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## **The Nature of Female Genital Mutilation According to the Istanbul Convention and Other International Instruments**

IVANA MARKOVIĆ\*

*The paper deals with the nature of female genital mutilation (FGM) as a highly gendered, harmful practice, which has in the meantime been formalized as a crime. Especially the Istanbul Convention is regarded as the driving force behind this legal development. But beyond that, this Convention, as well as the Convention of Belém do Para and the Maputo Protocol before that, have defined and located the very nature of FGM within the violence against women. By doing so, prior (false) beliefs and attempts to legitimize them due to cultural, social or religious reasons have become obsolete. The aim of this paper is to show the nature of FGM within the aforementioned instruments.*

**Keywords:** female genital mutilation, nature of the crime, gender, Istanbul Convention, Convention of Belém do Para, Maputo Protocol.

### **Introduction**

Female genital mutilation (FGM) is defined by the World Health Organization (WHO) as “all procedures that involve partial or total removal of the external female genitalia or other injury to the female organs for non-medical purposes”.<sup>1</sup> This is one of the oldest and at the same time the generally

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\* Dr Ivana Marković je docentkinja na Pravnom fakultetu Univerziteta u Beogradu.  
E-mail: [ivana.markovic@ius.bg.ac.rs](mailto:ivana.markovic@ius.bg.ac.rs).

<sup>1</sup> WHO, Female Genital Mutilation, Available at: [https://www.who.int/health-topics/female-genital-mutilation#tab=tab\\_1](https://www.who.int/health-topics/female-genital-mutilation#tab=tab_1), page accessed 1.2.2023.

accepted definition of this harmful practice;<sup>2</sup> a laudable unifying effort. However, a common definition ground is still only the first step of the necessary legal adjustments to combat violence against women (VAW). It has to be followed and reified by other instruments.

One of those instruments is the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), as the epitome of fighting violence against women (Marković, 2022: 92). Although it is a regional instrument, aiming at members of the Council of Europe (CoE), due to its comprehensiveness, especially when it comes to terms of criminal law, it has gained universal importance (Gasmi, 2019: 127).

Together with two other previously ratified and implemented international law instruments (the Convention of Belém do Pará from 1994, and the Maputo Protocol from 2003), it locates FGM within the very nature of VAW.

The subject of the paper is the evaluation of the nature of female genital mutilation as a very specific crime, rooted in traditional, cultural and religious (mis)beliefs, but which, until today, exists in numerous societies worldwide, regardless of its formal status as a crime. The purpose of this contribution is therefore to analyze the highly gendered nature of FGM, by this to understand why this practice has survived until today, and in which way it has adapted to bans and other formal restrictions that were enacted in the meantime.

Regarding the methodology used in the paper, the feminist approach, the human rights perspective and the dogmatic (in terms of criminal law) method have been combined. This is insofar necessary as female genital mutilation tackles opposing aspects - a strong cultural/social/religious rootedness on the one side, which makes the enforcement of its prohibition, formalized in the form of a criminal offence difficult on the other hand. It is the conflict between cultural relativism (according to which no particular culture is superior to others, and all cultural beliefs are equally valid) and universalism (or global feminism, according to which all people share the same universal human rights). The stance of cultural relativists on FGM is apologetic – they advocate for respect for the traditions and practices of others, as no culture is superior to another, especially when “an external nation with opposing views, values, and traditions seeks to assert or impose their values on another” (Danial, 2013: 5). Universalists, on the other side, strive to treat all human beings as

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<sup>2</sup> FGM is further subdivided into four categories with differing degrees of impairment: type I (clitoridectomy), type II (excision), type III (infibulation) and type IV (others) (Marković, 2022, 93-94).

equals, “especially when discussing issues of women who have a long history of oppression within the context of law, politics, and economics in the public, as well as a private realm” (Danial, 2013: 5).<sup>3</sup> Looking at the broader picture, as Moller Okin (1999: 35) remarks, ‘culture’ and ‘traditions’ are so closely connected to the (sexual) control of women, that they are basically equated.

The relevance and topicality of this (old) issue have gained (new) momentum. Although the prevalence rates of FGM are the highest in African countries, this practice has got (or should get) additional attention in Europe as well, because of the high immigration influx of people from regions of the world with high FGM prevalence rates (Marković, 2022: 92). However, convictions or even reports on FGM are rare in countries with either existing or new migrant communities.<sup>4</sup> The fear of being accused of discrimination and the sensitive issue of prohibiting ‘cultural practices’ may be regarded as some of the main reasons for that, while at the same time, the nature of FGM (which has not changed over the centuries) reflects the underlying issue towards women, girls and what is regarded as violence towards them.

