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THE EMERGENCE OF GENDER JUSTICE IN INTERNATIONAL CRIMINAL LAW: TOWARDS THE RECOGNITION OF FGM/C AS CRIMES AGAINST HUMANITY?

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ABSTRACT

L'obiettivo di questa tesi è cercare di dare una risposta alla seguente domanda di ricerca: è possibile che le mutilazioni genitali femminili (MGF) siano riconosciute come crimini contro l'umanità?

A tal fine, nel Primo Capitolo abbiamo rintracciato il percorso che ha portato all'emergere della "giustizia di genere" nel diritto penale internazionale: iniziando l'analisi dai Tribunali Militari di Norimberga e Tokyo, il Capitolo poi termina con l'esame delle misure *gender-sensitive* riscontrabili negli Articoli dello Statuto della Corte Penale Internazionale (CPI) e intraprese tramite regolamento dall'Ufficio del Procuratore, senza tralasciare gli avanzamenti ottenuti tramite la giurisprudenza.

Il Secondo Capitolo si focalizza sulla descrizione delle MGF partendo dalle origini storico-culturali fino alla categorizzazione moderna delle quattro "pratiche" individuate dall'Organizzazione Mondiale della Sanità (WHO) in

1. Clitoridectomia
2. Escissione
3. Infibulazione
4. Tutte le rimanenti operazioni non a fine medico fatte sui genitali femminili (incisioni, raschiature, cauterizzazioni, piercing).

In seguito si analizza in quali Paesi si verificano MGF e se esse facciano parte della cultura originaria o siano state importate dai migranti, poi, si riportano due studi sulle MGF che approcciano la materia da un punto di vista alternativo.

Il Capitolo si conclude con una panoramica degli strumenti internazionali e regionali in materia di MGF, sottolineando tra di essi, la virtuosità delle linee guida dell'Agenzia delle Nazioni Unite per i Rifugiati (UNHCR).

Il terzo ed ultimo Capitolo si concentra sulla domanda di ricerca. Ripercorrendo l'evoluzione del concetto di crimini contro l'umanità dai suoi fondamenti teorico-filosofici, si arriva all'analisi degli elementi contenuti nell'Articolo 7 dello Statuto della CPI. In seguito, si richiamano caratteristiche menzionate nel Capitolo Secondo per verificare se le MGF abbiano tutti i requisiti (gravità, *mens rea*...) per essere giudicabili dalla CPI secondo l'Articolo 7, paragrafo K ("altri atti inumani").

Dal lavoro di *matching* emerge che le MGF provocano una sofferenza paragonabile ad altre condotte condannate dall'Articolo 7; la sola procedura infatti, incide severamente sul benessere fisico delle donne. Le MGF sono una pratica irreversibile che viola il diritto delle

donne all'integrità fisica e che spesso possono causare danni ai figli al momento del parto

Il *target* della pratica è facilmente individuabile nelle giovani che vivono in quelle comunità dell'Africa e del Sud-Est Asiatico (e sempre più spesso in Europa, Americhe e Oceania) dove le MGF sono sistematicamente praticate e. la loro funzione sociale, sottomettere le donne al volere degli uomini della famiglia, non è discussa, spesso per paura di ripercussioni.

Gli autori della pratica sono altrettanto facilmente identificabili: guaritori e anziani della comunità.Infatti con l'evolversi del diritto penale internazionale il gruppo non deve più necessariamente essere di natura statale o para-statale, ma solamente avere un livello di

organizzazione minima che ne permetta l'esecuzione. E anche se oggi gli esecutori sono sempre più consapevoli dei pericoli legati alle MGF (anche se e quando eseguite in strutture sanitarie) grazie alla sensibilizzazione delle campagne mondiali contro tale pratica, continuano a praticarle in quanto le ritengono necessarie a contenere una "sovrabbondante" (quindi pericolosa per lo *status quo*) sessualità, che le donne sono incapaci, o non sono intenzionate, a controllare.

L'argomentazione si conclude asserendo che le MGF sono un crimine internazionale, verificabile in particolari circostanze: donne che vivono in villaggi e comunità dove le MGF vengono considerate un passaggio inevitabile nella loro vita, a prescindere dall'appartenenza etnico-religiosa. In quelle circostanze lo stigma contro coloro che rifiutano la pratica e i danni che la stessa provoca, sono la vera causa della sua inevitabilità e pericolosità. Quindi non solo le MGF potrebbero essere qualificate come "altri atti inumani", ma potrebbero anche essere considerate come atti chiaramente persecutori, in quanto emerge anche un mero intento persecutorio nella volontà di impedire ogni possibile avanzamento dlla condizione di sottomissione in cui vivono le donne.

La tesi si chiude lasciando aperta la domanda di ricerca ricordando come molte delle condotte che adesso sono crimini contro l'umanità (sparizioni forzate, schiavitù sessuale, stupro e altre ancora) inizialmente fossero categorizzate come "altri atti inumani".

Il diritto penale internazionale non può essere certamente la panacea contro tutte le condotte contrarie al senso di umanità; quel che è certo è il forte segnale che la criminalizzazione internazionale delle MGF darebbe, ovvero la fine dell'impunità per crimini lesivi dei diritti fondamentali delle donne, dovunque questi vengano commessi.

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INTRODUCTION

> [The crimes within the ICC jurisdiction:]
> *Their heinus nature elevates them to a level where they are of "concern" to the international community. They dictate prosecution because humanity as a whole is the victim.*
> William A. Shabas

In the past hundred years, more people have been killed in various types of conflicts and regime victimization than at any other time in history and the majority is likely to fall victim of crimes against humanity. Nevertheless, as Cherif Bassiouni keeps underlining, the international community has so far failed to adopt a specialized convention on crimes against humanity.

Despite the importance of the Nuremberg and Tokyo Tribunals at the end of World War I**,** impunity for egregious violations of human rights and humanitarian law has yet to be ended. As a result, the authors of previously unimaginable atrocities that now are daily news headlines have escaped justice for their crimes.

Female Genital Mutilation/Cutting is one of the fundamental violation of human rights. Indeed, it subjects girls and women to health risks and has life-threatening consequences without any medical necessity. Among those women's human rights violated by the practice are the right to the highest attainable standard of health and to bodily integrity.

What is more, Female Genital Mutilation/Cutting is a discrimination based on sex, a manifestation of gender inequality and discrimination "*related to the historical suppression and subjugation of women*"[1] which denies girls and women the full enjoyment of their rights and liberties and it is used as a way to control women's sexuality.

Unfortunately, Female Genital Mutilation/Cutting is a tradition that has

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[1] Ontario Human Rights Commission, *Policy on Female Genital Mutilation (FGM),* Ontario Human Rights Commission, Toronto, Revised 22 November 2000, p. 7.

become inseparable from ethnic and social identity among many groups. As stated by the International Conference on Population and Development, "*For women it is not only a painful ordeal but a means of social bargaining and negotiation; for societies it is a collective identity marker – a status symbol in the fullest sense – as well as a creator of cohesion*."[2]

That considered, in this paper we want to answer the following research question: can Female Genital Mutilation/Cutting be recognized as a crime against humanity?

To answer, in the First Chapter we will retrace the path of what is currently called "gender justice" in international criminal law towards the achievements reached with the Rome Statute of the International Criminal Court.

In the Second Chapter we will describe the reality of Female Genital Mutilation/Cutting today and its socio-historical background, along with some interesting studies which approach the subject from a different angle.

In the Third and last Chapter we will try to answer the research question through the matching between the requirements necessary to have crimes against humanity and the characteristics of Female Genital Mutilation/Cutting as described in Chapter Two.

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[2] Toubia, Nahid, Amany Abouzeid, and Eiman Sharieff, 'Health Risks vs. Defending Rights', *Countdown 2015*, Special Edition: *ICPD at 10: Where are we now?* June 2004, p. 21.

CHAPTER ONE
THE EMERGENCE OF GENDER JUSTICE IN INTERNATIONAL CRIMINAL LAW

Introduction

Since the beginning of human civilization, women and girls have suffered rape, sexual slavery, forced pregnancy and other brutal forms of sexual and gender violence during armed conflict.

As a proof, we can quote a famous example: the rape of the Sabine women. Although here "rape" is a conventional translation of the Latin *raptio* (abduction), the gravity of the conduct does not change: the first generation of Roman men abducted from the Sabine families their brides-to-be in order to begin a new society. It is an historical example of women as "booty" of war.

Long ignored, trivialized and misunderstood, gender crimes committed in the context of war or mass atrocity have usually been dismissed as a natural consequence or a side effect.

These last decades have indeed been historic: the international community has taken many concrete steps in response to the increasing call to recognize sexual and gender-based crimes as serious violations nationally and internationally, firstly through the development of international humanitarian law (hereinafter IHL).

Later, international courts and transitional justice institutions have recognized that gender and gender inequality produce certain kinds of "gendered" violence and victims; the progress in prosecuting crimes committed disproportionately against women and girls, in particular rape and sexual slavery, is unprecedented in history and has established precedential authority for redressing these conducts in other *fora* and conflicts.

In the arena of international criminal law (hereinafter ICL), there was a significant push towards the elimination, at least formally, of the private treatment (and consequential impunity) of gender crimes. For the first time, steps were taken to recognize women as full subjects of human rights and international criminal justice.

We are finally beginning to grasp the moral, social, economic and legal

importance of taking adequate measures to prevent and punish gender crimes.

However, in every legal system in the world, the investigation and prosecution of sexual and gender violence has been hindered by discriminatory and patriarchal rules, law enforcement attitudes and practices. Indeed the prevailing cultural view is that, while it is correct for society to formally outlaw rape and other gender-based crimes, the actual enforcement of these legal prohibitions threatens the dominating male social order and the "private" or domestic sphere of relations between women and men. This attitude is common in the international arena as well.

That is why one of the most outstanding progresses in ICL is the recent evolution of the way it addresses sexual and gender-based violence. In truth we can recall that no more than 60 years ago, Robert Jackson – Chief prosecutor of the Nuremberg Tribunal – decided not to present sexual crimes in the cases against Nazi leaders. Such an achievement was also possible thanks to the campaign of women's non-governmental organizations (hereinafter NGOs) since the Third World Conference in Nairobi held in 1985[1] that finally led to the recognition of gender-based acts of violence as human rights abuses at the Vienna World Conference on Human Rights of 1993[2]. One of the effective response to the requests voiced within the Vienna Document was the accountability through the prosecution of gender-related crimes as murder, systematic rape, sexual slavery and forced pregnancy by the International Tribunal for the Former Yugoslavia (hereinafter ICTY), the International Tribunal for Rwanda (hereinafter ICTR), the Special Tribunal for Sierra Leone (hereinafter STSL) and the International Criminal Court (hereinafter ICC). If such crimes had not been

[1] World Conference to review and appraise the achievements of the United Nations Decade for Women: Quality, Development and Peace Nairobi, 15 to 26 July 1985 aiming to evaluate the progress made during UN Decade for Women and devise a new course of action for the advancement of women. The Conference adopted the The Nairobi Forward-looking Strategies, a blueprint for action until 2000.

[2] The World Conference on Human Rights was held by the United Nations in Vienna, Austria, on 14 to 25 June 1993. The conference approved the *Vienna Declaration and Programme of Action*, UN doc. A/CONF: 157/23, 12 July 1993.

included in those Statutes, the perception would have once again been one of impunity and triviality of conducts if compared to the "real" war crimes and crimes against humanity.

Undeniably the primary impetus was the creation of the *ad hoc* international tribunals and particularly of the ICTY in The Hague in 1993, by the United Nations Security Council[3] (hereinafter UNSC) after deeming the atrocities committed during the Balkan conflicts a threat to the international peace and security – Chapter VII of the Charter of the United Nations. The following recognition that rape and other sexual violence could be strumentalized in a campaign of genocide contributed to the understanding of sexual or gender-based violence as war crimes and crimes against humanity.

The extraordinary advancement made in the following international or mixed Tribunals on redressing gender-related crimes is largely the result of hard work by scholars, activists and practitioners inside and outside the fora, who fought long and difficult battles to ensure that crimes were properly investigated, indicted and prosecuted. These offences are truly the most difficult to investigate and prosecute because they are intensely personal, the injuries are often less visible and details of the act provoke discomfort and aversion. But the only alternative is silence, impunity and grave injustice.

Notwithstanding the progress in the integration of sexual and gender-based crimes into ICL, justice still eludes many victims and those crimes are under-investigated and under-prosecuted. Not only is rape as well as other sex crimes increasingly systematically committed, but they also continue to be routinely committed opportunistically, simply because the atmosphere of war and the violence creates the opportunity. Whether organized or random, sexual violence generates mass terror, panic and destruction. It is clearly used as a weapon of war. As a matter of fact, the treatment of gender-related violence within ICL is bound

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[3] Security Council Resolution 827, 25 May 1993.

to the recognition of women's human rights and to the growing jurisprudence condemning violence against women in non-armed conflict situations as human rights violations.

The United Nations Secretary General (hereinafter UNSG) Kofi Annan was the first to give voice to the commitment to increase the number of women in senior peace-related positions to improve the situation[4].

In 2000 the UNSC passed Resolution 1325[5], a groundbreaking document underlining the United Nation's commitment to improve women's participation in and access to conflict resolution and to establish remedial measures for those victimized by war and criminal activity. Once for all women were recognized not only as passive victims, but were empowered as "survivors".

1.1. What is gender justice?

1.1.1. "Gender[6]" in international criminal law

In 1998, the term "gender" was used and defined for the first time in an ICL treaty, the Rome Statute of the International Criminal Court (hereinafter ICCSt.)[7]. Article 7.3 states:

> "For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."

The definition emerged from difficult and highly contentious negotiations in which the term "gender" served as a shield for conservative concerns about sexuality. Article 7.3 can therefore be defined as a "constructive ambiguity"

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[4] Pursuant United Nations General Assembly Resolution 52/96 (12 Dec. 1997) on gender balance, the UNSG issued a report on progress to date in achieving gender equality in the Secretariat: *Strategic Plan of Action, Report of the Secretary General on the improvement of the status of women in the Secretariat (1995-2000),* U.N. Doc. A/49/587, sect. IV (2000).

[5] UNSC Res. 1325 (31 Oct. 2000) on women, peace and security.

[6] There is of course an extremely large body of literature on the subject of gender both within the realms of the law and more widely in society at large. For the purposes of this thesis, however, we do not intend to engage with the notion of gender in the broad sense, but rather we will confine to the concept of gender as defined in the ICC Statute.

[7] Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998).

which consists in the use of ambiguous words which give comfort to those on different sides of a debate, thereby promoting agreement.

The way the ICC interprets "gender" has a direct impact on the cases of persecution it may prosecute, on the law applied, on how the Prosecutor undertakes his/her duties and on the protection and participation of victims and witnesses. As a consequence it deeply affects the legal construction of "gender" under international law.

There are three the main concerns regarding the previous definition: firstly the direct linkage between "gender" and the biologically determined "sex" which could be used to simplify the notion. Secondly the phrase "*within the context of society*" diverges from references to the "socially constructed roles" mentioned in other United Nations documents[8]. The social construction is there interpreted more broadly to include attitudes, values, responsibilities, opportunities and relationships between and among women and men, always acknowledging the influence of culture, political and economic context, class, race, ethnicity, poverty level, sexual orientation and age. Lastly "gender" is the only term defined in the context of the crime against humanity of persecution (Article 7) as if implying the will to isolate it from the others. This could reflect negatively on the prosecution of gender-based crimes, since it implies that they are somehow different to non-gender-based persecutions, i.e. those against other identifiable groups.

Such a definition could also restrict the range of gender crimes that may be prosecuted. For example, the ICC could narrow down the definition to eliminate persecution conducted on the basis of sexual orientation as a crime against humanity, hence allowing discrimination on that basis in its interpretation and

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[8] See *Beijing Declaration and Platform for Action* in Report of the 4th World Conference on Women, Beijing, 4 -15 September 1995, U.N. Doc. A/CONF.177/20/REV.1, U.N. Sales n. 96.IV.13 (1996), U.N. High Commissioner for Refugees, *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* , U.N. Doc. HCR/GIP/02/01; World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Review of Reports, Studies and Other Documentation for the Preparatory Comm. and the World Conference* , 30 July-10 August 2001, 10 U.N. Doc. A/CONF.189/PC.3/5 (2001).

application of law and when addressing the needs of victims and witnesses.

Codifying existing laws on gender crimes however, has proved to be successful to fill the blanks in ICL that were left by the Statutes of the ICTY, ICTR[9] and the Genocide Convention. This enhancement emphasizes that gender crimes are of the most serious nature and that it is mandatory to end the impunity associated with them. Having a wide spectrum of gender crimes in multiple provisions gives the ICC the ability to indict those accused of such crimes under several different Articles underlining the gravity of gender crimes.

That said we can also consider that, though missing the unique opportunity to adopt a forward looking definition of "gender", by using the "constructive ambiguity", the drafters did leave open opportunities for a positive and precedent-setting approach where "gender" is to be understood broadly as a multifaceted, complex and socially constructed category with the interpretive assistance of the ICCSt., United Nations practice, international law and international legal theory[10].

Unfortunately it is patent that the concept of gender has yet to be fully realized, as the lack of understanding and support shown to victims of gender crimes highlights, underlining how gender does not have to be perceived as related to women alone.

Now, more than ever, it is important not to limit the debate to women or to equate women to gender, even if generally the focus will be on women and their specific needs. Reference to sex understood as the biological difference between men and women is insufficient, especially if it means that the victim of the crime can only be a woman.

In addition, even though there is a link between gender-based crimes and sexual violence, not all gender-based crimes involve sexual violence since they can also involve gender inequality and social context, livelihood, general safety

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[9] See the analysis in the following paragraphs from 1.3 onwards.

[10] For a more in-depth analysis see V. Oosterveld *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*

and perception of roles (forced marriage is an example).

1.1.2. "Gender Justice or Just Gender?"[11]

First of all, before defining "gender justice", a definition of "gender-related violence" as intended in this paper is due.

The U. N. Committee on the Elimination of Discrimination against Women (CEDAW) defined gender-based violence as:

> "violence that is directed against a woman because she is a woman or that affects women disproportionately"[12].

Here "disproportionately" means that such violence is committed frequently, but not exclusively, against members of one sex, or that it has different consequences for women and men. It follows that gender-based crimes can also be committed disproportionately against men, as the 1995 massacre of Muslim boys and men in Srebrenica demonstrates.

For the sake of this paragraph we will focus on crimes such as rape, sexual slavery, sexual violence, forcible sterilization and trafficking as primarily directed against women because they are women and thus having gender-specific consequences – like pregnancy – and specific bodily harms, along with the related stigma and shame. Furthermore gender-related crimes against women were the major focus of discussion and analysis in the jurisprudence of the ICTY and ICTR.

As we mentioned, the specificity of gender-based crimes lies in the fact that violence is directed against persons who, even if belonging to a specific ethnic or religious origin, are targeted on the basis of their gender and that the offences are a direct consequence of power imbalances that exploit the distinction between males and females supporting patriarchal structures.

Historically, crimes of sexual violence have always been contrary to the

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[11] King K.L., Greening M. (2007), *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, Social Science Quarterly, Vol. 88, n°.

[12] CEDAW, General Recommendation No. 19, 11th session, 1992.

laws of war and to customary international law, but provisions on the subject were limited and the jurisprudence underdeveloped and under theorized.

The silence of international law made them the "forgotten" crimes[13]. Violence against women is often ignored and rarely punished. Women and girls suffer disproportionately from violence by the State, the community and the family both in times of peace and of war. Nowadays a life free from violence is considered a fundamental human right.

Still these crimes are frequently perceived as "private" acts and not as violations of human rights law (hereinafter HRL), IHL and ICL. Until comparatively recently they were perceived to be a natural – though unfortunate – part of war, as if this was an adequate and reasonable justification. What is worst is that women have all too often been treated as legitimate "war booty" for the use of soldiers to release tension, relax after battle or improve morale.

During times of armed conflict, pre-existing gender inequalities seem to provide a green light for gender-based crimes which are more likely to occur if violence was already prevalent before the beginning of the hostilities, if there was a cultural disparity between men and women and if there was little fear of punishment.

Recent happenings have stressed that gender-based crimes may also be committed purposefully as part of political or military goals of opponents and, as a consequence, they become weapons of war and instruments of terror. We can recall for example the systematic rape of Albanian women by Serbian forces in Kosovo; the sexualized violence against women in the 1994 genocide in Rwanda; the use of rape as a weapon of war by the *Mouvement de Libération du Congo* (MLC) and crimes of sexual violence in the Democratic Republic of Congo (DRC) since 2002.

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[13] K. Askin, "Women and international humanitarian law", in D. Koening and K. Askin (Eds) *Women and international human rights law* (Ardsley, NY: Transitional publishers, 2000) Vol. 1, 41 at 64 has a chronology of development of gender issues in IHL in the 1990s.

Gender injustice should be a key concern of the international community. Two major developments aim in this direction: the role of women in ICL and the ICCSt. [14]. Women have been and are still at the forefront of progress in this area of law and justice.

"Gender justice" is often used with reference to emancipatory projects that aim to advance women's human rights through legal changes or the promotion of their interests in social and economic policy.

The notion goes beyond related concepts of justice in class or race terms. "Women" *per se* cannot be identified as a coherent group along with other sets of disempowered people – such as ethnic minorities or socially excluded immigrants – because gender cuts across all social categories, producing differences of interests and conceptions of justice among them. In addition, unlike any other social group, relationships between women and men within the family and the community are spaces of gender-specific injustice and therefore in order to advance gender justice we must focus on power relations in the domestic or "private" context which infuse most economic, social and political institutions. Justice itself, in its conception and administration, is very often gendered, responding to a patriarchal standard derived from the domestic arena.

Nowadays the competing conceptions of "gender justice" which steer feminist activism and policy-making can be summarized into[15]:

- "Gender justice" as entitlements and choices: women able to refuse or renegotiate the social arrangements in which they find themselves.
- "Gender justice" as absence of discrimination.
- "Gender justice" as positive rights implying three obligations for the State as a guarantor: respect (no interference), protect (set standards), and fulfill (positive action).

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[14] See following paragraphs from 1.5 onwards.

[15] For in depth analysis see Goetz A. M *Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates and New Directions for Research*.

To sum up the notion that guides this paper, we quote the inclusive definition of "gender justice" by A. M. Goetz:

> "[…] gender justice can be defined as the ending of […] inequalities between women and men that result in women's subordination to men.[…] [G]ender justice as a process brings an additional essential element: accountability. Gender justice requires that women are able to ensure that power-holders—whether in the household, the community, the market, or the state—can be held to account so that actions that limit, on the grounds of gender, women's access to resources or capacity to make choices, are prevented or punished. […][G]ender justice adds an element of redress and restitution that is not always present in discussions of women's empowerment."[16]

Regrettably gender justice is still restricted in its potential by the underreporting of women's suffering: they fear denouncing sexual violence because of the shame or guilt of being a victim and of the denial and horror caused by evoking memories.

The ICC and its Member States can actively contribute to condemning these crimes, by signaling through judgments (or jurisprudence) that they will not be tolerated any further and by redressing their internal socio-economic gender imbalance. Judgments may serve as a deterrent and as a means to reinstate and recover the dignity of victims, weakening the stigma attached to them.

ICC Member States should be encouraged to implement UNSC Resolutions relating to women and armed conflicts[17], remembering that they are bound to incorporate the ICC Statute in their domestic legislation and to mirror its aspirations of gender justice by prohibiting gender discrimination and promoting gender sensitive education of soldiers.

In conclusion, the research should also shift from "*just seeing gender*" to the examination of "gender justice". Although women may be the primary proponents calling for a protected status within the international community, in practice the

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[16] Goetz A. M *Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates and New Directions for Research*, 2003.

[17] UNSC Res 1325 (2000), 1820 (2008), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013).

effective delivery of justice is about "just gender"[18].

1.1.3. Judging and gender

Since women comprise the majority of victims of gender-based crimes they are to be closely involved in the measures taken generally on their behalf at all stages of the processes – the reporting, investigating and decision-making – in order to put forward a gender perspective.

As women have increasingly begun to acquire political power, the international community has acknowledged that their participation in international criminal fora is fundamental both because it underlines how gender equity is a goal *per se* and because of women's broader commitment to ensure that gender-based crimes are investigated and punished.

The precedents for the adoption of principles of female representation and gender expertise have always been clear, though never incorporated in a Treaty forming an international body. Taking its lead from the Vienna Conference[19], the Beijing Conference[20] of 1995 urged governments and intergovernmental organizations to "*aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies, such as the [ICTY], the [ICTR] and the International Court of Justice, as well as other bodies related to peaceful settlement of disputes*."

The U.N. General Assembly later echoed these words in its call to all member states to "*commit themselves to gender balance*" by "*creating special mechanisms,*" including "*by presenting and promoting more women candidates*" within both national and international bodies and institutions[21].

Experiences in the ICTR, ICTY and SCSL demonstrated that female judges

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[18] See *supra* note 11.

[19] See *supra* note 2.

[20] Beijing Declaration and Platform for Action, UN Doc. A/CONF.177/20 (15 September 1995): 142(b).

[21] G.A. Res. 51/69, adopted 12 Dec. 1996. In 1997, the General Assembly reaffirmed the goal of 50/50 gender distribution by the year 2000 in all categories of posts within the United Nations system. G.A. Res. 52/96, adopted 12 Dec. 1997.

played a key role in the formulation of rules of evidence and procedure. As a consequence, the ICC has included women members of staff and positioned itself at the forefront compared to other international organizations. In the selection of judges, the ICC has taken into account the need for a fair presentation of men and women selecting 11 female judges out of a total of 19.

The recruitment policy of fair representation of women and men has also been applied amongst the staff of the Offices of the Prosecutor and Registry and legal advisers of the ICC. A gender balance in terms of recruitment policy is considered to facilitate successful investigations and prosecution of gender-based crimes. In addition the judges and staff generally are required to have legal expertise in the field of sexual and gender violence in order to develop an effective and common gender strategy against gender-based crimes. This involves the inclusion of a gender perspective at all levels of the decision-making processes on how to address those conducts.

To this day the ICC has not yet developed a consistent policy stating that gender is a priority concern, nor appointed a gender expert with an oversight authority; the new recruitment policy has not proved effective at the senior level or under the parameter of geographical representation and gender.

Yet achievements are not to be ignored.

From the point of view of gender justice principles, the influence of female judges in international tribunals was and still is, crucial. For example: in 1995, Chief Prosecutor Richard Goldstone instituted the position of Legal Advisor for Gender-Related Crimes (the Gender Legal Advisor). The Gender Legal Advisor has been instrumental in ensuring the investigation and prosecution of sexual violence crimes despite the legal difficulties in doing so given their inadequate listing in the ICTY and ICTR Statutes.

The influence of female judges from other criminal tribunals has considerably advanced gender justice principles. The intervention of Justice

Navanethem Pillay in the 1998 *Akayesu* case[22] advanced gender issues in the international sphere. The sexual violence charge of the amended indictment actually led to the defendant's conviction for genocide due to those acts: it was the first time that an international Tribunal found that rape and sexual violence can constitute genocide.

Judge Pillay has lately observed:

> "Who interprets the law is at least as important as who makes the law, if not more so.... I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary."[23]

And more: Justices Carmen Argibay (at the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery) and Elizabeth Odio Benito and Florence Mumba (both at the ICTY) contributed significantly to gender justice worldwide. In the *Nikolic* case[24] (1999), Judge Elizabeth Odio- Bennito requested the Prosecutor to bring rape charges – even though he so far argued that evidence was insufficient – eventually succeeding at having the indictments amended by the Appeals Chamber[25].

Finally the international community did accept that gender-based crimes could be war crimes, genocide and crimes against humanity.

However, even if a significant advancement has been made with the modern acceptance of women holding roles within the judiciary, this development alone will not solve the issue of gender injustice.

Today there exists a pressure on States to put forward female candidates for judicial roles. However female judges who are specifically chosen for their gender expertise could face claims of bias which could taint their appointment election

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[22] See following paragraphs 1.3.2 onwards.

[23] United Nations, Division for the Advancement of Women and Centre for Refugee Studies, York University, Canada, Gender-Based Persecution: Report of the Expert Group Meeting, EGM/GBP/1997/Report, (Toronto, Canada, 9-12 November 1997): 33.

[24] *Prosecutor v. Dragan Nikolić*, IT-94-2, February 1999.

[25] A further analysis on ICTY judgment can be found in the following paragraphs dedicated to each of the *ad hoc* Tribunals.

and are therefore not beneficial for the advancement of gender justice.

Research has shown that female judges do not necessarily judge in favour of women unless they have a feminist orientation. Nevertheless, as we quoted before, women are more frequently motivated to ensure that gender crimes are duly investigated and punished. The 2007 research by King and Greening[26] found that their presence alone may be enough to make a difference during trials, but only if firstly women reach a role and authority which cannot be questioned.

