris;*
- b. coercing or procuring a woman to undergo any of the acts listed in point a;*
- c. inciting, coercing or procuring a girl to undergo any of the acts listed in point a.*

⁶¹ *Khan v. the United Kingdom*, no. 11579/85, Commission decision of 7 July 1986. See also *Compilation of Council of Europe standards relating to the principles of freedom of thought, conscience and religion and links to other human rights*, §54.

⁶² CETS No. 210, adopted in 2011 and entered into force in 2014. It has been ratified by Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Denmark, Finland, France, Italy, Malta, Monaco, Montenegro, Netherlands, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden and Turkey. Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Norway, Slovak Republic, Switzerland, “the former Yugoslav Republic of Macedonia”, Ukraine and United Kingdom have signed but not yet ratified it. Armenia, Azerbaijan, Liechtenstein, Republic of Moldova and the Russian Federation have neither signed nor ratified it. The Convention is also open for signature and ratification by the EU.

⁶³ Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, §196

⁶⁴ *Ibid.*, §197

⁶⁵ *Ibid.*

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21. It should be noticed that the act of “inciting” is limited to girl victims only as the drafters wished to differentiate between child and adult victims, and did not wish to criminalise the incitement of women to undergo any of the acts in the first paragraph.⁶⁶
22. In applying paragraphs *b.* and *c.* the individual cannot be taken to have intentionally committed the offence merely because the offence resulting from the coercion, procurement or incitement was foreseeable. The individual’s actions must also be able to cause the acts in *a.* to be committed.⁶⁷
23. In respect of both FGM and FM the Convention takes steps to criminalise the aiding, abetting and attempt of these acts (Article 41), removes unacceptable justifications for these crimes such as honour or religion or culture (Article 42) and requires the offences be applicable regardless of the relationship between the victim and perpetrator (Article 43).
24. While the Convention requires FGM and FM to be criminalised, a number of differing approaches have been used by States which can be seen as effective to comply with the Convention.⁶⁸
25. The Convention also addresses the issues of extraterritorial jurisdiction and dual criminality.⁶⁹ Articles 44.1*d.* and 44.2 require States to apply the principle of nationality to attain jurisdiction over these offences in cases where either the victim or perpetrator is a national. Article 44.1*e.* also covers residents, further extending the reach of the States’ jurisdiction to cover acts committed abroad by, and to, non-nationals. Article 41.3 also requires that States ensure their jurisdiction is not subordinate to the condition that the acts are criminalised in the territory where they were committed, eliminating any complications with the principal of dual criminality. However this clause is open to reservations as provided for in Article 78.2.
26. Article 44.4 removes any requirement that the victim make a complaint in order to initiate proceedings. Article 59.4 attempts to address some of the legal ramifications of marriage ensuring that Parties shall take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.
27. Article 60 further requires Parties to take the necessary legislative or other measures to ensure that gender based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection. Further to this, Article 61 requires that Parties respect the principle of non-refoulement⁷⁰ in accordance with existing international law obligations.

⁶⁶*Ibid.*, §201

⁶⁷ *Ibid.*, §202

⁶⁸ FRA *Addressing forced Marriage in the EU*: 2014, p. 20. Nevertheless an earlier Council of Europe document CDEG (2005) 1 “*Forced marriages in Council of Europe member States: comparative study of legislation and political initiatives*”, prepared by Ms Edwige Rude-Antoine recommend Governments to include in their criminal-law provisions a specific offence of forced marriage, with penalties reflecting aggravating circumstances.

⁶⁹ The rule of dual criminality usually requires that in order to prosecute the acts must be criminal offences in the place where they are committed, see Article 44, paragraph 3 of the Istanbul Convention (as well as the relevant paragraphs of its Explanatory Report) which aims at combating in particular certain forms of violence against women which may be – or are most frequently – committed outside the State’s territory.

⁷⁰ The principle is found in Article 33(1) of the 1951 Convention relating to the Status of Refugees “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; it is further explained by the UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

28. The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) is the independent expert body responsible for monitoring the implementation of the Istanbul Convention by the Parties. It must be noted that this monitoring process is still in the early stages due to the recent establishment of the monitoring mechanism. As such no recommendations or comments have been issued, however the first assessment and reporting has commenced as of 2016.⁷¹

29. The *Council of Europe Convention on Action against Trafficking in Human Beings*⁷² is relevant for FM as trafficking can have the purpose of forced marriage.⁷³

30. The *Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Convention)*⁷⁴ requires criminalisation of all kinds of sexual offences against children. It sets out that States in Europe and beyond shall adopt specific legislation and take measures to prevent sexual violence, to protect child victims and to prosecute perpetrators. Although the Convention makes no explicit references to FGM or FM, these two harmful practices, and especially the second one, could fall under Article 18 (Sexual abuse) since children are victims.

31. The Committee of Ministers has in its *Recommendation (2002)5 to member States on the protection of women against violence* also defined violence against women as including FGM and FM and as such they constitute a violation of fundamental rights.⁷⁵ The *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*⁷⁶ refer explicitly to FGM and FM by stating that member States should consistently combat any form of physical, sexual, psychological and economic violence particularly directed against women and girls (including stalking, sexual violence, forced and child marriage, female genital mutilation, forced abortion and forced sterilisation, sexual harassment, crimes committed in the name of so-called “honour”, aiding or abetting and attempt to commit any of these offences); and violence against persons on the basis of their sexual orientation or gender identity, including situations when violence is perpetrated under the pretext of a cultural and religious prescription or practice. They should strive to adopt adequate legislation and introduce initiatives to prevent such violence, protect the victims and prosecute the perpetrators.⁷⁷

32. The Parliamentary Assembly of the Council of Europe (PACE) affirmed in its *Resolution 1247 (2001) on female genital mutilation* FGM as a violation of Article 3 ECHR.⁷⁸ It called for legislation and education aimed at ending the practice and to prosecute perpetrators even when the crime is committed abroad. In *Recommendation 1723 (2005) and Resolution 1468 (2005) on forced marriage and child marriage* the Assembly expressed its grave concern at the fact that, under the cloak of respect for the culture and traditions of migrant communities, there are authorities which tolerate forced marriages and child marriages although they violate the fundamental rights of each and every

⁷¹ For further information on issues, themes and practices arising from the Convention, the Council of Europe, in partnership with Amnesty International, has published a guide on the Convention in which it explains the intended content, purpose, and functioning of the Convention alongside promising practices in a number of State Parties. See *The Istanbul Convention – A tool to end female genital mutilation - Council of Europe / Amnesty International - Guide, 2014*.

⁷² CETS No. 197, adopted in 2005 and entered into force in 2008. It has been ratified by Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and United Kingdom. Belarus has also ratified it. The Czech Republic has signed but not yet ratified it. The Russian Federation has neither signed nor ratified it. The Convention is also open for accession by the EU.