The paper is structured into two parts. The main section is devoted to the nature of the crime according to the Istanbul Convention and analyzes FGM as a gendered crime regarding the actors and the reasons (justifications) for female genital mutilation. The second part deals with other international law instruments (the Belém do Pará Convention and the Maputo Protocol). In conclusion, the most important points of the analysis have been summarized and underlined.

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<sup>3</sup> In addition, the “very fact that a female must undergo such a painful and harmful procedure to curtail her sexual desire by making her more appealing to a man is another issue of itself” (Danial, 2013: 5).

<sup>4</sup> Germany has accepted one of the highest numbers of migrants in recent years. Accordingly, the number of genitally mutilated girls/women rose there from 35.715 in February 2015 to 64.812 in December 2017 (Awo et al., 2018: 7). The numbers from 2020 show that around 74.899 women and girls were subjected to FGM (Terre des Femmes, 2020). From 2015 to 2017, the number of girls/women at risk rose from 5.956 to 15.540 (Awo et al. 2018: 7). In 2020, the number was 20.182 (Terre des Femmes. 2020). However, the judicial statistics show a different picture. While in 2020 there was no conviction for the criminal offence from § 226a of the German Criminal Code (*Verstümmelung weiblicher Genitalien – Female Genital Mutilation*) (Statistisches Bundesamt, 2021: 34), in 2021 the number of convictions was – two (Statistisches Bundesamt, 2022: 34). The qualification of this criminal offence as “stigmatizing” for foreigners because it is allegedly implied that the subjugation of women and the control of female sexuality seem to be their typical problems (Sotiriadis, 2014: 339) is, in other words, the fear of being labelled as discriminatory.

## The nature of the crime according to the Istanbul Convention

### *A gendered crime – The actors*

The issue of FGM is situated within the broader frame of violence from the gender perspective. The Convention defines violence against women as “a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life” (Art. 3, lit. a). The notion of gender-based violence against women is understood as “violence that is directed against a woman because she is a woman or that affects women disproportionately” (Art. 3, lit. d) and runs like a thread through the very nature of female genital mutilation.

The drafters of the Convention agreed upon and expressed in the Explanatory Report that all criminal law provisions should be formulated in a *gender-neutral manner*, meaning that the sex of the victim or the perpetrator should not be a constitutive element of the crime.<sup>5</sup> However, this is valid only in principle and is not preventing Parties to introduce gender-specific provisions.<sup>6</sup>

When it comes to FGM, the Convention itself breaks with the principle of gender neutrality, due to the nature of female genital mutilation.<sup>7</sup> The name and the content of the offence define that the victims of this crime are necessarily women or girls. Art. 38 stipulates that the Parties should criminalize the following intentional conducts: a) excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris; b) coercing or procuring a woman to undergo any of the acts listed in point a; c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a.

Gender-based asylum claims (Art. 60) are also explicitly connected to FGM; female genital mutilation and forced marriage are mentioned first when it comes to the gender-related persecution of asylum seekers.<sup>8</sup> In this regard,

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<sup>5</sup> Council of Europe (2011), para. 153.

<sup>6</sup> Council of Europe (2011), para. 153.

<sup>7</sup> Council of Europe (2011), para. 198.

<sup>8</sup> Council of Europe (2011), para. 313.

FGM is an unexceptionally gendered crime. When it comes to the victims, the offence can be described as gender-exclusive.

FGM is a gendered crime with regard to the perpetrator as well, although not in an exclusive manner like in the previous case. In communities where FGM is practised, the ritual is supported by both men and women, usually without further questioning it.<sup>9</sup> Men are rarely present during the intervention (Sotiriadis, 2014: 322). It is very common that elderly, esteemed persons from the community, almost exclusively women, to perform this genital cutting (Small et al., 2020: 469). This may be either a woman "skilled in" and paid for executing this task ("professional cutters") or a female relative, which is one of the explanations for the very high number of unreported cases. In principle, both categories of women that perform the procedure have also undergone FGM and derive their experience and understanding from their own mutilation, as well as from cuttings they have performed in the meantime. Not only has FGM a twofold gender "mark" (as victim/as perpetrator); furthermore, but it happens regularly that the (former) victim transitions into the new role of a perpetrator in a broader sense (transgression), which is also rooted in the patriarchal system.<sup>10</sup> This manifest either in the role of the principal offender when the woman performs FGM or in the role of an accomplice/co-offender who is inciting, coercing or procuring. Yet, due to the absence of understanding of FGM as physical and psychological violence or as a transgression at all, there is no consciousness that they are doing something blameworthy.<sup>11</sup> They are perpetuating the subjugation of the next generations of women, together with the rest of the community. The difference