So, it is even more important that gender becomes and remains part of the main power structure and that it is not marginalized. An improvement would be for all staff (irrelevant of gender) to be guided and educated in developing gender awareness. Further efforts to include gender-competent advisors at all levels will provide much needed support for gender-based crimes prosecutions, with broader access to female legal counsel and gender-competent representatives of the victims, thus assisting the interpretation of gender in international law and the development of legal standards to protect persons.

Today, women have reached the top Tribunal leadership and occupy key positions[27]. We are strongly convinced that female jurists bring a unique perspective to male-dominated groups because they give a different ‘‘voice’’ to conflict resolution[28]. Women have distinctive attitudes and behaviours from their male counterparts that may be useful when reflected across policy domains.

1.2. Women and World War II

The intentional extermination of millions of innocent civilians during World War II stunned the world community and shattered illusions of State security and

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[26] See *supra* note 11.

[27] Women are prominent at all levels in record numbers: two of the four Chief Prosecutors have been women (Louise Arbour, Canada and Carla Del Ponte, Switzerland); women have served as Presidents at the ICTR (Judge Navanethem Pillay, South Africa) and the ICTY (Judge Gabrielle Kirk McDonald, United States); as Vice-Presidents of the ICTY (Judge Florence Mumba, Zambia; Judge Elizabeth Odio Benito, Costa Rica); and as one of the three ICTY Registrars (Dorothee’ De Sampayo, Netherlands).

[28] See Gilligan C. (1993) *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, July 1993.

protection. Men, women and children alike were slaughtered, tortured, starved and forced into slave labour. In addition to these crimes, countless women and girls were also singled out – including by the Allied Forces – for rape, sexual slavery and other forms of sexual violence and persecution.

In Europe and Asia sexualized torture, sexual mutilation and forced abortion were widespread, as was rape as a prelude to murder. Both the Nazi and Japanese governments implemented various forms of forced prostitution and overlooked large-scale occurrences of rape. In Europe, the Nazis also conducted sterilization experiments while sexual slavery was particularly prevalent in Asia.

During the Second World War, the world witnessed the ‘‘Rape of Nanking’’ in China; the sexual enslavement of Korean women; Nazis raping Jewish, Roma and Soviet women while Russian men raped German women in retaliation; and Moroccan mercenaries (with French approval) raped Italian women.

In spite of that, waging aggressive war was considered the “supreme crime” by the Nuremberg and Tokyo Tribunals, so most of the attention was focused on prosecuting crimes against peace, not war crimes or crimes against humanity and certainly not crimes committed exclusively or disproportionately against women and girls.

1.2.1 Nuremberg and Tokyo Tribunals

When the war ended after years of catastrophic devastation, the Allies held trials for individuals considered most culpable for the atrocities. The World War II Tribunals recorded a significant amount of sex crimes committed during the conflict.

Yet in establishing the International Military Tribunals in Nuremberg (hereinafter IMT) and Tokyo (hereinafter IMTFE) to prosecute leaders for crimes against peace, war crimes and crimes against humanity, all trials focused principally on crimes against peace and, in part because of that, sexual violence was largely ignored.

Even though the Control Council Law N.10 Article II (1) (c) “*Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity”*

stated

> "Crimes against Humanity: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, or other inhumane acts committed against any civilian population […]"

neither of the Charters listed rape as a crime or contained explicit provisions recognizing gender-based crimes as war crimes or crimes against humanity, therefore minimizing the atrocities. Some of the crimes of sexual violence were prosecuted by the IMT, but these prosecutions remained invisible because not explicitly included in the indictments and because no reference was found in the index of transcripts. Further, the systematic rape and sexual slavery by the Japanese imperial army of as many as 200,000 former "comfort women" was wholly ignored in the Tokyo trial.

Remarkably, although gender-specific crimes were not directly included within the expansive language of the IMT Charter[29], the Tribunal had the power to include rape among the crimes charged. For instance rape and other sexual assaults could have fallen under enumerated war crimes, such as "*devastation not justified by military necessity*" and "*the ill-treatment of civilian population*" inter alia. Then Article 6(b) of the IMT Charter defined war crimes to include, but "*not to be limited to*" a number of specifically enumerated crimes. And finally Article 6(c) of the IMT Charter defined crimes against humanity as including "*other inhumane acts*" in addition to those specifically named, allowing rape to be prosecuted as such.

Unlike the Nuremberg Indictment however, the Tokyo Indictment did contain allegations of gender- related crimes, rape included. Defendants were charged for alleged acts "*carried out in violation of recognized customs and conventions of war... [including] mass murder, rape and other barbaric cruelties*"[30].

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[29] *See* Charter of the International Military Tribunal, *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945.

[30] *See* Charter of the International Military Tribunal for the Far East, Article I, Jan. 19, 1946.

Although the inclusion of rape in the indictment set an important precedent for future prosecutions, it was only achieved when pursued in conjunction with other crimes, never independently, thus reducing it to a minor infraction.

In the Tokyo Tribunal, three persons were found guilty of sex crimes. The basis for the prosecution of rape was the reference to family honour, the Statute's provisions prohibiting ill treatment, abduction of the civilian population and inhumane acts constituting a war crime. Since this was subsequently interpreted as evidence of customary law, the Statutes of the ICTY and ICTR were able to include a modicum of gender perspective by characterizing rape as a crime against humanity.

Disappointingly, the Nuremberg and Tokyo Tribunals did little to hold the military accountable.

The failure to appropriately prosecute sexual crimes minimized the particular harms suffered by women in times of war and resulted in an absence of forceful precedent for future punishment of wartime sexual assaults, once again demonstrating the international community's deliberate blindness to the suffering of women.

Not only did this failure to prosecute sexual assaults overlooked the horrific treatment and subsequent suffering of women during World War II, but it also inexcusably perpetuated the notion that rape was not as grave as other war crimes. The notion that rape and sexual assaults were lesser crimes perpetuated the belief that sexual assaults inevitably accompany war.

1.2.2 The case of Japan's "confort women": sexual slavery unpunished?

In the Far East Tribunal, evidence of rape was part of the evidence of Japan's crimes against humanity. But the Tribunal ignored the abduction and deception of over 200.000 girls and young women of non-Japanese origin from Japanese occupied territories and their transport to "comfort stations", now disclosed in their true nature of rape camps.

The unveiled atrocities that the Japanese forces committed, especially the large scale rape of women and girls and the barbaric treatment of the general

population created an outcry in the international public opinion. The press reports of the Rape of Nanking reached Emperor Hirohito, who was appalled by the negative image of the Imperial Army created by the incident. To stop the international condemnation and restore "the honour of Japan", military regulation of the euphemistically called "comfort stations" was extended, converting them into facilities for sexual slavery.

During the War, the Japanese established military brothels in Countries they occupied. Many women came from those very Countries – like Korea, China and the Philippines – and many also from Japan and the Dutch East Indies.

Official figures state that the Japanese Army enslaved between 80,000 and 200,000 women and girls from 1932 to 1945, who became the victims of the largest case of human trafficking of the 20th Century. They were taken to comfort stations (military camps) throughout the Pacific, including East Timor and the Solomon Islands and thus received the appellation of "comfort women". They were kept for months or years on end, forced to provide sexual services to personnel while being starved and beaten. Most of the women were under the age of 20, some as young as 12: the comfort stations were their first sexual experience and left many of them infertile as a result of their enslavement. By some estimates only 25 to 30% survived the ordeal.

The Japanese used several means to recruit women: advertisements found in wartime posters showed a failed attempt to attract volunteers into prostitution, therefore the military started to employ any form of force or violence to obtain the increasing number of women needed to "comfort" soldiers. Some were obtained through abduction or deception, or were purchased from destitute parents. Colonies like Taiwan, Korea and the occupied territories were indeed very poor because of the Japanese exploitation for the war effort. Many women and girls lived in poverty and worked to support their families, so recruiters only had to promise them better jobs as nurses, waitresses, maids or typists, along with a better salary.

Even when recruiters did mention comfort stations, they misrepresented

their nature: the U.S. Office of War Interrogation Report N.49, also known as the "OWI Report"[31]indicated that comfort services were understood to be visiting wounded soldiers and that was the reason why some Korean women enlisted.

The Japanese Army sometimes ordered the heads of small villages to round up girls of a certain age – between 15 and 22 years old – and deliver them because they needed to "work". In case of refusal the Army threatened the destruction of the whole village.

In Java, the Japanese used civilian internment camps as a source for young women and girls; in other places police forces contributed to the system by arresting women in the street and by forcing their transfer with the alleged accusation of participating to the resistance.

It is understood that the comfort women slave system was designed to meet four military needs[32]:

- The need of the soldiers to have sex or to rape to keep fighting;
- The need to avoid antagonizing local population by preventing the rape of their women;
- The need to minimize sexually transmitted disease among troops;
- The need to keep rape away from international scrutiny and outrage.

Slavery is usually equated to forced labour or deprivation of liberty; however, sexual autonomy is a power attached to the right of ownership of a person and controlling another person's sexuality is, therefore, a form of slavery. The Japanese "comfort system" combined these forms of control: in addition to restricting its victims' freedom of movement, it forced them to perform sexual labour. Thus, it constituted a system of slavery that violated international law.

International law prohibited slavery well before the Japanese Army created

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[31] Japanese Prisoner of War Interrogation Report No. 49 from Aug. 20 - Sept. 10, 1944, issued on October 1, 1944, based on the information obtained from the interrogation of twenty Korean "comfort girls" and two Japanese civilians captured around the tenth of August, 1944 in the mopping up operations after the fall of Myitkyin in Burma.

[32] See "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" by Rhonda Copelon, 2000.

that system. The existence of a prior international prohibition of slavery draws support from at least five sources.

The first is the 1926 Slavery Convention[33] which provided that every person had a right to be free from slavery and which defined slavery as "*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*." This Convention was the culmination of a century-long development of the norms against slavery, the slave trade and forced labour and entered into force in 1927, strengthening the criminal nature and the universal obligation to prosecute. Although Japan was not a signatory and its criminal code did not address specifically the issue until 1994, by the time of the Rape of Nanking (1937) the Convention was clearly understood as declaratory of customary international law.

The second source is the 1907 Hague Convention IV and annexed Regulations[34] to which Japan was a signatory. The Convention codified the customary law prohibition of making slaves of prisoners of war or of occupied civilian populations. Although it stipulated an exception for "*the needs of the army of occupation*" (Article 52) it could never have included sexual slavery since sex is not a military necessity. Furthermore, the 1907 Convention prohibited rape and emphasized its prohibition in Article 46:

> "Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected. […]"

When read together, these provisions prohibited what is now understood as the crime of sexual slavery, later reinforced by the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (Articles. 29 and 32).

The third source is the 1930 International Labour Organization (ILO)

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[33] *Convention to Suppress the Slave Trade and Slavery*, international treaty of the League of Nations and first signed on 25 September 1926. It was registered in League of Nations Treaty Series on 9 March 1927, the same day it went into effect. The objective of the Convention was to confirm and advance the suppression of slavery and the slave trade.

[34] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Convention concerning forced Labour[35] whose article 2 (a), permitting compulsory military service, did not apply to the comfort women system because it was not a "*work of purely military character*"; and whose Article 2 (d), permitting compulsory labour in the case of threat to the well-being of the population, found no justification because women's sexual integrity can never be sacrificed in the name of emergency and sexual servitude may never be a permissible form of compulsory labour.

The fourth source are the Trafficking Conventions of 1904, 1910 and 1933[36] which provided further evidence that the international community considered sexual slavery a criminal offense before and during World War II. All the conventions are cumulative in the sense that the later reaffirmed the earlier ones. The 1910 Convention provides, in Article 2, that parties must punish those who have "*by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed*" a girl or woman for "*immoral purposes*," which was a reference to prostitution. The 1921 International Convention for the Suppression of the Traffic in Women and Children is also particularly relevant because according to Articles 2 and 3, States parties had to take all steps necessary to discover and prosecute persons engaged in the traffic of women and children.

The fifth and final source of the prohibition of sexual slavery at the time of World War II was the customary humanitarian law prohibition of forced prostitution. The 1919 War Commission Report[37] of World War I listed "*abduction of girls and women for the purpose of enforced prostitution"* as a war

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[35] International Labour Organization (ILO), Forced Labour Convention, C29, 28 June 1930, C29.

[36] 1904 International Agreement for the Suppression of the White Slave Traffic, League of Nations; 1910 International Convention for the Suppression of the White Slave Traffic, League of Nations; 1933 International Convention for the Suppression of the Traffic in Women of Full Age, League of Nation.

[37] *The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* was instituted at the plenary session of the Paris Peace Conference of 25 January 1919 and issued the *Report* on May 6th 1919.

crime.

Since the General Assembly of the League of Nations already considered the prohibition on trafficking in women and girls to have become part of customary international law well before World War II, both conventional and customary law provided forceful evidence that sexual slavery was a crime well before Japan instituted the system of militarily-controlled sexual slavery. However at the end of the conflict, Japan claimed to have no military responsibility for the stations.

The prosecution of those war crimes was largely a domestic matter. For example in 1948 there was one Tribunal pertaining to sexual slavery, the Dutch Military Tribunal at Batavia (Jakarta)[38], who was able to demonstrate that the comfort stations violated international law.

In the early 1990s new papers were discovered confirming the liability of the Japanese Government; yet it still maintained that recruitment tactics by "middlemen" were not under its control, hence refusing official apologies. According to the Government's point of view, comfort women and girls were "prostitutes" and "camp followers": in this way they asserted both the voluntarism and the immorality of the conduct, as well as Japan's own innocence. The stigma suffered by those women further exacerbated their suffering: instead of being welcomed back to their communities as victims of a terrible wrong, they experienced shame and isolation.

In the end the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery was held in Tokyo from the 8th to the 12th December 2000. The Tribunal was organized by women's NGO and Japan and other Asian women's and human rights organizations with the purpose to make a judgment on Japanese military sexual slavery before and during the Second World War from

[38] The Batavia Military Tribunal of 1948 held a war crimes trial to prosecute the forcible seizure for rape and prostitution and involved female internees from the Netherlands stationed in central Java who had been forced into sexual slavery by the Japanese during WWII. Records were made available in 1992 in The Hague.

the perspective of international law and gender justice. Indeed, while both the IMT and IMTFE did find that the German and the Japanese slave labour systems were governmentally organized, their detailed treatment and prosecution stands in sharp contrast to the absence of consideration of its gender companion. Nonetheless the post-war tribunals were able to make clear that the system was *de facto* sexual slavery, a term widely recognized today.

International legal experts, including Gabrielle McDonald (former President of the ICTY) and Patricia Viseur-Sellers (Legal Adviser for Gender-Related Crimes in the Office of the Prosecutor for the ICTY and ICTR), acted as judges and chief prosecutors during the 2000 Trials. As the Japanese government did not respond to the invitation, a Japanese lawyer, acting as *amicus curiae* (independent adviser), explained the position of his country.

The judges found both the Japanese State and the Emperor Hirohito guilty of war crimes and crimes against humanity. The Japanese military government official and their agents committed crimes of rape and sexual slavery against women and girls as a part and in the course of their war of aggression. The conduct was widespread in scale and in a huge geographical area and systematic because sustained by rigid regulations and common characteristics.

The Tribunal concluded by recommending the Japanese government to make a meaningful apology and to provide compensation to the surviving victims. When apologies eventually came, they were half-hearted and the Government continued to refuse any legal liability.

1.2.3 The Geneva Conventions

The 1949 Geneva Conventions[39] constitute much of the basis of the current

[39] The conventions signed at Geneva on August 12, 1949 consist of the following: Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

International Humanitarian Law and contain some provisions aspiring to the protection of women during armed conflict, explicitly recognizing issues particular to women in wartime. In addition all the provisions of the Conventions apply equally to men and women.

The most important of the four Conventions for advancing prohibitions of violence against women is the Fourth Geneva Convention of 1949[40]. During international conflicts, special protection was accorded to the honour and modesty of women. Indeed, Article 27 of the Fourth Geneva Convention provides that

> "women shall be protected against any attack against their honour, in particular against rape, enforced prostitution, or any form of indecent assault".

Additional Protocol I prohibited outrages upon personal dignity[41] and clarifies that

> "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault"[42].

Article 75 laid down minimum standards of protection for those who find themselves in times of armed conflict and in its Paragraph 2 (b) referred to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, were aimed at humiliating and ridiculing, or even forcing them to perform degrading acts[43]; unfortunately it omitted rape.

During non-international conflicts, common Article 3 to all the Geneva Conventions contained the essential rules and gender-based crimes are implicitly prohibited under the category of "*outrages upon personal dignity, in particular humiliating and degrading treatment*". This category is meant to include the acts,

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[40] Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS. 287, p. 306.

[41] Article 75 (2) (b) of Protocol I Additional to the Geneva Conventions Relating to the Protections of Victims of International Armed Conflict, 1977, 1125 UNTS 3, p. 38

[42] Article 76 (1) of Protocol I, *supra* note 11.

[43] ICRC Commentary to the Fourth Geneva Convention, paragraph 4540, www.icrc.org/ihl.nsf/COM/475-760008?Open Document, 01 July 2010

frequently occurred during the Second World War, which still occurs nowadays, such as rape, sexual slavery and enforced prostitution. However States are not under a rigorous duty to take measures to suppress gender-based crimes committed during a non-international conflict.

> Protocol II reaffirms and supplements common Article 3 prohibiting:
> "outrages upon personal dignity in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"[44].

This sub-paragraph was considered sufficient for the protection of women and children, but is not intended to be part of the acts which are absolutely not tolerated: violence to the life and health and physical or mental well-being of persons, collective punishments, taking of hostages and acts of terrorism[45]. The consequence is that the already limited protection afforded is not absolute.

So, even if the Conventions expressly included rape and forced prostitution, they erroneously linked rape with honour or dignity instead of with gender-based violence. Such an explanation grossly mischaracterized the offense by perpetuating negative stereotypes and concealing the sexual and violent nature of the crime.

Truth be told, later on the additional Protocols shifted the meaning from the protection of honour to the protection of personal dignity, thus acknowledging the personal physical and mental harm done to the women as direct victims of crimes of sexual violence. Yet they did not adequately address the reality of women's suffering during armed conflict, nor did they protect them, in particular from sexual violence[46]. In fact their primary aim was always to regulate the battlefield, in which women and girls have no space, because they are included within the broader category of civilians.

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[44] Article 4(2), Protocol II Additional to the Geneva Conventions Relating to the Protections of Victims of Non-International Conflicts, 1125 UNTS 609, p. 612.
[45] Id. 43.
[46] Judith Gardam, 'Women and Armed Conflict: The Response of International Humanitarian Law' in Helen Durham and Tracey Gurd (Eds), *Listening to the Silences: Women and War* (Martinus Nijhoff, Leiden 2005), pp. 114-123.

To this day IHL has not evolved to be able to face the change of modern warfare technologies and to support prevention as a means of protection. As a consequence, it has badly adapted to the plight of women, not taking into account the pre-conflict inequalities, reinforced and amplified in times of conflict.

1.3. *Ad hoc* international trubunals

In the 1990's, the *ad hoc* international tribunals for Rwanda and for the former Yugoslavia were created in response to specific conflicts in both Countries.

The Statutes of the two International Tribunals were annexed to Resolutions of the U.N. Security Council. They are thus "subsidiary organs" created pursuant to Article 29 of the Charter of the United Nations[47]. Not only are they binding upon all Member States of the U.N. in accordance with Article 25 of the U.N. Charter, but they are also definitive of jurisdiction for the judges of the Court[48].

Hence their establishment draws upon three distinct but related areas of law: international criminal law, international humanitarian law and international human rights law. It is the presence of this third area that sets them apart from its predecessors.

The ICTY and ICTR received the mandate to prosecute, among other, persons responsible for rape as a crime against humanity. Both courts took on the task with eagerness. Indeed, unlike International Military Tribunal Charter, the *ad hoc* tribunals' Statutes specified rape as a crime against humanity[49] but did not identify sexual abuse as gendered violence or as a "*grave breach*"; they required only that women were the object of "*special respect*" as it was in the Geneva Conventions, nevertheless contributing to the recognition of gender crimes.

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[47] Prosecutor v. Tadič, *Judgment of the Appeals Chamber*, para. 15, U.N. Doc. Case No. IT-94-1-AR72 (Oct. 2, 1995).

[48] Prosecutor v. Tadič, *Decision on the Defence Motion on Jurisdiction of the Trial Chamber for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in The Territory of Former Yugoslavia since 1991*, para. 8, Case No. IT-94-1-T (Aug. 10, 1995).

[49] Article 5 (g) ICTY Statute; Article 3 (g) ICTR Statute.

As we stated in the previous paragraphs, up until the judgments of the ICTY and the ICTR, when notified, evidence of crimes of sexual violence was used to support other charges of war crimes and crimes against humanity. Early international treaties or international customary law did not explicitly prohibit gender-based crimes as war crimes, crimes against humanity or genocide. For instance, the Genocide Convention was silent on the subject of gender-based crimes. Early IHL contained a few relevant provisions to gender-based crimes under the umbrella notion of honour: for example Article 46 of the annex to the 1907 Hague Convention promoted respect of family honour and was interpreted as an implicit prohibition of rape and possibly other kinds of gender-based crimes.

Throughout the second half of the 20th century attitudes to gender crimes changed. The turning point was the case law of the ICTY and ICTR brought about by the very efficient lobbying of women's human rights NGOs and supported by the positive input of female judges. The conflicts in the Former Yugoslavia and Rwanda revived the debate on how to address women's suffering during armed conflicts as both in Bosnia and Rwanda gender-based crimes were heavily committed.

So the ICTY and ICTR undertook the difficult task of clarifying the definition, the elements and liability for these crimes, partly addressing the lack of clear provisions prohibiting gender-based crimes. Rape was no longer only viewed as included in the crime of torture or other similar crimes, but it was also examined as an international crime *per se*.

A first major milestone was reached when later the tribunals discussed the association of gender crimes to honour and dignity which perpetuated existing gender inequalities. That reasoning reinforced expectations about male and females roles and their respective behaviors, diminishing the gravity of the crimes.

A second major milestone was reached with the ruling of both tribunals that

rape could be considered as an act of genocide[50], a crime against humanity and a war crime[51]. These decisions left little doubt that the prohibition of rape was at least a principle of international customary law, or even a principle of *jus cogens*.

While both tribunals significantly developed ICL since the War Tribunals of WWII, according to their Statutes they have limited jurisdiction, temporally and territorially[52]. Yet sexual crimes are not confined into specific regions or committed only by certain groups, hence the ability to investigate and prosecute them should not be limited in such a manner.

1.3.1. ICTY

The United Nations established in 1993 the Yugoslav Tribunal, giving it jurisdiction to prosecute war crimes, crimes against humanity and genocide committed in the territory of former Yugoslavia since 1991. By that time, nearly 50 years after the Second World War, women's organizations and scholars had made key advancements in deconstructing many of the stereotypes and misconceptions surrounding rape crimes, which resulted in more prosecutions in domestic courts. Nonetheless, the ICTY had little real international precedent on prosecuting gender crimes to work with.

To give an insight to that social background, it is important to underline that in Kosovo, even before the beginning of the conflict, the Yugoslav State apparatus overtly criticized Albanian women and precluded them from work and health care. As a consequence Serbian armed forces felt legitimized when targeting Albanian women in their ethnic cleansing campaign in Kosovo

Following the lead of the Geneva Conventions, the ICTY Statute

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[50] *Prosecutor v. J. P. Akayesu* ICTR-96-4.T.

[51] *Prosecutor* v. *Kunarac, Kovac and Vukovic* IT-96-23-T

[52] The ICTY has jurisdiction over the territory of the former Yugoslavia from 1991 onwards. It has jurisdiction over individual persons and not organizations, political parties, army units, administrative entities or other legal subjects. The ICTR was created with the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.

(hereinafter ICTYSt.) did not include rape or other forms of sexual violence as a "*grave breach*" under Article 2, nor as a violation of customs of war under Article 3. Acts of rape, when prosecuted under Article 3, were once more defined as outrages upon personal dignity.

Even though rape was explicitly quoted in Article 5, the crimes against humanity provision, nothing – except perhaps historical marginalization of sex crimes and lack of political will – prevented the prosecutors from indicting sexual violence in all its forms under other provisions, for example under Article 4, genocide.

THE ČELEBIĆI JUDGEMENT: RECOGNIZING SEXUAL VIOLENCE AS TORTURE

In the *Ćlebići* case[53] on November 16th 1998, the Yugoslav Tribunal handed down a landmark decision redressing gender crimes committed in the Balkans, convicting the accused[54] of a number of crimes, including sex crimes, committed in the Člebići prison camp in Bosnia.

Firstly the Court had to face the issue whether rape constituted torture under the Geneva Conventions (par. 475 of the Judgment). The Trial Chamber had no difficulty in demonstrating that rape and other forms of sexual assaults were expressly prohibited under IHL (par. 476-477).

A more difficult task was the definition of "rape": no international instrument at the time contained a definition of the term. So the Trial Chamber drew guidance from the recently delivered ICTR *Akayesu* Judgment which considered the definition of rape in the context of crimes against humanity and thus found no reason to depart from it (par. 478-479). In support of its reasoning the Chamber reported the statements of international bodies like the Inter-American Commission of Human Rights, the European Court and the U.N Special Rapporteur on Torture and on Contemporary forms of Slavery and on Rape as

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[53] Prosecutor v. Delić, Judgment, IT-96-21- T, 16 Nov. 1998

[54] H. Delić, Bosnian deputy commander of the Člebići prison camp, which was used from May to December 1992 to detain 700 Bosnian Serb prisoners.

Torture (par. 480-493).

The conclusion was that in the light of findings, rape constituted torture. They underlined how women were raped for the purpose of obtaining information, as a punishment for reporting previous abuse, as coercion and intimidation, as a form of sex domination and as pure humiliation as a means to create an atmosphere of fear and powerlessness in the camp.

Judge Elisabeth Odio-Benito, one of the three female judges appointed in the ICTY, was sitting in the case and her extensive expertise in gender crimes had a significant impact on adjudicating female sexual torture and sexual violence.

THE FURUNDŽIJA JUDGEMENT: THE RAPE OF A SINGLE VICTIM IS A SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW

The *Furundžija*[55] case, delivered on December 10th 1998, combined with other jurisprudence finally ended the image that sex crimes were not as serious as other crimes of violence. Rape crimes were indicted as war crimes of torture and outrages upon personal dignity, both under Article 3, violations of the laws or customs of war.

The role Furundžija[56] played in facilitating the rapes allowed them to occur and continue and he was therefore just as responsible as if he had raped himself.

According to the Trial Chamber the accused was present during both the alleged "interrogations" of a witness to obtain information and during the rapes that followed, which caused her severe physical and mental suffering (par. 264-267 of the Judgment).

He was convicted of torture as a co-perpetrator (par. 268-269) and outrages upon personal dignity and as an aide and abettor as war crimes because not only did he not stop the acts but also implicitly encouraged their perpetration (par. 274-275).

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[55] *Prosecutor v. A. Furundžija* Judgment IT-95-17/1-T, 10 Dec. 1998

[56] Paramilitary leader of the Jokers, a unit of the Croatian Defence Council (HVO).

Sitting on both the trial and the Appeal[57] was Judge Florence Mumba, the defense alleged essentially that, because she had previously served as a member of the U.N.'s Commission on the Status of Women (CSW) and condemned rape as a war crime and urged its prosecution, she was predisposed to promote a common feminist agenda and should have been disqualified for having at least an appearance of bias. The application was dismissed because Judge Mumba was subjectively free of bias and no circumstances objectively gave rise to an appearance of bias.

THE KVOČKA CASE: RAPE AS PERSECUTION IN THE CONTEXT OF A JOINT CRIMINAL ENTERPRISE

The *Kvočka* case[58] in 2001 rendered justice for some of the victims of Prijedor region camps, convicting all five indicted[59] for sex crimes committed under persecution as a crime against humanity.

The arrest of the first accused, Kvočka and Radić, was in 1998, but the 113 day-long trial started only the 26th February 2000.

First of all the Trial Chamber demonstrated how Prijedor region camps functioned as a joint criminal enterprise, using the huge amount of evidence found (par. 319). Inside the camps a mixture of serious crimes was committed intentionally, maliciously, selectively and even sadistically against non-Serbs detainees. It concluded that because the camp persecuted, terrorized and otherwise mistreated its detainees between 16th May and 30th August 1992, it was wholly foreseeable that women held in the camp would be raped.

Secondly the Chamber analyzed the responsibilities of each of the accused.

Kvočka held the highest level of authority and participated in the enterprise, therefore he was a co-perpetrator even though he did not physically commit the

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[57] Appeal Chamber Judgment IT-95-17/1-A, 21 July 2000.

[58] *Prosecutor v. V. Kvoča et al.* IT-98-30/1-T, 2 Nov. 2001.