⁷³ See for example, §10 of *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings* by “the former Yugoslav Republic of Macedonia”, First evaluation round, published on 17 June 2014; §§10-11, 91 *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings* by Bosnia and Herzegovina, 14 May 2013.

⁷⁴ CETS No. 201, adopted in 2007 and entered into force in 2010. It has been ratified by Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine. Armenia, Azerbaijan, Estonia, Ireland, Norway and the United Kingdom have signed but not yet ratified it. The Convention is also open for signature and ratification by the EU.

⁷⁵ Preamble; Appendix §1.a.

⁷⁶ Adopted by the Committee of Ministers on 2 March 2016.

⁷⁷ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, adopted on 2 March 2016, Guidelines 44.

⁷⁸ PACE Resolution 1247 (2001) on female genital mutilation, §7.

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victim.⁷⁹ *Recommendation 1868 (2009)*⁸⁰ and *Resolution 1662 (2009)*⁸¹ *on action to combat gender-based human rights violation, including the abduction of women and girls* refer both to FGM and FM. *Recommendation 1891 (2009) on migrant women: at particular risk from domestic violence* refers to FGM.⁸² *Recommendation 1940 (2010)*⁸³ and *Resolution 1765 (2010)*⁸⁴ *on gender-related claim for asylum* also refer explicitly to FGM. *Resolution 1952 (2013) on children's rights to physical integrity* include FGM.⁸⁵ A new *motion for a resolution on female genital mutilation in Europe*⁸⁶ has been issued which calls for the Assembly to investigate further the issue of FGM in member States with a view to identify measures to effectively end the practice. The Assembly will investigate the various dimensions of this problem in Europe with a view to identifying measures to effectively prevent FGM, including when it occurs outside Europe, and to ensure both the protection of women and girls at risk and the multidisciplinary care of the consequences of these mutilations.

b. United Nations

33. A number of provisions set out in the *Universal Declaration of Human Rights* (UDHR)⁸⁷ can be considered applicable to both FGM and FM. In particular the articles relating to equal treatment and non-discrimination (Articles 1, 2, 7) can be applicable due to the discriminatory and gender specific nature of these acts, while the acts themselves and their consequences can be considered a violation of the right to life, liberty and security of person (Article 3).

34. Specific to FM there is the potential application of Article 4 on the prohibition of slavery, as there is the conceivable social impact of forced marriage to be a form of servitude. Child marriage has also been recognised as having the potential of constituting cruel, inhuman or degrading treatment, particularly where governments have failed to establish a minimum age of marriage that complies with international standards.⁸⁸ FGM equally violates Article 5 by qualifying as degrading treatment.⁸⁹ Focusing more on the consequence and implications of these acts, Article 8 requires the availability of an effective remedy for violations of the aforementioned rights, while Article 14.1 provides for the right of asylum in the face of persecution.⁹⁰

35. As regards the issue of FM, Article 16 also grants men and women equal rights as to marriage, during marriage and at its dissolution; and requires that marriage shall be entered into only with the free and full consent of the intending spouses.

36. The *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* can apply to cases of FGM and FM, as individuals at risk of these can be considered members “of a particular social group” in accordance with Article 1(A)(2). Article 33 also includes the principle of non-refoulement. Furthermore, the UNHCR Executive Committee of the High Commissioner's Programme (ExCom) adopted the *Conclusion on Women and Girls at Risk*⁹¹ which, inter alia, suggests to provide women and girls at risk of sexual and gender-based violence (SGBV), including FGM and FM, with emergency voluntary relocation (e.g. to another town within a given country), or emergency resettlement (to a third country). Another way forward would be to lower requirements for family reunification for these vulnerable cases. UNHCR has also issued *Guidelines on International protection: 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*.⁹²

⁷⁹ PACE Resolution 1468 (2005) on forced marriage and child marriage, §3.

⁸⁰ PACE Recommendation 1868 (2009) on action to combat gender-based human rights violation, including the abduction of women and girls, §1.

⁸¹ PACE Resolution 1662 (2009) on action to combat gender-based human rights violation, including the abduction of women and girls, §1, 4, 5, 7.2 and 7.4.

⁸² PACE Recommendation 1891 (2009) on migrant women: at particular risk from domestic violence, §2.1.

⁸³ PACE Recommendation 1940 (2010) on gender-related claims for asylum, §1.

⁸⁴ PACE Resolution 1765 (2010) on gender-related claims for asylum, §3.

⁸⁵ PACE Resolution 1952 (2013) on children's rights to physical integrity, §2.

⁸⁶ Motion for a resolution on female genital mutilation in Europe, Doc. 13736 of 24 March 2015.

⁸⁷ Adopted by the United Nations General Assembly in 1948.

⁸⁸ See concluding observation of the Committee against Torture on Bulgaria (CAT/C/BGR/CO/4-5).

⁸⁹ The Special Rapporteur for Torture has considered FGM as falling within his mandate; see comments under the Convention against Torture below.

⁹⁰ The European Union Institutions in particular have discussed the threat of FGM as a possible factor when considering asylum claims. The Istanbul Convention, Article 60, discussed above, also makes provision for the consideration of violence against women in asylum claims.

⁹¹ UNHRC, 6 October 2006, No. 105 (LVII) -2006

⁹² UNHCR selected publications on preventing and combating Sexual and Gender-Based Violence: *Position Paper on Violence against Women and Girls in the European Union And Persons of Concern to UNHCR*, March 2014; *Note du Haut Commissariat des Nations Unies pour les réfugiés*

37. The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*⁹³ contains provisions applicable to some forms of FM. Article 1(c) has required the abolition of any marriage that takes place in exchange for remuneration without the women's right of refusal, transfer of the wife for value, or for any marriage under the age 18 where it will exploit the child. Article 2 again calls for setting a suitable minimum age for marriage and for free consent to be a requirement for marriage.

38. The *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage*,⁹⁴ Article 1, further confirms the need for free consent in marriage. In Article 2 the States Parties are required to set a minimum age for marriage and only in exceptional cases shall marriage be granted under the minimum age. In Article 3 there is an obligation to register all marriages in an official register.

39. The *International Covenant on Civil and Political Rights* (ICCPR)⁹⁵ also contains a number of fundamental and wide reaching rights. The consequences and impact on the lives of women of both FM and FGM can lead to these rights being infringed.⁹⁶ Specific to the issue of FM however, Article 23.3 provides that “*No marriage shall be entered into without the free and full consent of the intending spouses*”.