<sup>9</sup> Out of a modest number of court cases related to FGM, the following can be mentioned in this regard. A case from 2008 concerned the daughter of two Somalis, parents of eight children, and asylum seekers who arrived in 1993 in Switzerland. The girl was cut at the age of two years, done for 250 Swiss francs by a Somali physician in Switzerland. The mother wanted the cutting; the father was against the complete removal of his daughter's external genitalia, asking for a less invasive intervention. They agreed to remove only the clitoris. Both parents were convicted to a two-year suspended sentence. In an interview, the father declared that at that time, it felt "normal" for them to let their daughter be cut (Johnsdotter, Mestre I Mestre, 2015: 17).

<sup>10</sup> Agboli et al. (2022: 7) have underlined in their research that „women used to comply with the social norm as prescribed by patriarchy. (...) Some women described their initiation stage as being taught about their gender roles by the older women who are the guardians of the tradition. They were guided by the instructions from the older women to endure pain and suffering as their accepted fate.”

<sup>11</sup> The term "illegal" would not suffice here, as FGM is not punishable in all countries where it is being performed.

is that they have experienced it and maybe even conducted it. And yet, the community pressure and the desire for respect and reputation seal the unbiased view on FGM. For the mothers, it is important to prove that their daughter is respectable, moral, society conform and - because of this, a marriageable person. For the mother-in-law, her son must get a decent woman that will contribute to the good reputation of the new family (Peller, 2020: 13).

The Istanbul Convention therefore rightly identified various forms of contributions to the crime and integrated them into Art. 38, not just relying on the foresight of national legislators. Furthermore, the Convention contains Art. 41 a separate provision on aiding or abetting and attempting<sup>12</sup> regarding Art. 38 (a). By doing so, the Convention included and made a whole range of participants legally visible (Marković, 2022: 96). What remained invisible or rather blocked out in the picture that the community draws of this custom, aside from the very nature of the cutting, is the aspect of very tangible duress that an intervention has to be suffered through. The nature of the procedure is clandestine, and so is the female body and female sexuality. Only afterwards follows the revelation and the harvesting of the promised advantages of having mutilated genitalia (above all marriageability due to premarital virginity and marital fidelity).

Traditional birth attendants, medical professionals, and even barbers and herbalists can also carry out the act,<sup>13</sup> albeit this happens more seldom. With easier access to medical services, according to some estimates, one in five girls was cut by a trained health practitioner. This phenomenon is called the medicalization of FGM and is the most current emerging issue of this practice (Khosla et al., 2017: 6).<sup>14</sup> Irrespective of the motive on their side for such a medically not indicated intervention, whether to provide a more secure procedure or to simply fulfil the social obligation which was asked for, without

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<sup>12</sup> Art. 41: (1) Parties shall take the necessary legislative or other measures to establish as an offence, when committed intentionally, aiding or abetting the commission of the offences established in accordance with Articles 33, 34, 35, 36, 37, 38.a and 39 of this Convention. (2) Parties shall take the necessary legislative or other measures to establish as offences, when committed intentionally, attempts to commit the offences established in accordance with Articles 35, 36, 37, 38.a and 39 of this Convention.

<sup>13</sup> See UNFPA (2022) *Female Genital Mutilation: Frequently Asked Questions*. Available at: [https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#who\\_performs](https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#who_performs), page accessed 26.11.2022.

<sup>14</sup> The WHO defines medicalization as „situations in which FGM is practised by any category or trained healthcare personnel, whether in a public or private clinic, at home or elsewhere” (WHO, 2010: 2).

questioning it, the issue of the criminal liability of healthcare providers remains,<sup>15</sup> next to the question of the violation of medical ethics while performing unnecessary bodily mutilation.<sup>16</sup> FGM remains harmful to girls and women even when it's carried out by physicians. Medicalization further even reinforces the continuity of the practice by seemingly legitimizing it.<sup>17</sup>

Looking at the other possible actors, the mere fact that also barbers as pure technicians of handcraft or even less qualified herbalists can become involved in such a delicate intervention, shows the unawareness or misconception of its sanitary consequences. Together with medically unskilled (elderly) persons of respect that perform the act, they make up the majority of perpetrators. The cultural, social and partly religious meanings are, hence, dominating and, more importantly, justifying the ritual. And there are, indeed, multiple reasons for undertaking FGM, which are inextricably linked to the issue of gender.

