



Female Genital Mutilation in Europe: An analysis of court cases

Report prepared by
Sara Johnsdotter
Ruth M. Mestre i Mestre

This report was financed by, and prepared for the use of the European Commission, Directorate-General for Justice and Consumers, Unit D2 "Equality between men and women", in the framework of a contract managed by Fondazione Giacomo Brodolini (FGB) in partnership with Istituto per la Ricerca Sociale (IRS).

The information and views set out in this report are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this report. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.



FGB - Fondazione Giacomo Brodolini

Via Solferino 32
00185 Rome
Italy
Tel +39 064424 9625
Fax +39 0644249565
www.fondazionebrodolini.it



IRS - Istituto per la Ricerca Sociale

Via XX Settembre 24
20123 Milano
Italy
Tel. +39 2467 641
www.irs-online.it




Europe Direct is a service to help you find answers
to your questions about the European Union.

Freephone number (*):

00 800 6 7 8 9 10 11

(*): Certain mobile telephone operators do not allow access to 00 800 numbers or these calls may be billed.



FEMALE GENITAL MUTILATION IN EUROPE: AN ANALYSIS OF COURT CASES

Report prepared by
Sara Johndotter
Ruth M. Mestre i Mestre



Table of Contents

Summary	5
1 Introduction	7
1.1 Aims of the overview	7
1.2 Organisation of the report	8
2 Methods	9
2.1 Selection of countries	9
2.2 Template for data collection	9
2.3 Analysis	10
2.4 Limitations	10
3 Legal context	11
3.1 Due diligence standard	11
3.2 The process of FGM reporting	14
4 Criminal court cases	16
4.1 'Typical' vs. 'atypical' FGM cases	16
4.2 Court cases: Countries in which FGM was performed	18
4.3 The type IV question: the limits of FGM legislation and conventions	20
5 Examples of novel approaches in prosecution – and prevention	22
5.1 Error of prohibition	22
5.2 Neglect of care	23
6 Identified cases that do not reach conviction	28
7 Rumours	30
8 Reasons for not reporting	32
9 Immigrant communities at risk of FGM	35
10 Policy suggestions	36
11 Summary and conclusions	40
References	43
Appendix 1: Country experts	47
Appendix 2: Instructions to Country Experts	48
Appendix 3: WHO classification of FGM	50

Summary

This study develops a comparative overview of recent FGM(Female Genital Mutilation) court cases within the EU, as well as an exploratory survey of transnational movements in relation to FGM. The legal aspects of 20 recent criminal court cases in Europe are analysed, and evidence about transnational movement to have FGM performed is assessed. The report is based on data collected by country experts in eleven European countries. Data include court decisions, migration background of groups from FGM-practising countries in the host countries, the process of FGM-reporting, and stakeholders' proposals and opinions regarding FGM.

The report addresses the general legal context or framework to fight FGM in the eleven countries, and it briefly analyses the impact that the embracing of the *due diligence* standard could have, as a consequence of the signature of the Istanbul Convention by all the countries in the report. A finding of our study is the fact that the responses given by different countries to FGM are modelled by disparities of public prosecution systems in Europe. Calling upon state parties to apply the Istanbul Convention and accordingly modify existing provisions that limit their jurisdiction over FGM cases (art. 44) could have an impact on such procedural disparities, although further research is needed in this area.

The review of existing court cases shows the legal concepts of 'error of prohibition' and 'neglect of care' as novel approaches for both prosecution and prevention of FGM in Europe. As a consequence, the report points out that these aspects (due diligence, neglect of care, and error of prohibition) ought to be further explored in future discussions, not primarily for their potential to result in more criminal court cases of conviction, but because of their potential power as preventive tools.

In the analysis of collected data, we distinguish between 'typical' and 'atypical' cases, provide examples of those categories, and discuss what the criminal court cases tell us about the geography of illegal FGM activities among migrants in European countries. A strong tendency in the data is that rumours about a transnational movement to have FGM carried out state that girls are brought to their countries of origin to undergo FGM. This situation is reflected in court cases: although FGM has been carried out in France, Italy, Switzerland, and possibly in Spain, a majority of criminal court cases regard FGM performed in African countries.

As for the process of reporting suspicious, pending, or performed FGM cases, most countries establish for professionals a duty to report. However, there are conflicting interpretations of such duties between legal operators and lay people, provoking practical difficulties and ethical dilemmas.

Country experts collected possible reasons for the scarcity of reported suspected cases within the EU. Amongst the reasons stated by stakeholders in the different countries, the two more important were lack of first-hand information and fear of disproportional measures (such as parents under arrest and institutionalisation of children). Children at risk of FGM are not in abusive environments, but the system responds as if that were the case.

As for the policy suggested, the report briefly discusses the legal and ethical implications of some of the stakeholders' suggestions. For instance, a valuable suggestion is the idea of creating incentives to report by offering better service provisions for affected women and girls. This suggestion tries to counterbalance the idea many professionals have that reporting will only make things worse for the affected family, as special services and provisions are not in place. Access to services or rights would not rely on the willingness of victims themselves to cooperate or report but on the establishment of a system of services that professionals can use when reporting such cases. A stronger emphasis in awareness-raising campaigns among professionals and communities, on medical and social support for affected girls and women would possibly strengthen as well the incentive to report.

The report identifies several areas where further research is needed. One such area is processes of social and cultural change as regards views and practice of FGM among immigrants from FGM-practising countries. A future key question is how legislation, policies, and preventive efforts can speed up the processes of abandonment of FGM among immigrant communities in Europe.

1 Introduction

The European Commission is making efforts to eliminate the practice of Female Genital Mutilation (FGM), also called Female Genital Cutting (FGC), or Female Circumcision (FC). In November 2013, the Communication 'Towards the elimination of FGM' (COM (2013) 833) was adopted. It has a strong focus on prevention, and also promotes a better support to EU member states in prosecuting FGM more effectively. Among the measures suggested in the communication is the action 'analyse criminal laws and court cases related to FGM'.

The European Commission asked The European Network of Experts on Gender Equality (ENEAGE) to collect and analyse existing FGM court cases, and also to collect accounts of transnational movement within the EU to carry out FGM. ENEAGE appointed Sara Johnsdotter, professor of Medical Anthropology at Malmö University, Sweden, and Ruth M. Mestre i Mestre, professor of Philosophy of Law and member of the Human Rights Institute at Valencia University, Spain, for the task. Both Johnsdotter and Mestre i Mestre (hereafter called 'the project leaders') have extensive experience doing research on FGM at an EU level.