40. Article 3 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁹⁷ provides once again for the equal treatment of men and women in the enjoyment of their convention rights. Article 10.1 requires marriage to have free consent of both parties while Article 12.1 recognises the right of enjoyment of the highest standard of physical and mental health.⁹⁸

41. The *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW)⁹⁹ states in its Article 1: [...] *the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*”.

relative à l'évaluation des demandes d'asile introduites par des femmes, December 2012; *Action against Sexual and Gender-Based Violence: An Updated Strategy*, Division of International Protection, June 2011; *Comments on Articles 48 and 48 bis of the Draft Council of Europe Convention on preventing and combating violence against women and domestic violence*, November 2010; *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations*, March 2010; *Key Gender Related Findings and Recommendations*, March 2010; *Handbook for the Protection of Women and Girls*, 2008; *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, November 2008; *Evaluation of UNHCR's efforts to prevent and respond to sexual and gender based violence in situations of forced displacement*, PDES/2008/08, October 2008; *Handbook for the Protection of Women and Girls*, January 2008, section 5.8.1

⁹³ Adopted in 1956 and entered into force the following year.

⁹⁴ Adopted in 1962 and entered into force in 1964. It has been ratified by Austria, Azerbaijan, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Montenegro, Netherlands, Norway, Poland, Romania, Serbia, Slovak Republic, , Spain, Sweden, “the former Yugoslav Republic of Macedonia” and United Kingdom. Greece and Italy have signed but not yet ratified it. Albania, Andorra, Armenia, Belgium, Bulgaria, Estonia, Georgia, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Portugal, the Russian Federation, San Marino, Slovenia, Switzerland, Turkey and Ukraine have neither signed nor ratified it.

⁹⁵ Adopted by the General Assembly in 1966 and entered into force in 1976.

⁹⁶ These rights are: the right to life (Article 6), the prohibition of degrading treatment (Article 7) which may be infringed by FGM and the prohibition on slavery (Article 8) and right to liberty and security (Article 9) by FM.

⁹⁷ Adopted by the General Assembly in 1966 and entered into force in 1976.

⁹⁸ UN, CEDAW/CRC *Joint general recommendation No. 31 on harmful practices*; for the health implications of FM see §§ 20-21; for the health implications of FGM see § 19: “It may have various immediate and/or long-term health consequences, including severe pain, shock, infections and complications during childbirth (affecting both the mother and the child), long-term gynaecological problems such as fistula, psychological effects and death”.

⁹⁹ Adopted by the UN General Assembly in 1979 and entered into force in 1981.

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42. Article 2 of the Convention then proceeds to prohibit and eliminate such discrimination. Of particular relevance to State's responsibilities on the issue of FGM and FM are subsections (b) on the adoption of legislative measures to prohibit discrimination, (e) on taking appropriate measures to eliminate such discrimination by any person, organisation or enterprise, and (f) on the adoption of appropriate measures including legislation to “*modify or abolish existing customs and practices which constitute discrimination against women*”.

43. Article 3 requires States to make efforts to ensure the full development and advancement of women in all fields for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms. Both FM and FGM constitute a direct interference and violation of women's rights, while their effects and long-term impact further hinder them from full enjoyment of their freedoms.¹⁰⁰

44. Article 5 further requires State measures to “*modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women*”. Given the discriminatory nature of both FGM and FM and their basis on a stereotype of female inferiority or subservience,¹⁰¹ Article 5 is particularly relevant to these issues.

45. Article 16 contains provisions applicable to FM as it provides that women have the same right as men, and to freely choose a spouse. The Committee on the Elimination of Discrimination against Women has issued General Recommendations on the progress of the Convention's implementation. In General Recommendation No. 21 the Committee has stated that “while most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention.”¹⁰²

46. Of particular significance to FGM and FM is General Recommendation No.19 on Violence against Women.¹⁰³ According to the Recommendation violence against women “includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”.¹⁰⁴ The Committee on the Elimination of Discrimination Against Women has confirmed gender-based violence as included in the definition of discrimination under Article 1 and affirms the applicability of specific provisions of the Convention in such cases, regardless of whether those provisions expressly mention violence.¹⁰⁵ It also confirms the responsibility of States in cases where the acts of discrimination are carried out by private entities, relying on Articles 2 and 5.¹⁰⁶ The Committee has also confirmed FM and FGM as violent practices perpetuated by traditional attitudes of the subordination of women for the purpose of Articles 2(f) and 5.¹⁰⁷ It equally confirms the effects of such violence to “deprive them of the equal enjoyment of, exercise and knowledge of human rights and fundamental freedoms.”¹⁰⁸

47. With regards to FM, General Recommendation 21 focuses on equality in marriage and expresses that “A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.”¹⁰⁹ In this connection the Committee has pointed that the States parties' reports reveal “that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others women's poverty forces them to marry foreign nationals for financial security”.¹¹⁰

¹⁰⁰ UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, preamble.

¹⁰¹ CEDAW/CRC *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18, § 6.

¹⁰² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in marriage and family relations* 1994, §15.

¹⁰³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women* 1992.

¹⁰⁴ *Ibid.*, §6.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, §9.

¹⁰⁷ *Ibid.*, §11.

¹⁰⁸ *Ibid.*

¹⁰⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, §16.

¹¹⁰ *Ibid.*

48. Focusing on the right to health in the context of FGM and FM, the Committee on the Elimination of Discrimination Against Women also identifies violence against women as a critical issue for the health of women and so falls under Article 12 of the Convention guaranteeing equality in health care.¹¹¹ The Committee has stated that State reports must demonstrate that health legislation, plans and policies are based on scientific and ethical research and assessment of the health status and needs of women in that country and take into account any ethnic, regional or community variations or practices based on religion, tradition or culture.¹¹² This is all the more so as “some cultural or traditional practices such as female genital mutilation also carry a high risk of death and disability”.¹¹³

49. Article 16 of the *Convention against Torture*¹¹⁴ proscribes acts of cruel, inhuman or degrading treatment or punishment. The Committee against Torture has applied this obligation to States’ “*failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation...*”¹¹⁵ and the Special Rapporteur on Torture has considered FGM a violation falling within their mandate.¹¹⁶

50. Furthermore, the Committee against Torture and the Committee on the Elimination of Discrimination against Women have also identified child marriage as a harmful practice which leads to the infliction of physical, mental or sexual harm or suffering, with both short- and long-term consequences, and negatively impacts on the capacity of victims to realise the full range of their rights.¹¹⁷

51. Given that FGM and FM are often practiced on girls under the age of 18,¹¹⁸ the *Convention on Rights of the Child*¹¹⁹ is another significant instrument on these two issues. Article 2.2 provides that “*States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members*”. Article 5 has implications for the prohibition of FM and FGM as it provides for the respect of the rights and duties of parents in the raising of their children. However this respect is not an absolute devolution of responsibility and the State must ultimately act in the best interests of the child’s wellbeing pursuant to Article 3. Article 11.1 adds: “*States Parties shall take measures to combat the illicit transfer and non-return of children abroad*”. Article 11.2 provides: “*To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.*”

¹¹¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, §5.

¹¹² *Ibid.*, §9.

¹¹³ *Ibid.*, §12(b).

¹¹⁴ Adopted by the UN General Assembly in 1984 and entered into force in 1987.