Beyond these immediate participants, the chain of actors disperses in terms of gender. In the end, the whole community delivers the triad of the traditional/cultural/religious elements that form the foundation and ideological legitimization of FGM. The system relies on the implicit consent of every member of the community. This consent is to be understood in sociological, not in dogmatic terms.<sup>18</sup> In order to receive the rewards, parents act within the structures of community hierarchy and allow or fuel the infringement of the physical integrity and autonomy of their daughters

<sup>15</sup> See Marković, 2012: 306-324.

<sup>16</sup> The WHO, as one of the guiding principles, highlights that "medicalization of FGM is never acceptable because this violates medical ethics since (i) FGM is a harmful practice; (ii) medicalization perpetuates FGM; and (iii) the risks of the procedure outweigh any perceived benefit." (WHO, 2016: ix).

<sup>17</sup> See WHO, 1997: 9. Available at: <https://apps.who.int/iris/bitstream/handle/10665/41903/9241561866.pdf?sequence=1&isAllowed=y>, page accessed 28.11.2022.

<sup>18</sup> When it comes to consent in dogmatic terms, it has to be evaluated within medical interventions as justification ground that could exclude the unlawfulness of the crime, if all of the following conditions are met: 1) medical indication, 2) performance of the intervention *lege artis*, 3) consent or presumed consent, and 4) purpose of healing (cure/recovery). When it comes to FGM, at least three of the four conditions are not met, which means that female genital mutilation cannot be justified via medical interventions as a justification ground. Marković, 2022:101. This includes consent, which - to be legally valid, has also to fulfil some criteria, namely: 1) the entitlement to dispose of the respective legal good, 2) a statement of consent, 3) the ability to consent, without defect of consent, and 4) prior informing of the patient („informed consent“). (Marković, 2012: 315). Having in mind that FGM is often performed on babies and girls, none of the criteria are met. The substitution of the girl's consent for her parents' consent is also not valid.

(Christou, Fowles, 2015: 345). Gender-based violence is perpetuated by these circular social structures of power – if an individual is powerful because he/she is a guardian of the traditions, customs and identity of the community then the individual will want the practices to continue (Christou, Fowles, 2015: 345). Later on, this scheme of power is transferred to one's offspring, and the circle continues.

### *A gendered crime – The reasons (justifications) for FGM*

The exact historical roots of female genital mutilation remain unclear. The works of Greek historians and geographers Herodotus and Strabo indicate that female circumcision took place in Ancient Egypt<sup>19</sup> at the time of the Pharaohs (Ofor, Ofole, 2015: 113) (hence another name for type III of FGM is “pharaonic” circumcision), most probably as part of religious ceremonies and rites (Ahmadi, 2013: 43 – 53). They are happening until today in Egypt; a country that is having one of the highest prevalence worldwide.<sup>20</sup>

Various reasons or rather justifications why female genital mutilation is performed exist. What they have in common is the origin that lies in the community; the unawareness, ignorance or rejection of established medical, anthropological, and social arguments against the practice, and the social pressure to respect and follow the traditions and customs.

The reasons are usually roughly categorized as psychosexual, sociological and cultural, hygienic and aesthetic, religious, and socio-economic. Yet, arguments cannot be strictly located into only one category; they overlap and goad each other. In basically all of the mentioned categories and arguments, gender-related (mis)beliefs and (mis)conceptions are the foundation that paves the way for justification in the eyes of FGM practitioners and supporters.

Female genital mutilation is seen as an initiation rite, coming-of-age ritual or passage rite. It marks the transition to womanhood. The sense of belonging is literally interwoven into the removal of external female genitalia; some may call it building of identity to divert from other cultural groups (Christou, Fowles,

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<sup>19</sup> Romans are also said to have performed FGM on their female slaves to prevent pregnancy, by installing rings on the two sides of the labia (Momoh, 2005: 5). Those rings (brooches) were called “fibulae”, marking the etymological root of infibulations (FGM type III).

<sup>20</sup> According to the Egyptian Family Health Survey (EFHS), 86 per cent of Egyptian married women between the ages of 15 and 49 have undergone FGM in 2021. See UNFPA Egypt, available at: <https://egypt.unfpa.org/en/node/22544>, page accessed 1.2.2023.