[59] M. Kvočka, D. Prcać, Z. Žigić, M. Kos, M. Radić were professional policemen and a retired policeman, a waiter and a taxi driver who worked in the camps.

crimes. Prcać participated in the system which made all the crimes possible facilitating and maintaining the camp functioning and was then found guilty of war crimes and crimes against humanity (par. 720-723 of the Judgment). Kos and Radić were found responsible as co-perpetrators of war crimes and crimes against humanity on the same ground of Prcać (par. 728-730 and 737- 739). Žigić, the only one who was not a regular employee of the camp, participated in the criminal enterprise as a co-perpetrator of persecution, murder and torture. The Chamber found that he entered the camps for the sole and very purpose of abusing detainees (par. 746-748).

The Trial Chamber also noted that other forms of gender related crimes, including forced marriage, forced abortion, forced impregnation, forced nudity, molestation, sexual slavery, sexual mutilation, forced prostitution and forced sterilization, were international crimes of sexual violence and then punishable as such.

Judge Patricia Wald sat as the sole female judge on the case.

THE KUNARAC ET AL. JUDGEMENT: DEVELOPING THE LAW ON SEXUAL SLAVERY

The *Kunarac*[60] judgment, handed down on February 22nd 2001, was the first case on rape as a crime against humanity to come before the Yugoslav Tribunal and the first international trial in history to adjudicate rape and enslavement for crimes essentially constituting sexual slavery. Rape was no more acceptable as a part of warfare and, therefore, it had to be prosecuted as a crime under international law and not ignored as a private act of an individual to be dealt with by domestic law.

Judge Florence Ndepele Mwachande Mumba (presiding) along with her two counterparts at the ICTY, Judge David Hunt and Judge Fausto Pocar, rendered this historic judgment against three Bosnian Serb defendants, Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic in what has come to be called the "Foca

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60 *Prosecutor v. D. Kunarac & Z. Vukovic* IT-96-23/1-T.

case".

The original indictment focused entirely on a series of gender-related crimes committed in the town of Foca during the war: rape, enslavement, torture and outrages upon personal dignity against civilian Muslim women and girls.

The accused were members of the military and the victims were civilian women and girls held in detention facilities in Foca after the takeover of the town.

The judgment articulated indicia for enslavement which included, among other things, exploitation, sex, prostitution, trafficking in persons, assertion of exclusivity, control of sexuality and restriction on an individual's autonomy. Finding that the women and girls had been raped, enslaved and treated as the personal property of Kunarac and Kovac, the accused were convicted of rape and enslavement as crimes against humanity.

The Trial Chamber expounded upon the elements of rape in previous judgments and concluded that the violation of sexual autonomy determine the threshold between sexual activity and rape and that such a conduct may be "*evidenced*" by coercion, force or threat of force *inter alia* (par. 457-460 of the Judgment). In addition it laid a sound foundation for the subsequent prosecution of the crime of sexual slavery, still supported by recent jurisprudence and the writings of jurists.

First of all the Trial Chamber took into consideration the difficulty in the identification of the perpetrators by the victims due to the hardships of the situation and to the very nature of the experience. While there was evidence that testimony had been honestly given, the true issue was whether it was reliable (par. 561-564).

Secondly the Chamber assessed the existence of an armed conflict and that the crimes were not only made possible by it, but also they were very much a part of it (par. 567- 568); it also underlined that the three accused played an active part in their capacity of soldiers, while none of their victims did (par. 569).

What was assessed was the systematic attack against the Muslim civilian population during which women, separated from men, were kept in detention

centers, living in unhygienic conditions and mistreated in many ways (par. 570-574). All what happened was well known by the accused (par 581).

Since the ICTY Statute did not distinguish sexual slavery as a separate crime, two of the accused (Kunarac and Kovac) were charged with both rape and enslavement as crimes against humanity: they enslaved women and young girls treating them as their personal property and subjected them to repeated rape and other forms of sexual violence, including forced nudity and sexual entertainment, over a period of weeks or months. Kovac was also convicted of "*outrages upon personal dignity*"; Kunarac and Vukovic were found guilty of torture as a war crime and crime against humanity. Further they all required the victims to perform domestic labour.

The Court adopted the 1926 Slavery Convention's definition of enslavement (par. 518) because the ICTYSt. did not have one and went on to illustrate in broad terms what is meant by "*the powers attaching to the right of ownership*." The reasoning was supported by the fact that various human rights instruments referred to slavery without providing any explicit definition (par. 533).

Analyzing the circumstances of former Yugoslavia at the time, since female chastity had always been the base of male and familial honour, systematic rape was an effective instrument of terror to devastate the community dismantling female, male and family honour, one woman at a time. This sexual violence victimized the women, but it also exposed the inability of Muslim men to protect their wives, mothers, sisters and daughters.

Because of this connection between female chastity and male honour, the Serbs probably assumed that their victims would never testify against them out of fear of retaliation from their own families; rape often lead to victims being divorced by their husbands or being classified as "unmarriageable" by the community. However, to try to overcome the fears of dishonour, the ICTY shielded the victim's faces from the public gallery, while they did face the accused. The ICTY also confused the victim's voices in order to let them tell their stories with as much anonymity as possible.

Beyond the intended consequential effect of the punishment of the Foca Defendants, the judgment contains many "firsts "which set legal precedents.
Indeed for the first time before an international tribunal, a case was prosecuted solely on charges of sexual violence without including any other charges; the Tribunal's ruling established rape as a crime against humanity when used as an instrument of terror within a systematic attack in a widespread manner; it established that rape did not have to be ordered from higher up in the military hierarchy to rise to the level of crimes against humanity; it established rape as a form of enslavement; and the Tribunal's ruling established slavery, based on sexual coercion (i.e., sexual enslavement) as a crime against humanity.

To quote M.L. Gasaway Hill

> "By expanding the list of which crimes are classified as crimes against humanity, the Tribunal has re-shaped our world. Such linguistic leadership offers hope that the ambiguity discussed earlier will indeed be overcome with an unfettered recognition of women's humanity. Perhaps as this hope is finally actualized, the sign *rape victim* in the judicial semiotic system will be re-shaped into the sign *rape survivor*, honouring the suffering and the bravery of Foca's Muslim women".[61]

1.3.2. ICTR

During the 1994 Rwandan conflict the pervasiveness of sexual violence and rape as means of ethnic destruction to commit genocide, crimes against humanity and war crimes was well documented[62].

At the end of 1994, the UN Security Council concluded that an International Criminal Tribunal for Rwanda was necessary[63] to punish perpetrators of war crimes, crimes against humanity and genocide committed in Rwanda during the conflict. Based in Arusha, Tanzania, the Statute of the ICTR explicitly authorized

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[61] *Re-shaping our words, re-shaping our world: crimes against humanity and other signs of the times*, M.L. Gasaway Hill (2002).

[62] See *Report of the Special Rapporteur on the situation of Human Rights in Rwanda*, E/CN.4/1996/68,29 January 1996, paras. 16-24, in *The United Nations and Rwanda 1993-1996*, Department of Public Information, United Nations (New York, 1996), Document 167.

[63] U.N.S.C.: Resolution 955 of 8 Nov. 1994.

the prosecution of rape as a crime against humanity and a crime of war. Like the Yugoslav Tribunal, nothing precluded the ICTR from prosecuting rape and other forms of sexual violence under the genocide article or as other forms of crimes against humanity or war crimes.

Notably Article 4 of the ICTRSt. - applicable to non-international armed conflicts - included

> "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"

as violations of the Common Article 3 of the Geneva Conventions requiring humane treatment for all persons in enemy hands, without any adverse distinction, specifically prohibiting murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial.

Never before had sex crimes been so intensely investigated and documented in war, including by female investigators and reporters.

The magnifying lens on wartime sexual violence was prompted primarily by greater global awareness of the harm caused by sex crimes, backed by the presence of some female investigators, prosecutors and judges and fuelled by the pressure generated by women's organizations and human rights groups committed to ensuring that gender violence was prosecuted alongside other crimes of violence.

THE AKAYESU JUDGEMENT: CHARACTERIZING RAPE AS AN INSTRUMENT OF GENOCIDE

The landmark and groundbreaking decision of the *Akayesu*[64] judgment advanced gender jurisprudence worldwide and it was a major turning point against the impunity held towards gender crimes. This case was the first formal recognition of gender crimes (namely rape as genocide), being used systematically as a weapon of war and terror. For the first time in history, rape was recognized as an instrument of genocide used to "*kill the will, the spirit and*

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64 See *supra* note 47.

life itself'.

Despite documentation from human rights and women's rights organizations demonstrating that rape crimes were widespread throughout Taba, the original indictment brought against Jean Paul Akayesu[65] contained no charges of sexual violence among the twelve counts of war crimes, crimes against humanity and genocide for extermination, murder, torture and cruel treatment committed in his commune.

What happened is that in the midst of trial, a witness on the stand spontaneously testified about the gang rape of her 6-year-old daughter and a subsequent witness testified that she herself was raped and she witnessed or knew of other rapes.

The sole female judge at the ICTR at that time, Judge Navanethem Pillay, was one of the three judges sitting on the case and, having extensive expertise in gender violence and international law, questioned the witnesses about these crimes. Suspecting that these were not isolated instances of rape, the judges invited the prosecution to consider investigating gender crimes in Taba and to consider amending the indictment to include charges for the rape crimes if found they had been committed and if attributable to Akayesu.

As a consequence the indicted was charged with three counts of rape and other inhumane acts as crimes against humanity.

The Chamber explained how charging the indicted of both genocide and crimes against humanity was not a violation of the *ne bis in idem* principle, but a practice known as "concurrent sentencing" (*concours ideal d'infractions*) which permitted multiple convictions for the same act and which already existed in civil law systems like the Rwandan (par. 461-470).

Regarding the crime of genocide[66] the Chamber confirmed that the killing

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[65] Rwandan citizen who was *bourgmestre* (major) of Taba commune, Prefecture of Gitarama, in Rwanda.

[66] Article 2. 3 (a) of the ICTRSt.

of group's member, the serious bodily or mental harm, the *dolus specialis* requirement to aim to destroy in whole or in part the group, the imposition of measures to prevent births and the forcible transfer of children to another group, were all conducts occurred in Rwanda (par. 494-524) during an armed conflict of non-international character (par. 525-636).

In the *Akayesu* case, the ICTR, when considering the extent to which acts of sexual violence constituted crimes against humanity, noted that there was no definition of rape in international law, so it specified that rape could be defined as "*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive*" (par 686-688). Properly defining rape as a form of aggression, they underlined how sex can be used to destroy a people and, by so doing, they placed gender crimes in a larger context.

The Trial Chamber concluded that sexual violence was widespread and systematic in Taba and committed by Hutus with the intent to humiliate, harm and ultimately destroy, physically or mentally, the Tutsi group. Akayesu was ultimately convicted of, among other crimes, rape as an instrument of genocide and as a crime against humanity. He was sentenced to life imprisonment (chapter 8 "verdict").

It is worth mentioning the fact that the Office of the Prosecutor of the ICTR developed the "Best Practices Manual On The Prosecution Of Sexual Violence Crimes In The Context Of Genocide, Crimes Against Humanity And War Crimes" in order to advance the successful prosecution of charges of sexual violence and to take into consideration the needs of victims of such violence. Since then the prosecution of sexual violence is a specialized issue that requires focused and particularized attention to ensure that the crimes are prosecuted fairly, adequately and with sensitivity.

1.4. The Special Court for Sierra Leone

In Sierra Leone civil war erupted on 23 March 1991 and became internationally notorious for appalling brutality against civilians. As the Sierra Leone Truth and Reconciliation Commission aptly recounted, "*this was a war*

measured not so much in battles and confrontations between combatants as in attacks upon civilian populations."

Reports emerged of indiscriminate mutilations, abductions of women and children, recruitment of child soldiers, rape, sexual slavery, gratuitous killings and wanton destruction of villages and towns. Many civilians were abducted and forced to work in the country's abundant diamond, bauxite and titanium mines.

In 1999, when forced to retreat, the rebels abducted thousands of civilians, whom they forced to carry looted goods and ammunition, perform hard labour and fight.[67] Abducted women and girls were repeatedly raped and subjected to other forms of sexual violence, as they had been since the very beginning of the war. Women and girls suffered a variety of abuses throughout the duration of their captivity, which often lasted years, including sexual slavery, forced labour and forced pregnancy.

The peace process, which involved the UN Assistance Mission in Sierra Leone (UNAMSIL)[68], was complicated and marred by several cease-fire violations by rebels. Finally on January 18th 2002, the disarmament and demobilization process was declared complete and the civil war officially ended.

As part of the reconstruction process, the Special Court for Sierra Leone was created by agreement between the United Nations and the government of Sierra Leone to prosecute those "*who bear the greatest responsibility for serious violations of international humanitarian law*"[69]. The creation of the special Court presented the possibility that rampant gender-based violence committed during

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[67] *See* Truth & Reconciliation Commission, Report of the Sierra Leone Truth and Reconciliation Commission: Witness to Truth, Vol. 2 (2004).

[68] On 22 October 1999, the Security Council established UNAMSIL to cooperate with the Government and the other parties in implementing the Lomé Peace Agreement and to assist in the implementation of the disarmament, demobilization and reintegration plan. On 7 February 2000, the Council revised UNAMSIL's mandate. It also expanded its size, as it did once again on 19 May 2000 and on 30 March 2001.

[69] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 1, U.N. Doc. S/2002/246, (Jan. 16, 2002).

the conflict would be prosecuted and punished, thereby contributing to gender-sensitive transitional justice. It should have contributed to the process of truth-telling and to the narrative construction of crimes against humanity and war crimes committed within Sierra Leone, to reflect the experiences of victims of that conflict. These victims include female victims of gender-based violence.

The Special Court was also a part of the wider international efforts to make evident the serious nature of gender-based crimes in armed conflicts around the world.

The SCSL differs in notable ways from the ICTY and ICTR. It is based on an agreement between the Government and the U.N. and was not established by a Security Council Resolution under Chapter VII of the U.N. Charter, so it does not have the power to require international cooperation. In addition, the SCSL is a hybrid Court relying on both international and domestic laws; as a consequence the professional and support staff of the Court was a mix of Sierra Leonean and foreign nationals.

In 2002, Physicians for Human Rights (PHR) calculated that as many as 215,000 to 257,000 women and girls may have been subjected to sexual violence in the decade-long conflict period[70]. Those data, though not exhaustive in portraying the extreme brutality of the violence committed against women by all parties, do serve to underscore the magnitude of the atrocities at issue in the trials of the SCSL.

According to the 2003 Human Rights Watch report "*We'll kill you if you cry": sexual violence in the Sierra Leone conflict*"[71] abducted women and girls were assigned "husbands" and forced to become the husbands' sex slaves[72]. In addition to suffering horrific sexual violence, victims were also made to perform

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[70]Physicians For Human Rights, "War-Related Sexual Violence In Sierra Leone: A Population-Based Assessment", 3-4(2002)

[71]Human Rights Watch, "We'll Kill You If You Cry": Sexual Violence in the Sierra Leone Conflict, Vol. 15, N... 1 (A), (Jan. 2003).

[72] Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Judgment.

forced labour such as cooking, washing, carrying loads and farming. These atrocities were committed against Sierra Leonean women and girls on a massive scale. In many cases, these crimes led to the phenomenon known as "bush wives": unlike any form of marriage either forced or arranged, it was characterized by "*the forceful abduction and holding in captivity of women and girls ('bush wives') against their will, for purposes of sexual gratification of the 'bush husbands' and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties)*" as described by Justice Julia Sebutinde

As an instrument of peace building, the Special Court received a broad mandate and it was expected to undertake gender-sensitive prosecutions. Crimes in our interest are provided with under Article 2 to Article 6 of the Special Court's Statute. The Statute listed "*rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence*" as crimes against humanity in Article 2(g). Additionally, with respect to crimes against humanity, the SCSL also had the power to prosecute the crimes of murder, extermination, enslavement, deportation, imprisonment, torture, persecution and "*other inhumane acts*." Rape, enforced prostitution and any form of indecent assault could be prosecuted as violations of Common Article 3 to the Geneva Conventions and Additional Protocol II as stated under Article 3 of the Statute. It also included the war crime of "*outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault*" in Article 3(e). The Statute similarly includes gender-specific crimes under Sierra Leonean law in Article 5, covering offences relating to the abuse of girls (though these national crimes have not been charged by the Prosecutor). However, as these provisions did not meet international standards in terms of definition of crimes and punishment, they were not to be applied.

To facilitate the prosecution of these gender-related crimes, Article 15 requires the Prosecutor to give due consideration to the employment of prosecutors and investigators experienced in gender-based crimes and juvenile justice.

The rape convictions and the explanation of the evidence in this regard, were positive additions to the narrative construction of gender-based crimes within Sierra Leone.

The charge of sexual slavery and outrage upon personal dignity raised the possibility that the Special Court would be the first international institution to issue convictions for sexual slavery since the Statutes of the ICTY and ICTR did not explicitly list sexual slavery as a crime against humanity. Besides it prosecuted and distinguished between rape, sexual slavery and forced marriage, yet not without difficulties.

Furthermore the SCSL has addressed the issue of forced marriage in times of conflicts as a crime against humanity, introducing very important details on the phenomenon into international criminal jurisprudence. However the impact was limited because the majority of the judges dismissed the forced marriage charges for redundancy[73] holding it was, in effect, subsumed by the crime against humanity of sexual slavery.

THE AFRC JUDGMENT: DEFINING SEXUAL SLAVERY AND FORCED MARRIAGE AS A SEPARATE CRIME AGAINST HUMANITY

The AFRC judgment[74] was delivered by the SCSL Trial Chamber II on the 20th June 2007. Here the SCSL raised awareness on sexual slavery and forced marriage and stated that consent to those acts was not possible given the very definition of slavery and the context war, hostile and coercive.

Sexual slavery is defined in the judgment as "an *act of humiliation and degradation so serious as to generally be considered an outrage upon personal dignity*" correctly defining the objective threshold for the act. The Trail Chamber

[73]They referred incorrectly to the Rome Statute of the ICC as separating "gender crimes" into an isolated paragraph within its crimes against humanity listing. The Rome Statute's crimes against humanity listing separates out crimes of sexual violence into one paragraph, but this paragraph does not capture all gender-based crimes. For example, a separate paragraph prohibits acts of gender-based persecution.

[74] Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, SCSL-04-16-T, Judgment (20 June 2007) (Special Court for Sierra Leone, Trial Chamber II).

chose to follow the ICC's elements of sexual slavery since they were the only codified in ICL and were included in the Rome Statute.

However the powers of ownership listed in the first element of the war crime of sexual slavery - "*purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty*" – were found non-exhaustive, if considering that enslavement could include situations where individuals were not physically confined. The *mens rea* was identified in the intention to engage in sexual slavery or in the reasonable knowledge that it was likely to occur.

The AFRC case explained the act of forced marriages; the separate concurring opinion of Justice Sebutinde in particular provided important details on the practice in the controlled territory.

According to the Prosecution's definition before the Trial Chamber, the "new" crime against humanity of forced marriage "*consists of words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage"* (par. 701 of the Judgment). Justice Sebutinde stressed that after removing the sexual elements of forced marriage, what is left is the label "wife" and the "conjugal duties" – cooking and laundering clothes. When such duties are forced upon women, they impose a demeaning servile status that, under certain circumstances, constitutes a violation of fundamental human rights.

The Appeal judgment further contributed to the definition: "*a perpetrator compelling a person by force or threat of force through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering or serious physical or mental injury on the part of the victim*". The breach of the "exclusive" relationship between "husband" and "wife" lead to disciplinary consequences, as explained in the separate concurring opinion.

The AFRC case did not resulted in a conviction because the Trail Chamber dismissed the charges, categorizing forced marriages as sexual slavery. Unfortunately the SCSL did not include any convictions for neither sexual slavery nor forced marriage even in the Appeal judgment of 2008[75]; to finally have a result we had to wait the RUF Trial Judgment[76].

What all SCSL's judgments did acknowledge is the intersectionality of gender-based crimes: indeed they often intersect with each other (e.g. forced marriage and sexual slavery) and with other crimes, including murder as crime against humanity.

To sum up, forced marriage is not only a crime of sexual violence, but also one of gender inequality, which is mandatory to redress considering in some regions is still a customary practice.

In the context of armed conflict, a consequence of forced marriages is the stigmatization of women by their own communities, forcing the victims to passively accept their fate. A successful prosecution could be hindered by this acceptance when interpreted as a decriminalization, hence allowing the perpetuating of its occurrence. Moreover, women who are forced to marry will be required to fulfill their conjugal duties, but also all duties associated with the role "wife" being thus stripped of their free will.

The distinct elements of forced marriage which emerged to this day are essentially: a "*forced conjugal association*" that is "*exclusive*". Unfortunately neither of those terms is defined, leaving open what constitutes the *actus reus* of forced marriage.

What is more, the crime of "forced marriage" set forth in the AFRC Appeals Judgment is so loaded with ambiguity that does little to advance women issues in ICL and still, to date, the Special Court is not contributing as much as it could to

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[75] *Prosecutor v. Brima*, SCSL-2004-16-A, Appeals Judgment (Feb. 22, 2008).
[76] *Prosecutor v Issa Hassan Sesay Morris Kallon Augustine Gbao* SCSL-04-15-T (2 March 2009).

gender-sensitive transitional justice in Sierra Leone.

International criminal justice mechanisms have a role to play in realizing gender justice after a conflict. To follow up in this analysis, we can quote Jennifer Gong-Gershowitz:

> "Contrary to acknowledging the victims' suffering, the AFRC Appeals Judgment, by distinguishing the crime of forced marriage from the crime of sexual slavery, has the ironic effect of minimizing the sexual violence and enslavement that were the principal features of forced marriages in the Sierra Leone conflict. As a result, the decisions of the Special Court for Sierra Leone may actually undermine the recognition of forced marriage as a serious violation of human rights in peacetime and a crime akin to modern-day slavery in the context of war. […]By reaching to define a "new" crime of forced marriage subsumed under "Other Inhumane Acts," the AFRC Appeals Judgment […] failed to enhance the understanding of conflictrelated violence against women and girls." [77]

Gender discrimination authorizes and facilitates gender violence. Patriarchal gender stereotypes are all too often used to reinforce the secondary status of women all over the world's societies and this should not be the enduring legacy of the suffering of women in armed conflict.

1.5. The International Criminal Court

Slowly but surely the international community became increasingly aware and sensitive to the high rate of gender crimes during conflicts; hence the decision to create a permanent Court to deal with crimes of an international concern in the end of the 1990s.

Surely women's rights activists viewed the negotiations for the ICC as an historic opportunity to address the failures of earlier international treaties and tribunals and to properly delineate, investigate and prosecute wartime violence against women and they relied upon their successes in drawing attention to atrocities suffered by women in recent conflicts in Bosnia and Rwanda.

In many ways, it was an opportune time to lobby for a "gendered" Statute

[77] Gong-Gershowitz J. (2009), *Forced Marriage: A "New" Crime against Humanity?* Northwestern Journal of International Human Rights, vol. 8, Issue 1, Article 3, 53-76.

for an international criminal Tribunal if we consider the achievements of the women's rights movement at the Vienna Conference in 1993 and at the Beijing Conference in 1995.

At the Vienna Conference, Governments condemned gender-based violence and violence against women in war situations and called for the integration of women's rights into the mainstream of the UN system. Later, the Beijing Platform for Action committed Governments to "*integrat[ing] a gender perspective in the resolution of armed or other conflicts and foreign occupation*."

As a result, the majority of States at the Rome Diplomatic Conference[78] in 1998 supported the integration of gender provisions in the future Statute, but only a few were willing to fight for it against the minority opposition. The opposition group was an alliance between some anti-choice groups, mostly from the U.S. and Canada, a few delegations representing States as the Vatican and Countries that followed its lead on certain issues, along with a core group of Islamic States.

What is more the Rome Treaty Conference was committed to working through the Statute's provisions by consensus with the result that many provisions were watered down.

Nevertheless various forms of sexual and gender based crimes were recognized among the most serious crimes of concern to the international community at the Rome Conference. In our opinion the most significant provisions of the Rome Statute regarding women's rights are to be found in the definition sections in Part II of the Statute. These sections define the crimes that will come within the jurisdiction of the Court and since the impunity long enjoyed by perpetrators of gender crimes was also enabled by their inadequate treatment under prior legal instruments, their recognition was key to putting an end to it.

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[78] During its 52nd session the U.N. General Assembly decided to convene a diplomatic conference for the establishment of the ICC to be held in Rome from the 15 June to the17 July 1998 to define the Treaty. The Rome Conference was attended by representatives from 161 member states, along with observers from various other organizations, intergovernmental organizations and agencies and NGOs and was held at the headquarters of the Food and Agriculture Organization of the United Nations in Rome.

For the Rome Statute "gender-based crimes" are "*those committed against a person on the basis of gender, whether male or female, as a result of existing gender norms and underlying inequalities*".

The Elements of Crimes of "sexual violence" under article 7(1) (g), 8(2) (b) (xxii) and 8(2) (e) (VI) include, *inter alia*, that:

> "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent'; and, such conduct was of a gravity comparable to the other offences."

The ICC Statute is often hailed for its progressive legislative framework that includes reference to gender and gender-based violence. This was manifest in the codification of an increased number of the gender-based crimes as war crimes and crimes against humanity and the inclusion of a gender mandate within the ICC structures and procedures.

The express inclusion of various crimes of gender-based and sexual violence in the ICC Statute is closely connected to the increased attention – and consequential prosecution – given to these crimes by the ICTY and ICTR

As a matter of fact, in the case of the ICTY and ICTR, the mandate was restricted to examine rape as a crime of sexual violence rather than including it in the broader category of gender. The ICC Statute on the other hand, partially addressed the issue, recognizing an increased number of crimes of sexual violence, but it also tackled the gender-based crimes debate codifying some of the existing rules and further developing international law in some instances, such as on forced pregnancy.

The Statute was the first instrument in international law to include an expansive list of sexual and gender-based crimes as distinct war crimes relating to both international and non-international armed conflict, expanding the list of sexual and gender based crimes as crimes against humanity to include not only

rape but other forms of sexual violence along with persecution on the basis of gender. Moreover in the Statute sexual and gender-based crimes committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group could constitute acts of genocide. Additionally the Office of the Prosecutor has the duty to investigate gender-based crimes and victims are enabled to come forwards and be heard in a safe environment by the existence of gender-sensitive rules of procedures and evidence.

Articles 43, 54, 57, 64 and 68 are key provisions on the investigation and prosecution: they offer protection and support to victims and witnesses involved in cases before the ICC and allow crimes to be prosecuted in a non-discriminatory and respectful manner in the hope that this will help to surmount their reluctance to participate. These improvements, which implicitly enhance gender-based justice, could have the effect of encouraging all stakeholders to participate in the future.

However, while the ICC Statute is often praised for its progressive legislative framework, to this day the path towards gender justice still has a long way to go.

Article 6 – Genocide

In relation to Article 6 of the Statute, sexual and gender based crimes committed with an intent to destroy a national, ethnical, racial or religious group, in whole or in part, are acts of genocide if they cause serious bodily or mental harm (Article 6(b)), or they constitute the deliberate infliction of conditions of life calculated to physically destroy the group (Article 6(c)), or when they are intended to prevent births within the group (Article 6(d)).

In view of the serious bodily or mental harm and potential social stigma associated with rape and other forms of sexual violence among targeted groups, such acts can cause significant and irreversible harm to individual victims and to their communities; it follows that crimes of rape and sexual violence may be an integral component of the pattern of destruction inflicted upon a particular group of people.

Article 7 – Crimes against humanity

Prior to the drafting of the ICC Statute, the international community had never before codified crimes against humanity; therefore, a proper definition of gender-based crimes and their inclusion within the ICC's crimes against humanity provision was imperative in view of the international community's formal recognition of such crimes.

Article 7(1)(g) and (h) of the Statute set out explicitly sexual and gender-based crimes which may constitute crimes against humanity, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence of comparable gravity and persecution on the ground of gender. Under Article 7, sexual and gender-based crimes are to be charged as crimes against humanity when they are committed "*as part of a widespread or systematic attack directed against civilian populations*" and "*pursuant to or in furtherance of a State or organizational policy to commit such attack"*. The crime against humanity of persecution against any identifiable group or collectivity on various grounds, including gender under Article 7(1)(h) is an important recognition within the Statute that help to confront the issue of impunity for systematic persecutions on the basis of gender, particularly against women.

The crime of "enslavement" within the Statute is defined as the "*exercise of any power attaching to the rights of ownership over a person*" openly recognizing trafficking in persons, in particular women and children.

In addition, crimes such as enslavement, deportation or forcible transfer of population, torture and murder included a gendered or sexual element. Sexual and gender-based crimes could constitute a form of torture or other inhumane acts of a similar character when intentionally causing great suffering, or serious injury to the body or to the mental or physical health.

Article 7(1) (g) encompasses gender crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and sexual slavery along with any other form of sexual violence of comparable gravity.

Hopefully this would allow the ICC to prosecute more effectively those who

rape during warfare with the intent of reproduction of a certain group, underlining how sexual violence is used as a mechanism of hatred, with the aim of ethnic cleansing.

Article 8 – War crimes

Article 8, the ICC Statute's war crimes provision, differs from the Statutes of previous Tribunals because it combines the grave breaches to the Geneva Conventions of 1949 and the violations of the law or customs of war, traditionally addressed in separate articles.