¹¹⁵ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, §18

¹¹⁶ UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak : Addendum*, 5 February 2010, A/HRC/13/39/Add.5, §195: “Articles 1 and 16 CAT include in their definitions of torture and cruel, inhuman or degrading treatment “acquiescence by a public official”, which clearly extends State obligations into the private sphere and which should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private actors. I consider that the concept of “acquiescence” contained in the CAT, goes beyond the protection obligations and entails a duty for the State to prevent acts of torture in the private sphere, and recall that the concept of due diligence should be applied to examine whether States have lived up to their obligations.” See also UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, A/HRC/7/3, §68.

¹¹⁷ See, for example, the concluding observations of the Committee against Torture on Bulgaria (CAT/C/BGR/CO/4-5) and the concluding observations of the Committee on the Elimination of Discrimination against Women on Montenegro (CEDAW/C/MNE/CO/1).

¹¹⁸ CEDAW/CRC *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18§20; OHCHR report on *Good practices and major challenges in preventing and eliminating female genital mutilation*, §3

¹¹⁹ Adopted by the UN General Assembly in 1989 and entered into force in 1990.

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52. The most directly relevant provision of this Convention to FGM and FM is Article 19.1 which provides: “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” The Committee on the Convention of the Rights of the Child in its General Comment No. 13 has listed both FGM and FM as harmful practices which constitute violence for the purpose of Article 19.¹²⁰ Article 24.3 requires States to take “all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”. Following the same reasoning as the right to health concerns, FGM and FM can also be covered by Article 27, which guarantees the right of children to “a standard of living adequate for the child’s physical, spiritual, moral and social development.” Equally pertinent to the victims of FGM and FM is Article 39 which requires States to take steps to promote the recovery and reintegration of a child that has suffered from abuse, exploitation, or inhuman and degrading treatment.

53. States Parties to the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*¹²¹ have explicit obligations with regard to child and/or forced marriages that include dowry payments or bride prices because they could constitute a sale of children as defined in article 2 (a) of the Protocol.¹²²

54. The preamble of the General Assembly *Declaration on the Elimination of Violence against Women*¹²³ affirms that violence against women is a violation and nullifies their enjoyment of fundamental rights and freedoms, and is a manifestation “of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women”. Article 1 defines Violence against Women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” Article 2 expressly refers to “female genital mutilation and other traditional practices harmful to women” as a form of violence against women. Article 4 calls on States to “pursue by all appropriate means and without delay a policy of eliminating violence against women”¹²⁴ and, for that purpose, “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women whether those acts are perpetrated by the State or by private persons”.

55. The *Beijing Declaration and Platform for Action* further echoes the stance of the above General Assembly Declaration and its definitions of violence against women while introducing objectives to be used to end such practices. FGM and FM are specifically referred to as harmful practices.¹²⁵ The Beijing Platform for Action also lists early marriage as an impediment on access to education¹²⁶ and classes both FM and FGM as grave health risks.¹²⁷ In regards to FM, the Beijing Platform for Action calls for laws to ensure marriage is only entered into with full free consent of parties and in addition, enact and strictly enforce laws concerning the minimum legal age of consent and the minimum age for marriage and raise the minimum age for marriage where necessary.¹²⁸ A follow up Resolution adopted on the implementation of the Beijing Declaration and Platform of Action lists FGM and FM as harmful customary or traditional practices which are “violations of the human rights of women and girls and obstacles to the full enjoyment by women of their human rights and fundamental freedoms”, and are to be eradicated.¹²⁹ The Five-year Review of the implementation of the Beijing Declaration and Platform for Action (Beijing + 5) reports that progress has been made since the Fourth World Conference in Beijing. Women’s rights have gained recognition, violence against women is

¹²⁰ UN Committee on the Rights of the Child (CRC), *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, §29.

¹²¹ Adopted by the UN General Assembly in 2000 and entered into force in 2002.

¹²² See also Art. 3 (1)(a)(i).

¹²³ UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104

¹²⁴ See also the conclusions of the 51st session of the Commission on the Status of Women, on the elimination of all forms of discrimination and violence against the girl child.

¹²⁵ United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, Platform of Action §39.

¹²⁶ *Ibid.*, §71.

¹²⁷ *Ibid.*, §93.

¹²⁸ *Ibid.*, §274(e).

¹²⁹ UN General Assembly, *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, 16 November 2000, A/RES/S-23/3, §69(e).

now an illegal act in almost every country, and there has been worldwide mobilisation against harmful traditional practices.¹³⁰

56. In December 2012 the General Assembly adopted for the first time by consensus **Resolution 67/146 on intensifying global efforts for the elimination of female genital mutilations**. The Resolution recognises FGM as a harmful practice that constitutes a serious threat to the health of women and girls. It expresses deep concern that, despite the increase in national, regional and international efforts and the focus on the abandonment of female genital mutilations, the practice continues to exist in all regions of the world. It urges States to condemn all harmful practices that affect women and girls, in particular female genital mutilation, and to take all necessary measures, including enacting and enforcing legislation, awareness-raising and allocating sufficient resources to protect women and girls from this form of violence.”¹³¹

57. In November 2014 the General Assembly adopted **Resolution 69/L.23 on Child, Early and Forced Marriage** declaring FM as “a harmful practice that violates, abuses and impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls”.¹³² The 2030 Agenda for Sustainable Development contains Goal 5 on achieving gender equality and empowering all women and girls. Sexual violence and exploitation are specified as a barrier to achieving this goal¹³³, while the elimination of harmful practices, specifically including FGM and FM, is one of the targets to achieve this Goal.

c. European Union

58. The **Charter of Fundamental Rights** contains many of the same rights as the Universal Declaration, the International Covenants and the ECHR which for the same reasons as noted earlier are applicable to FM and FGM.

59. The European Union has adopted a number of instruments on both FGM and FM. While there is a long list of resolutions and directives calling for an end to FM and FGM only the most significant will be discussed here.

60. The EU has issued a number of directives where it has addressed FGM and FM:

- **Directive 2003/86/EC**¹³⁴ deals with family reunification. In Article 4.5 it provides that States, in an effort to combat forced marriage, can institute an age requirement to be met before unification is allowed.
- **Directive 2011/95/EU**,¹³⁵ known as the EU Qualifications Directive, sets forth the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection. In qualifying for refugee status an act of persecution can have a gender or child specific form,¹³⁶ while gender related aspects shall be a given due consideration for the purposes of determining membership of a particular social group.¹³⁷

¹³⁰ § 28 <http://www.un.org/womenwatch/daw/followup/beijing+5.htm>

¹³¹ §§4, 9 and 14.

¹³² UN General Assembly, Resolution 69/L.23 on *Child, Early and Forced Marriage*, 17 November 2014.