2015: 346, 347). The mutilation of girls at a very young age or even as babies is falling out of this argument. Rather are the presumed easiness to bear and to forget the pain, avoidance of dissent and an early fitting and adapting to her future role the main motives for cutting newborns, infants and toddlers.

This future role is connected to another alleged characteristic of FGM – the marriageability of the woman.<sup>21</sup> Besides her being cut, she is also introduced to her expected responsibilities as a wife (Ofor, Ofole, 2015: 116), later mother and thus as an accepted (albeit inferior compared to men) member of society (Ofor, Ofole, 2015: 117) (fixed gender roles). An uncircumcised woman cannot marry and is ostracized by her community, tribe and family.<sup>22</sup> Maintaining the virginity of the woman is a precondition for marriage. By her being mutilated, the sexual desire of the woman was curbed, her chastity maintained and thus her and her family's honour preserved. The female body is being treated as an object for a higher collective cause that she if she wants to be part of this community, has to subjugate to.

Suppressing her sexuality functions also as prevention for her to become unfaithful and ensuring the fatherhood of her husband (Braun, Böse, 2020: 567). The uncircumcised woman is altogether seen as an unfaithful, wild, untrustworthy subject that, to deserve the acceptance and the respect of the community needs to let go of parts of her disruptive, raw femininity (some regard it as masculinity)<sup>23</sup> in order to gain a predefined, decent femininity, often synonymous with obedience and submissiveness, like all the generations of women before her. Her sex should be identified. For this, it

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<sup>21</sup> "Woman" is to be understood in a broader term and should include girls, as FGM is often connected with forced and child marriage.

<sup>22</sup> Jomo Kenyatta, the former President of Kenya was quoted: "In the matrimonial relation, the rite of passage is the deciding factor. No proper Gikuyu [ethnic group from Kenya, annotation of the author] would dream of marrying a girl who has not been circumcised, and vice versa. It is taboo for a Gikuyu man or woman to have sexual relations with someone who has not undergone this operation. (...) Their parents have demanded that if their sons wished to settle down and have the blessings of the family and the clan, they must divorce the wife married outside the rigid tribal custom and then marry a girl with the approved tribal qualifications. Failing this, they have been turned out and disinherited." (Mosges, 2009: 5-6).

<sup>23</sup> An Egyptian woman defending FGM was quoted with the following statement: "We are circumcised and insist on circumcising our daughters so that there is no mixing between male and female... An uncircumcised woman is put to shame by her husband, who calls her 'you with the clitoris'. People say she is like a man. Her organ would prick the man." (Mosges, 2009: 18).

is necessary to remove the clitoris and the labia,<sup>24</sup> the “inversed male parts” of her body, to purify her and to help her to become a complete woman. Because not only is she filthy, driven by her libido; her external genitals could hurt the baby during delivery; are unsightly and dirty and need to be cleaned for additional hygienic and aesthetic reasons. The whole narrative is reflected in the respective names of the practice. In Ethiopia, an uncircumcised woman is pejoratively called ‘kintram’ (the one with clitoris) (Mosges, 2009: 18). In Guinea, the term for FGM can be translated to “common help”; in Egypt, the respective word ‘thara’ means to clean/purity (Awo et al, 2018: 5). By attributing positive connotations, the unavoidable painful agony of the procedure as such and the recurrent secondary damages are taken into account; the ideological foundation is enhanced and ready to be passed on; and the idea to criticize a seemingly universal custom becomes surreal.

A paradox seems to occur here. Why would the girl/woman want to distinguish herself from (uncut) women from another group and reinforce her identity if the practice is universal? In their understanding, the practice is ubiquitous indeed, but it is only undergone by the rightful girls/women who have understood their place and function in society (family/clan/tribe). This reinterpretation of the significance of the mutilation and the *reversal* of one’s suffering and lack of rights (equality) into hubris and self-delusion is a pattern that is repeated in other (often religious) traditions as well.

Of course, some women are aware of the physical disadvantages and the pain their daughters suffer but choose to remain pragmatic and enable them to have a good start in society. Either way, the existing system<sup>25</sup> is sustained. *Social power* is the underlying issue here, and a “self-fulfilling prophecy” (Christou, Fowles, 2015: 346). Members of society with influence and power preserve their position by guarding the tradition that gives them power. As Christou and Fowles (2015: 346) have formulated it: “if the practice they guard loses its value to the community, then they will lose the status conferred by their role”.