Sexual and gender based crimes are often committed in the context of and in association with an international or non-international armed conflict hence falling under the Court's jurisdiction as war crimes under Article 8. Those crimes include acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of Common Article 3.

Other types of war crimes such as intentionally directing attacks against the civilian population, torture, mutilation, outrages upon personal dignity or the recruitment of child soldiers could also contain gendered and sexual elements.

Regrettably the Statute defined enslavement in the same manner as the 1926 Slavery Convention, but it fortunately added that enslavement "*includes the exercise of such power in the course of trafficking in persons, in particular women and children*." On the other hand, unlike the 1926 Convention, the Rome Statute specifically addressed the crime of sexual slavery.

After the adoption of the Statute, the Preparatory Commission negotiated an Elements Annex to guide the Court in the interpretation of the crimes within its jurisdiction. The Elements Annex adopted a very narrow definition of enslavement which was then extended to sexual slavery. Again the Elements adopted did not adequately reflect that crime under international law.

The *actus reus* of sexual slavery is defined as:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar

deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

While this definition contains potential flexibility in the phrase "*such as"* it puts the emphasis on the commercial exchange and on trafficking or similar deprivation of liberty, which is far from the lived experience of women and men coerced or deceived into enslavement situations and sexual slavery. It is important to note the absence of relevant and non-commercial means of enslavement such as "using" another person as one's property and the notion of "control over sexuality" that represents a step backwards from the 1926 Convention.

Case law

We can retrace a gender-sensitive evolution in the ICC case law through the years. During the course of the first ICC trial against Thomas Lubanga Dyilo[79], although he was not charged directly as additional crimes, but during the course of the trial, the Office of the Prosecutor explained the gender dimension of the crime of enlisting and conscripting children under the age of 15. The Office took note of the reactions of civil society and their preference for these aspects to be explicitly charged. Sexual and gender crimes were then included directly in the indictment in all subsequent cases, such as the *Katanga/Ngudjolo*[80] and the *Mbarushimana*[81] cases.

Sexual violence being a major concern not only in the DRC, the decision to open an investigation on the Central African Republic[82] was the first instance

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[79] *The Prosecutor v. Thomas Lubanga Dyilo*, Case 01/04-01/06. On 14 March 2012, the Court, by unanimous verdict of the Trial Chamber, found Lubanga guilty as a co-perpetrator in the use of child soldiers.

[80] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case 01/04-01/07. Both men are charged with six counts of war crimes and three counts of crimes against humanity, relating to an attack on the village of Bogoro on 24 February 2003 in which at least 200 civilians were killed, survivors were imprisoned in a room filled with corpses and women and girls were sexually enslaved.

[81] *The Prosecutor v. Callixte Mbarushimana*, Case 01/04-01/10. By a 2 to 1 majority, Pre-Trial Chamber I ruled on 16 December 2011 that the confirmation was declined. After the Prosecutor's appeal against the decision was rejected, Mbarushimana was released on 23 December 2011.

[82]On 22 May 2007, the ICC Prosecutor announced his decision to open an investigation on the

where the international criminal justice system to deal with a situation where the allegations of sexual crimes far outnumbered the allegations of killings.

The Office of the Prosecutor also charged the President of Sudan, Omar Al-Bashir[83], of committing genocide *inter alia* through the fact that thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, were subjected to acts of rape by forces of the Government of Sudan.

In some of the cases not all the charges of sexual and gender crimes the Office requested were confirmed by the Judges. Indeed, in the case against Jean-Pierre Bemba[84] for instance, sexual violence and rapes were originally included under the counts of torture and rape, as crimes against humanity and war crimes, as well as outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime. The Trial Chamber only confirmed the charges of rape as war crime and crime against humanity.

Gender-Sensitive Measures and the Office of the Prosecutor (OTP)

The OTP has received a clear mandate to embrace the concept of gender-based crimes and to take all measures to develop an appropriate gender policy. Under Article 54(1) (b), the ICC Prosecutor has a duty to investigate crimes of sexual and gender violence. Investigations into gender-based crimes should be carried out with genuine gender awareness of how to direct, plan and conduct investigations into such crimes.

Thus far, steps undertaken by the OTP include the creation of a Gender and Children Unit, that advises the Office on sexual, gender violence and violence

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CAR] focusing on allegations of killing and rape in 2002 and 2003, a period of intense fighting between government and rebel forces.

83 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Case 02/05-01/09. On 14 July 2008, the Prosecutor accused Sudanese President Omar al-Bashir of genocide, crimes against humanity and war crimes. The Court issued an arrest warrant for al-Bashir on 4 March 2009 for war crimes and crimes against humanity; in July and August 2010 al-Bashir traveled to Chad and Kenya, neither of which turned him over to the ICC despite being States Parties.

84 *The Prosecutor v. Jean-Pierre Bemba Gombo,* Case 01/05-01/08. He was charged with five counts of war crimes (murder, rape, torture, pillaging and outrages upon personal dignity) and three counts of crimes against humanity (murder, rape and torture). The trial of Bemba began on 22 November 2010.

against children and supports its investigations and prosecutions; the appointment of a Special Gender Advisor, who provides additional expertise on gender violence, gender-related policies, practices and legal submissions; and the training of staff to develop the specific expertise required to deal with gender-based crimes.

The Gender and Children Unit (GCU) include advisers with legal and psycho-social expertise dealing specifically with gender and children issues. The GCU advises the Prosecutor directly and provides support to the Office's divisions, from the pre-analysis to the prosecution phases. Professor Catharine A. MacKinnon was appointed as Special Gender Adviser to the Prosecutor of the ICC in November 2008 and has been providing strategic advice to his Office on sexual and gender violence.

Since her election in December 2011 the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, has expressed her commitment to pay particular attention to the investigation and prosecution of sexual and gender-based crimes and to enhance access to justice for victims of these crimes through the ICC[85].

In the 2012-2015 Strategic Plan this issue was included as "Strategic Goal 3" with a view to "*enhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender based crimes and crimes against children*". Further, the mainstreaming of a gender perspective and analysis in the Court's work in all its stages, from the preliminary examinations to after the conclusion of the proceedings is stated in the "Draft Policy Paper" of February 2014[86].

It is hoped that documents as the "Draft Policy Paper" would harmonize practices of the different actors involved, promoting cooperation, increasing

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[85] See the statement of the Prosecutor-elect of the International Criminal Court, Mrs. Fatou Bensouda, "Gender Justice and the ICC: Progress and Reflections", 14 February 2012.

[86] DRAFT Policy Paper on Sexual and Gender Based Crimes, February 2014, Office of the Prosecutor of the ICC.

accountability for sexual and gender based crimes and enhancing the preventive impact of the Statute through the work of the Court in relation to these crimes.

According to the Draft the objectives of the policy are:

a. Affirm the commitment of the Office to pay particular attention to sexual and gender based crimes in line with Statutory provisions;
b. Guide the implementation and utilization of the provisions of the Statute and the Rules so as to ensure the effective investigation and prosecution of sexual and gender based crimes from preliminary examination through to appeal;
c. Provide clarity and direction on issues pertaining to sexual and gender based crimes in all aspects of operations;
d. Contribute to advancing a culture of "good practice" in relation to the investigation and prosecution of sexual and gender based crimes; and
e. Contribute, through its implementation, to the on-going development of international jurisprudence regarding sexual and gender based crimes.

From now on, it would be desirable that the Office of the Prosecutor to increasingly present acts of genital mutilation or deliberate injuries to the genitalia as sexual crimes[87].

Additional steps that the Office may take are those aiming to promote complementarity between States and other stakeholders: promoting ratification of the Statute, encouraging domestic implementation, participating in awareness-raising activities on the Court's jurisdiction, exchanging of lessons learned and best practices to support domestic investigative and prosecutorial strategies and assisting relevant stakeholders to identify pending impunity gaps.

In conclusion, as the Prosecutor declared in 2012:

> "It is my belief that the law and judicial proceedings are a powerful tool to shed light on these crimes, give a voice to the victims and punish their

[87] In *Kenyatta et al*., the Prosecution argued that acts of forcible circumcision and penile amputation against Luo men constituted "*other forms of sexual violence*" pursuant to article 7(1)(g) and the Pre-Trial Chamber II found that the evidence placed dignity under articles 8(2)(b)(x), 8(2)(b)(xxi), 8(2)(c)(i), 8(2)(c)(ii) may also have a sexual and/or gender element.

perpetrators. The law will help to change behaviour."[88]

As we said before, more needs to be done in the field of gender mainstreaming.

As an example we can quote the situation of victims: though achieving a more active role through the gender-sensitive provisions dealing with their protection and their participation at all stages of the proceedings, procedural safeguards have yet to help victims and witnesses through the painful process and to contribute to their rehabilitation. Without adequate procedural safeguards, victims may not report the crime, testify or even withdraw charges thus weakening the case.

Conclusions

The progress of these last fifty years in addressing gender-based violations makes us hope that efforts will be made not only to ensure the prosecution of these serious violations, but to prevent them from happening in the first place.

With the growing understanding that women have often fared badly in legal responses to human rights violations and to war, significant advances have been made in attempting to ensure that adequate redress is provided in the future.

This commitment was already evident in the very founding documents of the ICC: the Statute provides an unprecedented articulation of gender and sexual violence as serious international crimes and its Elements reflect the clear attempt to include the proposals of women's rights and feminist legal scholars into progressive developments within national and international criminal jurisprudence without compromising the rights of the accused.

However, political will to prosecute sex crimes is crucial, as well as pressure exerted from NGOs is often indispensable to ensure that gender crimes are investigated and indicted. Sex crimes inflict acute physical and mental violence on survivors and they cause extensive harm to the families, communities

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[88] Fatou Bensouda "*Gender Justice and the ICC: Progress and Reflections"* International Conference: 10 years review of the ICC. Justice for All? Statement, Sydney, 14th February 2012.

and associated groups of the victims.

Evidence indisputably demonstrates that gender crimes are amongst the most serious crimes committable and constitute a threat to international peace and security.

Only through the constant recognition of women's issues in times of conflict and the codification of explicit prohibitions of sexual violence and gender-based crimes, women will receive adequate attention and protection. Plus, women's human rights will be fully protected and enjoyed as actual human rights only through the full inclusion and recognition of gender issues in international law, alongside the vigorous prosecution of gender crimes.

Yet a broad incorporation of the gender norms codified in the Rome Statute will not automatically change misogynist or sexist laws. Under the Statute's principle of complementarity, states are *encouraged*, to incorporate the key provisions in their domestic laws; the danger of exclusion and impunity persists in the ICC and in the accountability processes – national and international – to which it should give rise.

Finally, changing patriarchal culture and the inequality of women is the multi-faceted and imperative responsibility of both women and men to which the ICC can and must make a contribution.

CHAPTER TWO
FEMALE GENITAL MUTILATION/CUTTING: A GLOBAL CONCERN

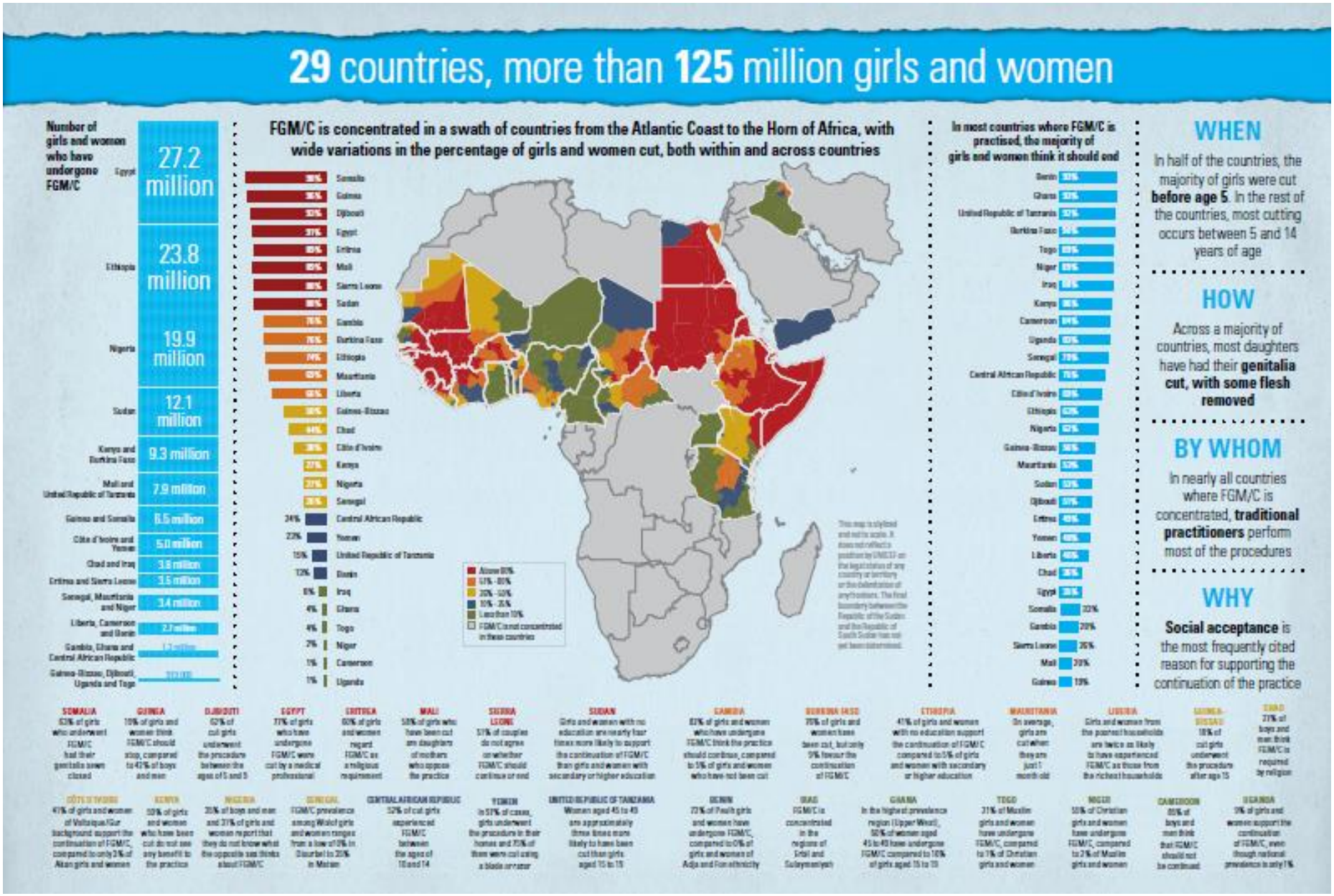

Fig. 2.1 *Picture portraying FGM/C in Africa and Middle East and its variations* (UNICEF 2013).

2.1. Socio-historical-cultural background

> The genital mutilations are the primary means for bringing the female body into line with what the culture considers to be appropriate sexuality.
>
> Abusharaf 1997[1]

FGM/C is rooted in a distant past. Though the origin of such female genital ritual (hereinafter FGR) is unknown, the Greek historian Strabo found evidence of the procedure among ancient Egyptians in early 1st Century A.D. His finding was confirmed in a 4th Century papyrus from St. Ambrosius of Milan, which recorded, as did Strabo that Egyptians used to circumcise both males and females[2]. We are dealing with an ancient custom: recently emerged evidence from Egyptian mummies suggests that infibulation (also known as the "pharaonic" procedure) was practiced there some 2,500 years ago[3].

The practice is believed to have begun in Nubia and then to have spread to ancient Egypt and eventually into many African and Middle Eastern Countries (e.g. Egypt, Yemen), to Southeast Asia (e. g. Indonesia, Malaysia) and some regions of South America. It is also practiced among some Australian aboriginals[4].

Rationales behind the practice are as diverse as the communities in which it has been firmly established, but practitioners usually rationalize their action as a religious or cultural prescription aimed at promoting cleanliness, ensuring virginity, preventing promiscuity, enhancing aesthetic beauty and improving

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[1] Abusharaf, R.M. (1997). *Changing traditions: Sudanese women extirpating ritualized female genital surgeries*. Awaken. New York: Equality Now. pp. 19–22.

[2] *See* David L. Gollaher, *Circumcision: A History of The World's Most Controversial Surgery* 195-96 (2000).

[3] Izett S, Toubia N: *A research and evaluation guidebook using female circumcision as a case study: learning about social changes.* RAINBO, New York, 1999.

[4] Williams, N. (1990). *Africa: a ritual of danger*. Time, Fall Special Issue. Women: The Road Ahead, p. 39.

marital prospects[5]. Girls themselves may desire to undergo the procedure as a result of social pressure from peers and because of fear of stigmatization and rejection by their communities if they do not comply.

In some places, girls who undergo the procedure are given rewards such as celebrations, public recognition and gifts[6]. Hence, in cultures where it is widely practiced, female genital mutilation/cutting has become an important part of the cultural identity of girls and women and it conveys a sense of pride, the coming of age and a feeling of community membership.

From being mostly a traditional practice of large parts of Africa and of parts of the Middle East, nowadays it is increasingly emerging among immigrant populations in Europe, North America and Australia.

Variations in the prevalence of FGM/C and the reasons why it is performed still reflect the diverse perceptions, culture and religious practices of the various communities involved.

A number of cultural foundations to FGM/C can be argued.

Firstly, the claim of religion: circumcision is said to be prescribed by the Koran or the Bible. Even though the practice can be found among Christians, Jews and Muslims, none of the holy texts of any of these religions prescribes FGM/C and, in addition, the practice pre-dates both Christianity and Islam. The role of religious leaders varies: on the one hand those who support the practice tend either to consider it a religious act, or to see efforts aimed at eliminating the act as a threat to culture and religion. On the other hand, there are religious leaders who support and participate in efforts to eliminate the custom. When religious leaders are unclear or avoid the issue, they may be perceived as being in favor.

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[5] See Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (2001)

[6] *See* Behrendt A (2005). *The practice of excision in Moyamba and Bombali districts of Sierra Leone: perceptions, attitudes and practices*; UNICEF (2005). *Female genital mutilation/female genital cutting: a statistical report*, New York.

Secondly proponents have argued the conditions deemed necessary for girls' marriageability – i.e. to be "clean" and "beautiful" – which are essential to be considered a "proper" wife. Indeed in Arabic, the word for FGM/C is "*Tahara*" which means "to purify" a woman (of her sexual desire). As a consequence she must be "cut" (as it is called by the practitioners and victims) to *enhance* her femininity. Cutting becomes an "essential" aspect of women's identity; behind it lurks the (un)conscious wish to deprive women both of sexual desire and pleasure[7] and of "masculine" parts such as the clitoris[8]. In case of infibulation, in particular, the result sought is to achieve "smoothness"[9]: this is alleged to be men's wish, accepted by society as the belief and as the requirement for women to have no sexuality. Women should be totally available and focused on men's desire and wish.

Thirdly there is the idea that the female sexual organ, in particular the clitoris, has a detrimental effect on male sexuality, or even on the baby. Sometimes the conviction expressed by women is that FGM/C enhances men's sexual pleasure[10]. Consequently genital mutilations are performed with a sense of *righteousness*: the forbidden sexual pleasure of women is eradicated.

Fourthly we find the necessity to control women's sexuality. It is thought that without circumcision the woman may threaten to become promiscuous and to evade her husband's control. Circumcision thus purges the woman of her overabundant sexuality and ensures that the man is able to respond adequately to the sexual demands of his wife. This image of purity is specifically expressed by the practice of infibulation, where the (potential) wife, remains, as it were, *sealed*

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[7] *See* Lax, 2000, *Socially Sanctioned Violence Against Women: Female Genital Mutilation.*

[8] *See* Talle, 1993 *Transforming women into "pure" agnates: aspects of female infibulation in Somalia*; Ahmadu, 2000 *Rites and wrongs: an insider/outsider reflects on power and excision*; Johansen, 2007 *Experiencing sex in exile—can genitals change their gender*?

[9] *See* Talle, 1993; Gruenbaum, 2006 *Sexuality issues in the movement to abolish female genital cutting in Sudan*.

[10] *See* Almroth-Berggren et al., 2001 *Reinfibulation among women in a rural area in central Sudan*.

until the moment that her husband can make his rightful claim.

Finally, circumcision serves as an initiation ritual in the transition from girlhood to womanhood. This argument, however, is pointless in cases where circumcision is performed at an extremely young age.

The practice of FGM/C is often upheld by local structures of power and authority such as traditional leaders, religious leaders, circumcisers, elders and even some medical personnel.

In many societies, older women who have themselves been "cut" often become gatekeepers of the practice, seeing it as an essential part of the identity of women and girls. That is probably why women and more often older women, are more likely to support the practice and tend to see efforts to combat the practice as an attack to their identity and culture[11]. It is however important to underline that some of these actors also play a key role in efforts to eliminate the practice.

All these premises serve as an illustration of a broader gendered approach to female sexuality. The sexual autonomy of the girl/woman in such cultural settings does not stand on its own but derives its very existence from the sexuality of the man[12]. Again the key to female sexual integrity is contained in her circumcision.

What is more, the socioeconomic context has also to be taken into account. In Countries where female circumcision is common, marriage is often one of the few options of survival for women. There is often an expectation that men will only marry women who have undergone the practice. Those who do undergo FGM/C are excluded from the community and, in any case are not considered to be marriageable, thus sacrificing a certain level of financial and social security. The desire for a proper marriage, which is often essential for economic and social security as well as for fulfilling local ideals of womanhood and femininity, may account for the persistence of the practice.

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[11] *See* Toubia and Sharif, 2003 *Female genital mutilation: have we made progress?* Draege, 2007 *The role of men in the maintenance and change of female genital cutting in Eritrea*, Johnson, 2007.

[12] M.C. Nussbaum, *Sex & Social Justice*, 1999, chapter 4.

Where FGM/C is widely practiced, it is supported by both men and women and usually anyone departing from the norm face condemnation, harassment and ostracism. As such, FGM/C is a social convention governed by rewards and punishments which are a powerful fuel for its perpetration. In view of its conventional nature, it is difficult for families to abandon the practice without the support of the wider community. In fact, it is still carried out even when it is known to inflict harm upon girls, as the perceived social benefits of the practice are deemed higher than its disadvantages[13]

There are many justifications for FGM/C among different Countries. In Kenya, 30% of women who support the continuation of the practice agreed that FGM/C helped to preserve virginity and avoid immorality. In Nigeria, similar rates (36%) were reported by women, while 45% of men who supported the continuation of the practice agreed with this statement. FGM/C was believed to be proof of a girl's virginity, thereby improving the marriage prospects of unmarried girls who have undergone the procedure. In Côte d'Ivoire, "improved marriage prospects" was cited by 36% of women who favoured the continuation of the practice once married. FGM/C is also believed by some communities to ensure that a woman is faithful and loyal to her husband. For example, 51% of women in Egypt believe that FGM/C prevents adultery[14].

In a parallel, in a World Health Organization study conducted in Egypt, 33.4% of the subjects perceived the practice of FGM/C to be a religious tradition and that was the most important reason for performing it. In general, 72% of women who have been married reported that FGM/C is an important part of religious tradition[15].

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[13] *See* UNICEF, 2005, *Female genital mutilation/female genital cutting: a statistical report*. New York.

[14] PATH. Female genital mutilation in Africa. *An analysis of current abandonment approaches*. Nairobi: PATH; 2005. Available from: http:// www.path.org/publications/files/CP_FGM/C_combnd_rpt.pdf. Accessed February 8, 2012.

[15] Tag-Eldin MA, Gadallah MA, Al-Tayeb MN, Abdel-Aty M, Mansour E, Sallem M. Prevalence of female genital cutting among Egyptian girls. *Bull World Health Organ*. 2008, 86, 269–274.

However, looking only at national prevalence rates can hide the regional variations within a Country. FGM/C often reflects ethnicity or social interactions of communities across and within national borders.

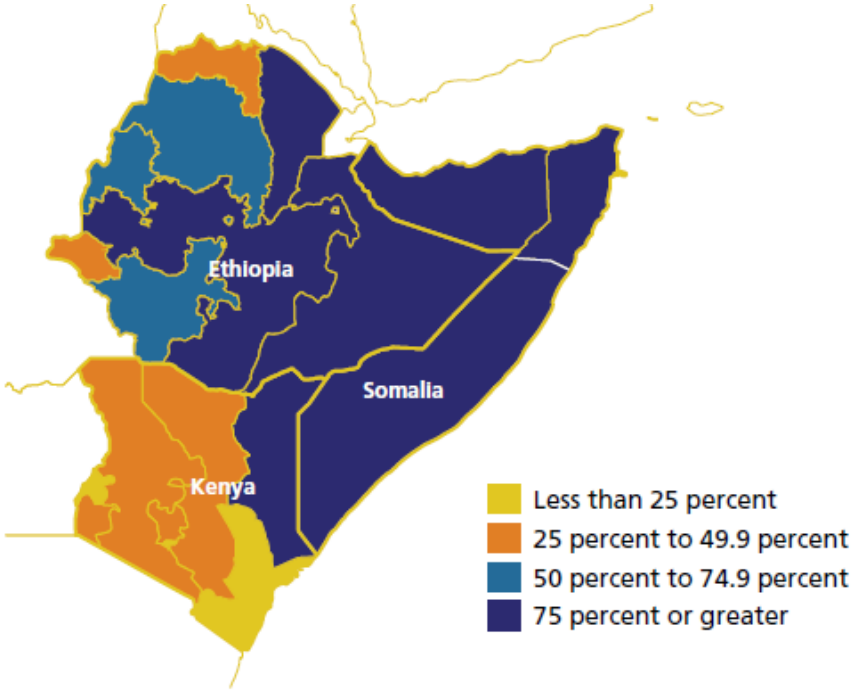

Fig. 2.2 *Picture showing variations within and across borders of FGM/C in Ethiopia, Somalia and Kenya* (PRB 2008).

We can quote Ethiopia as a prime case study: the distribution of female genital cutting varies depending on ethnic origin and region[16]. The 2008 research conducted through community-based cross-sectional house-to-house interviews of 858 females of reproductive age (15–49 years), in Kersa district, East Hararge, Oromia region, Ethiopia showed:

- FGM/C was reported to be known by 38.5% of the interviewees.
- The majority (76.1%) reported that local healers were the main performers of FGM/C, whereas 18% of procedures were reported to have been performed by elderly people.

[16] Amare D, Aster B. Baseline survey on female genital mutilation and other harmful traditional practices, in North Gondar, Amhara Regional State. Feb 2006.

- The main reason for the practice of FGM/C was the reduction of female sexual hyperactivity (60.3%); further there were the prevention of early initiation to sex before marriage for females and the prevention of unprotected sex. Hence we can take that women are perceived by the community as being unable to control their sexual desires without undergoing some form of genital mutilation/cutting.
- Circumcision of daughters was reported by 88.1% of respondents and this showed a statistically significant association with
    - The Christian religion (Christians dominate in the north),
    - Illiteracy,
    - Amhara ethnicity.
- The majority of the respondents (92.3%) were themselves circumcised.
- The 68.8% did not know of any health-related problems associated with FGM/C; only a few noted problems associated with FGM/C during delivery and sexual intercourse, or were aware of psychological problems associated with the practice.
- When asked about the role of women in stopping the practice of FGM/C, the majority (76.7%) had not tried to prevent FGM/C in the community but some (23.2%) had attempted to stop it. One quarter of the respondents did not give any reason why they did not try to stop FGM/C, adding that "*to stop is to interfere with the norm*", believing that FGM/C practice is acceptable and they did not want to stop it at all[17].

Regarding cultural explanations, it has been suggested that FGM/C can be seen as a tool for increasing social cohesion among communities; hence it is regarded as a binding force in social life[18].

Considering that FGM/C is positively related to illiteracy, the practice can

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[17] Aro et al. *Female genital mutilation: prevalence, perceptions and effect on women's health in Kersa district of Ethiopia*, International Journal of Women's Health 2012:4 45–54.

[18] Amare D, Aster B. *Baseline survey on female genital mutilation and other harmful traditional practices, in North Gondar, Amhara Regional State*. Feb 2006.

be thought as a societal norm and a source of income for the perpetuators. Girls terminate their education at an earlier age to meet their family responsibilities: the options available are marriage or becoming engaged. Therefore poverty, lack of education, insufficient information and inadequate knowledge might increase the risk of FGM/C.

Information, communication and integration are very important in all communities; according to Western societies, advocacy at school, training of health workers in the management of victims, recognition and training of the perpetuators and implementation of laws alongside strategies designed to outlaw the practice are to be undertaken. Further, a successful extinction of FGM/C should start at the grass roots level and involve all the potentially concerned community members (religious leaders, advocates and educators) in working towards a generation of women safe from FGM/C.

2.2. What is FGM/C? The pactice today

First of all it is important to determine the meanings of: mutilation, cutting and circumcision.

Female genital mutilation/cutting (FGM/C), also known as female circumcision (FC), female genital cutting (FGC) and female genital mutilation (FGM), all involve the cutting or alteration of the female genitalia for social rather than medical reasons.