1.1 Aims of the overview

The recent reports from the European Institute for Gender Equality (EIGE 2013a, 2013b)¹ are the starting point of this research review, whose aim was twofold:

- to make a comparative overview of recent FGM court cases within the EU;
- to make an exploratory survey of transnational movement in relation to FGM.

Less than fifty court cases exist in Europe, and a majority of them took place in France in the 1980s and 1990s. The overall objective of this study was to explore the legal aspects of existing court cases, focusing on recent ones, and to assess evidence about transnational movement to have FGM carried out. Twenty court cases were analysed in this report.

1 The publication *Female genital mutilation in the European Union and Croatia – Report* (2013a) by the European Institute for Gender Equality (EIGE), including the supplement with country reports (2013b), is an extensive compilation of FGM-related data from all EU member states. The reports cover legal frameworks, national policies, prevalence estimates, child protection routines, and provision of services to girls and women who have been subjected to FGM.

1.2 Organisation of the report

In Chapter 2, we describe the methods used in this overview, the criteria for the selection of countries, the template for data collection in the eleven European countries, the questions guiding our analysis, and the limitations of this study.

In Chapter 3, we present the legal context within which our discussion is situated, including the concept of ‘due diligence standard’. We briefly describe salient recent legislation or modifications regarding FGM in the eleven countries and give an overview of FGM reporting processes in the various countries.²

In Chapter 4, we discuss the criminal court cases that have taken place in Europe. We distinguish between ‘typical’ and ‘atypical’ cases and provide examples of those categories, and also discuss why stating exact numbers is difficult. Further, we discuss what the criminal court cases tell us about the geography of illegal FGM activities among immigrants in European countries, and we discuss briefly why Type IV of FGM presents a problem in law enforcement.

In Chapter 5, we discuss how the legal concepts of ‘error of prohibition’ and ‘neglect of care’ present novel approaches for both prosecution and prevention of FGM in Europe, based on our analysis of existing court cases.

In Chapter 6, we introduce the category ‘identified cases that do not reach conviction’, and argue that this is an important category in future research.

In Chapter 7, we present the data on rumours from the country reports and discuss the tendencies. This section also includes a presentation of reasons stated for not reporting, as well as more general reflections on why FGM reports are so relatively scarce in European countries.

Chapter 8 is a brief section about the immigrant communities in the eleven countries. We present the difficulties in drawing any conclusions about the criminal court cases and rumours in relation to specific ethnic communities.

In Chapter 9, we present policy suggestions that were introduced by interviewees and country experts. These are sorted into those of more general nature and those that aim specifically at counteracting transnational movement to have FGM carried out.

Finally, in Chapter 10, we conclude by summarising the findings and emphasising some of the policy suggestions.

² For a systematic and detailed overview of FGM-related legislation in all of EU's member states, see EIGE (2013a, 2013b).

2 Methods

Starting in the summer of 2015, eleven country experts (in ten EU member states and Switzerland) collected data in their respective countries. Their data collection spanned over several months in phases, during which the project leaders had the opportunity to ask about clarifications regarding continuously submitted data. All of the country reports were finalised by October 17, 2015.

2.1 Selection of countries

Countries were selected by the project leaders based on prior knowledge about court cases and the existence of rumours in the various countries. Data from EIGE's reports from 2013 were helpful in the selection of countries to be included in this review. Some countries were selected because they had criminal court cases regarding FGM; others were chosen because of reported existence of rumours. Switzerland made an interesting addition: it is outside of the European Union and yet at the heart of Europe. Being a non-EU member state, it is seldom included in analyses of FGM policies. Given that Switzerland had FGM court cases, it was of special interest to have this country included in the analysis.

The countries selected were Austria, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland, and the UK.

2.2 Template for data collection

The country experts (see Appendix 1) received instructions on what data to collect. (For a detailed version, see Appendix 2.) The following themes were covered in the template:

1. Criminal court cases

- 1a. Principle of extraterritoriality regarding FGM.
- 1b. Criminal court cases regarding FGM.

2. Relevant immigrant groups

- 2a. Immigrant groups affected by FGM in their countries of origin.
- 2b. Migration backgrounds of these groups.

3. Regulation of the duty to report suspected, planned, or performed FGM

Legal instructions for citizens when it comes to reporting suspected cases of FGM to the police and/or child protection services.

4. Rumours about transnational movement to have FGM performed

Rumours about performed but unreported FGM (in host country, another European country, country outside of Europe) and the context of the rumours in as much detail as possible.

Regarding the criminal court cases, original court decisions were requested from the country experts in cases where the country report did not clearly state the grounds for conviction or acquittal. These original court decisions were in all cases intelligible to at least one of the project leaders (written in English, the Romance languages, or the Scandinavian languages).

2.3 Analysis

The project leaders were responsible for the final analysis of the data collected in the eleven countries. Themes guiding the analysis included:

- Comparative analysis of the legal aspects involved in criminal court cases in the EU
- member states and Switzerland;
- Contextual information about the immigrant communities at risk of FGM;
- The process of FGM reporting, and how it is influenced by national legislation;
- The issue of transnational movement contributing to the practice of FGM.

The analysis, furthermore, aimed at exploring whether conclusions drawn from this overview would generate suggestions for future policies at the EU level.

2.4 Limitations

In this research review, we were not able to fully handle the various cultural contexts in the eleven countries; cultural contexts that would presumably affect the breeding ground for rumours, have an effect on willingness to report among professionals and communities, or impact community members' inclination to persist in upholding this cultural practice or their susceptibility to cultural change.

In the same line of reasoning, this report does not focus on the national legal cultures that have an impact on processes of FGM-reporting, on how the law is interpreted and enforced, or which institutions are mainly responsible for certain legal actions. It was possible for the country experts to reproduce existing legislation regarding duty to report FGM but outside of the scope of this study to investigate how those provisions are played out in practice and how different laws harmonise (e.g., legislation on professional confidentiality vs. legislation on duties to report crime). A deeper analysis of these complex processes of FGM-reporting within the specific legal context of each country, or an in-depth mapping of how professionals and other citizens *interpret* this legislation and *act* on basis of their understanding of the law in each country, could be an important step in future research.

3 Legal context

In all eleven countries, FGM is legally banned, either through specific criminal provisions (Austria, Denmark, Italy, Spain, Sweden, Switzerland, the UK) or through provisions in the Penal Code that penalise bodily injury and mutilation (Finland, France, Germany, the Netherlands). In addition, all countries have legislation in place regarding extraterritorial jurisdiction (the principle of extraterritoriality), i.e., the possibility to undertake legal proceedings, under certain conditions, when the act is committed outside of the country that opens a legal process. Also, all countries have removed the principle of double incrimination, making it possible to take proceedings even in case the act of FGM is not criminalised in the country where it is committed.