One of the biggest sources of social power was always *religion* and, in this regard, female genital mutilation is often ascribed to the fastest-growing

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<sup>24</sup> According to a woman from Sudan, “In some countries they only cut out the clitoris, but here we do it properly. We scrape our girls clean. If it is properly done, nothing is left, other than a scar. Everything has to be cut away.” (Mosges, 2009: 17).

<sup>25</sup> Christou and Fowles identified the reasons for upholding FGM and attributed them to three principal parties: *the protector* (senior male members of a community), *the conformist* (women who have undergone FGM) and *the cultural group* (community identity) (Christou, Fowles, 2015: 346-347).

religion in the world, Islam. The fact is that FGM predominantly takes place in countries with Muslim populations and that the countries with the highest prevalence rates are Muslim countries. The fact is, also, that not all Muslims practice FGM and that the custom itself historically predates Islam. However, where it is practised by Muslims, religion is frequently cited as a reason; the mutilation has acquired a religious dimension (Mosges, 2009: 15).<sup>26</sup> The Quran is void of reference to FGM. Other sources of Islamic Law (Sharia), and the hadith (traditions, *sunna*) do entail links to FGM. The most quoted one is about Umm Atiya al-Ansariya reporting about a woman that was performing circumcisions in Medina and Muhammad told her: "Do not cut severely as that is better for a woman and more desirable for a husband" (Al-Awa, 2019: 2). Another hadith is attributed to Muhammad saying "A female circumcision is an act of sunna for men and an honourable act for women" (Al-Awa, 2019: 3). Because the hadiths don't require female mutilations, the third source of Sharia, juridical consensus, will be consulted. The Islamic schools of jurisprudence, however, have different opinions on FGM,<sup>27</sup> and this is the reason why this issue remains a grey area.<sup>28</sup>

Lastly, as arguments pro-FGM, *economic motives* also play a role. One of the main driving forces – marriage, is not an option for the girl/woman, but a means for survival in times when economic security, social status and respect

<sup>26</sup> In Malaysia, FGM is termed *wajib*, meaning a religious obligation, ordered by Allah (Awo et al, 2018: 5).

<sup>27</sup> See Wüstenberg, 2006: 827. "No matter what Islamic school the girl (her parents, annotation of the author) may tend to, the right of the physical integrity of the child comes always before freedom of religion; the Hippocratic oath is valid for all people and who prioritizes the Sharia is liable to prosecution", he annotates under the subsection title "Basic Law (Constitution, annotation of the author) instead of Sharia".

<sup>28</sup> The Islamic Central Council of Switzerland (Islamischer Zentralrat Schweiz, IZRS) has under the subtitle "The difference between FGM and the sunna-cutting", classified type I of FGM (removal of the clitoral prepuce) as a "moderate, in the Islamic normativity anchored" variant of FGM. The question was not whether it is allowed or not, but whether it is a recommendation (*sunna*) or an obligation (*wajib*). The Council concluded that there is not one Islamic school of jurisprudence, that has not categorized female circumcision at least as sunna (recommended). As a legal notice on their website from 2018, it is further annotated that "due to the legal bans of FGM in some countries, including Switzerland, and the ambiguity regarding the sunna-cutting [type I FGM, I.M.], it is advised to get council from a specialist before taking the intervention into consideration." See Islamischer Zentralrat der Schweiz. Available at: <https://www.izrs.ch/fatwa-wie-ist-das-islamische-urteil-ueber-die-beschneidung-der-frau.html>, page accessed 1.12.2022. Female genital mutilation is a criminal offence in Switzerland since 2012 (Art. 124 *Verstümmelung weiblicher Genitalien* – Mutilation of female genitalia). It includes all forms of FGM.

from society are linked to marriage and reproduction (Mosges, 2009: 6). The socio-economic survival of women lies in the hands of men; first their fathers, then their husbands (Finke, 2006: 14). Socio-economic factors are also the higher bride prices for mutilated women (Boyd, 1998: 36) if she marries at all, as well as the fees the (professional) cutters receive and makes a living out of it.<sup>29</sup>

The creators of the Istanbul Convention had these issues in mind when they proclaimed Art. 42 - Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour". There, namely, it is stated that: 1) Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour; 2) Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.

In other words, acts covered by the text of the Convention (FGM included) cannot be justified by reasons based on culture, custom, religion, tradition or honour. This means that all of the mentioned arguments listed in favour of FGM are invalid.

## **Other international law instruments**

We can put the Istanbul Convention and its provisions on FGM in the broader context of international law and its instruments. Two such instruments are the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) from 1994 and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) from 2003.