The procedure was historically known like its male counterpart, simply as circumcision or FC; however, the term has now been largely abandoned as it implies an analogy with male circumcision when it is actually a far more damaging and invasive procedure. Yet various communities still use FC because it is a literal translation from their own languages.

The expression "female genital mutilation" gained growing support from the late 1970s. Since the early 1990s, FGM has gained recognition as a health and human rights issue among African governments, the international community, women’s organizations and professional associations.

Finally in 1990 the term was adopted at the Third Conference of the Inter-

African Committee on Traditional Practices Affecting the Health of Women and Children (IAC), an international private organization based in Dakar, Senegal. Since 1991, when the WHO recommended to the United Nations to adopt the term FGM/C[19], its use has spread. It was embraced not only by the U.N. and its Agencies, but also by a plurality of scholars, experts and activist groups pushing various agendas.

Over the last two decades the expression FGM has been most widely used, yet recently many commentators and some United Nations' Agencies tended to prefer "female genital cutting" (FGC) which they perceive to be more neutral and less offensive to people whose culture endorses the ritual[20].

While the UN continues to use FGM in official documents, some of its agencies (United Nations Children's Fund [UNICEF] and United Nations Population Fund [UNFPA]) have started to use the combined term female genital mutilation/ cutting (FGM/C) to capture the significance of the term "mutilation" at the policy level and at the same time to use less judgmental terminology for practicing communities[21].

Both terms emphasize the fact that the practice is a violation of girls' and women's human rights. FGM, in particular, is meant to more aptly capture the harmful nature of the procedure as a human rights violation, thereby providing a more robust ground upon which to campaign for its abolition.

According to the WHO, female genital mutilation/cutting is any surgical modification of the female genitalia, comprising all "*procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for cultural or nontherapeutic reasons"*.

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[19] UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, Innocent Digest 2 (2005).

[20] See Rebecca J. Cook Et Al., *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* 263 (2003).

[21] Eliminating Female Genital Mutilation: An interagency statement, World Health Organization, Geneva, 2008.

Tab. 2.1 *Chart showing what kind of FGM/C and in what percentage is practiced in Countries of Africa and Middle East* (PRB 2008)

	Types of FGM/C (%)		
	Nicked, No Flesh Removed	Flesh Removed	Sewn Closed
Benin	0.6[a]	97.5[a]	3.9[a,c]
Burkina Faso	1.2	90.8	2.0
Cameroon	4.0	85.0	5.0
Central African Rep.	—	—	—
Chad	19.4	74.7	2.4
Côte d'Ivoire	6.1	80.0	5.7
Djibouti	24.9	6.4	67.2
Egypt	—	—	—
Eritrea	46.0	4.1	38.6
Ethiopia	—	—	6.1
Gambia	—	—	—
Ghana	—	—	—
Guinea	1.7	86.4	9.3
Guinea-Bissau	0.8	91.7	3.2
Kenya	—	—	—
Mali	3.0	75.8	10.2
Mauritania	5.4	75.3	—
Niger	0.8[a,c]	90.5[a,c]	13.3[a,c]
Nigeria	2.0	43.5	3.9
Senegal	0.2	82.7	11.9
Sierra Leone	—	—	—
Somalia	1.3	15.2	79.3
Sudan (North)	21.5	1.7	74.1
Tanzania	1.9	91.3	2.0
Togo	7.7	85.7	1.7
Uganda	—	—	—
Yemen	—	—	—

Recognition of the different types of FGM/C is important because the incidence of complications differs with the severity of the procedure.

A WHO interagency group has classified female genital cutting into four types:

- Type 1, partial or total removal of the clitoris and/or the prepuce (clitoridectomy);
- Type 2, partial or total removal of the clitoris and labia minora, with or without excision of the labia majora (excision);
- Type 3, narrowing of the vaginal orifice with creation of a covering seal by cutting and positioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation); and

- Type 4, all other harmful procedures to the female genitalia for nonmedical purposes, e.g., pricking, piercing, incising, scraping and cauterization[22].

Of the four types, Types 1 and 2 are the most prevalent, undergone by approximately 85% of genitally cut women throughout the world[23].

It is estimated that 15% of all circumcised women have undergone the most severe form of FGM/C, i.e., infibulation and approximately 70%–80% of all circumcisions in Djibouti, Somalia and Sudan are of this type[24].

The WHO estimates that about 100–140 million girls and women worldwide have undergone FGM/C – out of which 91.5 million are in Africa – and each year a further two million girls and women are at risk of this practice.

It is performed on girls aged 4–12 years and in some cultures as early as a few days after birth or as late as just before marriage[25].

Recent surveys have found that 90% of girls in Egypt who had undergone FGM/C were 5–14 years of age when subjected to the procedure.

FGM/C is generally done among girls younger than 10. When subjected to the procedure, 50% of those cut in regions of Ethiopia, Mali and Mauritania were under 5 years of age, whereas 76% of those in Yemen were not more than two weeks of age[26].

When done during childhood, the cutting leaves a scar that narrows the female genitalia and complicates childbirth, causing injury and has a negative impact on sexuality at a later age[27].

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[22] World Health Organization. *Eliminating female genital mutilation: an interagency statement*: *UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, and UNIFEM*. Geneva, Switzerland: World Health Organization; 2008.

[23] Nahid Toubia, *Female Genital Mutilation,* Women's Rights, Human Rights: International Feminist Perspectives 224, 226 (J. S. Peters & Andrea Wolper eds., 1995).

[24] Prevalence data are available from the demographic and health survey reports of each country.

[25] Center for Reproductive Rights. Female Genital Mutilation. *A Matter of human rights. An advocate's guide to action*. 2nd Ed. New York: Center for reproductive rights; 2006.

[26] Idem supra note 7.

[27] World Health Organization. *Female Genital Mutilation, Integrating Prevention and the*

In other communities, women undergo the practice when they are about to be married, are pregnant with their first child, or have just given birth.

In Ethiopia the prevalence of FGM/C among women of child-bearing age is 80%, whereas the rate for women who have undergone FGM/C themselves which have at least one daughters who has also undergone FGM/C is 48%[28]. A study conducted among schoolgirls in Egypt has shown that the overall prevalence of FGM/C among girls aged 10–18 years was 50.3%. In rural schools, the prevalence was 62% as compared with 42% in urban schools[29].

Tab. 2.3 *Chart showing the prevalence of age of women and girls who underwent FGM/C in Africa and Middle East* (PRB 2008)

	Data Source		Prevalence by Age (%)		
			15-49	15-19	35-39
Benin	DHS	2006	12.9	7.9	16.3
Burkina Faso	DHS	2003	76.6	65.0	81.6
Cameroon	DHS	2004	1.4	0.4	1.2
Central African Rep.	MICS	2000	35.9	27.2	43.3
Chad	DHS	2004	44.9	43.4	46.2
Côte d'Ivoire	MICS	2006	36.4	28.0	43.8
Djibouti	MICS	2006	93.1	—	—
Egypt	DHS	2005	95.8	96.4	95.9
Eritrea	DHS	2002	88.7	78.3	92.6
Ethiopia	DHS	2005	74.3	62.1	81.2
Gambia	MICS	2005/06	78.3	79.9	79.5
Ghana	MICS	2006	3.8	1.4	5.7
Guinea	DHS	2005	95.6	89.3	98.6
Guinea-Bissau	MICS	2006	44.5	43.5	48.6
Kenya	DHS	2003	32.2	20.3	39.7
Mali	DHS	2006	85.2	84.7	84.9
Mauritania	DHS	2000/01	71.3	65.9	71.7
Niger	DHS	2006	2.2	1.9	2.9
Nigeria	DHS	2003	19.0	12.9	22.2
Senegal	DHS	2005	28.2	24.8	30.5
Sierra Leone	MICS	2006	94.0	81.1	97.5
Somalia	MICS	2006	97.9	96.7	98.9
Sudan (North)	MICS	2000	90.0	85.5	91.5
Tanzania	DHS	2004/05	14.6	9.1	16.0
Togo	MICS	2006	5.8	1.3	9.4
Uganda	DHS	2006	0.6	0.5	0.8
Yemen	PAPFAM	2003	38.2	—	—

Management of Health Complications into the Curricula of Nursing and Midwifery. Teacher's guide. Geneva: WHO; 2001. Jasmine A, Christine M, Michel B, Oliver I. *Care of women with female genital mutilation/cutting*.

[28] WHO. *Progress in Sexual and Reproductive Health Research*. Geneva: WHO; 2006.

[29] Idem *supra* note 2.

Since the practice is forceful and aggressive and performed without the consent of the victim, it is unethical and even more when performed on young girls. Definitely the procedure is particularly severe for very young girls for it is performed without anesthesia and has heavy complications.

Women who have undergone any form of FGM/C are traumatized and likely to develop physical, psychological and social problems associated with it, along with poor quality of life and self-esteem during adulthood. Furthermore, women with Type 2 and 3 are more likely to require cesarean section and have postpartum blood loss than women who had not undergone FGM/C. Studies on the psychological effects of FGM/C are scarce and need to be duly emphasized, given that FGM/C is one of the reported risk factors for post-traumatic stress disorder in women. Newborns from mothers who have undergone FGM/C might have a complication during birth[30] and birth injury that may be costly to treat afterwards.

Considering that the procedure is mostly done in unhygienic conditions[31], it is reasonable to predict transmission of contagious and blood-borne diseases, including human immunodeficiency virus due to the use of the same instruments in multiple operations. FGM/C is hence responsible for high health care demands and medical costs

Members of the extended family are usually involved in the decision-making about female genital mutilation/cutting, although women are usually responsible for the practical arrangements for the "ceremony".

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[30] Banks E, Meirik O, Farley T, Akande O, Bathija H, Ali M. *Female genital mutilation and obstetric outcome: WHO collaborative prospective study in six African Countries.* Lancet. 2006, 367, 1835–1841.

[31] Thoraya Obaid, *Frequently Asked Questions on Female Genital Mutilation/Cutting*, http://www.unfpa.org/gender/practices2.htm#8

Tab. 2.4 *Chart showing the distribution of the medically and traditionally performed FGM/C and if national law has ruled on the matter* (PRB 2008).)

	Traditionally Performed (%)	Medically Performed (%)	National Law
Benin	99.0	0.6	●
Burkina Faso	88.6	0.2	●
Cameroon	89.0	4.0	◐
Central African Rep.	—	—	●
Chad	94.2	2.7	◐
Côte d'Ivoire	95.2[c]	0.5[c]	●
Djibouti	—	—	●
Egypt	24.1[b]	74.5[b]	●
Eritrea	94.5	0.6	●
Ethiopia	—	—	●
Gambia	—	—	○
Ghana	—	—	●
Guinea	88.7	10.0	●
Guinea-Bissau	—	—	◐
Kenya	—	—	●
Mali	91.7	2.5	◐
Mauritania	70.9	1.1	●
Niger	97.0	0.5	●
Nigeria	59.0[c]	12.6[c]	○
Senegal	92.5	0.6	●
Sierra Leone	—	—	○
Somalia	—	—	○
Sudan (North)	78.0[b]	18.1[b]	◐
Tanzania	89.1[c]	2.0[c]	●
Togo	—	—	●
Uganda	—	—	◐
Yemen	—	—	○

Medically Performed refers to FGM/C performed by a health professional including doctors, nurses, and midwives.

Traditionally Performed refers to FGM/C performed by a traditional practitioner including local specialists known for performing circumcisions, traditional birth attendants, and older women without further designation.

National Laws:

●= Laws that specifically prohibit the practice of FGM/C;
○= No laws;
◐= No specific laws, but existing general provisions of criminal codes have been or can be applied to FGM/C.
— Data not available

* Total for types of FGM/C adds to more than 100 percent due to multiple responses

[b] Refers to daughters' experience

[c] Special tabulations by PRB staff

As we can see FGM/C is mainly practiced by traditional/local healers in various parts of the world who may not have professional experience in surgical procedures. It is often carried out using primitive instruments, razor blades or pieces of glass and without anesthetic or attention to hygiene. In some Countries, medical personnel, including doctors, nurses and certified midwives, perform FGM/C in the belief that this way complications would occur less frequently.

Highest rates of medical personnel performing the procedure are found in Egypt. In Guinea and Nigeria 10% and 13%, respectively of FGM/Cs are carried out by medical personnel, whereas around 90% of FGM/C procedures in Guinea and Eritrea are performed by traditional/local healers.

Regarding FGM/C there are at least two principal ethical issues that are of concern: first, the already mentioned harmful health consequences awaiting women; and second, the non-consensual nature of the procedure.

The following health complications are the most common: pain, trauma, hemorrhage, difficulty urinating, painful menstruation, painful sexual intercourse (dyspareunia), sexual dysfunction, infections resulting from contaminated instruments, an increased risk of HIV transmission, unintended labia fusion, proliferation of scar tissue at the site (keloid) and infertility. The act itself, given the associated pain and suffering, constitutes a human rights infraction as it infringes the prohibition against torture, cruel inhuman, or degrading treatment, as well as the prohibition against all forms of physical and mental violence, injury and maltreatment[32].

Women who have endured the procedure lose the capacity to fully enjoy sexual relationships because of the irreversible nature of the procedure. The scar left by FGM/C is not temporary; rather, it is a life-long perpetual denial of affected women‘s human right to sexual freedom.

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[32] *See* International Covenant on Civil and Political Rights, Article 7, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]; Convention on the Rights of the Child, Article 19(1), Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990).

In 2012 an article by M. Ghosh *et Al.*[33] reported that rates of HIV acquisition after a sexual trauma resulting from of FGM/C – which makes sex extremely painful and can cause increased abrasions, lacerations and inflammation – are significantly high and are comparable to those of victims of sexual assault (generally accepted as a risk factor for HIV acquisition). It also stated that while very few studies analyzed the relationship between FGM/C and HIV infection[34], the risk of HIV acquisition is likely increased considering the extensive trauma, inflammation and increased vaginal epithelial damage. Moreover, the procedure being performed with shared instruments not properly cleaned, trauma and consequent infections are increased. The article concluded by reaffirming that the mucosal microenvironment is so profoundly altered by FGM/C that it will likely influence HIV susceptibility.

The consent of an adult women to circumcision must be put into perspective against their before mentioned background; as far as female minors are concerned, what we consider standards of legally valid consent are absent and in any case parents or legal wards take the decision on their circumcisions.

Non-consensual FGM/C occurs when girls lack the capacity to give an informed consent and when women are subjected to the procedure against their will. The right to bodily integrity is not only a legal precept, but it is also an ethical prescription that forbids anyone from invading another‘s bodily space without permission. Generally, law as well as ethics, prescribe that permission must be sought and obtained before performing any medical procedure on an individual, regardless of the type of procedure. Whether performed by traditional practitioners, midwives, or physicians, FGM/C is a medical procedure. Therefore, its exercise is under to the rules and principles of medical ethics.

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[33] Mimi Ghosh, Marta Rodriguez-Garcia, Charles R. Wira (2012), *Immunobiology of Genital Tract Trauma: Endocrine Regulation of HIV Acquisition in Women Following Sexual Assault or Genital Tract Mutilation*.

[34] Morrone A, Hercogova J, Lotti T: *Stop Female Genital Mutilation: Appeal to the International Dermatologic Community*. International Journal of Dermatology, 2002, 41, 253–263.

For instance the General Assembly of the International Federation of Gynecology and Obstetrics declared "*that [FGM/C] is a violation of human rights, as a harmful procedure performed on a child who cannot give informed consent*" and urged gynecologists and obstetricians to "*oppose any attempt to medicalize the procedure or to allow its performance, under any circumstances, in health establishments or by health professionals*"[35].

An independent moral theory that most profoundly speaks to FGM/C is *care ethics*: originated from feminist psychologist Carol Gilligan's 1982 book and subsequent writings, it has since been expounded by other commentators and today it is still evolving. A distinctive feature of care ethics is its emphasis on relationships and on the nature of their resulting moral obligation – benevolence, empathy and compassion – borne out of a sense of interdependence and interconnectedness represented by the quote "*we are* [all] *in it together*"[36].

Girls and women are submitted to FGM/C with the full knowledge and active support of their parents, uncles, aunts and so forth (close relationships), all of whom perceive themselves as standing in solidarity with members of their family as they celebrate a treasured cultural rite. The paradox here is the gap between intent – promoting the best interest of their loved one – and the reality of the procedure which involves a real risk of harm. An alternative set of social arrangements that would do a better job of promoting women's welfare would be those rites of passage that involve no cutting. The Kenyan *Ntanira Na Mugambo* or "Circumcision through Words", practiced since 1996[37], retains all aspects of traditional female genital rituals, except cutting.

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[35] *Resolution on Female Genital Mutilation*, International Federation of Gynecology and Obstetrics (1994), http://www.figo.org/projects/general_assembly_resolution_FGM/C (emphasis added).

[36] Rosemarie Tong, *the Ethics of Care: A Feminist Virtue Ethics of Care for Healthcare Practitioners*, 23 J. MED. & PHIL. 131 (1998).

[37] Chelala Cesar, *An Alternative Way to Stop Female Genital Mutilation*, 352 Lancet 126 (1998).

2.3. Countries where FGM/C has been documented

Most of the girls and women affected by FGM/C live in 28 African Countries, but also in the Middle East and Asia.

Of 91.5 million girls and women affected in Africa, more than half are in three Countries ranking amongst the highest in prevalence rates: Egypt, Ethiopia and Northern Sudan[38].

[38] P. Stanley Yoder & Shane Khan, *Numbers of Women Circumcised in Africa: The Production of a Total*, Macro International Inc. (Mar. 2008).

Tab. 2.5 *Chart showing Countries in which FGM/C have been documented in a precise year and in what prevalence* (WHO 2008).

Country	Year	Estimated prevalence of female genital mutilation in girls and women
15 – 49 years (%)		
Benin	2006	12.9
Burkina Faso	2006	72.5
Cameroon	2004	1.4
Central African Republic	2008	25.7
Chad	2004	44.9
Côte d'Ivoire	2006	36.4
Djibouti	2006	93.1
Egypt	2008	91.1
Eritrea	2002	88.7
Ethiopia	2005	74.3
Gambia	2005/6	78.3
Ghana	2006	3.8
Guinea	2005	95.6
Guinea-Bissau	2006	44.5
Kenya	2008/9	27.1
Liberia	2007	58.2
Mali	2006	85.2
Mauritania	2007	72.2
Niger	2006	2.2
Nigeria	2008	29.6
Senegal	2005	28.2
Sierra Leone	2006	94
Somalia	2006	97.9
Sudan, northern (approximately 80% of total population in survey)	2000	90
Togo	2006	5.8
Uganda	2006	0.8
United Republic of Tanzania	2004	14.6
Yemen	2003	38.2

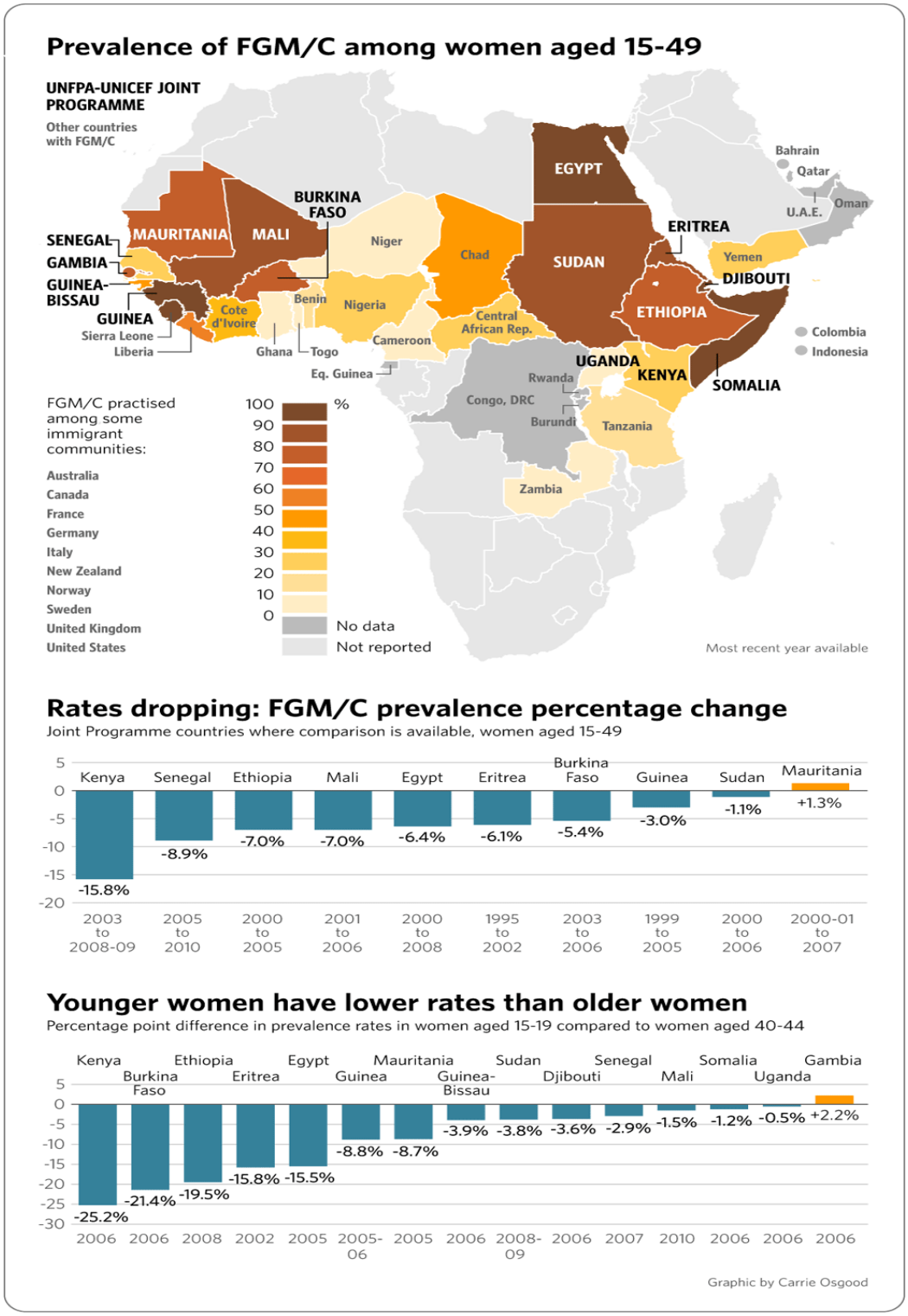

Fig 2.3 *Picture showing the prevalence of FGM/C among women aged 15-49, with the highest rates (90-100 %) in Egypt, Djibouti, Somalia, Guinea and Sierra Leone.* (UNFPA-UNICEF 2013)

Desegregated figures show that the prevalence rates vary dramatically amongst practicing nations, from as high as 97% in Somalia to as low as 0.8% in Uganda. The prevalence of FGM/C according to figures from African Countries shows a prevalence of more than 70% in Burkina Faso, Djibouti, Egypt, Eritrea, Ethiopia, Guinea, Mali, Mauritania, Northern Sudan and Somalia.

However, there is great variation in prevalence between but also within the Countries, reflecting ethnicity and tradition[39].

Female genital mutilation is practiced by people from all education levels and social classes, including urban and rural residents.

Prevalence by geographic area is an interesting partition which shows the difference in percentages between rural and urban areas, underlining once more the tight link between FGM/C, traditional practices literacy levels and generally knowledge available.

[39] Idem *supra* note 1.

Tab. 2.5 *Chart showing the distribution of the prevalence of FGM/C in the urban and rural areas of Countries* (PRB 2008).

	Prevalence by Geographic Area (%)			
	Urban	Rural	Lowest Region	Highest Region
Benin	9.3	15.4	0.1	58.8
Burkina Faso	75.1	77.0	44.4	89.6
Cameroon	0.9	2.1	0.0	5.4
Central African Rep.	29.2	40.9	—	—
Chad	47.0	44.4	3.5	92.2
Côte d'Ivoire	33.9	38.9	12.6	88.0
Djibouti	93.1	95.5	—	—
Egypt	92.2	98.3	71.5	98.0
Eritrea	86.4	90.5	81.5	97.7
Ethiopia	68.5	75.5	27.1	97.3
Gambia	72.2	82.8	44.8	99.0
Ghana	1.7	5.7	0.5	56.1
Guinea	93.9	96.4	86.4	99.8
Guinea-Bissau	39.0	48.2	28.7	92.7
Kenya	21.3	35.8	4.1	98.8
Mali	80.9	87.4	0.9	98.3
Mauritania	64.8	76.8	53.6	97.2
Niger	2.1	2.3	0.1	12.0
Nigeria	28.3	14.0	0.4	56.9
Senegal	21.7	34.4	1.8	93.8
Sierra Leone	86.4	97.0	80.8	97.0
Somalia	97.1	98.4	94.4	99.2
Sudan (North)	91.7	88.3	—	—
Tanzania	7.2	17.6	0.8	57.6
Togo	4.1	7.3	1.0	22.7
Uganda	0.2	0.7	0.1	2.4
Yemen	33.1	40.7	—	—

Tab 2.6 *Chart showing other Countries where there have been reports of FGM/C and year when documented* (WHO 2008)

Country	Continent(s)	Year Documented: [6]	Documented by: [6]
India	Asia	1992	Ghadially
Indonesia	Asia / Oceania	2004	Budiharsana
Iraq	Asia	2006	Strobel & Van der Osten-Sacken
Israel	Asia	1995	Asali et al.
Malaysia	Asia	1999	Isa et al.
United Arab Emirates	Asia	2002	Kvello and Sayed

Other countries where anecdotal reports indicate FGM having taken place within migrant populations: [6]

Colombia, DR Congo, Oman, Peru and Sri Lanka.

Growing migration has increased the number of girls and women living outside their country of origin – in Europe, the United States, Canada, New Zealand and Australia – who have undergone FGM/C or are at risk of being subjected to the practice. Some families arrange for their daughters to undergo FGM/C while on vacation in their home Countries where FGM/C is a tradition[40].

[40] Banda F. *National legislation against female genital mutilation*. Eshborn, Germany: German Technical Cooperation; 2003.

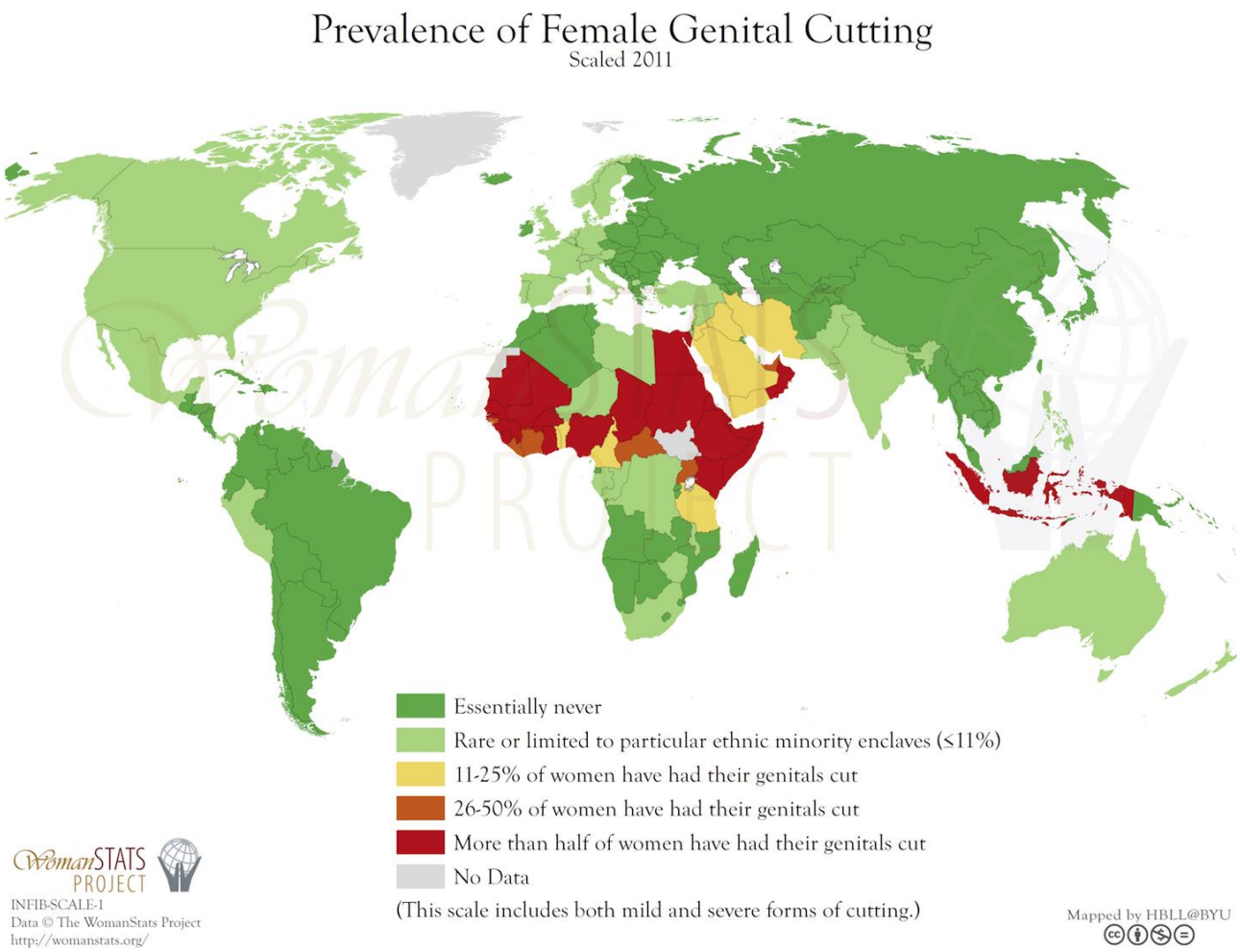

Fig. 2.4 *Picture showing prevalence of FGM/C in the world in 2011* (WSP 2011).