In this report, we will introduce the concept of ‘due diligence’ into the discussion about FGM at an international level, as has been suggested by, among others, the Council of Europe.³ Due diligence standard is about states’ positive obligations (that is, their duty to undertake clear actions) to protect human rights. In this case, we lean on the fact that all of the eleven countries in this overview have signed the *Istanbul Convention* and thereby these states pledge themselves to adapt their national legislation in the field of FGM to the provisions stated in the Convention.

3.1 Due diligence standard

The concept of ‘due diligence’ regarding state responsibility for non-state acts of violence has become a customary human right standard in international law since its emergence in the Inter-American Court of Human Rights.⁴ The due diligence standard, as declared by DEVAW (1994),⁵ refers to the obligation of states to ‘pursue by all appropriate means and without delay a policy of eliminating violence against women’, including ‘due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the state or by private persons’.

In 2006, UN officially endorsed the due diligence standard as a tool to fight violence against women, and recent rulings of the European Court of Human Rights⁶ have developed the meaning and scope of the due diligence standard in what regards

3 *The Istanbul Convention: A Tool to End Female Genital Mutilation*. The Council of Europe and Amnesty International, 2014.

4 See the Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). For an excellent account of the emergence and development of the standard, see Hasselbacher (2010).

5 Declaration on the Elimination of all forms of Violence Against Women, U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

6 Case of Bevacqua and S. v. Bulgaria (Application n. 71127/01, ECHR 2008) and Opuz v. Turkey (Application n. 33401/02, ECHR 2009).

the state's positive obligations to prevent, protect, prosecute and redress violence against women, considering the failure to meet due diligence in the fight against violence as a form of gender-based discrimination.

In 2011, the Council of Europe promoted the signature of the *Convention on preventing and combating violence against women and domestic violence*, known as the *Istanbul Convention*, with its own monitoring mechanism, the GREVIO.⁷ The Convention establishes as its first purpose to protect women against all forms of violence, and prevent, prosecute, and eliminate violence against women and includes the *due diligence standard* in art. 5.2:

Art. 5. State obligations and due diligence

1. Parties shall refrain from engaging in any form of violence against women and ensure the State authorities, officials, agents, institutions and other actors acting on behalf of the state act in conformity with this obligation

2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors.

The *Istanbul Convention* develops a framework for combating all forms of violence against women departing from this standard and the four duties that it imposes. It applies to all forms of violence within the scope of the Convention and specifically covers FGM in art. 38.

Art. 38. FGM

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

- **a** excising, infibulating or performing any other mutilation on 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 a⁸

The Convention provides the general obligations of the duty to prevent,⁹ protect and support; investigate, prosecute and judicially protect as well as provide effective access to justice. Aiding or abetting and attempting the commission of the offence

⁷ This is not the first action undertaken by the Council of Europe regarding gender-based violence. See, for example, the recommendation adopted by the Committee of Ministers of the Council of Europe in 2002 regarding the protection of women against violence.

⁸ Please note that the *Istanbul Convention* covers FGM Types I to III of the WHO classification (Appendix 3 of this report).

⁹ I.e., art.12. 1 *General obligations*. Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.

in 38.a must also be considered an offence and these acts cannot be justified as cultural, religious, customary or other. The *Istanbul Convention* establishes the duty to ensure that state jurisdiction covers all the offences, and in particular, for FGM it states that the state should make sure its jurisdiction covers offences committed within the territory of the state, by one of her nationals or by a person that has his or her habitual residence in the territory; as well as when the offence is committed against one of their nationals or a person who has his or her habitual residence on their territory, whether or not the act is criminalised in the territory where they were committed (art.44¹⁰). This means that the principle of extraterritoriality of all the states analysed should cover acts committed abroad **by** a national or resident **or to** a national or resident. Even if all countries had not eliminated the double incrimination as a result of European Parliament recommendations in 2001 and 2009, the *Istanbul Convention* has had direct impact on recent legislative modifications.

EIGE (2013) pointed out the fact that Germany did not extend its jurisdiction to national or permanent resident victims that were harmed abroad by a non-national or a non-resident. According to the *Istanbul Convention*, this would be a failure in the due protection or the due diligence standard. In 2015, Germany modified the Criminal Procedural Code so as to include within the jurisdiction of the State offences committed abroad against the person, including FGM, when the offender or the victim is a German national or resident.¹¹

A second example of this direct impact is the Spanish legislation. In March 2014, a Spanish law restricting the scope of extraterritorial jurisdiction of the State was passed;¹² but the Supreme Court confirmed in an FGM case that Spain had jurisdiction over FGM and the international responsibility to persecute FGM in spite of the 2014 Act,¹³ because Spain had signed the *Istanbul Convention* – requiring states to prosecute FGM regardless of the place of the commission of the crime.

The last example would be a Spanish court decision declaring that FGM performed before arriving in Spain when one of the custodians has long residence, is an offence committed by a resident (in this particular case, a person living in Spain since ten years) that cannot be exempted under error in prohibition (that is, not knowing that something is prohibited).¹⁴ Spain has thus enlarged its jurisdiction to protect girls that are *not yet* in European territory. According to the *Istanbul Convention* this is

10 Art. 44- Jurisdiction

1. Parties shall take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention when the offence is committed:

a in their territory; or

d by one of their nationals; **or**

e by a person who has her o his habitual residence in their territory

2. Parties shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance to this Convention where the offence is committed against one of their nationals or a person who has her or his habitual residence in their territory. (Emphasis added)

11 Under § 7 ‘Offences committed abroad – other cases’, female genital mutilation is applicable and punishable under the German law. A recent amendment (01.2015) of § 5 ‘Offences committed abroad against domestic legal interests’ now includes article 9a ‘Offences against the Person’ (a) and (b) with specific reference to § 226 ‘Causing grievous bodily harm’ and § 226a ‘Female genital mutilation’. [Country report, Germany]

12 L.O. 1/2014 on the modification of the Judiciary act 6/1985.

13 Sentencia del Tribunal Supremo (Supreme Court Decision) STS 2750/2015 de 26 de Mayo.

14 Sentencia del Tribunal Supremo (Supreme Court Decision) STS 835/2012 de 31 de Octubre.

correct although general principles of criminal law require that the parents participate with clear incriminatory acts.

3.2 The process of FGM reporting

The general feature of legal provisions to regulate reporting in the eleven countries is that *professionals* in most countries have a duty to report suspicions of FGM, pending or performed. The exception seems to be Germany, where doctors have a right but not a duty to report (EIGE 2013b).

England and Wales have new regulations on reporting with their 'Serious Crime Act 2015', launched during the fall.¹⁵ According to these regulations, professionals within the health care, social care sectors, and the school sectors (teachers) have a duty to report to the police when they have firm reasons to believe that a girl has been subjected to FGM.