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<sup>29</sup> An additional economically-driven argument in favour of this practice is that the aforementioned "professional cutters", who perform the procedure, rely on this earning. As FGM is very often practised in developing countries, this means that the whole community indirectly also benefits from this source of income. However, as the victims of this practice usually come from the same community, the argument for additional revenue is actually redundant.

The Belém do Pará Convention is a historic agreement as it was the first intergovernmental convention – a forerunner that directly addresses violence against women. In Article 1 of the Convention, violence against women is defined as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.” Consequences that are covered are physical, sexual and psychological harm, as well as suffering. Also, the environment in which the violence takes place includes both the public and, for this issue of higher relevance - the private sphere. The provision does not explicitly mention FGM. Yet it falls under Article 1 – the conduct is *per se* based on gender; it causes all three forms of harm and suffering (short- and long-term) and is usually done in the private sphere, with incentives coming from the public (community) and the family. However, the question that arises is whether this provision from the Belém do Pará Convention is too general to indicate the necessity to criminalize concretely FGM in national legislation. In addition to Article 1, in Article 7, lit. e it is stated that the state parties have agreed, to “take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women”. They have furthermore agreed to “adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity” (Article 7, lit. d).

The Maputo Protocol, on the other hand, is more specific when it comes to FGM. In Article 2 (1) lit. b it is stated that the Parties should “enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination, particularly those harmful practices which endanger the health and general well-being of women”. Harmful practices are defined as “all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity” (Article 1, lit. g). The elimination of these practices is stipulated in Article 5 of the Protocol, including “prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization<sup>30</sup> of female genital mutilation and all other practices in order to

<sup>30</sup> Para-medicalization means the mutilation to be performed by employees who have no formal medical training or clinical knowledge (Kimani, Shell-Duncan, 2018: 26).

eradicate them” (lit. b). Compared to the Istanbul Convention, the Maputo Protocol explicitly regulates medicalization and para-medicalization. The downside is that the Protocol does not contain a definition of female genital mutilation. It also does not include forms of participation like Articles 38 and 41 of the Istanbul Convention. A major current downside is also the fact that countries with the highest prevalence rates of FGM have either only signed (Somalia, Sudan) or have not even signed (Egypt) this human rights instrument. Yet, there are also positive examples of its impact, coming from legal practice.

In a very recent landmark case from Kenya (*Tatu Kamau v. Attorney General*),<sup>31</sup> not only did the judges refer to the Maputo Protocol several times. Other FGM-related issues (terminology, consent, scope of criminal zone, medicalization) were covered as well. On March 17, 2021, the Constitutional Court in Kenya confirmed the constitutionality of the Prohibition of Female Genital Mutilation (FGM) Act (No. 32 of 2011). The petitioner, Kamau, a (female) medical doctor, contested the constitutionality of the Articles 2, 5, 19, 20 and 21. Article 2 defines, amongst others, female genital mutilation; Article 5 establishes the functions of the Anti-FGM Board, designed to end FGM on behalf of the Kenyan government; while Articles 19 to 21 criminalize FGM (offence of FGM, aiding and abetting FGM, and procuring to perform FGM in another country). Not only did the three judges decide that the respective Act was not unconstitutional, but they also clarified the following: the term “female genital mutilation” is internationally accepted, signifying and reinforcing the point of difference in relation to male circumcision (para. 127); the hypothesis that anyone above the age of 18 undergoes FGM voluntarily is “far from reality” (para. 135); all FGM survivors “disclosed devastating immediate, short-term and long-term effects” (para. 137); the purposes of FGM were “community culture-centred and not individual benefit centred” (para. 145) and “medicalization (...) does not mitigate harm” (para. 141). Furthermore, the three judges have even spotted a lacuna in the respective Act – the absent criminalization of type IV FGM, impeding the effective enforcement of the FGM prohibition (paras. 105-107).

In another case from Kenya (*Katet Nchoe & Ano v. Republic*) from 2011, the court vividly held that “FGM is certainly harmful to the physical and no doubt psychological and sound well-being of the victim. It may lead to

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<sup>31</sup> Constitutional Petition 244 of 2019 (Formerly Machakos High Court Petition 8 of 2017), *Tatu Kamau v. Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae [2021] eKLR*. Available at: <http://kenyalaw.org/caselaw/cases/view/209223/>, page accessed 30.1.2023.

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childbirth complications, in this case, it led to the premature death of a teenager. That kind of custom could be truly well discarded and buried in the annals of history, just as we no longer remove our 2, 4 or 6 teeth from our lower jaw, or adorn our faces, and cheeks with healed blisters."<sup>32</sup>

## **Conclusion**

When speaking about the nature of female genital mutilation in the Istanbul Convention and other international documents, the following can be summarized and underlined.