¹³³ UNDP, Sustainable Development Goals, Goal 5 : Gender Equality available at <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda/goal-5.html>

¹³⁴ European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC.

¹³⁵ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.

¹³⁶ *Ibid.*, Art. 9(f).

¹³⁷ *Ibid.*, Art. 10.1(d).

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- *Directive 2012/29/EU* establishing minimum standards on the rights, support and protection of victims of crime, identifies both FGM and FM as harmful practices that constitute Gender Based Violence.¹³⁸
- *Directive 2013/33/EU*, known as the EU Reception Conditions Directive, lays down conditions for the reception of applicants of international protection (refugee status or subsidiary protection)¹³⁹. It requires States to take into account the specific situation of vulnerable persons in implementing the Directive and specifically mentions victims of FGM.¹⁴⁰

61. Additionally the *Communication from the Commission to the European Parliament and the Council: Towards the elimination of female genital mutilation* (COM/2013/833 final) reiterated the EU Commission's commitment to combating violence against women and eliminating FGM. The communication provides an overview of the situation regarding FGM in the EU, reaffirming it as a violation of human rights and sets out the Commissions objectives and steps to: attain a better understanding of FGM in the EU; promote sustainable social change to prevent FGM and support victims; guarantee protection to at risk women within existing EU asylum legislative framework; support member States enforcement and prosecution efforts; and promote the worldwide elimination of FGM.

62. Furthermore the General Affairs Council of 8 December 2008 adopted *EU guidelines on violence against women and girls and combating all forms of discrimination against them*. These guidelines, which cover FGM and FM, set out the operational objectives and intervention tools for the EU's external action on combating violence against women and girls. They represent a political and long-term commitment to prevent violence, protect and support victims and prosecute perpetrators.

d. Organisation of American States

63. The *American Convention on Human Rights* (Pact of San Jose)¹⁴¹ contains similar rights as discussed above with the Covenants and ECHR.

64. The *Inter American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Convention of Belém do Pará)¹⁴² reaffirms that violence against women is a violation of fundamental rights and freedoms.¹⁴³ It repeats the various rights of women to life, dignity, security and more (Article 4) and recognises that violence against women prevents the exercise of their civil, political, economic, social and cultural rights (Article 5).

65. Of particular note to FGM and FM it also references the right to be valued and educated free from stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination (Article 6). Given the cultural and discriminatory root of these practices it is valuable to address this aspect of FGM and FM.

¹³⁸ European Union: Council of the European Union, *Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 14 November 2012, L 315/57, Recital 17.

¹³⁹ Directive 2011/95/EU, Article 2(a).

¹⁴⁰ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, Art. 21.

¹⁴¹ Adopted on 22 November 1969 and entered into force on 18 July 1978.

¹⁴² Adopted on 9 June 1994 by the General Assembly of the OAS and entered into force on 5 March 1995.

¹⁴³ Organisation of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994, Preamble.

66. Article 7(e) requires States to “take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women”.

67. Article 8(b) also focuses on the social and cultural roots of violence against women, such as FGM and FM, by requiring States to “modify social and cultural patterns of conduct of men and women” to “counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimise or exacerbate violence against women”.

e. African Union

68. The *African Charter on Human and Peoples' Rights* (Banjul Charter)¹⁴⁴ contains similar fundamental rights as for the Covenants and ECHR. It mentions elimination of discrimination against women in Article 18.3

69. The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Maputo Protocol)¹⁴⁵ addresses the specific rights of women and therefore has a number of provisions to contribute to the legal sphere on FM and FGM. It defines discrimination against women as having the effect to “*compromise or destroy the recognition, enjoyment or the exercise by women, [...], of human rights and fundamental freedoms*”¹⁴⁶ and prohibits harmful practices which endanger the health and general well-being of women.¹⁴⁷

70. Article 5 contains a specific prohibition of FGM and all harmful practices which “negatively affect the human rights of women and which are contrary to recognised international standards”.¹⁴⁸ With regards to FM, Article 6 specifies that State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage while also requiring free consent of both parties for marriage to take place.

f. Southern African Development Community

71. Likewise the Southern African Development Community has adopted the *Protocol on Gender and Development*¹⁴⁹ referring to FGM and FM.

g. South Asian Association for Regional Cooperation

72. The South Asian Association for Regional Cooperation has adopted the *Convention on combating and prevention of trafficking in women and children for prostitution*¹⁵⁰ and the *Convention on regional arrangements for the promotion of child welfare in South Asia*¹⁵¹ which both refer to FGM and Child Marriage.

¹⁴⁴ Adopted at the OAU's Assembly in 1981, entered into force on 21 October 1986.

¹⁴⁵ Adopted by the African Union on 11 July 2003 and entered into force on 25 November 2005.

¹⁴⁶ African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, Art. 1(e)

¹⁴⁷ *Ibid.*, Art. 2(b)

¹⁴⁸ Maputo Protocol, Arts. 5 and 5(b)

¹⁴⁹ Adopted on 17 August 2008 and entered into force on 22 February 2013.

¹⁵⁰ Adopted on 5 January 2002.

¹⁵¹ Adopted on 5 January 2002.

IV. OVERVIEW OF APPROACHES AND PRACTICES IN PLACE IN MEMBER STATES

73. The replies¹⁵² submitted to the questionnaire reveal and emphasise the wide scope of issues FGM and FM can impact. States, owing to differing experiences, seem to view and address these two practices from a multitude of angles. This has resulted in a diverse range of overarching approaches, which in turn influence and create a wide variety of specific practices and responses.

74. The effectiveness or success of the various approaches and practices are not evaluated here, merely the variety of actions and approaches available are highlighted to show the multiple routes open to States in tackling FGM and FM.

75. Despite this diversity of approaches and the wide variety of practices, they can be grouped into categories following the framework taken in the Istanbul Convention.

76. States find it difficult to acquire data and information on FGM and FM, which in turn makes it hard for States and other actors to communicate and coordinate their approaches, and which again in turn can exacerbate the difficulty in finding information.

a. Integrated policies, development and data collection

National action plans

77. A number of States have specific action plans for these issues and though several reporting States do not have National Action Plans on FGM and FM, this is often due to these issues being covered under more general violence against women, equality, child protection, or human rights action plans.

78. Within these plans or in the general promotion and protection of rights, States have adopted a variety of organisational approaches. Some States have a multi-agency approach, involving the resources and cooperation of a wide range of government agencies, from ministries of health, education, immigration, to employment and foreign affairs. These multi-disciplinary systems are often coordinated by one department, such as the Ministry of Justice, and focus on implementing a national strategy based on close cooperation between the agencies and ensuring the multi-agency approach covers all aspects of these issues via specialisation of skills and resources, and complementary practices.

79. Other States implement their national strategy through a single department; however there is often cooperation with other government agencies. Some States also distinguish between national and international efforts to fight FGM and FM and so specialise their projects and resources between home and foreign offices.