The case of Somali immigrants in Norway

Due to its negative impact on public health, FGM/C has gained increased attention from the international community, especially when it increases in association with migration flows from Countries where the practice is still alive.

The 2012 qualitative study by A. Gele *et Al.*[41] aimed at exploring the impact of the adaptation to Western culture and the social context on the attitude toward FGM/C of Somali immigrants living in Norway.

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[41] Abdi A Gele, Bernadette Kumar, Karin Harsløf Hjelde, Johanne Sundby (2012), *Attitudes toward female circumcision among Somali immigrants in Oslo: a qualitative study*.

Somalia is a country characterized by decades of civil war that caused 25% of its people to migrate to Western Countries (such as Norway); in addition it has the highest prevalence of FGM/C in the world with 85% of urban and 98% of rural women undergoing its severest form (i.e. infibulation); yet figures reached the peak of 99% in 2004[42] despite the fact that programs aimed at eradicating the practice were active since the late 1970s.

What is more, the religious aspect of FGM/C in Somalia is very complex: cultural beliefs and religion in this community intermingle and locals take a number of cultural issues as religious doctrine. In fact it is Somali's belief that FGM/C is an Islamic practice. However, not only does the Koran does not mention it, but there are also some, among the conservative commentators, who consider it to be against the religion.

The presence of 30,000 Somali immigrants in Norway, the largest African immigrant group, was main reason to explore the attitudes toward FGM/C among the community. Furthermore in Norway FGM/C is not only illegal and criminalized since 1995, but also antagonistic to the value system of the country.

Results of the above mentioned qualitative study indicated that Somalis in Oslo had, to a large extent, changed their attitude toward the practice.

Different arguments were put forward to explain this change: above all it was remarked that the practice causes health problems; then that it is not a religious requirement (a very strong motivation which sustains the practice in Somalia); further that it is a very painful experience which potentially erodes females' sexual feelings; and that the social environment in Norway is supportive of its discontinuation – a situation opposed to the social pressure that sustains the perpetuation of the practice in Somalia.

The radical change of heart was also verified by the presence in Oslo of a large number of Somali parents who left their daughters uncut and by the high

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[42] The World Bank, United Nations Population Fund. *Female Genital Mutilation/Cutting in Somalia*. Washington, DC: World Bank, United Nations Population Fund; 2004.

status that Somali girls, boys, men and women attributed to being uncircumcised; in addition they were proud of the discontinuation of the practice.

Almost all of the participants from both genders agreed that uncircumcised girls in Oslo were healthier than the matching group of circumcised girls and they also had a higher chance of being married to a Somali man – another factor that push the perpetuation of the practice in Somalia.

While restricted to the analysis of the particular situation of the Somali communities in Oslo, the study highlights the success that has been achieved in improving attitudes toward FGM/C since – in areas in which it is not associated with social status by the majority – social factors that influence its continuation can be reversed. This is an important finding that may direct future regulations and policies of concerned Countries.

Emerging challenges that need to be addressed are the employ of stereotypical old messages against the practice – that have been used for generations in Africa – which do not take into consideration the dynamic nature of human behavior and the effects of the adjustment to culture and to the new social environment.

Consistently to the result of the study, future campaigns targeting behavioral changes toward FGM/C will have to bring into play members of the community who have already abandoned the practice as role models to finally eradicate the practice, first in migrants' receiving Countries and then in their Countries of origin.

2.4. Male complications due to FGM/C

While FGM/C is widely recognized to cause a wide range of both immediate and long-term health consequences to women, male complications are a new field of inquiry. It is our opinion that if men acknowledged their own complications associated to FGM/C, such recognition would presumably affect their attitudes and preferences.

The 2001 study by Lars Almroth *et Al.*[43] on a Muslim village in the Gezira Scheme along the Blue Nile in Sudan, tried to cast some light on the subject.

During the study a total of 59 men were interviewed, 29 young men (of an average age of 35) and 30 "grandfathers" (of an average age of 65). The aim of the study was to clarify complications related to and attitudes towards FGM/C among married men of the youngest parental generation – who have to choose whether their daughter should undergo FGM/C or not – and among the generation of grandfathers in this rural area of Sudan.

The important premise is that in the North of Sudan 90% of the women have undergone FGM/C and in most cases it was infibulation, the most severe form. In any case it is also important to remark that since the village had been part of a development project, it is possible that the men were more receptive to ideas about the negative impact of FGM/C on health and marriage than average men in Sudan.

The research found that there was a high level of awareness, especially among the young group, that FGM/C influences women's health negatively: indeed 90% of the young men and 70% of the grandfathers believed that FGM/C affected women's health.

The level of education of the subjects was relevant when answering the survey, because they were asked to specifically name complications, without choosing from a list and they covered almost all of those mentioned in literature.

Different aspects of sexuality turned out to be a central issue. 72% of the young men and 53% of the grandfathers admitted male problems due to FGM/C. The important results indicates that the focus when inquiring on the subject should be on sexual problems for both men and women, rather than on male satisfaction. Actually the fact that the wife suffered during sexual intercourse negatively

[43] Lars Almrotha, Vanja Almroth-Berggrena, Osman Mahmoud Hassaneinb, Said SalahEldin Al-Saidb, Sharif Siddiq Alamin Hasanc, Ulla-Britt Lithelld, Staffan Bergstro (2001), *Male complications of female genital mutilation*.

affected sexual satisfaction for the man. Here again the considerable outcome that men experienced their wives' suffering as their own problem deserves our attention.

The central difference between the young men's and the grandfathers' preferences regarding which woman ("cut" or "uncut") they would have preferred to marry shows that attitudes towards women without FGM/C have changed dramatically and rapidly.

While the majority admitted that her social situation would be very difficult when asked about a Sudanese woman without FGM/C, 29% thought it would not have been a problem. Moreover 55% of the young men would have preferred to marry a woman who had not undergone FGM/C – compared to 13% of the grandfathers – mostly to avoid problems during labour. Nonetheless all men except one were married to women who had undergone infibulation.

It is noteworthy that 86% of the young men would have accepted a woman without FGM/C to be their son's or grandson's wife, compared to 57% of old men. Since in many African–Arab cultures the purity and chastity (virginity) of the woman reflects the moral quality of the entire family, the answer is even more interesting. Indeed it suggests not only that the attitude of men changed, but also that there society as a whole is evolving. And such a change in the attitude can be the first step towards a concrete change.

For those who declared to prefer a wife who had undergone FGM/C the main reasons were social acceptance followed by tradition; this shows that social pressure is still of great importance and even more if we consider that the Sudanese expression ''*Rhalfa*'' (''child of an uncircumcised woman'') is still extremely insulting to use.

What emerged from the study could be expounded in other areas, with an approach that is replicable in similar areas where FGM/C is prevalent.

To understand the role of men in FGM/C (present and potential the issue must be addressed directly and preferably by men. Otherwise a vicious circle of false expectations could be perpetuated.

FGM/C can no longer be considered to only be a women's issue. Exposing male complications could draw attention to the importance of addressing men in future research and campaigns against FGM/C. Certainly, even though male complications are only minor ones compared to the suffering of women, they are a powerful argument to tackle the issue, especially since marriageability and male satisfaction are often mentioned by the very women as incentives to undergo FGM/C.

2.5. FGM/C *versus* Male Circumcision

Male circumcision has a deep importance because it is a symbol of ethnic and religious identity that is why it has always played a major part in the political and social history of many peoples.

The WHO has estimated that 664,500,000 males aged 15 and over are circumcised (30% global prevalence), with almost 70% of these being Muslim.

Circumcision is most common in the Muslim world, parts of Southeast Asia, Africa, the United States, the Philippines, Israel and South Korea and it is near-universal in the Middle East and Central Asia. It is relatively rare in Europe, Latin America, parts of Southern Africa and in most of Asia and Oceania.

While the WHO in 2007 estimated that approximately 75% of all American males and 30% of Canadian males (from newborns to seniors) were circumcised, these statistics have changed quite drastically. In fact in Canada, rates of circumcision for newborns have dropped from about 50% in 1998 to about 20% in 2000, falling to 13.9% in 2003[44]. In the United States, the drop is recent: up until 2006, more than 50% of newborn males were still being circumcised, but the figure fell to 32% in 2009[45].

Although some types of male circumcision are highly invasive – such as "superincision" and "subincision" practiced in some Pacific Islands and among

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[44] Canadian Children Rights Council, 2011.

[45] Circumcision Reference Library, 2010.

some Aboriginal groups in Australia – male circumcision is typically a minor procedure where the foreskin (prepuce) is removed and has no major effect on functions, sexual or otherwise. In fact, some men claim that they prefer being circumcised because it reduces the sensitivity of the area so they are able engage in sexual intercourse for longer periods of time.

On the contrary *all* types of FGM/C, even Type 1, have been certified by WHO to have deleterious effects on health and on sexual functioning, which male circumcision does not have. Moreover, even though the majority of male circumcisions are carried out for religious reasons, there are health *benefits* in male circumcision. In particular, although disputed by some, circumcision reduces the risk of penile cancer and rates of various types of infection and it improves hygiene. Circumcision has also been shown to lower men's risk for HIV acquisition by about 60%[46] and in 2007 it was recognized by UNAIDS as an additional intervention to reduce infection in men in settings where there is a high prevalence of HIV.

These grounds perhaps help to explain the reason why, in spite of the fact that no Western medical association currently recommends the circumcision of male newborn as part of a regular practice, none of them completely rule it out, leaving it to the parents to decide in consultation with their physician. Plus, in sharp contrast to FGM/C, male circumcision's health benefits largely outweigh its very low risk of complications when performed by adequately-equipped and well trained healthcare providers in hygienic settings.

We can then state that there are no comparable health benefits – claimed or otherwise – for FGM/C.

Martha Nussbaum[47] is one among those authors who rejected the analogy

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[46] *See* Auvert et Al., 2005 *Randomized, controlled intervention trial of male circumcision for reduction of HIV infection risk: the ANRS 1265 trial*; Bailey et al., 2007 *Male circumcision for HIV prevention in young men in Kisumu, Kenya: a randomized controlled trial*; Gray et al., 2007 *Male circumcision for HIV prevention in men in Rakai, Uganda: a randomized trial*.

[47] *See* M. Nussbaum (1999), Sex and social justice, *Judging other cultures: the case of FGM/C*, p.118.

between male and female circumcision. Nussbaum's argument quoted Nahid Toubia – first woman surgeon of the Sudan, now among other things advisor for the WHO and director of the Global Action against FGM/C of the Columbia University – who wrote "*The male equivalent of the clitoridectomy* [Type 1 FGM/C] *would be the amputation of most of the penis*" and the male equivalent of infibulation [Type 3 FGM/C] would be "*removal of the entire penis, its roots of soft tissue and part of the scrotal skin*"[48].

Nussbaum further stressed that the male operation, in both Judaism and Islam, is linked with membership to the *dominant* male community rather than with *subordination*, which we saw lies at the roots of the practice of FGM/C.

What is left in common between FGM/C and male circumcision is restricted to:

- They are performed on the genitals and
- They are typically done without the consent of the one receiving the procedure.

Though infants and children are often subjected to medical procedures without their consent it does not makes male circumcision patently morally unacceptable. That is because parents or legal wards consent to the procedure when it is considered to be medically appropriate. No such argument is available for supporters of FGM/C.

2.6. International and regional human rights treaties and consensus documents providing protection and containing safeguards against FGM/C

In every society in which it is practiced, FGM/C is an expression of gender inequality that is deeply rooted in social, economic and political structures.

Like the now-abandoned habit of foot-binding in China or the custom of dowry and child marriage, FGM/C represents a form of society's control over women. Such traditions have the effect of perpetuating normative gender roles

[48]N. Toubia, *Female Genital Mutilation: a call for Global action*, New York, UNICEF, 1995.

that are unequal and harm women.

For centuries, FGM/C was not a subject of international concern—that is, until recently.

There is a growing consensus that the arrival of Africans and Arabs into Western Countries contributed to the international involvement in what was regarded as a legitimate cultural practice worthy of deference and respect.

Escalating conflicts and internal frictions in many African and Middle Eastern Countries forced a substantial number of inhabitants to seek refuge in Western Countries. One of the more visible results of this flight was that the outcome of such cultural ritual, once confined to distant lands, began to be seen in social welfare offices and health clinics in Europe and North America.

Furthermore, FGM/C can sometimes be adopted by new groups and in new areas after migration and displacement[49]. Some other communities can be influenced to embrace the custom by neighboring groups[50], sometimes because of religious or traditional revival movements[51].

What is more, preservation of ethnic identity to mark a distinction from other, non-practicing, groups is important, particularly in periods of intensive social change. For example, FGM/C can be found among immigrant communities living in Countries that have no tradition of the practice[52]. Also FGM/C is also occasionally performed on women (and their children) from non-practicing groups when they marry into groups in which it is widely practiced[53].

The first arguments used to antagonize the newly-acknowledged practice

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[49] *See* Abusharaf, 2005 *Smoke bath: renegotiating self and the world in a Sudanese shantytown*, 2007 *Female circumcision: multicultural perspectives.*

[50] *See* Leonard, 2000 *Adopting female "circumcision" in southern Chad: the experience of Myabe*; Dellenborg, 2004 *A reflection on the cultural meanings of female circumcision: experiences from fieldwork in Casamance, southern Senegal*.

[51] *See* Nypan, 1991 *Revival of female circumcision: a case of neo-traditionalism*.

[52] *See* Dembour, 2001 *Following the movement of a pendulum: between universalism and relativism*; Johnson, 2007.

[53] *See* Shell-Duncan and Hernlund, 2006 *Are there "stages of change" in the practice of female genital cutting? Qualitative research findings from Senegal and The Gambia*.

were: the ritual is extremely hazardous to the physical and mental health of affected girls and women; the ritual violates the human right to bodily integrity when fully informed consent is neither sought nor obtained; and the ritual perpetuates gender inequality and subjugation in practicing communities.

So, at the beginning, the idea was that highlighting the physiological and psychosocial harm resulting from the procedure would arouse sufficient public disagreement and stimulate efforts toward its elimination.

Unfortunately the approach generated unintended consequences: instead of seeking the services of traditional cutters—pointed out for using rough instruments, for operating in unsanitary conditions and for their inability to manage complications resulting from the operation—parents and family members of girls and women due for the procedure began enlisting the services of qualified medical personnel.

This led to the development of the anti-"*medicalization*" argument, i.e. against employing suitably qualified health professionals to perform the procedure. Yet shifting the location of the operation to hospitals and clinics does not rectify the inherently wrong act of FGM/C.

Therefore the human rights approach emerged as a more productive framework in which the protection of human well-being, in all its dimensions, is accomplished not just by condemning conduct contrary to it, but also by holding perpetrators accountable.

From a human rights perspective the practice of FGM/C reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against women.

Through the decades the international community reached a consensus on different human rights instruments. The most important of those pertaining to FGM/C are the *Convention on the Elimination of All Forms of Discrimination*

against Women (hereinafter CEDAW)[54] and the *Convention on the Rights of the Child* (hereinafter CRC)[55].

In Article 2(f) of the CEDAW – after the previous prohibition *ad omnibus* of discriminating against women – State Parties specifically undertake to "*take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women*". Being FGM/C exclusively performed on women, it is *prima facie* discriminatory and its eradication is clearly imposed by this provision.
The obligation is reinforced in Article 5 (a) which requires "*social and cultural*" practices to be modified "*with a view to achieving the elimination of prejudices and customary and all other practices*" based on gender-related stereotyping or subjugation.

On the other hand, in its Article 24(3) the CRC – acclaimed as the most widely ratified human rights treaty – requires State Parties to "*take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children*". In its Article 19(1) it further imposes an obligation on State Parties to protect children from all forms of violence, injury, abuse, or maltreatment.

Beside these specific conventions, as the WHO itself already established, FGM/C violates affected children's and women's right to health, life, liberty and security, which are all protected by several international human rights instruments.

In particular FGM/C is a violation of the right to "the highest attainable standard of physical and mental health", prescribed in Article 12 of the International Covenant on Economic, Social and Cultural Rights[56], not only for

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[54] Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13.
[55] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990).
[56] International Covenant on Economic, Social and Cultural Rights, *opened for* signature Dec. 16,

the consequent heath complications but also because, according to the General Comment 14[57], it violates the right "*to control one's health and body, including sexual and reproductive freedom*".

To this we can add that, if the procedure leads to death, it breaches the obligation of States to respect and promote the right to life found in Article 6 of the International Covenant on Civil and Political Rights[58] which also recognizes the right to liberty and security of the person and forbids State Parties from restricting these rights.

Indeed, when forced or performed on children, FGM/C violates their liberty – as freedom to make decisions or choose actions that maximize individual preferences – and security – as non-interference with freely made decisions or chosen actions.

The procedure is also inhuman and degrading for those upon whom it is forced. Despite the term "inhuman and degrading treatment" is not defined by CEDAW nor in any linked Treaty, the European Court of Human Rights – in relation to Article 3 of the 1950 European Convention prohibiting torture and inhuman or degrading treatment or punishment – provided some guidance through its case law[59].

Moreover, protection against inhumane and degrading treatment is provided by the Universal Declaration of Human Rights[60], the ICCPR[61] and the Convention

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1966, G.A. res. 2200A (XXI), U.N. GAOR, 21st Sess. Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (*entered into force* Jan. 3).

[57] E.S.C. Res. ¶21 U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) or General Comment No. 14, stating that to realize women's right to health, it is "*important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights*".

[58] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (*entered into force* Mar. 23, 1976).

[59] *See* Ireland v. United Kingdom, Judgment of Jan. 18, 1978, Series A No. 25, p. 66 ¶167; Soering v. United Kingdom, Judgment of July 7, 1989, Series A No. 161, p. 39, ¶100; *see also* Tyrer v. United Kingdom, Judgment of Apr. 25, 1978, Series A No. 26, p. 14-15, ¶29-30.

[60] Universal Declaration of Human Rights, at Article 5, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), *adopted* Dec. 10, 1948.

[61] ICCPR Article 7.

against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[62] (CAT).

Africa, as the region with the highest prevalence of FGM/C, adopted its own regional legal framework. In particular we recall the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter Maputo Protocol)[63] and the African Charter on the Rights and Welfare of the Child (hereinafter ACRWC)[64].

The Maputo Protocol was the first international treaty to make express reference to FGM/C: in Article 5(b) it states that "*[A]ll forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation* " shall be prohibited in member Countries through the adoption of appropriate legislative and other measures and in Article 2 it obligates (like CEDAW) all State Parties to combat all forms of discrimination against women by enacting legislative, institutional and other appropriate measures.

The ACRWC on the other hand, prohibits in Article 1(3) the practice of any custom, tradition, culture, or religion "*that is inconsistent with the rights, duties and obligations contained in the…Charter*" and it stipulates that such practices "*shall to the extent of such inconsistency be discouraged*". In Article 4(1) the Convention explicitly states that decisions or actions by any person or authority concerning the child shall be judged by whether such decision or action promotes the best interest of the child.

Being FGM/C a harmful practice in the sense of Article 1(g) of the CEDAW – "a*ll behavior, attitudes and/or practices which negatively affect the fundamental*

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[62] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. res. 39/46, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987. In Article 16(1) it states "*Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment…*"

[63] Adopted at the 2nd Ordinary Session of the Assembly of the African Union, Maputo, July 11, 2003, OAU Doc. CAB/LEG/66.6, *reprinted in* 1 AFR. HUM. RTS. L. J. 40, (*entered into force* Nov. 25, 2005).

[64] African Charter on the Rights and Welfare of the Child (ACRWC), Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49.

rights of women and girls, such as their right to life, health, dignity, education and physical integrity" – it runs afoul of the "best interest of the child" principle. Hence FGM/C practicing nations who are parties to the ACRWC can be subjected to sanctions for failing to meet their obligation under the treaty.

Other regional instruments dealing with FGM/C are: again the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1978 American Convention on Human Rights.

In spite of the scarce compliance of State Parties, the importance of those Treaties' provisions lies in their norm-setting standard which provides accountability and the end of impunity for the perpetrators.

Many of the United Nations human rights treaty monitoring bodies have addressed FGM/C in their concluding observations on how States are meeting Treaty obligations. The CEDAW Committee, the CRC[65], the Human Rights Committee[66] and the Committee on Economic, Social and Cultural Rights[67] have been active in condemning the practice and recommending measures to combat it, including the criminalization of the practice.

In particular the CEDAW Committee issued in 1990 its General Recommendation on Female Circumcision (G.R. N. 14) that called upon states to take appropriate and effective measures with a view to eradicating the practice and requests them to provide information on measures being taken to eliminate female genital mutilation in their reports to the Committee[68]. Reference to FGM/C was then made in the 1992 General Recommendation N. 19, Violence against Women; and in the 1999 General Recommendation N. 24, Women and Health.

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[65] General Comment No. 4, 2003. Adolescent Health and Development in the Context of the Convention on the Rights of the Child. CRC/GC/2003/4.

[66] General Comment No. 20, 1992. Prohibition of torture and cruel treatment or punishment and General Comment No. 28, 2000. Equality of rights between men and women, CCPR/C/21/rev.1/Add.10.

[67] General Comment No. 14, 2000. The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4.

[68] CEDAW Committee, 1990.

The submission of reports required by human rights treaty bodies is a *bona fide* demonstration of State Parties' desire for recognition of compliance with treaty obligations; Countries with a poor human rights record and Countries perennially condemned for deficits in their legal and policy frameworks, would hopefully slowly improve their performance. As an example we can recall the periodic report by Sudan before the Human Rights Committee, the implementing body of the ICCPR. The Committee noted that despite the Country's efforts to criminalize FGM/C, its most serious form (infibulation) still run rampant and therefore urged Sudan to enact legislation prohibiting FGM/C and to ensure that perpetrators were punished[69]. Further, during Uganda's the periodic report, the CEDAW Committee, while praising the Country for promulgating the Prohibition of Female Genital Mutilation Act 5 (2010), criticized the Government for the continuous occurrence of the practice and recommended the improvement of awareness-raising and education strategies and the recruitment of civil society and religious organizations in a joint effort to eradicate the practice[70].

The legal regime of FGM/C is complemented by a series of political consensus documents, such as those resulting from the United Nations World Conferences and Summits, which reaffirmed human rights and called upon governments to strive for their full respect, protection and fulfillment. As an example we quote: the 1993 United Nations General Assembly, Declaration on the Elimination of Violence against Women[71] and World Conference on Human Rights, Vienna Declaration and Plan of Action; the 1994 Programme of Action of the International Conference on Population and Development, Cairo, Egypt[72];the 1995 Beijing Declaration and Platform for Action of the Fourth World

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[69] U.N. Human Rights Committee (HRC), *Concluding Observations of the Human Rights Committee: The Sudan*, Aug. 29, 2007, CCPR/C/SDN/CO/3, 15.

[70] U.N. Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Uganda*, Oct. 4-22, 2010, CEDAW/C/UGA/CO/7, 21-22.

[71] UN Doc. A/RES/48/104 (1993)

[72] 5−13 September 1994. UN Doc. A/CONF.171/13/Rev. 1 (1995).

Conference on Women, Beijing, China[73]; the 2001 UNESCO Universal Declaration on Cultural Diversity; the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions; the 2007 United Nations Economic and Social Council (ECOSOC), Commission on the Status of Women's Resolution on the Ending of Female Genital Mutilation[74].

In particular, we would like to remark that during the 1995 Beijing Conference it was recognized that the psyche of the mutilated woman is pervaded by a sense that the self and its integrity has been destroyed; that was thought to possibly lead the person even to commit suicide. Thus they declared FGM/C a violation of human rights and in effect banned it.

UNHCR Guidance Note On Refugee Claims Relating To FGM/C

We think that a very important international instrument which is worth a particular remark is the 2009 United Nations High Commissioner for Refugees' (hereinafter UNHCR) *Guidance Note on Refugee Claims Relating to FGM/C.* The Note was issued pursuant to UNHCR mandate as contained in the 1950 Statute and to the responsibilities defined in Article 35 of the 1951 Convention relating to the Status of Refugees and in Article II of its 1967 Protocol. The Document was issued in response to emerging legal and operational refugee issues and is intended to provide guidance on the interpretation or application of the applicable law and legal standards when treating claims for refugee status relating to FGM/C.

As many of the UN bodies and agencies, the UNHCR considers FGM/C to be a form of gender-based violence that inflicts severe harm (both mental and physical), amounts to persecution, violates a range of human rights of girls and women and constitutes torture and cruel, inhuman or degrading treatment.

The Note is based on the evolving jurisprudence regarding such claims and

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[73] 4−15 September 1995. UN Doc. A/CONF.177/20.

[74] March 2007, E/CN.6/2007/L.3/Rev.1.

establishes that a girl or woman seeking asylum because she has been compelled to undergo, or is likely to be subjected to FGM/C, can qualify for refugee status under the 1951 Convention relating to the Status of Refugees. Moreover under certain circumstances, a parent could also establish a well-founded fear of persecution, within the scope of the 1951 Convention refugee definition, in connection with the exposure of his or her child to the risk of FGM/C.

Indeed since the early '90s, an increasing number of jurisdictions have recognized FGM/C as a form of persecution in their asylum decisions. For example in France, the *Commission des Recours des Réfugiés* (CRR) accepted in *Aminata Diop* (1991)[75] that FGM/C could constitute persecution and that refugee status could be granted to a woman exposed to FGM/C against her will, where FGM/C was officially prescribed, encouraged or tolerated. In *Farah v. Canada* (1994)[76], the Immigration and Refugee Board of Canada described FGM/C as a "torturous custom" and recognized it as a form of persecution. The Board also found FGM/C to constitute a gross infringement of the applicant's personal security, referring to the Universal Declaration of Human Rights, Article 3, as well as a number of child-specific rights. The United States Board of Immigration Appeals determined in *re Fauziya Kasinga* (1996)[77], that the level of harm in FGM/C constituted persecution ("[FGM/C] *grave harm constituting persecution*"). The Australian Refugee Review Tribunal decided in 1997[78] that a well-founded fear of FGM/C practiced by the applicant's tribe involved gender-related persecution. In the United Kingdom, refugee status in relation to a well-founded fear of FGM/C was first upheld in *Yake* (2000)[79] and then in the leading case of *Fornah (FC) (Appellant) v. SSHD (Respondent)* (2006)[80]: the House of

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[75] *CRR 164078*, 18 September 1991.
[76] Decision of 10 May 1994.
[77] *Nr 3278*, 13 June 1996.
[78] *RRT N97/19046*, 16 October 1997.
[79] Immigration and Appeals Tribunal, Appeal Number 00TH00493, 19 January 2000.
[80] UK House of Lords, (UKHL 46), 18 October 2006.

Lords stated that "*it is common ground in this appeal that FGM/C constitutes treatment which would amount to persecution within the meaning of the Convention*". The House of Lords also found that "*it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment*".

We can find similar approaches elsewhere in Europe, including in Austria (2002 Austrian Federal Refugee Council, Independent Federal Asylum Senate)[81] Germany and Belgium (2007 *Conseil du Contentieux des Etrangers*)[82].

In addition in 2007 the European Court of Human Rights in *Emily Collins and Ashley Akaziebie v. Sweden* reiterated that it is not in dispute that subjecting a woman to FGM/C amounts to ill-treatment contrary to Article 3 of the 1950 European Convention on Human Rights[83].

In a precedent document of 2002 – Guidelines on Gender-Related Persecution – the UNHCR underlined "even *though a particular State may have prohibited a persecutory practice [FGM/C], that State may nevertheless continue to condone or tolerate the practice, or may not be able to stop it effectively. In such cases, the practice would still amount to persecution*". Thus in the Note it is again remarked that for protection to be considered available, States must display active and genuine efforts to eliminate FGM/C, including appropriate prevention activities as well as systematic and actually enforced prosecutions and punishment for FGM/C-related crimes.

In conclusion the Note reaffirmed the understanding that victims or potential victims of FGM/C can be considered as members of a particular social group and that "*harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious*

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[81] *GZ (Cameroonian citizen)*, 220.268/0-X1/33/00.

[82] *Jurisprudence n° 979-1239.*

[83] Application no. 23944/05, 8 March 2007.

or cultural grounds".