The Netherlands has a system that stands out in a cross-country overview. There, professionals have a right, but not a duty to report. Instead, they have a compulsory reporting code, which implies that they are obliged to assess the case and take action – whether or not they finally make the decision to report to the police or the child protection authorities. The reasons behind this policy is explained thus:

'Most actors consider that a duty to report would not lead to more reported FGM cases. The actors working directly in the field such as health professionals and key persons from the communities are clearly against a duty to report. Health professionals indicate that a duty to report might make patients reluctant to provide information, which would inhibit the possibility to provide medical care. Key persons from communities believe a duty to report would make communities much less open to preventive measures. Actors working more at the policy level are less strictly against a duty to report but believe that it would be counterproductive because there is too much resistance from both professionals and the communities. For this reason it was decided to implement a compulsory reporting code instead of a duty to report' (Country report, The Netherlands).

In all countries, citizens are encouraged to report to the child protection services any knowledge about a child at risk of abuse. Some countries – such as Spain and Sweden – have imposed, on *citizens in general*, a duty to report to the police when they have knowledge about pending FGM; that is, a duty to report crime when danger is imminent.

It is important to consider the difference between existing legislation on duty to report, and how it is interpreted in practice. There may be considerable differences between legal experts' and lay peoples' interpretations. This discrepancy may be manifested in ways that either encourages or discourages reporting: professionals may breach confidentiality when they have no legal right to do so (for example, before the Swedish legislation in 2006 made possible breach of confidentiality in all suspected FGM cases, social workers notified the police systematically, believing they had the right to do so; see Johnsdotter 2004) – or they may be held back because they do not realise that the existing legislation forces them to file reports when they face a suspected case. This situation is reflected, for instance, in the

¹⁵ *Mandatory Reporting of Female Genital Mutilation*, Home Office, 2015.

German country report, in the section about interviews: 'there are different opinions about duty to report'. In short, the different regulations on duty to report in the various European countries need to be clearly communicated to the professional bodies, in order to minimise the room for conflicting interpretations of this duty and the ethical dilemmas that arise.

4 Criminal court cases

All countries reporting FGM criminal court cases in EIGE (2013b) were included in this overview. We asked country experts to follow up already reported cases and, furthermore, to investigate into whether there were any new or pending criminal court cases in their respective countries.

We have systematically assessed the grounds for conviction and acquittal in these court cases. Whilst for a certain time, defendants could support the parents' dismissal of charges on the basis that it was the grandmother or another person in the country of origin who had supported and facilitated the performance, most jurisdictions now consider that without the participation of parents in some way, the FGM would have never occurred. For instance, the UK has sanctioned the assistance to mutilate overseas a girl's genitalia. On the other hand, where defences have tried to obtain the acquittal of parents by claiming 'error in prohibition', courts have not accepted it fully. In general, judges do not argue for the dismissal of parental responsibility, Italy being the only country where a court has held a cultural defence to acquitting parents; that is, the cultural justification as means for acquittal.

4.1 'Typical' vs. 'atypical' FGM cases

Presenting an overview of European FGM court cases in a table is difficult. Too many cases do not fit into the stereotypical idea of the circumstances of an FGM crime, in various ways. Depictions of FGM in the mass media have created expectations of what takes place when girls are cut, and many court cases in Europe do not fit this stereotypical image.

A 'typical' case would be a court case that took place in Italy in 2006. A woman of Nigerian origin was caught red-handed just about to perform the act on a baby in a house in Italy:¹⁶

The case regards a Nigerian woman, G.O., who was caught while she was about to perform FGM for 300 euros against a 20-day-old girl. The telephone of the woman had been kept under surveillance and the criminal police tapped a call with the father of the infant concerning the operation. G.O. had been tailed and was arrested in the house of the parents arrested, in Verona. At the moment of the arrest she was equipped with all the surgical instruments required for the surgery (scissors, gauze, surgical spirit, Lycodine and syringes). This circumstance, together with the registration of the call, furnished the evidence of responsibility.

[Country report, Italy]

¹⁶ Tribunale di Verona, sent. 14.4.2010, n. 979 that was then decided on appeal at Corte d'appello di Venezia, sez. II penale, sentenza 23/11/2012, n. 1085.

Further, one of the court cases in Switzerland can be seen as a ‘typical’ case:¹⁷

In 2008, a couple of Somalis, parents of eight children born in Switzerland, who arrived in 1993 as asylum seekers, were convicted for FGM (type Ib, removal of the clitoris) of their elder daughter in 1996, aged two when she was cut. It was performed by a Somali physician who was temporally in Switzerland. He was paid 250 Swiss francs and performed the procedure under local anaesthesia on the kitchen table. No post-surgical complications followed.

The cutting was desired by the mother. The father was against the complete removal of his daughter’s external genitalia, arguing for a symbolic intervention. Therefore, they both agreed on (only) the removal of the clitoris. During an interview with the media, the father declared that, at that time, it felt ‘normal’ to them to let their daughter be cut.

The parents received a two-year suspended prison sentence by the Cantonal Court of Zurich for having encouraged FGM (Article 24, the Swiss Criminal Code).

[Country report, Switzerland]

The most ‘atypical’ case of a prosecution for FGM may be the one in the UK in 2015, in which an obstetrician was accused of FGM for his way of suturing an already cut woman when she was bleeding during delivery.¹⁸ Another case is the only FGM trial in the Netherlands, in 2008, in which a father, originally from Morocco – which is not an FGM-practicing country – was accused of having performed FGM on his daughter:¹⁹

The accusation was based on hearings with the very young daughter (the age is not mentioned in the case) who proclaimed her father cut her in the genitals with a large pair of scissors. In the end, the Court found there was not enough evidence to lead to a conviction and the man was acquitted for FGM but convicted of child abuse.

[Country report, the Netherlands]

One of the Swedish FGM criminal court cases superficially looks like a typical case (father convicted in Sweden after his daughter’s type II FGM in Somalia),²⁰ but a scrutiny of the court procedures showed obvious flaws in how the Swedish courts assessed the evidence.²¹

17 Arrêt de la Chambre Pénale du Kassationsgericht des Kantons Zürich (Cantonal Supreme Court of Zurich) du 26 Juin 2008 (SE080004).

18 He was acquitted of the charges by a Southwark Crown Court decision of February 4th, 2015.

19 Uitspraak LJN BJ7447 Rechtbank Haarlem, 11 September 2009.

20 Göteborgs tingsrätts dom 2006-06-26 i mål nr B3206-06 (Göteborg District Penal Court), Hovrätens för Västra Sverige dom 2007-01-30 i mål B5015-06 (Västra Sverige Court of Appeal), Högsta domstolens dom 2006-12-22 i mål B4407-06 (Supreme Court).