80. In some States the municipalities or regional authorities are also engaged as main actors to design or implement policy and practices, ensuring a local stakeholder with goals and responsibilities and allowing for a targeted approach to specific areas and communities.

81. Most States reported a level of engagement, both in domestic and foreign operations, with NGOs and other interested bodies such as academic institutions and volunteer or charity organisations at a variety of levels, from development and consulting on policy and practices, to implementation and funding.

¹⁵² See document CDDH-MF(2016)03.

Data collection

82. Most States reported insufficient or unavailable statistics on many aspects of FGM and FM. Criminal convictions, reporting, and asylum applications statistics were hindered by various factors; however given the recent changes in legislation and action plans new data should be available in the future.

83. Criminal case statistics on FGM and FM and case monitoring efforts were lacking in many States' replies, often due to insufficient data or to a lack of data collection systems.

84. In those States which did report criminal proceedings, the numbers were often low. However a number of factors contribute to this, including the short time elapsed between the introduction of the new criminal offences, the categorisation of criminal cases, and the general difficulties involved in securing prosecutions or even police reporting of these acts. This highlights, not that there is a lack of risk in respect of FGM or FM, but that efforts for prevention and protection are either more effective or are more suited than prosecution efforts to the fight against FGM and FM.

85. However there is some data available on the prevalence of FGM and FM within the States. While many States do not have a national or systematic data collection project, States have relied on inquiries, calls and various other accesses to their support services to collect data. Additionally statistics are also produced by police departments; data is collected by the medical services on women during pregnancy; and studies have been carried out on the activities of shelters and social workers. Additionally NGOs have also carried out their own research and data collection.

86. Some States have used qualitative and quantitative studies to analyse the risk and pervasiveness of these acts in their jurisdictions using the data from States with high prevalence of FGM or FM and the immigration from those States. This data has then been used to also understand the likelihood of the practice continuing and to identify the attitudes and behaviours behind the practice, which in turn enables better responses and preventive techniques.

87. There are a number of issues of privacy given the intimate nature of these issues, however some States have taken efforts to catalogue and record cases found by medical staff, such as the creation of a medical code for FGM or the mandatory collection of data by medical practitioners.

88. However data collection still remains sporadic and speculative, with many States not reporting any significant collection efforts. Better information on the prevalence and risk of these acts, in addition to improved understanding of the mentality and attitude behind the practice, and the sharing of this information will be a major advantage in designing and implementing efforts to end the practices.

b. Prevention

89. In this section the States' replies indicated approaches and practices in the scope of prevention of FGM and FM. Prevention methods vary but a particular emphasis has been placed on raising awareness, education, early identification, training of professionals, public information campaigns, shifting attitudes and involvement of NGOs and civil society.

Information campaigns

90. The majority of responding States have engaged in an awareness campaign. These campaigns are multifaceted in their approach and content, focusing on a variety of issues involved with FGM and FM. Awareness campaigns can be directed at a number of recipients such as towards the victims, educating those at risk on their rights and the protections available, whilst encouraging them to speak up about abuse or to challenge harmful practices. They are also directed towards professionals, raising awareness in a various fields and encouraging their participation and expertise in tackling these issues. Additionally the general population can be engaged by a campaign to encourage discussion, engagement with the problems, and stimulate a shift in accepted attitudes.

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91. It is observed that while a number of States have campaigns at the national level, some retain the focus to only those regions or municipalities where there is a risk or prevalence of FGM and FM. This narrow approach enables the tailoring of the information and tactics to the particular community's view and issues surrounding FGM or FM. One particular method within this tailored approach is the dissemination of information or targeting of these campaigns at asylum centres, airports during times of migration, and newly arrived immigrant communities.

92. A notable aspect to these campaigns is their involvement of a variety of media. Traditional methods such as leaflets and seminars on the various issues are supported in some States by social media campaigns. Online campaigns, e learning tools, and web based information are also seen as useful methods to spread and promote information. A number of States also engage the State television network while others involve Academic Institutions to benefit from their research and networks. NGOs and local charities in many States were also invited to participate; and often were used to enable the dissemination of information and encouraged to actively participate in the campaign.

93. Another focus of the awareness campaigns is the inclusion and cooperation of various agencies and disciplines involved in the fight against FGM and FM. While awareness-raising focused towards the public is one side of the issue, communication between the various sections of the public sector and civil society, which must work together to provide effective solutions to the issue, is also a benefit to ensure a cohesive and cooperative strategy.

94. In addition to domestic efforts, a number of States engage in international or extra-territorial campaigns. Given that FGM and FM are much more prevalent in States outside Europe, campaigns and activities in this external arena are essential to foster change and progress where the phenomena stem from. A number of States support awareness projects in foreign countries either through their own charities or NGOs or in partnerships with various States by supporting the activities and campaigns of Intergovernmental Organisations, such as the UNFPA/UNICEF programme "Female Genital Mutilation/Cutting: Accelerating Change" or by raising awareness of FGM and child, early or forced marriage through events such as the Girl Summit in 2014.

Training of professionals

95. Aside from raising awareness within various professional fields, concrete and comprehensive training is essential to provide actors with the tools to identify, report, support and provide care to those who are at risk or have suffered from FGM and FM. The majority of responding States have a variety of training programmes to enable professionals to prevent FGM and FM. The most comprehensive of these are run by the State, with the support of civil society, however some States have let NGOs or institutions involved with FGM and FM take the lead; while others still have created specialist expert teams or units to coordinate the efforts against FGM and FM.

96. It should be noted that while some States have specific training on FGM and FM, these are sometimes administered as parts or sections of wider programmes, such as eliminating violence against women, domestic violence, trafficking in human beings, child protection or so called 'honour-based' crimes.

97. A wide range of professionals should receive training on these issues, from child protection services, medical professionals, social workers, school and educational institutions to asylum and immigration officials and the police and judiciary. Each field or profession will need to be adequately trained to understand these issues within their field of expertise and be equipped with effective tools to handle arising cases.

98. Training methods vary between States and between sectors. Some States reported mandatory, regular and continuous training of actors, while other actors are encouraged and incentivised to attend training. In some fields it is included in basic training, in others it is pursued in more detail as a specialisation, enabling the creation of specialist caseworkers.

99. Another aspect identified is the involvement of parents in the training via the form of family education programmes. Here professionals in education, health and social care are able to interact and support parents in the course of educating them on child development.

Early identification

100. A number of States have a mechanism in place for the early identification of those individuals at risk, though in a number of cases this was not implemented on the national level.

101. A multitude of sectors including education, childcare, healthcare, police, immigration, religion and even consular services are relied upon, and hopefully trained, to provide an early warning of at risk individuals. This is often implemented via a duty to report perceived risks (with a freedom from confidentiality in the cases of certain professions) combined with training in early warning signs and symptoms. Of particular note was the practice of information sharing (and the ensuing privacy discussion) between professionals, departments, or sectors in order to properly monitor or assess the vulnerability of an individual to FGM or FM.