2.7. Factors contributing to the continuation/discontinuation of FGM/C

To sum up, we report the result of the integrative review by Maria Reig Alcaraz *et Al.*[84] on factors contributing or hampering the continuation of the practice of FGM/C.

- Migration of women to the West: although carrying their cultural heritage, acculturation prevails and women adapt to the customs of the host country. The new social context then applies even greater pressure, as FGM/C is also punishable by law and over the years, new attitudes towards the eradication of FGM/C are adopted in women's place of residence.
- Legislation punishing FGM/C: culture and social environment in general influence immigrant's men and women attitudes towards the practice; however it may also promote the secret nature of the practice, considering how often laws are incomplete or are not backed by a clear and homogeneous policy. In the future, laws are to be conceived more and more as instruments of social change, not only as temporary solutions.
- Means of communication: television, radio, newspapers, community meetings, discussions with family members or friends and mosque or church sermons play a major role in the eradication of FGM/C for several reasons
    - They can clarify doubts and misconceptions on FGM/C and on its continuation in a language accessible by most.
    - They can promote programs already implemented to eradicate the practice.
    - They increase knowledge among people both in quantity and

[84] M. Reig Alcaraz, J. Siles González, C. Solano Ruiz., *Attitudes towards female genital mutilation: an integrated review*, 2013.

in quality from sources considered as reliable.

- Tradition and social pressure: these are the main causes for the continuation of the practice as they give rise to feeling of respect, cohesion of the community and of belonging to a group. Defending cultural identity through tradition becomes especially important when a group has faced colonialism (as in Africa), when immigrants are faced with a stronger majority culture and when change do not favor those holding social power (usually men)
- Religion: it is considered an ambivalent factor. In fact religion can be used as an argument both to justify and to prohibit FGM/C. The main reason for this apparent paradox is the level of literacy and the consequential direct access to religious texts. Beliefs based on interpretation transmitted often orally may be the result of a distortion of the original text.
- Healthcare and social services professionals', public officers', lawmakers' and Ministers' knowledge of FGM/C: when provided with culturally competent treatment and care women are less discriminated and marginalized and thus encouraged to identify more with the new culture. A common and holistic approach should reflect a unified understanding of the values, beliefs and attitudes of individual acculturation processes. Institutions and public sector organizations contribute towards political, educational and healthcare measures for the definitive eradication of FGM/C.

Jomo Kenyatta, in its 1938 "*Facing Mount Kenya*", started what we now know as the African defense of FGM/C and other traditional practices which ever since has influenced many Western commentators. Criticism towards FGM/C was considered as inappropriate and "ethnocentric", a demonization of other cultures when Western's was the first to be at fault.

In his writing Kenyatta stressed the constitutive role played by initiation rites (like FGM/C) in the formation of a community and the opposed

disintegrative effect of interference. For this reason he opposed the criminalization of the surgery and recommended instead a more gradual process of education and persuasion[85].

As Nussbaum recalls[86], there are four main critiques to the opposition towards FGM/C. In the interest of this paragraph we will report just two of them and Nussbaum's counter-argument.

Firstly it has been said that FGM/C can be morally on a par with Western practices of dieting and body shaping; Nussbaum underlines how, on the contrary, FGM/C is carried out by force and usually on children far too young to consent, is irreversible, is usually performed in unsanitary and dangerous conditions and thus it is linked to lifelong health problems and even death and is unambiguously and exclusively linked to customs of male domination and sex hierarchy.

It has been said that FGM/C involves the loss of a capacity that may not be central to the lives of the women in question, but to which Westerns attach disproportionate significance (i.e. sexual satisfaction). A comparison is often made between the celibacy of nuns and FGM/C. Nussbaum remarks that a vow of celibacy – the *choice* not to exercise a capability to which they ascribe human value – is different from FGM/C which involves for-going altogether the very possibility of sexual functioning well before one being able to make an informed choice. Even mothers cannot make an informed choice because they have no direct experience of female sexual pleasure and live immersed in traditional beliefs about women's impurity, due to their lack of literacy and education.

The vigor of internal resistance to FGM/C is deflected by upholders of tradition with labels like "Westernizers" and "colonialists"; those should not intimidate outsiders, but actually, on the contrary, internal criticism should give confidence to all of those who assist or work to oppose the practice.

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[85] J. Kenyatta, *Facing Mount Kenya*, 1938.
[86] Id. *supra* note 44.

Conclusions

FGM/C can no longer be seen as a traditional custom. It has become a global problem of modern society.

The practice of FGM/C is a violation of human rights and has to be stopped altogether. Integrated efforts by policymakers, the Ministry of Health and international organizations are needed all over the world.

The Millennium Development Goals[87] (hereinafter MDG) establish measurable targets and indicators of development that are relevant to ending FGM/C. Progress toward the abandonment of the practice will contribute to the empowerment of women (MDG 3), improvement of maternal health (MDG 5) and a reduction in child mortality (MDG 4). A World Fit for Children[88], the outcome document of the 2002 UN General Assembly Special Session on Children, explicitly called for an end to harmful traditional or customary practices such as FGM. The UN Study on Violence against Children[89] report provided another important opportunity to highlight the issue and generate action to realize the goal of the abandonment of FGM/C.

The younger generation is growing up with reproductive rights as well as protection from violence enforced by tradition. To achieve these goals, it is recommended to handle religious leaders and perpetuators in a respectful way, while condemning the practice and providing health information. This is very important and could be a key factor in policy-making inside Countries involved.

The main reasons used to justify the practice, though differentiated, have all no scientific justification, but hamper women's self-determination in the area of sexuality. Therefore, FGM/C violates the right of girls and women to determine their own reproductive health and sexuality.

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[87] United Nations: Millennium Goals.

[88] UN General Assembly: A World Fit For Children: Resolution Adopted by the General Assembly. United Nations, New York, 2002.

[89] UN Division for the Advancement of Women: UN study on violence against children.

The history of human civilization is speckled with harmful and risky cultural practices, once treasured as part of people‘s ineliminable identity, which, over the years, have providentially disappeared. Through persuasion, education and reasoned dialogue, the people gradually realized the error of their ways. Criminal prohibition came later, after the groundwork had been laid. A similar approach may be needed to tackle the problem of FGM/C.

While the criminalization of the conduct is necessary, it might not be sufficient to trigger the needed change. FGM/C is acknowledged as a unique, deeply rooted cultural practice; therefore a revision of attitudes and behaviors is also required.

Bringing an end to female genital mutilation/cutting requires a broad-based, long-term commitment. Experience over times has shown that there are no quick or easy solutions.

Decades of prevention work undertaken by local communities, governments and national and international organizations have contributed to a reduction in the prevalence of FGM/C in some areas. Communities that have employed a process of collective decision-making have been able to abandon the practice. Indeed, when the practicing communities decide themselves to abandon FGM/C, the custom can be eliminated very rapidly.

Several governments have passed laws against FGM/C and where these laws have been complemented by culturally-sensitive education and public awareness-raising activities, the practice has declined. National and international organizations have played a key role in advocating against the practice and generating data that confirm its harmful consequences.

Health professionals need to know about this practice, not only in order to identify possible cases at risk but also to provide culturally competent care from a holistic perspective and with a trans-cultural approach to issues that are closely linked to women’s identity

The value of education in this process cannot be underestimated; as the research quoted in the first paragraphs showed, FGM/C are more resisted by the

educated class. Then the dissemination of information about the adverse consequences of the practice holds even greater prospect for success. Care ethics helped us demonstrating that most people would wish no harm on their relatives or close ones, even if culture prescribes otherwise. But first people need to be properly and fully informed in order to realize that, whatever cultural significance female genital ritual holds for them, it can be achieved through means that are free from health consequences.

In the end the very WHO stated "*culture is not static; it is in constant flux, adapting and reforming*" and so attitude can and will only change when the individuals involved "*understand the hazards and indignity of harmful practices and when they realize that it is possible to give up harmful practices without giving up meaningful aspects of their culture*" [90].

Despite some successes, the overall rate of decline in the prevalence of FGM/C has been slow. It is therefore a global imperative to strengthen the effort towards its elimination.

Lessons learned proved that successful actions and interventions must be:

- Multi-sectorial, i.e. from as many sides as possible and at different levels.
- Sustained through times to achieve a true behavioral change.
- Community-led to encourage a collective and shared choice, in a non-judgmental and non-coercive way. A collective, coordinated choice to abandon the practice would allow that no single girl or family is disadvantaged by the decision

Programmes which foster women's economic empowerment are likely to contribute to this advancement: they provide incentives to change the patterns of traditional behavior where a woman is bound as a dependent member of the household, or where women are excluded from the access to economic gain and

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[90] *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA*, WHO 1–2 (1997).

its associated power. Gainful employment empowers women in various spheres of their lives, influencing sexual and reproductive health choices, education and healthy behavior[91].

In conclusion we hope that with global support, FGM/C will be abandoned in practicing communities within a single generation[92].

The United Nations has designated February 6 as the "International Day of Zero Tolerance of Female Genital Mutilation".

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[91] *See* UNFPA, 2007, *Women's Economic Empowerment: Meeting the Needs of Impoverished Women*. New York.

[92] Lewnes A (ed.): Changing a harmful social convention: female genital mutilation/cutting. *Innocenti Digest* 12, Florence, Italy, 2005.

CHAPTER THREE
FGM/C AS CRIMES AGAINST HUMANITY?

3.1. The evolution of the concept of crimes against humanity

In this paragraph we will retrace the evolution of the concept of crimes against humanity because we believe that the contemporary status and future development of this offense under international law cannot be understood or appreciated without reference to its history.

Unlike war crimes and genocide, crimes against humanity are not yet codified in an international convention. On the contrary, the law of this offence has primarily developed through the evolution of customary international law.

We could say that the broader notion of crimes against humanity is as old as humanity itself. However its present status has evolved mainly throughout the 20th Century thanks to the influence of the Nuremberg Trials; indeed the latest development was the definition of Crimes against Humanity during the ICC Diplomatic Conference of 1998, a milestone for the international community.

Through times, in addition to the International Treaties dealing with the broad notion of crimes against humanity, various Regional Treaties have contributed to the evolution of the term[1] along with the contribution of national courts' judgments; this cross fertilization facilitated the process of recognizing which crimes are international, a particularly important procedure as it symbolizes their recognition as *jus cogens*. The threshold limit value that was set is the *erga omnes* obligation of states which gives them the right to proceed against the perpetrator of these crimes[2].

Therefore for the category of crimes against humanity, the core value to protect is the essential humanness carried by each and every person: a crime against humanness negates the very being in the world as a human, thus devaluing

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[1] Gallant, K.S., (2008). *The Principle of Legality in International and Comparative Criminal Law* 1st ed., Cambridge: Cambridge University Press.

[2] Fletcher, G.P. and Ohlin, J.D., (2008). *Defending Humanity: When Force Is Justified and Why*, OUP USA.

the person *qua* human. According to Bauman[3], the very essence of *humanitas* can be traced to the landmark concept in Greek philosophy of *philanthropia* and the Roman concept of *ethos*.

3.1.1. Theorietical foundations

The term "crimes against humanity" is thought to be based upon a natural law concept. Indeed, reports of forbidden forms of crimes date back to Herodotus in the 5th Century BC. Later, St. Augustine and St. Thomas Aquinas also set philosophical premises in order to distinguish a "just" from an "unjust" war[4]. Other early scholars include Grotius' *De lure Belli Ac Pacis*, Vitoria, Ayala, Belli, Gentili and Vattel. As a matter of fact Vattel as early as in 1757 characterized certain crimes as being a crime against humankind in general following the lead of a number of judicial decisions and opinions of his time.

However important to trace the evolution of the term, all those authors did not refer to the present form of crimes against humanity, but more to the philosophy underlying its notion.

3.1.2. Developments prior to World War II

The notion of crimes against humanity was born essentially as an extension of the laws of war, which have deep historic roots and were aimed to limit the devastation caused by armed conflict by – among other things – criminalizing certain conduct committed by nationals of one State against nationals of another. In contrast, crimes committed by the State within national borders were considered outside the reach of international justice until quite recently.

The first known *ad hoc* International Criminal Court was established in 1474 to judge Peter von Hagenbach for crimes committed during the siege of the town of Breisach; it was the first international criminal trial for what we now call crimes against humanity.

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[3] Bauman, R.A., (1996). *Crime and Punishment in Ancient Rome* 1st ed., London: Routledge.

[4] Bassiouni, M.C. (1999). *Crimes against Humanity*, 2nd edition. Dordrecht, Netherlands: Kluwer.

Many claims exist around the birth of the phrase "crimes against humanity." The French revolutionary Maximilien Robespierre, for instance, described the deposed King Louis XVI as a criminal *envers l'humanité*; almost a century later, on September 15, 1890, a minister –George Washington Williams- wrote a letter to the US Secretary of State, characterizing the actions of King Leopold of Belgium in the Congo as "crimes against humanity".

Crimes against humanity however, truly emerged from the expression "the laws of humanity", which can be traced back to the 1860s. As an example, the St. Petersburg Declaration of 1868 was proclaimed to limit the use of explosive or incendiary projectiles because they were described as "*contrary to the laws of humanity*"[5].

Finally the concept "laws of humanity" found expression in conventional international law in the Hague Conventions of 1898 and 1907; in particular it is to recall the Marten's Clause which appeared in their Preamble and in many key international humanitarian law treaties that followed. The Clause is considered to be the earliest identifiable legal foundation for crimes against humanity because it supported the notion that international law encompassed transcendental humanitarian principles that existed beyond conventional law[6]. The Clause stated that

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience[7].

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[5] Robinson, D. (1999). *Defining "Crimes against Humanity" at the Rome Conference*, American Journal of International Law 93:43.

[6] Cryer, R., (2005). *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press.

[7] See *Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907. The 1907 Hague Convention has probably its roots in an International Military Commission staged on Crete in 1898 by the six Great Powers (Russia, France, Italy, Great Britain, Germany and Austria). These trials exercised jurisdiction over acts that would later be termed "crimes against humanity."

Later, in May 1915, the main winners of the World War I – Russia, France and Britain – protested against Turkey's massacres of Armenians, defining it as "crime against humanity" and implying an extended responsibility to all members of the Ottoman government. Despite the denunciation, there was no judicial enforcement due to obstacles raised by some Countries[8].

It was not until after World War I when the Treaty of Versailles summarized the agreements reached by the theories of academics into the creation of a Tribunal to bring the former Emperor of Germany to trial.

The allies again tried also to prosecute Turkish officials with the accusation of "deportations and massacres" of the Armenians, but Turkey had not ratified the Treaty of Sevres of August 1920 which foresaw the obligation to surrender the perpetrators of the Armenians' persecutions.

Unfortunately, in July 1923 the Treaty of Lausanne replaced the Treaty of Sevres and it included amnesty for offences committed between 1914 and 1922. That was a clear political decision, as the victors were worried that a possible prosecution of criminals could have had repercussions within their own borders, where they systematically mistreated minorities.

3.1.3. The Nuremberg Charter and its legacy

The juridical history of crimes against humanity really begins at Nuremberg and in time it has proven to be its very legacy, even at the cost of chronic definitional confusion that will be explained in this paragraph.

The spark that ignited the call for the first formal recognition of the concept of crimes against humanity was the atrocities committed by the Nazis during World War II: execrable acts were committed against civilians, constituting some of the worst crimes in modern history. Those were then the impulse to establish that certain criminal conducts were prosecutable in the name of humanity, as they offend its very core.

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[8] Among others the U.S. *see* Simon, T.W., and (2007) *The Laws of Genocide: Prescriptions for a Just World,* United States: Praeger.

After the end of the World War II, the London Conference was organized by the victorious Countries of the war (the UK, France, the Soviet Union and the US). It was the US delegate, Robert Jackson, who proposed the title of "Crimes against humanity" for an imprecise category which contained the provisions of "*atrocities, persecutions and deportations on political, racial or religious grounds*". The conference ended with the adoption of the Charter of the Nuremberg Tribunal on 8th August, 1945 that included three categories of crimes: war crimes, crimes against peace and crimes against humanity.

> The Charter defined crimes against humanity as
>
> murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[9]

The inclusion of that category in the Charter is thought to have reflected the desire of the Allies not to be restricted "*to bringing to justice those who had committed war crimes in the narrower sense* [..], *but that also such atrocities should be investigated, tried and punished as have been committed on Axis territory against persons of other than Allied nationality*.[10]"

Despite being the foundation for a new legal paradigm, the definition of crimes against humanity in the Charter contained questioning limiting principles: first, the Nuremberg Tribunal could assert jurisdiction only over those crimes against humanity committed "*before or during the war*" and second, those criminal conducts had to be connected to a war crime or a crime against peace ("*in execution of or in connection with any crime within the jurisdiction of the Tribunal*").

The former requirement became known as the "war nexus," and it is clear

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[9] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, Article 6(c), 59 Stat. 1544, 82 U.N.T.S. 279.

[10] Schwelb E. (1946), Crimes against Humanity, British. Year Book of International Law, Vol. 23, 178-183.

that the Charter's drafters and the Nuremberg Tribunal itself considered the war nexus necessary to justify the "invasion" of international jurisdiction into what would be otherwise considered as acts within the domestic jurisdiction of a State.

Even though the chance to expand the jurisdiction of the Court to the peace period was indeed innovative, it was necessary for crimes to have been committed within a war nexus, thus narrowing its applicability.

The post-World War II prosecutions for crimes against humanity were widely criticized because it was thought that they violated the principle of legality or *nullum crimen sine lege*: no conviction for a crime is possible without prior law. The controversy on whether the inclusion of crimes against humanity in the Nuremberg Charter was an appropriate articulation of pre-existing legal principles or an illegal assertion of "victor's justice" is still open. There is no doubt however that even in the case these crimes were not enshrined in customary international law when the Charter was drafted, they gained that status shortly thereafter.

Overall, the definition given in the Nuremberg Trials is considered concise, even lacking and since the notion has substantially evolved. Yet the Nuremberg Charter was the main basis for the definition formulated in the Tokyo Charter, even if the Control Council law No. 10 of 1945 broadened the definition given by The Hague and was further adopted by the occupying powers.

3.1.4.The codification of crimes against humanity by the ILC

As we said before, unlike the international law prohibitions against genocide and war crimes, the prohibition against crimes against humanity did not become the subject of a comprehensive multilateral convention (i.e. the ICC Statute) until very recently. Without a consensus definition, international tribunals, international law drafters and commentators in the post-Nuremberg era were left to follow the Nuremberg precedent.

As a consequence, many interpretations of the scope of the offense which followed treated the war nexus requirement as a substantive element: a state of war was a mandatory condition to apply the term "crimes against humanity" to inhumane acts that did not constitute war crimes, even if the nexus could have

been easily dismissed as an element peculiar to the circumstances of the Nuremberg and Tokyo Tribunals.

But then, at the same time, those who participated to the trials and to the codification efforts attempted to eliminate the war nexus requirement on the grounds that it rather limited the scope of the prohibition against crimes against humanity because it excluded other inhumane acts committed in peacetime.

All these efforts were further opposed by those who wanted to stop the increasing erosion of State sovereignty and were afraid of elevating every peacetime crime to a crime against humanity in violation of international law. Thus, opponents of the war nexus were forced to find another principle to distinguish crimes against humanity from ordinary crimes and to justify the application of international jurisdiction. As a result there was a mosaic of definitions that hardly satisfied the principle of legality.

A milestone in the evolution of the term has been the work of the International Law Commission (ILO): it first met in 1947 with the goal of preparing a draft code of offences against the peace and security of mankind[11]. What happened is that in 1946, the United Nations endorsed the principles of international law within the International Military Tribunal's Charter[12] and directed the International Law Commission [13] to "*formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal*[14]."

The outcome was that the ILC's 1950 report on the "Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal" clarified that:

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[11] Clark, R. S. (1990). "Crimes against Humanity at Nuremberg." In *The Nuremberg Trial and International Law*, ed. G. Ginsburg's and V. N. Kudriavstsev. Dordrecht, Netherlands: Martinus Nijhoff.

[12] See G.A. Res. 95(I), U.N. Doc. A/64/Add.1 (1946), at 188 (1946)

[13] The U.N. created the ILC in order to promote "the progressive development of international law and its codification." G.A. Res. 174, U.N. GAOR, U.N. Doc. A/519, at 105 (1945).

[14] G.A. Res. 177, U.N. Doc. A/519, at 111-12 (1947).

> in its definition of crimes against humanity the Commission has omitted the phrase "before or during the war" contained in article 6(c) of the Charter of the Nurenberg Tribunal because the phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion [*sic*] with crimes against peace.[15]

In parallel, the ILC began to prepare a "Draft Code of Offences against the Peace and Security of Mankind". It defined the offense of crimes against humanity in terms of the nature and scope of the acts themselves by requiring crimes against humanity to be committed on a massive or systematic basis considering how during the Nuremberg-era it was often remarked how only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places endangered the international community or shocked the conscience of mankind, warranted intervention by States other than the one on whose territory the crimes had been committed, or whose subjects had been their victims.

In 1954 all efforts to the "Code of Offenses against the Peace and Security of Mankind" in which individual responsibility was derived from the four Geneva Conventions (1949) and their Additional Protocols (I and II) dealing with armed conflicts (1977).

The 1991 and 1996 "Draft Codes of Crimes against the Peace and Security of Mankind" were the hummus for further deliberations which were needed for the implementation of the project for a permanent International Criminal Court[16].

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[15] Report of the International Law Commission to the GeneralAssembly, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, 14, U.N. Doc. A/1316 (1950), reprinted in 4 AM. J. INT'LL. 126, 132 (Supp. 1950); [1950] 2 Y.B. INT'LL. COMM'N 374

[16] Shaw, M.N., (2008). *International Law* 6th ed., Cambridge: Cambridge University Press.

3.1.5. Domestic prosecution of crimes agaisnt humanity[17]

Crimes against humanity are recognized as being among the criminal conducts over which universal jurisdiction exists. According to this principle, those crimes are so offensive to the whole universal community that any national Court may assert jurisdiction over their perpetrators without relying on the usual bases of jurisdiction, i.e. territoriality[18], nationality[19], or passive personality[20].

Since the Nuremberg Tribunal, several domestic courts have undertaken prosecutions of crimes against humanity, invoking either the traditional bases for jurisdiction or the principle of universal jurisdiction.

THE CASE OF FRANCE

In 1982, the public Prosecutor of Lyon charged Klaus Barbie[21] with crimes against humanity[22] for arresting and torturing to death a Jewish member of the *Resistance* because it was unclear whether his victim had been selected for being Jewish or for participating in the resistance.

The French Court of Cassation in 1985 defined crimes against humanity and it underlined three elements: that the crimes must be committed in a systematic manner; that the perpetrator must act with a discriminatory motive, based on the race, religion, or ideology of the victim and that crimes against humanity must have been committed in accordance with a State's "*hegemonic political ideology*."

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[17] The following is the list of the fifty-five Countries that criminalize CAH in their respective criminal codes: Albania; Argentina; Australia; Azerbaijan; Bangladesh; Belarus; Belgium; Bosnia and Herzegovina; Burkina Faso; Burundi; Canada; Congo; Costa Rica; Croatia; El Salvador; Estonia Ethiopia; Fiji; France; Georgia; Germany; Indonesia; Iraq; Ireland; Israel; Kenya; Lithuania; the Former Yugoslav Republic of Macedonia; Mali; Malta; Montenegro; the Netherlands; New Zealand; Niger; Norway; Panama; the Philippines; Portugal; Republic of Korea; Romania; Rwanda; Samoa; Senegal; Serbia; Sierra Leone; South Africa; Spain; Trinidad and Tobago; Uganda; United Kingdom; and Uruguay.

[18] Territorial jurisdiction exists when the offense is committed on the state's territory.

[19] Nationality jurisdiction exists when the accused is a national of the state.

[20] Passive personality jurisdiction exists when the victim is a national of the state.

[21] Former head of the Gestapo based in Lyon who had been convicted, *in absentia*, for war crimes but he was in Bolivia.

[22] *Prosecutor v. Barbie*, Judgment of Oct. 6, 1983, Cass. crim., 1984 D.S. Jur. 113, J.C.P. 1983, II, G, No. 20, 107 (1983).

The further requirement of a "common plan" which was identified has been criticized as a misinterpretation of Article 6 of the Nuremberg Charter.

THE CASE OF CANADA

In 1988, Imre Finta[23] was charged with war crimes and crimes against humanity[24]. The Canadian Criminal Code had a definition of crimes against humanity as

> murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations[25].

At first a jury acquitted Finta of all charges but then both the Ontario Court of Appeal and the Supreme Court of Canada upheld it. Among the issues examined by the Supreme Court was whether the trial judge had properly instructed the jury on the requisite *mens rea* for crimes against humanity.

In the end the Supreme Court ruled that the trial judge properly instructed the jury to examine whether Finta "*knew or was aware that he was assisting in a policy of persecution*" and further stated that the element of State policy of persecution or discrimination – not in the Canadian Criminal Code – was a "*pre-requisite legal element of crimes against humanity*".

As we gathered, the decision by the French Court of Cassation in Barbie added a number of new elements to the definition of crimes against humanity deviating from the original ILC definition with the omission of social and cultural

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[23] Imre Finta served in the Royal Hungarian Gendarmerie in 1944 and headed the investigative unit at Szeged, Hungary, where approximately 9,000 Jews were confined, robbed and deported to concentration camps in Auschwitz and Strasshof.

[24] Regina v. Finta, [1994] S.C.R. 701, 812 (Can.).

[25] Criminal CODE § 7(3.76) (Can.).

grounds as possible bases for discrimination.

The Supreme Court of Canada required as well a discriminatory motive – even though it was not explicitly included in the Canadian Criminal Code – and a State policy of discrimination. However, these conditions can be hard to identify when crimes are committed to pursue the objectives of a non-state actor.

Nevertheless the decisions in the Barbie and Finta cases were delivered without any guidance from the ILC about the proper scope and content of crimes against humanity and, in addition, at the time there were no international Tribunals adjudicating cases of crimes against humanity. That is why we are convinced that the (mis)interpretations by those domestic courts helped to direct the development of crimes against humanity, as is evident from the ICTY Statute, the ICTR Statute, the reports issued in connection with those tribunals and the 1996 ILC Draft Code.

3.1.6. The ad hoc *tribunals*

In the post-Nuremberg era a vast number of Treaties, Resolutions and Conventions tried to clarify the term of crimes against. The most important among those is considered to be the 1948 Genocide Convention: indeed it helped the development of the notion of crimes against humanity through rejecting the nexus with armed conflict, previously required in the IMT Charter[26].

Another important landmark in this path was the creation of the *ad hoc* International Tribunals by the UN Security Council.

ICTY

Given the trend toward the uncoupling of the prohibition of crimes against humanity from a state of war, it was surprising that the United Nations Security Council reproduced a version of the war nexus when it drafted the Statute of the ICTY.

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[26] DeGuzman, M.M., (2000). *Road from Rome: The Developing Law of Crimes against Humanity*, The. Human Rights Quarterly, 22, 335.

As one might expect, confusion surrounded its reintroduction to the definition of crimes against humanity; Article 5 defined the offence as specific acts committed during an armed conflict and directed against any civilian and then added acts such as imprisonment, torture and rape to the jurisdiction of the tribunal.

Things changed when in 1995 the first ICTY major judgment—the Tadič case— was delivered and rejected the war nexus criterion on the grounds of incompatibility with customary international law[27]. The Appeals Chamber ruled that customary law evolved since Nuremberg and that an international armed conflict, not even a conflict at all, was required; they declared the war nexus a jurisdictional element peculiar to the Nuremberg Charter which was found in contradiction with a substantive element of customary international law[28].

For the first time the Trial Chamber laid to rest some of the definitional confusion that had been afflicting the concept of crimes against humanity since the beginning and defined crimes against humanity in terms of the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population.

On the one hand, after the Tadič judgment the prosecutorial burden of proof was minimized with respect to the war nexus and it was easier to justify international jurisdiction. On the other, unfortunately, in so doing the Trial Chamber also reversed the before-mentioned progressive trend, attaching further elements to the prohibition against crimes against humanity which were not in the Tribunal's Statute nor elsewhere in customary international law. Paradoxically that increased the Prosecution's burden of proof.

The ICTY decisions, in parallel with Security Council's guidelines, directed

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[27] Dinstein, Y., (2000). *Case Analysis: Crimes against Humanity after Tadič*. Leiden Journal of International Law, 13(02), 373-393.

[28] See *Prosecutor v. Tadič*, Case No. IT-94-I-T, Decision on the Defence Motion, (Int'l Crim. Trib. former Yugo., Trial Chamber II, Aug. 10, 1995), at 30; Prosecutor v. Tadič, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal in Jurisdiction (Int'l Crim. Trib. former Yugo., App. Chamber, Oct. 2, 1995), at 73.

the drafters of the ICTR Statute to omit an armed conflict requirement to establish a crime against humanity, broadening considerably the protection provided by this norm. From that moment onwards the Nuremberg charter was regarded as a divergence to the custom due to jurisdictional limitations and the ICTY Statute was considered as an anomaly due to non-legal issues[29].