21 The defendant was convicted despite contradictory and insufficient circumstantial evidence (Johnsdotter 2008, Talle 2010).

An overview of the criminal court cases on FGM in Europe renders a picture of a spectrum, which includes some 'typical' FGM cases, some 'atypical', and finally cases that can be placed in between the stereotypical case and those that few people would categorise as 'authentic' FGM cases.²²

4.2 Court cases: Countries in which FGM was performed

It is noteworthy that there is no court case indicating transnational movement *between* two countries in Europe. Four countries have had court cases concerning FGM that apparently has taken place in Europe: France, Italy, Switzerland, and possibly Spain – all of them by residents in their respective host society. In Switzerland, the Somali couple described above confessed that they had FGM performed on their daughter in Switzerland in 1993. In Italy, the Nigerian woman in the case described above was active in Verona, Italy. In France, trials were held against West African immigrants in the 1980s and the 1990s for FGM that had been carried out on French soil. The French country expert reports an additional later case: it was taken to court in 2012, four minor girls whose parents are of Guinean nationality are said to have been cut in France between 1993-2005 (the two elder ones) and 2005-2009 (the two younger ones). In one case there was material evidence found by police officers of the Minors Protection Squad: 'a bloody kitchen roll holding pieces of genital flesh' (the French country report; information from mass media reporting). Both parents were convicted for assistance, in spite of their denial, since the act was carried out in their home and they, thus, ought to have known and given their consent.

In Spain, in two cases the court has determined as proven fact that FGM was performed in the period of time comprised between two regular medical checks, in which the three girls did not leave the country, although the date, place, or authors were not identified, and the parents insisted that it had been done abroad. The first case²³ was taken to court in Catalonia in 2013. It is a case about two girls, one born in The Gambia and the other one in Spain. The girls lived in The Gambia between 2007 and 2009, while the parents stayed in Spain. In 2008, the mother was informed about the initiation of a magistrate's investigation and told that she must notify the authorities when the girls returned to Spain. In 2010, a gynaecological examination was performed, and no anomalies found. Half a year later, experts detected a change in one of the girls, 'an alteration to the external female genitals that looked mutilated' (Country report, Spain). It was estimated to have been afflicted at some point during those six months. The parents were each sentenced to six years in prison.

The other case was brought to court in Teruel, ratified by the Supreme Court²⁴ and followed the same structure: in a first check the girl's genitalia seemed intact, in a second check they were detected as modified. Since the girl had not left the country in that period of time, it was assumed FGM had been performed in Spanish territory,

22 On the only FGM charge in a court in the Netherlands: 'Among the actors working against FGM in the Netherlands this is therefore not considered a real FGM case' (on the Moroccan father case, from the Netherlands country report).

23 Sentencia Audiencia Provincial de Barcelona (Barcelona's Provincial Audience) SAP B 4991/2013 de 13 de Mayo.

24 Sentencia del Tribunal Supremo (Supreme Court), STS 835/2012 de 31 de Octubre.

with no identification of the actors, place, or time. The father, a Spanish resident since ten years, was sentenced to six years imprisonment, and the mother to two years. Both decisions seem to uphold the idea that the place of commission of the crime is irrelevant for the purposes of conviction, although this is not clearly stated.

The other court cases,²⁵ other than those presented above, concern FGM activities in African countries, and that is the reason why the principle of extraterritoriality is of capital importance in prosecuting FGM, as it extends the jurisdiction of a state to illegal acts committed abroad under certain circumstances. A 'typical' case where FGM was performed in Africa, would be the one that led to conviction in Denmark in 2008:²⁶

The case concerned a girl from Eritrea aged four years, who underwent FGM in Sudan in 2003. Both parents were accused and presented at court. At the trial, the mother was sentenced to two years imprisonment, however only six months unconditional. The father was acquitted presumably because the FGM had been performed in Sudan without his knowledge.

[Country report, Denmark]

Another, one of the FGM convictions in Sweden in 2006:²⁷

A 16-year old girl with Somali-born parents told her school welfare officer that she had been physically abused by her mother. The mother had used different objects during the beating and the beating had been going on for several years. The girl said that she feared for her life since her mother had attacked her with a frying pan while she was asleep. The girl's sister had stopped their mother from hitting the girl. The girl also told the welfare officer that her mother had subjected her to FGM five years earlier, during a visit in Somalia. She also said that her mother had performed several genital examinations on her to ensure that she was still a virgin. The school welfare officer reported the case to the social authorities and the social authorities reported the case to the police.²⁸

[Country report, Sweden]

Medical examination showed an injury to the girl's clitoris corresponding to type I in the WHO classification. Her mother was sentenced to three years imprisonment for FGM and grievous violation of integrity.

²⁵ Some ten criminal court cases. (Exact figure not available, since information is lacking in some cases.)

²⁶ Dom fra Retten på Frederiksberg (Decision of the Frederiksberg Court), 23rd of January 2009.

²⁷ Mölndals tingsrätts dom 2006-10-02 i mål B854-06 (Decision of the Mölndal District Penal Court).

²⁸ Police records show that the girl's mother had turned to the police six times to report that her children had been raped. This indicates that this mother had some serious problems and should thus not be understood as being a 'typical Somali' mother.

4.3 The type IV question: the limits of FGM legislation and conventions

The Verona case from 2008 is interesting for several reasons. One of them regards the kind of FGM (*aruè*²⁹) and how that type of FGM relates to existing legislation in Italy. A specific crime provision was introduced in the Italian criminal code in 2006, following a debate started by a Somali-born gynaecologist suggesting the medicalisation of a mild form of FGM in 2005. The criminal provision states that:

Art. 538 bis.

1. Anyone who, in the absence of therapeutic purposes, causes a mutilation of female genitals is punishable with imprisonment from four to twelve years. For the purposes of this section, the practice of mutilation of female genitals refers to clitoridectomy, excision and infibulation and any other practice which causes similar effects.

2. Anyone who, in the absence of therapeutic purposes, in order to damage sexual function, causes injury to the female genital organs other than those mentioned in the first paragraph, and resulting in a disease in the body or mind, is punished with imprisonment from three to seven years. The penalty is reduced to two thirds if the injury is minor.

This means that Italy has a provision for FGM types I, II and III, and another provision for type IV that requires a specific malice or intent (to damage the sexual function) and a specific result (disease in the body or mind) in order to be punished. In any case, Type IV will always receive a lesser penalty than the other types.