Shifting cultural behaviour

102. To complement the skills and tools given to professionals to prevent FGM and FM, there should also be wider efforts to inspire a shift in behaviour and attitude of those who engage in these practices.

103. Potential offenders and victims must be informed and educated on not only the laws and risks involved, but engaged to think on, understand and question any harmful traditional attitudes and stereotypes which give rise to these practices.

104. The empowerment of women and girls, and the education of children as well as parents are essential focuses to enable a shift in attitude and a change in deeply held beliefs.

105. Pre-Schools and Schools are particularly important in this regard. States have reported curriculums with classes on gender perspectives, diversity training, combatting prejudice and stereotypes and the building of healthy sexual and interpersonal relationships. These can, and should, take place at all ages and stages of education, building and advancing alongside the child's education and maturity.

106. One method also identified was the training and evaluation of the educators themselves, to ensure their values and teaching methods further enhance the content being taught.

107. Outside of schools, some projects have focused on education through respected peers, mentors and community figureheads. These individuals are able to reach out to younger men and women to inspire and support them to evaluate and challenge established gender roles or stereotypes. The wider community itself has also been engaged to shift established attitudes. Some programmes involved faith leaders, community leaders, parents and other influencers to create a dialogue and support system for challenging and shifting attitudes within the at risk community.

c. Protection*Procedures, measures, and support services*

108. It should be noted that while some States have specific FGM or FM protection mechanisms, in many cases these are part of or covered by a general system of measures and procedures on violence against women or child protection. The structure of protective mechanisms can span various state sectors, and is implemented via specific and coordinated measures, procedures and services.

109. A number of States have implemented a hotline which allows at risk individuals to receive instant support and advice on their situation and general information. Public institutions and interested organisations and charities can further support those at risk by providing information and advice and it should be noted that many States' replies identified the need for anonymity in respect of the potential victim, as this encourages them to make use of the resources.

110. Shelter networks, protective housing and protection groups in hospitals are used to create a safe physical space for victims but also to provide appropriate care, in particular psychological and emotional care, to those at risk or affected. It should be mentioned that while some States reported a national network of shelters, others rely on more localised and municipal systems.

111. The duty to notify is also cited as a measure to enable the protection of at risk individuals and victims. Given the reluctance to report or even the acquiescence of some victims to the practices means that it is necessary to encourage and support professionals and citizens to notify and report suspected or potential cases. Many States have specific obligations and procedures for healthcare workers, social workers and educators to notify or report when they suspect a risk of FGM or FM. While there should be due care and debate on privacy concerns, a number of States have exemptions for medical professionals in their confidentiality laws to enable and encourage or require reporting.

112. The various frontline institutions and organisations, such as in education, immigration and healthcare play a vital role in fulfilling the protection element of FGM and FM policies. Prompt assessment and investigation by the relevant authorities once an at risk individual has been identified leads to effective protective measures being implemented in time and in the most appropriate way to take into account all interests concerned.

113. If necessary many States provide for an intervention by child protective services in the cases where this is required. This can include monitoring, removal of the child to protective custody and follow up visits. Trained social workers, from the State or from relevant organisations, can also provide mediation and dialogue-based resolution of conflicts between the family and the at risk individual.

114. The police must also possess adequate training and mechanisms to effectively recognise, identify, handle, and pursue cases brought to them in order to enable effective protection of the victim.

115. While involving the police, non-penal measures may be useful due to the complex family elements involved in these issues. At times victims will seek protection but not wish to see family members punished. It is therefore necessary to also have a civil, social and healthcare mechanism in place to provide immediate and long-term protection. One approach is Protection Orders which can be obtained for those at risk, guaranteeing police and state protection, with legal force, yet without instigating criminal proceedings. These also can produce enforceable orders such as the removal of passports to prevent a victim being taken abroad or requiring their location and return if they are already outside the State.

116. Adequate healthcare is obviously required. Many States report public healthcare provided to victims, both physical and psychological in both short and long term.

d. Asylum issues

117. Many reporting States recognise FGM and FM as potential grounds for international protection or asylum, typically by considering gender-based violence as a form of persecution, and, in some manner, gender as a particular group. The legal basis varies State to State, from the implementation of EU Directive 2011/95/EU; to interpretation of the 1951 Convention Relating to the Status of Refugees; or in national legislation following ratification of the Istanbul Convention. It is also common that States have made it an obligation or practice to ensure a gender-sensitive interpretation is adopted when processing asylum claims. Furthermore, many States have ensured that there are reception conditions and support services available, underlined by a gender-sensitive approach, to victims of FGM and FM during their asylum process.

118. However despite this recognition few States collect data on these asylum applications due to their collection methods or the general categorisation of these claims as gender based violence. To improve this it is worthy to regard the practices of those States who do have data collection and recording methods in place; and in some States the Immigration and Asylum officers will make note of suspected FGM and FM risks even when not claimed as a reason for asylum.

119. It should also be highlighted that many reporting States have no special procedure for regaining residency status for migrant victims who have left and then not returned to the host State because they were forced into marriage in another State. A few States do have some procedures on this but many are often tied to conditions of time limits, residency as minor, risk of life, humanitarian grounds, or a particular connection to the State.

e. Prosecution

120. In the majority of reporting countries FGM and FM are criminalised. However the exact form of the criminal provision varies. Many States have specific offences, or plan to introduce them. However a number of States rely on other criminal offences such as assault, coercion, bodily harm, abuse of trust etc.

121. It should be noted that for those criminal codes which do not introduce a specific crime that the Istanbul Convention and a number of States with specific provision also criminalise the act of removing a person from the State to perform FGM and FM upon them. While some States have made mention of this, it would be useful to know if and how this aspect is covered by the alternative criminal provisions in the States that rely on those.

122. The Istanbul Convention makes reference to various elements of the prosecution of these crimes in Articles 42-48, such as aggravating circumstances, sanctions, prohibiting mandatory alternative dispute mechanisms and unacceptable justifications. Not all States commented on these aspects of their criminal law of FGM and FM and in particular it would be beneficial to know the relevant provisions for States which have not ratified the Istanbul Convention.

123. Whilst not concerned directly with prosecution, many States cited their validity of marriage laws (age, consent, due notification etc.) as a form of prevention or protection against forced marriage. While it was not explicitly asked in the Questionnaire, few States commented on the civil consequences of forced marriage. Although it is presumed that forced marriage would contravene the consent and possibly age requirements most national jurisdictions have, it would be edifying to understand the various States positions on the validity of forced marriages conducted abroad. Additionally, it should be establish what residency implications of an annulment of a forced marriage arise where the residency is dependent on the un-coerced partner.

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Extraterritorial jurisdiction

124. One of the major aspects to the criminalisation of FGM and FM is the reality that these acts often occur outside the territory of the State in question. This creates issues of jurisdiction, specifically of extraterritoriality and dual criminality.