All of the mentioned documents locate FGM within the violence against women. Due to its goal and comprehensiveness, this is especially evident for the Istanbul Convention. Here, not only is violence against women and gender-based violence defined; the same has been done for FGM, which is regulated in Art. 38. Its gender-centrism reflects the very nature of this harmful practice, and is reflected with regard to the actors (both the perpetrator, as well as the victim), and the reasons (justifications) for FGM. Furthermore, the exclusiveness regarding the sex of the victim makes it an even more gendered crime than forced marriage (Marković, 2022, 105-106). The only criminal offence from the Istanbul Convention that is similar in its gender uniqueness is forced abortion.<sup>33</sup>

When it comes to the alleged arguments in favour of this practice, the Istanbul Convention has formalized their rejection through Art. 42 (Unacceptable justification for crimes, including crimes committed in the name of so-called 'honour').

The predecessors to the Istanbul Convention – the Belém do Pará Convention and the Maputo Protocol also entailed the classification of the nature of FGM, although not as specific as the Council of Europe Convention on preventing and combating violence against women and domestic violence. The Belém do Pará Convention rightly included both the public and the private sphere, as well as deterrent measures. The Maputo Protocol located FGM within harmful practices called for their elimination and mentioned explicitly the issues of

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<sup>32</sup> Katet Nchoe & Ano v Republic, High Court Nakuru, Consolidated Criminal Appeals Nos. 115 & 117 of 2010 [2011] eKLR. Available at: <http://kenyalaw.org/caselaw/cases/view/74018/>, page accessed 30.1.2023.

<sup>33</sup> See Art. 39 of the Convention.

medicalization and para-medicalization, which do not alter the nature of FGM as violence against women. On the other side, the Protocol does not contain a definition of FGM, nor other additional questions (e.g. that of participation). It was, however, explicitly referred to in the recent landmark case of *Tatu Kamau v. Attorney General from Kenya*, in which many of the (mis)beliefs regarding the nature of FGM have been proved wrong and anachronistic.

To conclude: No matter how many cultural, religious or pseudo-medical reasons and justifications are listed; from a human rights and feminist point of view, the practice of female genital mutilation is directly based on social power, asymmetrical gender relations (Finke, 2006: 14), and the submission and control of female sexuality (Sotiriadis, 2014: 323). From the perspective of criminal law, it is undoubtedly grievous bodily harm,<sup>34</sup> for which no justification ground is applicable.

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<sup>34</sup> Therefore, the newly introduced crime of the mutilation of female genital organs from Art. 121a in the Serbian Criminal Code is rightly following the crime of grievous bodily harm, systematized within Charter Thirteen – Offences against Life and Limb.

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IVANA MARKOVIĆ\*

## **Priroda ženskog genitalnog sakaćenja prema Istanbulskoj konvenciji i drugim međunarodnim instrumentima**

Predmet ovog rada je priroda sakaćenja ženskog polnog organa (female genital mutilation – FGM), kao izrazito rodno fokusirane, štetne prakse, koja je u međuvremenu formalizovana kao krivično delo (kriminalizovana). Posebno je u tom pogledu značajna Istanbulska konvencija, koja se može označiti kao pokretač ovakvog pravnog razvoja. Ali i mimo toga, ova Konvencija, kao i Međuamerička konvencija o prevenciji, kažnjavanju i iskorenjivanju nasilja nad ženama (Belém do Pará konvencija) i Protokol Afričke komisije za ljudska prava i prava naroda o pravima

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\* Dr Ivana Marković je docentkinja na Pravnom fakultetu Univerziteta u Beogradu. E-mail: [ivana.markovic@ius.bg.ac.rs](mailto:ivana.markovic@ius.bg.ac.rs).

žena u Africi (Maputo protokol) pre nje, definisali su i locirali prirodu FGM unutar rodno zasnovanog nasilja (nasilja nad ženama). Time su ranija (pogrešna) uverenja i pokušaji legitimisanja ove prakse na osnovu kulturnih, socijalnih ili verskih razloga naglašeno zastarela i neprihvatljiva. Cilj ovog rada jeste da predstavi prirodu sakaćenja ženskog polnog organa u sklopu pomenutih instrumenata.

**Ključne reči:** žensko genitalno sakaćenje, priroda zločina, rod, Istanbulska konvencija, Belém do Pará konvencija, Maputo protokol.