The Verona case, decided by the Venice Court of appeal in 2012, gathers three indictments on two separate cases in which the link is the woman performing FGM.³⁰ A Nigerian woman was accused to have performed an *aruè* (Type IV) to baby X, and to attempt to do the same to baby Y. The mother of X and the father of Y were also accused.

The young girls underwent medical examination and in both cases it was definitively established the absence of medical reasons for the operation. [...] The technical advice ascertained a 4 mm seam on the glans clitoris. The judge stated the penal responsibility of the midwife and sentenced her to one year and eight months imprisonment. The relatives of the girls (the father, in the first case; the mother and the aunt in the latter one), on the other hand, were sentenced respectively to four and eight months imprisonment.

[Country report, Italy]

29 A local term in Nigeria for a procedure involving a shallow incision in the clitoris (Basile 2013).

30 Tribunale di Verona, sent. 14.4.2010, n. 979 and Corte d'appello di Venezia, sez. II penale, sentenza 23/11/2012, n. 1085.

Both parents went to appeal (not the woman performing FGM) on the grounds of, amongst others, lack of the specific malice required by the criminal code in art. 583 bis, 2, as the parents' intent was not to harm the girls' sexual function, the result was not disease and the harm was minor, since the cut was done in mucous tissue (Basil 2013). Consequently, they were acquitted.

The IV category in the WHO classification of FGM (Appendix 3) presents difficulties in criminal proceedings. Firstly, there is the difficulty of evidence, if the FGM procedure did not lead to permanent change of the girl's external genitals. This might be the case if some time has passed and the healing process erases all traces of cutting. Secondly, the term 'mutilation' for type IV as it is described in the WHO classification is inconsistent with both the medical and the legal term 'mutilation'.³¹ A shared criminal principle establishes the prohibition of using ambiguous terms and vague concepts when typifying a conduct, since criminal law is the last recourse for state action (due to its consequences in the lives, freedom and rights of declared offenders). That is probably why the *Istanbul Convention* does not clearly include Type IV in its wording (see supra), as neither the conduct, nor the harm, nor the damage done can be clearly determined. Considering that the *Istanbul Convention* is a legally binding document for state parties, Italy is actually fulfilling its international duties just as it is, since WHO definitions are not legally binding but mere interpretative tools that judges can decide to use – or not. Hence, milder forms of type IV expose the limits of FGM legislation and conventions.

³¹ Medical definition: Disfigurement or injury by removal or destruction of any conspicuous or essential part of the body.

5 Examples of novel approaches in prosecution – and prevention

Another case from Spain shows how far jurisdiction can be stretched in FGM cases. In 2011, a father of Gambian origin was sentenced to six years in prison while the mother – also of Gambian origin – was sentenced to two years in prison, a verdict confirmed by the National Audience of Justice in 2013.³² What is noteworthy in this case is that the FGM of the girl was performed in The Gambia *before* she and her mother arrived in Spain. Given that the father had lived in Spain since 1999, he ought to have known the Spanish law well and protected his daughter from FGM, it was argued. The Spanish jurisdiction thus covers illegal acts committed abroad by a resident, including FGM performed on non-residents.

This case demonstrates two novel aspects of FGM prosecution that we would like to introduce regarding grounds for acquittal or conviction. The first one relates to the alleged *error of prohibition* (when a person does not know that a certain act is illegal) and the other concerns the duty of care and its neglect.

5.1 Error of prohibition

Some legal systems include error of prohibition as a form of *ignorantia legis* and it refers to the situation of someone being ignorant of the fact that a certain behaviour or act is prohibited. Although ignorance of the law is not an excuse in itself for not complying with it ('ignorance of the law excuses no one'), in criminal provisions a distinction is made as to the resulting penalty – the penalty given to a person who was ignorant of the law will not be equal to the penalty given to the one who acted illegally willingly or knowing that the act receives a legal reproach. Both case law and the doctrine distinguish between 'insurmountable error' and 'surmountable error' (or equivalents thereof). Surmountable error would mean that even though it is possible that the person did not know the act was illegal, she or he *could have known* that it was, or could be expected to know. Insurmountable error expresses the situation in which it is not reasonable to expect that someone knew that the law prohibited his or her behaviour; when it is unlikely that someone would even have thought that the act could be criminalised.

Some court cases in this overview discussed the possibility of parents incurring in error of prohibition (Italy, Spain). The Spanish courts, for instance, have established that a long-term resident cannot claim to be unaware of the criminal provisions

³² Sentencia de la Sala de lo Penal de la Audiencia Nacional (National Audience), SAN 1323/2013, de 4 de Marzo.

against FGM, but a person living in a rural area of Senegal could claim to be ignorant of the laws enforced in Europe.³³ In Italy, the Venice Court of Appeal stated that the *ignorantia legis* excuse requires the union of two elements: a subjective element (the person's situation and perception, knowledge, etc.) and the objective element (the context that could make that error insurmountable).³⁴ The case involved a Type IV FGM in Verona one month after the enactment of the law prohibiting FGM. No informative campaign had been undertaken by public authorities to explain the new provisions, and the mother had recently arrived in Italy. The court held that it was not reasonable to expect the mother to have known that Type IV was prohibited under Italian law. This brief analysis suggests that information campaigns are a key element in both prevention and prosecution and have to be undertaken in countries of origin as well as countries of residence; once again following the due diligence standard set up by the *Istanbul Convention* for FGM and other forms of gender-based violence. It is important also to remember at this point that criminal law provisions are not *primarily* preventive instances: although criminal law is a tool for states for modifying or stopping a behaviour, on the one hand, it acts *ex post*, this is once the crime/behaviour has been committed, and, on the other, it acts as a *last resort* (last *ratio*) of state action, which means, amongst other things, that other actions must be taken to prevent or stop an undesired behaviour.

5.2 Neglect of care

The second novel approach concerns the duties of care and the neglect of care, which can take different shapes in different legal systems. All legal systems include the duty to hamper or impede harm inflicted on a person. If someone can stop harm from occurring to another person, he or she has to assist her.

In a similar vein, some courts convict parents not as direct authors of the crimes but as necessary co-operators in the performance of FGM, for instance, because they have organised the meeting with the woman cutting. As already mentioned, France has a case with convicted parents for assistance,³⁵ as reported in the French country report:

A lawsuit was judged by a Criminal Court in Nevers in June 2012. It concerned four minor girls with parents of Guinean nationality residing in France (...). The parents were accused for their 'complicity of deliberate violent acts having involved a mutilation or permanent infirmity on minor of less than 15 years (...)'. They were convicted for assistance.

[Country report, France]

However, assistance requires clear incriminatory acts. As stated in the Austrian report:

³³ Sentencia del Tribunal Supremo (Supreme Court) STS 835/2012, de 31 de Octubre.