125. The reporting States have a mix of approaches. The majority have provisions which provide extraterritorial jurisdiction. However some States only have this in relation to one of the crimes.

126. There is also a mix of approaches in how that extraterritorial jurisdiction is established. The majority of States employ the principle of nationality, in respect of both the victim and the perpetrator. However others take this further and claim jurisdiction when the victim or perpetrator is a permanent resident of their State. To add to the mix some States also go even further by including those who are habitually resident.

127. The issue of dual criminality also produces different responses. A number of States have waived the requirement, thereby claiming criminal jurisdiction over these acts regardless of the law where they were committed. Other States uphold the requirement of dual criminality and so will not prosecute unless these acts were criminalised in the State they were committed in. Some States also waive the requirement of dual criminality in respect of one act, often FGM, but not of the other, or waive it in regard of their nationals and residents but not of those who are merely present on their territory.

V. CONCLUSIONS AND POSSIBLE FOLLOW-UP

Conclusions

128. FGM and FM are serious human rights violations in contradiction with a number of fundamental rights and freedoms recognised by the European Convention on Human Rights (ECHR) in particular Article 2 on the right to life and Article 3 on the prohibition on torture and inhuman or degrading treatment or punishment which imply a positive obligation upon the States. Moreover such harmful practices are in contradiction with the Istanbul Convention, namely Articles 37 and 38 which deal specifically with FGM and FM, as well as a number of other provisions contained in the Convention.

129. The fact that that not only women but often girls are victims of FGM and FM implies a violation of their rights according to the UN Convention on the Rights of the Child.

130. The standards and norms contained in international and regional treaties applicable to FGM and FM have led to the adoption and implementation of legislation, policies and strategies in many member States. Nevertheless these serious human rights violations continue to exist and their number seems even to be on the rise in Europe.

131. A comprehensive approach including integrated policies, protection, prevention, and prosecution is most effective to tackle the nuanced and multifaceted issues of FGM and FM including cultural attitudes supporting such practices.

132. Prevention is one of the core elements to ending these practices. Prevention methods may vary but a particular emphasis has been placed on raising awareness, early identification, education, the training of professionals, public information campaigns, shifting attitudes and the involvement of NGOs and civil society.

133. Some States have specific FGM or FM measures, in many cases these are part of or covered by a general system of measures and procedures on violence against women and girls or child protection.

134. Most States recognise FGM and FM as potential grounds for international protection or asylum, typically by considering gender-based violence as a form of persecution, and, in some manner, gender as a particular group. However despite this recognition few States collect data on these asylum applications due to their collection methods or the general categorisation of these claims as gender based violence.

135. In the majority of reporting States FGM and FM are criminalised. However the exact form of the criminal provision varies. Many States have specific offences, or plan to introduce them. However a number of States rely on other criminal offences such as assault, coercion, bodily harm, abuse of trust etc.

136. A number of States have specific action plans for these issues and though several reporting States do not have National Action Plans on FGM and FM this is often due to these issues being covered under more general violence against women, equality, child protection, or human rights action plans. It was noted that an effective response to combat FGM and FM requires more than individual measures in the fields of prevention, protection and prosecution and therefore integrated policies need to be further implemented.

137. Amongst the challenges identified are:

- That there is a lack of data, in particular comparable data, on FGM and FM;
- That some States do not have a mechanism in place for the early identification of individuals at risk;
- That there should be wider efforts to promote a shift in behaviour and attitude of both the public at large, and those who engage in these practices; and that the empowerment of women and girls, and the education of children as well as parents are essential focuses to enable a shift in attitude and a change in deeply held beliefs;
- That many reporting States have no special procedure for regaining residency status for migrant victims who have left and then not returned to the host State because they were forced into marriage in another State; and
- That there is a lack of information from States regarding elements of the prosecution of these crimes, such as aggravating circumstances, sanctions, prohibiting mandatory alternative dispute mechanisms and unacceptable justifications are included in their criminal law.

Possible follow-up

138. On the basis of the current draft legal analysis prepared by the CDDH-MF and the replies from member States to the questionnaire, the Group would pursue its work on the drawing-up of a Guide to national good practices. This Guide would be following the structure *a*. Integrated policies, development and data collection, *b*. Prevention, *c*. Protection, *d*. Asylum issues, *e*. Prosecution.

139. Any further follow-up work could take several forms:

- a *declaration* by the Committee of Ministers reaffirming that FGM and FM are serious human rights violations for which States have an obligation to prevent and combat these acts in Europe and abroad; and/or
- a *recommendation* by the Committee of Ministers that would give further guidance to member States on the effective implementation of the existing standards which apply to these issues, mainly those of the Istanbul Convention. Such an instrument could include examples of national good practices (in the same manner as the Committee of Ministers' Recommendation to member States on human rights of older persons).

140. It would also be possible in the above legally non-binding instruments to encourage further ratification of relevant treaties such as the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention),¹⁵³ the Council of Europe Convention on Action against Trafficking in Human Beings,¹⁵⁴ the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)¹⁵⁵ and the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.¹⁵⁶

¹⁵³ See above footnote 62.

¹⁵⁴ See above footnote 72.

¹⁵⁵ See above footnote 74.

¹⁵⁶ See above footnote 94.

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141. It is important that any possible new recommendation will not duplicate work already undertaken by other committees and bodies of the Council of Europe or other international and regional organisations and that it will bring added value. This should in no way lead to any contradiction with the standards of the Istanbul Convention, which however does not cover all aspects related to these two practices to the same degree, but instead to focus on issues which are not covered so extensively by it, such as international cooperation to tackle the problems. Moreover, at present not all member States are Parties to the Istanbul Convention and it is expected that it will take quite a while before it will be applicable to all. On the other hand, due to the seriousness of these human rights violations there is a degree of urgency in moving ahead with the combat and prevention of FGM and FM in all member States whether or not they are Parties to the Istanbul Convention.

142. Any decision on the most appropriate instrument should await the outcome of the work on the preparation of the Guide to national good practices. Bearing in mind the urgency of the matter, a decision on further follow-up action could therefore be discussed at the next meeting of the CDDH-MF in September and submitted to the CDDH in December before pursuing any further work.

143. Any further action by the CDDH would of course imply the continued necessary coordination with other relevant bodies (GEC, GREVIO, GRETA, CDPC). In addition, other Committees and other bodies of the Council of Europe are invited to participate in the CDDH-MF meetings (e.g. Lanzarote Committee and CAHENF). Furthermore, other bodies and intergovernmental organisations (e.g. OHCHR, FRA, EIGE) as well non-governmental organisations active in this field (e.g. Centre d'Information sur les Droits des Femmes et des Familles) and religious and belief communities could send a representative to the meetings upon the decision of the CDDH-MF or its Chairperson.