ICTR

The ICTR was created one year after the ICTY and the definition of crimes against humanity set in its Article 3 is considered to be more complete and detailed.

Indeed Article 3, instead of using the vague expression "*directed at a civilian population*" of the ICTYSt., required the acts to be part of a "*widespread or systematic attack*".

The definition introduced within the Nuremberg Charter included persecutions on political, racial or religious grounds, although this was not a requirement for murder-type crimes. The ICTR set that crimes against humanity must take place against the background of a discriminatory attack on the civilian population.

The new condition is likely to have been added because the Rwandan government wanted to raise the threshold for crimes against humanity as high as possible to exclude any offences of which it could be accused. That is also why they underlined so well the distinction between crimes against humanity and ordinary crimes – prosecutable by national courts – by the use of the element of discrimination.

Therefore, at least theoretically, a discriminatory context had to exist for the act to qualify as a crime against humanity. In practice, however, case law did not set discriminatory intent as a prerequisite, as the proof of motive was difficult; this way the work of the prosecutors was easier.

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[29] Shelton, D., (2005). *Remedies in International Human Rights Law* 2nd ed., Oxford: Oxford University Press.

Overall, we can conclude that the Yugoslavia and Rwanda Tribunals contributed to the International Criminal Justice system through the establishment of crimes against humanity as self- standing crimes that did not need a nexus to be prosecuted. This eventually led to the elevation of human rights violations at the level of international crimes[30].

3.1.7. The Rome conference and the ICC Statute

The ICC Statute was established in 1998 and entered into force on July 2002; it enjoyed the premises stated by the Nuremberg trials, the ICTY and the ICTR Statutes, all of which included elements of crimes against humanity.

The negotiations which led to Article 7 of the Rome Statute (crimes against humanity) were lengthier than anticipated, due to the already mentioned lack of an pre-existing conventional definition of the offence at the time: indeed even though the term was used by the Nuremberg Charter, no global multilateral Treaty was ever negotiated before the Rome Conference even though, at an academic level, discussions on an International Criminal Court and on its jurisdiction started around the mid 50es.

Article 7 of the ICCSt. added the acts of enforced disappearance and apartheid to those previously set out by the *ad hoc* tribunals; drug trafficking and terrorism were however excluded[31]. For Antonio Cassese the inclusion of crimes such as forced pregnancy, apartheid, enforced disappearance and the addition of gender and culture as grounds of discrimination were a progress in customary international law[32].

No war nexus was required in the ICC Statute and the discriminatory intent was needed only for the crime of persecution[33].

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[30] Sands, E.B.P., (2003). *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge: Cambridge University Press.

[31] Sadat, L.N., Carden, S.R., (1999). *New International Criminal Court: An Uneasy Revolution*, The. Georgetown Law Journal, 88, 381.

[32] Cassese A., *International Criminal Law*, 126, 2008.

[33] Cryer, R., (2005). *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press.

Later developments of ICL brought to the acknowledgment that such crimes could be committed not only by a State, but also by an organized armed group embodied by "non-State actors" and State-like entities that exercised *de facto* control over a given territory by fulfilling the functions of government[34].

The Rome Statute was drafted with the aim to create a world society sharing the belief in the protection of human rights and in the fight against impunity, with the ambitious plan of restoring the faith in justice[35].

In the Statute are embodied some and not all, forms of customary international law: indeed custom goes beyond it. It is possible – as the Kampala process showed – and it will be possible for the Statute to be amended fruitfully through custom and public perception to include new crimes.

3.2. Basic Elements of Crimes Against Humanity

Crimes against humanity are characterized by acts so abhorrent that shock our sense of human dignity. Article 7 of the Rome Statute defines crimes against humanity as follows:

> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under

[34]Nollkaemper, A. and Wilt, H.V.D., (2009). *System Criminality in International Law*, Cambridge: Cambridge University Press.

[35] Kirsch, P., (2001). *The International Criminal Court: Current Issues and Perspectives*. Law and Contemporary Problems, 64(1), 3-11.

> international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. […]

This definition resulted from a series of intense negotiations and reflects a number of political compromises. In some respects, it is more expansive than previous and subsequent formulations, but in others it is narrower.

The definition reflects the fundamental structure and content of these offences: crimes against humanity are inhumane acts of a serious nature committed as part of a widespread or systematic attack against civilians. Each of the inhumane acts constitutes a crime in most of the world's criminal law systems, but their commission as part of a broader attack justifies their characterization as crimes against humanity and the exercise of international criminal jurisdiction.

The definition in Article 7 thus comprises:

- The elements of the "constitutive crimes" (murder, extermination, etc.)
- The *chapeau* or "contextual" aspect of the crimes reflected in the opening paragraph above. Three contextual elements are required: the widespread or systematic element; the civilian population; the policy pursuance (not required by the *ad* hoc Tribunals) along with the mental element of the crime, the *mens rea*.

  In other words, to be guilty of a crime against humanity, a defendant must commit the underlying inhumane act *knowing* that he or she is contributing to a widespread or systematic attack against civilians.

<u>Widespread or Systematic</u>

The first issue resolved during the debate in Rome was the disjunctive (widespread OR systematic) or conjunctive (widespread AND systematic) nature of this element.

The concept of "widespread" was clearly defined by the ICTR in the *Akayesu* case: "*massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims*"; as it was

the concept of "systematic": "*thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources*"[36].

We can then say that "widespread" accounts for the number of violations made (the total number of people whose rights have been restricted, weighted by the relative importance of the rights violated). On the other hand "systematic" is a qualitative notion referring to acts partly involved in some plan: the planning element itself gives to the notion the qualitativeness considering an objective cannot be expressed in numerical figures.

Civilians

The word "any" before the civilian is the *raison d' être* of crimes against humanity, i.e. protecting every citizen and without considering his/her nationality. The crime is addressed to civilians rather than combatants, though the word "population" entails a connection with a larger body of victims.

Crimes against humanity can also include acts committed against civilians who were members of a resistance movement and former combatants – regardless of whether they wore a uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated, either because they left the army or because they no longer bore arms.

Policy

The ICTY and ICTR Statutes did not include the policy provision, even though the policy element (phrased with the use of the term "*directed*") has been widely supported since Nuremberg.

Indeed Article 7 of the Rome Statute reflects the developments of international customary law – in which the policy it is not necessarily the policy of a State – and takes into account "organizational" policies. The entity behind the policy does not need to be a State but could also be an organization exercising *de*

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[36] *Prosecutor vs J. P. Akayesu*, ICTR-96-4-T.

facto power in a given territory.

Mens Rea

The *mens rea* requirement for crimes against humanity has a cognitive character: the Court requires that the defendant must be aware that his/her act is a part of a widespread or systematic attack on a civilian population and pursuant to a plan[37].

The mental requirement takes into consideration the content, not the motive; as a consequence the mental element criterion is fulfilled when the perpetrator is only aware of the risk that an attack exists and that certain circumstances of the attack render his conduct more dangerous than if it did not exist; or more, that its conduct prepares the ground for other crimes. It is not necessary for the perpetrator to share the purpose or goals of the overall attack.

3.2.1. Crimes currently considered crimes against humanity

The main challenge in defining crimes against humanity has always been identifying the precise elements that distinguish these offenses from crimes subject exclusively to national laws. According to Margaret deGuzman[38] the definition of crimes against humanity not only determines the scope of international jurisdiction, but also gives rise to a number of additional important consequences:

1. Unlike most domestic crimes, crimes against humanity are generally considered outside the scope of statutes of limitations. There are two conventions on this question, although neither is widely ratified: the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity" of 1968 and the "European

[37] Relevant case studies include ICTR *Prosecutor v. Kayishema and Ruzindana* Judgement; ICTY *Prosecutor v Tadič*, Judgement; ICTR *Prosecutor v. Rutaganda; Kupreskic* Judgement; ICTR, *Prosecutor v. Musema*, Judgement; ICTR, ICTY *Prosecutor v. Milan Babic* and *Prosecutor v. Georges Ruggiu*.

[38] DeGuzman M. M. (2011), "Crimes against humanity", Brown B. S. (Ed) *Research handbook on international criminal law*, (Cheltenham: Edward Elgar, 2011), 65.

Convention on the Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes" of 1974. At the same time many States avoided statutes of limitations for crimes against humanity in their domestic laws so an argument can be made that customary international law at least permits, if not requires, that limitations be inapplicable to such crimes[39].

2. The immunities that often shield State representatives from criminal responsibility are not available (at least before international tribunals)[40];
3. The concept of universal jurisdiction[41], though controversial, always include crimes against humanity within its scope, allowing them to be tried before any criminal Court in the world;
4. The prohibition of crimes against humanity is a *jus cogens* norm of international law and so derogation is not permitted under any circumstances. As a result, States have an international law obligation either to prosecute perpetrators of crimes against humanity or to extradite them to States intending to pursue prosecutions[42].

In light of the very serious legal consequences of defining an offense a crime against humanity and the consequent higher moral condemnation entailed, the importance of understanding the exact contours of these offences is crucial.

First of all, murder has been always included in the definition of crimes against humanity and no concerns have ever been expressed on this offence.

Extermination as a crime against humanity refers to acts intended to bring

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[39] Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 143-44 (2d Ed. 2001).

[40] *See* Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121, ¶ 61 (Feb. 14) holding that Congo's incumbent minister of foreign affairs was immune from prosecution for crimes against humanity in Belgian courts, but stating that he could be prosecuted by an international Court with jurisdiction.

[41] Theory that sustain certain crimes are subject to the jurisdiction of all States.

[42] According to M. C. Bassiouni "*the duty to prosecute or extradite whether alternative or co-existent is clearly established in conventional and customary international criminal law with respect to 'crimes against humanity*". *See* M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law*.

about the death of a large number of victims of a targeted population.

Enslavement is considered a crime against humanity when the perpetrator exercises over another individual any or all of the powers attached to the right of ownership along with the other basic elements[43].

Deportation is defined as the forcible transfer of population, i.e. the forcible movement of people from one place to another within the territorial borders of one state.

Imprisonment (or other severe deprivation of liberty) is the first of the enumerated acts that was not previously included in the Nuremberg or Tokyo Charters.

In order for an offence to qualify as torture the only threshold foreseen by the Statute is that the accused held victims in custody or under his control and inflicted them a certain amount of pain.

As we saw in Chapter 1, the extensive list of specific sexual offences that constitutes a crime against humanity is considered the most significant development of international criminal law.

Regarding persecution, to qualify as a crime against humanity, the perpetrator's act or omission should be of gravity similar to the other crimes listed in the ICC Statute, the perpetrator must intend to discriminate on the basis of political, racial, or religious identity and the conduct must actually target the members of a precise group.

The enforced disappearance of persons is again an exclusive of the Rome Statute as well as the crime of apartheid which allows the prosecution of any widespread or systematic policy of apartheid. The conduct was so deeply condemned in the conscience of people that the regulation of apartheid became a legal necessity; this shows how deep can be the influence of public perception on

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[43] Boas G, Bischoff J L and Reid N L, (2008), *Elements of Crimes under International Law*, Cambridge: Cambridge University Press.

the transformation of law[44].

The final element of the current definition of crimes against humanity is a general provision (Article 7(k)) which could capture punishable crimes that are yet unforeseen or unspecified. Nonetheless the threshold limit value for an act to be considered as a crime against humanity in this catch-all provision is very high, as it will be demonstrated in the following paragraph.

3.3. Matching requisites for crimes against humanity (Article 7.(k)) with FGM/C reality

When the international community is confronted with harmful practices that are not codified in the Rome Statute of the International Criminal Court, it has to legally characterize these conducts. And if the act is within the domain of the core crimes of the Rome Statute, there always is the question of how it would be best criminalized: weather as a war crime, a form of genocide, or a crime against humanity.

In our specific case study can FGM/C be tried as "other inhumane acts" under Article 7(k) of the ICCSt.? We will try to answer the question by matching the criteria required by the Rome Statute and the actual reality of FGM/C as outlined in Chapter 2.

First of all we need to recapitulate the requirements needed in order to have an act characterized as "other inhumane act", a category which aims to prevent impunity for inhumane conducts that are not mentioned in Article 7, which prevents the provision from becoming too rigid.

The category of crimes against humanity is not a novelty of the ICCSt. – being already mentioned in the London Charter, the Tokyo Charter and in the Statutes of the ICTY, ICTR, SCSL and Extraordinary Chambers in the Courts of Cambodia (ECCC)[45] – but, for the first time, in the ICC Statute there was a

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[44] Politi, M. and Nesi, G., (2001). *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Hampshire, England: Ashgate Pub Ltd.

[45] *Prosecutor v. Momcilo Perišić* (Trial Judgment), ICTY IT0481T, Sept. 6, 2011, para. 110; Case

clarification on the scope of the provision in the Elements of Crimes (hereinafter EoC).

> The elements specified are the following:
>
> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
> 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. [*where "character" refers to the nature and gravity of the act that have to be similar to those previously enumerated*[46]]
> 3. The perpetrator was aware of the factual circumstances that established the character of the act.
> 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Indeed the ICC's EoC set a lower threshold to have an act tried as "other inhumane acts" than for the war crime of inhuman treatment ("*severe physical or mental pain or suffering*") and the attack to human dignity is not even mentioned; the category is however dependent on previous acts defined as inhumane and offers no guidelines to identify other possible actions.

According to Iris Haenen[47], the ICC could use human rights law as a source[48] to bridge this gap, a fact which is also supported by the earlier "Draft Codes of Offences against the Peace and Security of Mankind". Yet the problem is that not every human rights violation would constitute an inhumane act.

The acts which are currently listed under the Statute's provision protect the right to life (murder and extermination), to bodily integrity (torture, rape...) and to

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of Nuon Chea, Ieng Sary, Khieu Samphan & Ieng Thirith (Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order), ECCC 002/19092007/ECCC/OCIJ, Feb. 15, 2011, para. 157.

[46] Before the Rome Statute the *ad hoc* tribunals required, for example, that the conduct be "*of similar seriousness*".

[47] Haenen I (2013)., *Classifying acts as crimes against humanity in the Rome Statute of the International Criminal Court*, German Law Journal, Vol. 14, N. 7, 796-822.

[48] In accordance with the third paragraph of Article 21, the Court must apply and interpret the law in a way that is consistent with internationally recognized human rights.

liberty (enslavement, deportation…); furthermore the crimes of persecution and apartheid require a link with any of the enumerated inhumane acts. As a consequence, only violations that resulted in great suffering on the part of the victims, or serious injury to their body or to their mental or physical health, would qualify as such.

Now to go back to our research question, in Chapter 2 we stressed how FGM/C of all types has subsequent physical and psychological complications of growing intensity. In the *Kenyatta*[49] case the ICC ruled that inflicting sufferance or injury similar to other conducts of Article 7 through a serious attack on human dignity was the criteria to be fulfilled for acts to be criminalized under Paragraph k. In the FGM/C case frequent health complications are pain, trauma, hemorrhage, difficulty urinating, painful menstruation, painful sexual intercourse, sexual dysfunction, infections resulted from contaminated instruments, increased risk of HIV transmission. The practice *per se* is particularly severe because often performed without anesthesia, leaving women traumatized with future poor life quality and self-esteem and in unhygienic conditions, increasing the danger of contagious and blood-borne diseases. The very nature of the procedure is irreversible and violates women's right to bodily integrity. FGM/C could also be dangerous for newborns as it often causes birth injury.

All that said, we can state without doubt that FGM/C causes such sufferance and injury to victims that it can be compared to other acts condemned as crimes against humanity both by their nature and their gravity, especially if the related complications lead to the death of the woman.

The civilian population criteria required by Article 7 and the systematic or widespread nature of the conduct was well described by the ICC in the *Katanga*[50] arrest warrant. In the case of FGM/C the target population can be outlined as

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[49]Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case n° ICC-01/09-02/11.

[50] Situation in Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case n° ICC-01/04-01/07.

young women living in those communities of Africa and South-East Asia – but lately also in Europe, Australia, New Zealand, Canada, USA and Latin America – where the procedure is systematically performed. The social function of FGM/C – we can recall that in Countries like Egypt and Somalia the percentage of women that underwent the practice is above 90% – is still not questioned nor opposed (sometimes for fear of ostracism or retaliation) and it focuses on the perpetuation of the submission of women to the will of the male(s) of the family.

Perpetrators too can be clearly acknowledged as the group of traditional healers of the above-mentioned communities. In support of this statement we quote the article by Gerald Werle and Boris Burghardt[51] where they argued that nowadays large-scale violence is no longer perpetrated only by States and that the lack of an evident link between criminalized conducts and a specific State also reflects the reality of international criminal law today. In that article the authors concluded that in order for a group to be considered as perpetrators under the crimes against humanity provision, the criterion was a sufficient degree of organization to enable its member to carry out the practice.

Moreover, we can underline how all perpetrators are by now aware of the dangers related to FGM/C (even when "medicalized"), thanks to world-wide campaigns of information that have spread lately, but they are more persuaded of the necessity of the practice to control an otherwise overabundant sexuality that women themselves are unwilling or unable to control. Perpetrators are convinced that FGM/C is part of the "appropriate" sexuality of women (since it is controlled by men) which serves the purpose of enduring unequal normative gender roles within the community.

We can conclude that the purpose of controlling and administrating women's reproductive health and sexual freedom can be outlined as the policy

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[51] Burghardt B., Werle G. (2012), *Do Crimes against Humanity Require the Participation of A State or "State-Like" Organization?* Journal of International Criminal Justice, Volume 10 (2012), 1151-1170.

underlying the conducts of perpetrators. A further subjective element, besides the *mens rea* or criminal intent, of the awareness of the existence of the practice by the perpetrator is present, thus fulfilling the conditions outlined by Cassese[52].

FGM/C has an extremely high prevalence in the Countries where it is practiced and has also recently begun to spread all over the world because of the migration of the communities where it is an inevitable fate. FGM/C is part of a traditional practice – the contextual element that Cassese[53] required for a conduct to be classified as crime against humanity – and, as we said before, it is unavoidable for women: those are the reasons why we are convinced that it is systematic in character.

At this point of the argumentation, the following objection that could be raised is: if we criminalize FGM/C under Article 7(k), would the practice of male circumcision be equally open to criminalization?

To respond we recall Paragraph 5 of Chapter 2 in which we compared the two procedures and then established that they had no common features beside the fact of being performed on genitals and often without the consent of the child. What is more, we underlined how not only male circumcision is typically a minor procedure which affects no function of the male, but how sometimes it is even claimed to be at least favourable or beneficial for heath. On the contrary, FGM/C is always dangerous and aggressive for women.

Therefore the level of damage produced by the two is not comparable and it serves as well as the threshold limit value to determine which conduct is unlawful. As a consequence, the special treatment reserved to FGM/C is justified by the damages it always produces.

To sum up we can say that the international crime of FGM/C could be framed within the particular circumstances of women living in villages where the

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[52] Cassese A., Gaeta P. (2013), *Cassese's international criminal law*, Oxford University Press, Oxford, Third Edition.
[53] *Idem* 52.

practice is inevitable and systematic, regardless the religious or cultural background of its inhabitants. In those environments the stigma against those who refuse to submit and/or the damages resulting from the procedure are the very causes of its unavoidability and dangerousness.

Additionally FGM/C is aimed to control women and, through them, the clan; the will behind the practice is to systematically target the women of the group to perpetuate their submission.

Besides we conclude that FGM/C could not only be qualified as "other inhumane acts" but it may also be considered as an act noticeably persecutorial: women as such are the target in those groups where the practice is particularly severe from the medical standpoint or because of the evident persecutory intent to hinder the advancement of their status.

In the end the coercive element, the violence of the practice and the prosecutorial intent behind FGM/C are not only elements which entitle victims to international protection, but they also allow the international prosecution of perpetrators.

3.4. Way forward for crimes against humanity

As we witnessed throughout the years, some crimes are so egregious that they involve and injure humanity as a whole, even if the perpetrators never go beyond their State.

Iris Haenen well expressed the dilemma which plagues international criminal law we she wrote: "*The law must be able to anticipate and react to these cruelties. On the one hand, the law must be specific enough to assure legal certainty and prevent arbitrary convictions; on the other hand, it must be broad and general enough to keep up with developments in real life and cover previously unimagined behavior*"[54].

That is why we suggest that the key aspect to allow the category of crimes

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[54] *Idem* 48.

against humanity to adjust to different contexts and to be up-to-date to different times should be the scale of harm caused.

Human rights violations occur globally at every moment and an analysis of the exact motives, the scale of these attacks and methods to prevent them will grant a completely different perspective on the study of crimes against humanity as we know them.

Aristotle was the first to consider human beings as political animals, explaining the societal reaction to any form of crime and crimes against humanity are undeniably *delicti ius gentium* affecting the international community at large[55].

A significant number of uncertainties remain with regard to the definition of crimes against humanity under customary international law and even under the Rome Statute. That is the reason why, the call Professor Bassiouni issued twenty years ago for the international community to adopt a specialized convention addressing these crimes remains important today[56]. Such a convention would assist States in incorporating the prohibition of crimes against humanity into their national laws and encourage States to prosecute these crimes.

A convention addressing crimes against humanity would also reflect an international consensus on the underlying normative framework for this category of crimes. Much of the scholarly and judicial discussion of crimes against humanity has focused on the doctrine as it has evolved since Nuremberg, with little attention to the normative underpinnings of these crimes. Definitions such as the one contained in the Rome Statute were crafted mostly by reference to prior definitions and case law rather than through critical analysis of the norms under-girding the international prohibition of crimes against humanity.

The international community's interest in such crimes is motivated less by

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[55] Ntoubandi, F.Z., (2007). *Amnesty for Crimes against Humanity under International Law*, Leiden, Netherlands: Brill.

[56] M. Cherif Bassiouni, "Crimes against Humanity": The Need for a Specialized Convention (1994).

the presence of concrete international harm than from a moral conviction that such crimes must be punished.

Over time, crimes against humanity have become more closely associated with the moral norms at the heart of international human rights law than with their original progenitor, war crimes.

The very term "crimes against humanity" suggests that the *raison d'être* of this category of crimes is that they harm or threaten harm to "humanity" in addition to their more immediate victims. The relevant question therefore is what harm these crimes inflict on "humanity?" Do they threaten the peace and security of the world and therefore present a possibility of direct harm? This rationale provided the impetus for the ILC's efforts to codify "offenses against the peace and security of mankind." However, the ILC found it quite difficult to identify a principled basis on which to determine which crimes pose such a threat.

The "seriousness" or "gravity" rationale for international crimes is sometimes expressed by describing the crimes as "shocking the conscience of humanity." As a matter of fact Bruce Broomhall posed "collective conscience," as the primary normative rationale for crimes against humanity[57]. This expression mirrors the Martens Clause's basis for legal protections.

We believe that crimes that shock the conscience of humanity also threaten the peace and security of the world. Thus, the Rome Statute's preamble equates "*unimaginable atrocities that deeply shock the conscience of humanity"* with crimes that *"threatened the peace, security and well-being of the world.*"

Even the Security Council has invoked the common conscience on multiple occasions to justify using its Chapter VII powers, thereby linking the world's shock to the maintenance of peace and security. The rationale for action then relied more on the moral repugnance of the harm than on the imminence of concrete cross-border harm.

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[57] *See* Broomhall B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 49 (2003).

Despite this linkage between the collective conscience and peace/security rationales, Broomhall affirmed that now the former has acquired independent force.

However there is little consensus about what makes crimes sufficiently shocking or grave to merit international adjudication. On the one hand there is a tendency to focus on the scale of the crimes as reflected in the "widespread" criterion within the definition. On the other hand many commentators are reluctant to ground the rationale for crimes against humanity in a quantitative analysis.

The systematic nature of the crimes, including perhaps their commission pursuant to a policy, presents an alternate basis on which to find them particularly grave. The ICC prosecutor in 2006[58] suggested a number of factors that might impact gravity for the purposes of admissibility before that court, including the scale of the crimes, the nature of the crimes, the manner of commission of the crimes and the impact of the crimes. Such factors could also be relevant to the determination whether one or more acts rises to the level of a crime against humanity.

The current definitions of crimes against humanity in various international instruments and decisions fail to address adequately normative questions.

In sum, the failure of the international community to adopt a more coherent normative framework for crimes against humanity has led to significant inconsistencies in this body of international criminal law.

Conclusions

In this chapter we analyzed how conducts can be classified as crimes against humanity. The law of crimes against humanity has developed largely in reaction to specific, horrific historical circumstances, in particular, the Holocaust, ethnic cleansing in the former Yugoslavia and genocide in Rwanda. Definitions were

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[58] ICC Office of the Prosecutor, *Report on Prosecutorial Strategy 5* (Sept. 14, 2006).

crafted to enable the international community to prosecute such crimes while attempting to respect the principle of legality. Even the Rome Statute's definition, although theoretically crafted to respond to unforeseen future circumstances, reflects political compromises rather than a consistent and integrated normative framework.

Crimes against humanity concern acts committed as part of an attack against a civilian population. When a conduct is not covered by any of the specific inhumane acts listed under Article 7 of the ICC Statute, the clause "other inhumane acts" enters into play as a catch-all provision. Yet the EoC of the ICC do not offer any guidance to identify other possible inhumane acts beside the *eiusdem generis* rule of interpretation requiring the conduct to be sufficiently grave and to cause great sufferance or injury to be comparable to the previously listed crimes.

We can recall that crimes as sexual violence, forcible transfer of population, enforced prostitution and the enforced disappearance of person were not initially listed as specific inhumane acts, but were qualified as "other inhumane acts" in the case law. Later they were codified in the Rome Statue and in the Special Court for Sierra Leone Statute. So crimes that are not listed in Article 7 but that are qualified as "other inhumane acts" could in the future be included.

The codification of a new crime would require amendments to the Rome Statute: a further obstacle to overcome and a full new Chapter for history to cover.

CONCLUSION

> *Even though cultural practices may appear senseless or destructive from the standpoint of others, they have meaning and fulfil a function for those who practise them. However, culture is not static; it is in constant flux, adapting and reforming. People will change their behaviour when they understand the hazards and indignity of harmful practices and when they realize that it is possible to give up harmful practices without giving up meaningful aspects of their culture.*
>
> FGM "A joint WHO/UNICEF/UNFPA Statement" 1997

This paper was born out of a research question which reflects the trend towards the criminalization at the international level of those conducts damaging the full enjoyment of women's human rights: could FGM/C be criminalized as crimes against humanity by the ICC?

To answer this question in the First Chapter we outlined the path that brought the emergence of what is nowadays known as "gender justice" in ICL. Indeed ICL developed significantly from an almost complete legal gap regarding women's rights (we quoted for example the IMTs of Nuremberg and Tokyo) to a keen gender-sensitivity both in international and national jurisprudence, well represented by the special measures taken by the ICCSt.

In the Second Chapter we started to define FGM/C from its origins to end with what is the practice today, underlining also other relevant aspects (e.g. male complications due to FGM/C and the comparison between male circumcision and FGM/C) which could help reaffirm the need for its final elimination.

The Third Chapter is the one dedicated to answer our research question after we delineated the framework within which we were moving. Firstly, we described the evolution of crimes against humanity from a philosophical concept to the inclusion of a category of crimes against humanity in the Statutes of international criminal Tribunals and to their prosecution at the national level.

Then, after listing the elements required for a conduct to be a crime against humanity and the crimes which are currently included in the category, we

matched the characteristics of FGM/C of the Second Chapter with those requirements.

What we found is that the necessary conditions of gravity, policy and *mens rea* are fulfilled by FGM/C; moreover the coercion, the violence of the operation and the prosecutorial intent to prevent the advancement of the status of women entitle victims to international protection, but they also allow the international prosecution of perpetrators.

Our research question is then left open: unfortunately just the international criminalization of FGM/C would not be enough to deter the perpetration of the violation of so many women's fundamental human rights. However, in so doing the ICC would definitely confirm the end of the impunity for those crimes; at the same time this message could serve as a strong input for all States to implement socio-cultural policies that would reinforce the effect of prosecution and criminalization of the practice at the national level. Indeed, strategies to end FGM/C must be accompanied by holistic, community-based education and awareness-raising, because the practice – as a social behavior – derives its roots from a complex set of belief systems. Bringing an end to FGM/C requires changing community norms and societal attitudes that discriminate against women and subjugate their rights to those of men.

According to W. A. Shabas a reform of ICL is needed to harmonize universal human rights with universal human responsibilities. He is convinced that criminal law should prescribe behaviours that society seeks to prevent because of its most disturbing nature and its contradiction with core social values.

For the author, it is necessary to identify conducts that are progressively prohibited and criminalized in the majority of States because the minimization of pain and suffering of its citizens ought to be the first priority of any civilized society, as well as the full enjoyment of the right to life and bodily integrity.

He concludes that the next wave of international criminal justice should focus on the types of behaviour which are seriously harmful and deplored by all people and thus it should take its lead from fundamental human rights law.

This statement is reinforced by what t P. De Stefani wrote: criminal law, on the other hand, is useful to give true effectiveness to international human rights instruments, as it requires the respect of those rights which would not be otherwise sufficiently granted in the framework of international responsibility created by human rights treaties.

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