³⁴ Corte d'Appello di Venezia, 23 Nov. 2013, (dep. 21 feb. 2013), n. 1485.

³⁵ Greffe de la Cour d'Assises de Nevers, Arrêt criminel n°3/1 du 1 juin 2012, Extrait des minutes du Greffe du tribunal de Grande Instance de Nevers, demandé le 31 août 2015.

If the act is, for instance, committed on a woman or a girl residing in Austria by a non-Austrian cutter in a foreign country, charges can be filed in Austria against the cutter and the parents [...] who have facilitated the act by organising the ritual and bringing her to the country of origin where the procedure is carried out. It goes without saying that the evidence for such planned FGC must be manifest. To proceed with this fictive case, this means that charges can be filed only if, for example, an appointment with the cutter has already been fixed and the flight tickets booked.

[Country report, Austria]

Yet, another approach can be followed regarding the fact that some countries have a specific criminal provision regarding the neglect of the duties of care certain persons have in relation to others, paradigmatically, parents towards children. Noteworthy, Germany has criminalised ‘violation of duties of care or education’,³⁶ making it possible to prosecute parents who *did not prevent* a mutilation committed abroad (Country report, Germany).

This is exactly what took place in one of the criminal court cases in Switzerland. A woman (‘the Stepsister’) who had custody over a younger girl (‘the Girl’) travelled from Switzerland to Somalia and let the girl stay with her biological mother. The girl was subjected to FGM (type III, infibulation) in 2002.

In 2008, the committing magistrate gave the Stepsister a six-month suspended prison sentence. The Stepsister appealed, arguing that the Girl was under her biological mother’s custody once in Somalia. Nevertheless, in 2009, the committing magistrate referred the complaint to the Fribourg Criminal Court for ‘Neglect of duties of care, supervision or education’ (Article 219 in the Swiss Criminal Code) and ‘Abandonment’ (Article 127 in the Swiss Criminal Code). After several judicial turnabouts, the Stepsister finally was found ‘guilty’ in 2012, with a suspended sentence.³⁷

On 3 July 2012, the Criminal Division decided to convict the Stepsister for “Abandonment” in the sense of Article 127 SCC. First, the Stepsister was recognised responsible for the Girl, since she has raised her and been the contact person for the school. Second, the condition of immediate danger was fulfilled. In fact, the court acknowledged that in a country where the rate of FGM is around 98%, the operation of the Girl was only a matter of time. Third, even though it was not the reason why the Stepsister sent her to Somalia, the judge estimated that she could not ignore this risk, being herself cut and her own daughter as well. Therefore, the criterion of intentionality in the sense of Article 127 SCC was fulfilled, since the Stepsister did not react to prevent FGM from happening. Fourth, the Stepsister brought the Girl to Somalia without telling her that it was forever. Although the Girl declared wanting to meet her biological mother, she

36 § 171 in the Criminal Code, *Violation of duties of care or education*: ‘Whosoever grossly neglects his or her duty to provide care or education for a person under the age of sixteen and thereby creates a danger that the person’s physical or mental development could be seriously damaged, that the person will engage in crime or in prostitution, shall be liable to imprisonment not exceeding three years or a fine.’ [Country report, Germany]

37 Arrêt de la Chambre pénale du Tribunal Cantonal de Fribourg du 3 Julliet 2012 (501 2011-1).

argued that she would have never accepted to stay indefinitely in Somalia. Fifth, the biological mother cannot be considered a third party, who would break the causal link, since she ‘was one aspect of the danger faced by the Girl’. Sixth, the Stepsister lives in Switzerland since 19 years and cannot stipulate that she did not know about the FGM ban. Seventh, the Swiss law can be applied, since the offence started in Switzerland when the Stepsister bought the flight tickets.

[Country report, Switzerland]

The Swiss criminal court case described above shows that legislation already existing in many European countries could be used to bring criminal proceedings in cases that are today being closed due to lack of evidence showing that parents or custodians specifically planned or instigated FGM. The liability focuses on *neglect of care and supervision*. This is reported in yet another pending case in Italy in 2013, regarding two Nigerian girls born in Italy, who:

... were subjected to infibulation during a journey to Nigeria. In this case, the decision to perform the operation was taken and realized by the grandparents living in Nigeria. Anyway, both the parents, who live in Italy with the children, are at the moment under investigation because they were aware of the decision and did not oppose it.

[Country report, Italy]

This approach, focusing on ‘neglect of care’, is possibly underused or overlooked in some countries. For example, a case took place in Sweden in 2008:³⁸ A teen girl was taken to her father’s family in Somalia with her younger sisters. She ran away and reached the Swedish Embassy in Addis Ababa, Ethiopia, and told the staff there that she and her sisters had been subjected to FGM. Later, during a police interrogation, she related: ‘And one day my father called my [paternal] grandmother and said to her, “I want to take the children back to Sweden, so you have to...” ... one cuts away things from the girl.’ The girl had not overheard the conversation, she said, but that was what her grandmother told her had been said. The girl and her sisters were cut. This all took place while her father was in Sweden. Her father in Sweden was detained and held in custody for three weeks, ‘justifiably suspected’ for instigation of FGM. In November 2008, the man was released because it could ‘not be proven that the suspect(s) had committed a crime’ (prosecutor’s decision after preliminary police inquiry). The charges built only on the FGM Act and therefore had to be dropped due to lack of evidence to prove intent. With an alternative interpretation of existing laws – legislation that focuses on duties to provide care and supervision – it might have been possible to prosecute in such a case.³⁹

In some jurisdictions, such as the Swedish one, this ‘neglect of care’ is accessory: it is applied in addition to a provision of the criminal code. This means that the neglect of care has to result in an offence. Sections in the Swedish legislation that possibly could be used would include:

³⁸ Data from preliminary police investigation (K152756-08, Johnsdotter’s research archive).

³⁹ After the signature of the *Istanbul Convention*, the girl could go against the state for neglect – neglect being the contrary of due diligence.

The Penal Code, 3 Ch, 5 §: A person who inflicts bodily injury, illness or pain upon another or renders him or her powerless or in a similar helpless state, shall be sentenced for assault to imprisonment for at most two years or, if the crime is petty, to a fine or imprisonment for at most six months.

If it is impossible to prove intent, but only ‘carelessness’, it would also be possible to convict according to:

The Penal Code, 3 Ch, 8 §: A person who through carelessness causes another to suffer bodily injury or illness not of a petty nature, shall be sentenced for causing bodily injury or illness to a fine or imprisonment for at most six months.

However, a shared general principle of criminal law prohibits carrying out extensive interpretations of criminal provisions, and criminal courts are right in being very cautious in their rulings. A Spanish case can illustrate this. The parents of two girls (all four Spanish citizens of Gambian origin) were acquitted in a case that occurred in 2003. The mother travelled with their children to her country of origin, spending two months during the summer. The two girls were left for a couple of days under the care of the grandmother, who used the mother’s absence to perform FGM on them. When the mother came back she had a big fight with the grandmother, as she was against the practice. The court states that,

although it is true that parents have a duty of care towards their children, that cannot imply that the family should not travel to the country of origin... It cannot be understood as neglect of the duty of care the fact that the accused left her children with her mother.⁴⁰

In summary, although court cases in this brief overview may demonstrate the possibility of extending the scope of grounds for prosecution, perhaps more importantly this aspect could work as an important tool in prevention. If European ethnic communities from concerned FGM societies are informed that custodians may be liable to criminal proceedings if they do not protect their children from FGM, this could possibly make an important step in efforts to safeguard young girls.

Furthermore, the brief discussion about ‘error of prohibition’ has shown a twofold possibility in prevention considering its subjective and objective elements. On the one hand, and coupled with the *Istanbul Convention*, the conviction in Spain regarding a child that had been subjected to FGM *before* she arrived in Spain (thus a non-resident, and abroad), could also work as an important signal to communities. Children from resident families are protected whether or not they themselves are residents. On the other hand, as in the Italian case, the objective element reaffirms the need to conduct informative and preventive campaigns both in the country of origin and residence. Thus, these two aspects – *error of prohibition* and *neglect of*

40 Sentencia de la Sala de lo Penal de la Audiencia Nacional (National Audience) SAN 5/2014 de 24 de Febrero.

care – ought to be further explored in future discussions on how criminal legislation is implemented in European countries, not primarily for their potential to result in more criminal court cases of conviction, but because of their potential power as preventive tools.

6 Identified cases that do not reach conviction

There is at least one more category to consider, situated between ‘criminal court cases resulting in conviction’ and those that can be classified as ‘rumours’, without substantiation. These are the cases that are *de facto* documented but, for some reason, do not reach the criminal court system or do not lead to court proceedings ending in verdicts of ‘guilty’ or ‘not guilty’. We consequently briefly focused on the different models of public prosecution featured by European states – an in-depth analysis would have gone beyond the scope of this report.

European legal systems are divided between two major legal cultures – and this split is evident in the organisation of criminal procedures and in the initiation of prosecutions.⁴¹

a) in common law systems make a clear division between judges and prosecutors. “*The criminal investigation power*” is not coupled with other functions, and prosecutions are initiated either by victims or by the police, in an adversarial system.

b) in continental law systems, two types can be found: either both judges and prosecutors are part of the judiciary, or only judges belong thereto. Civil law systems relate to the French model of the “*ministère public*”, where public officials have a virtual monopoly on prosecutions,⁴² within an inquisitorial system.

In addition, in the various systems, the autonomy of the public prosecution from the executive branch can be complete or limited in a number of ways (Martín Pastor et al. 2013).⁴³ Furthermore, in carrying out their functions, prosecutors rely on either a system of discretionary prosecution (opportunity principle) or a system of mandatory prosecution (legality principle). According to the Bordeaux Declaration, ‘prosecutors in both cases not only act on behalf of the society as a whole, but also

41 Joint Opinion of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on ‘Judges and prosecutors in a democratic society’ (2010), known as the *Bordeaux Declaration*.

42 However, this authority is not exclusively responsible for prosecution in all continental or civil law systems. This increases the complexity in comparing public prosecution services in Europe (see Martín Pastor 2013).

43 There is a wide body of literature on public prosecution in Europe. In the last ten years, an important amount of comparative analyses has been developed, and the CCPE has been working since 2005 in collecting information about the functioning of prosecution services in Europe, and implementing Recommendation (2009)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system. According to the CCPE, it has taken a longer time for harmonisation in the field of law enforcement to emerge as a concern because this is a sensitive issue for each state’s institutions, with implications on the organisational structures of public authorities. For a very interesting comparison between eight out of the eleven countries covered by our report, see Martín Pastor (2013).

discharge duties to particular individuals, namely the accused person to whom a duty of fairness is owed, as well as the victims of crime to whom a duty is owed to ensure that their rights are fully taken into account. Prosecutors must take proper account of the views and concerns of victims but they should not initiate or continue prosecution when an impartial investigation on the basis of the available evidence shows the charge to be unfounded’.

Another problem concerns whether the jurisdiction of a state is subordinated to the reporting of the victim. In *Opuz v. Turkey*, the European Court of Human Rights compared the different systems, and it appears that in Italy, Spain, and Switzerland, the authorities are required to continue criminal proceedings despite the victim’s withdrawal of his/her complaint. In Denmark, England and Wales, Finland, France, Germany, the Netherlands, and Sweden, the authorities have a margin of discretion in deciding whether to pursue criminal proceedings against perpetrators of gender-based violence. Therefore, legal systems make a distinction between crimes that are privately prosecutable (for which the victim’s complaint is a prerequisite) and those that are publicly prosecutable (usually more serious offences for which prosecution is considered to be in the public interest). The court states that: ‘It appears from the legislation and practice of the above-mentioned twenty-seven countries⁴⁴ that the decision on whether to proceed where the victim withdraws his/her complaint lies within the discretion of the prosecuting authorities, which primarily take into account the public interest in continuing criminal proceeding.’⁴⁵

The relationship between the disparities of public prosecution in European countries and FGM is a finding of our research, in the sense that the response given to FGM by the different countries is modelled thereby: different countries investigate and initiate court proceedings in a completely different manner, which makes it difficult to identify the category of ‘Identified cases that do not lead to conviction’. Future research aimed at identifying cases in this category – which concern identifiable girls who have been subjected to FGM, but do not end up in convictions – has to look for cases of this kind in different arenas in the various European countries. In some EU member states, these cases can be found in the criminal court system; in others they can only be pinpointed in the police or social services sectors; in yet other countries, such as Austria, these cases may be identified within FGM help centres. A typical case of this kind is the one described above: in which a police investigation was started in Sweden in 2008 following the assessment that a Swedish-Somali girl had been subjected to FGM in Somalia.⁴⁶ The case never reached criminal court, but could only be identified through access to police records.

It is worth noting that the *Istanbul Convention* calls upon state parties to modify existing provisions that limit their jurisdiction over FGM cases (art. 44), and could therefore have an impact on these procedural disparities.

44 The twenty-seven countries considered by the Court are: Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, England and Wales, Finland, the former Yugoslav Republic of Macedonia, France, Georgia, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Moldova, the Netherlands, the Russian Federation, Serbia, Slovakia, Sweden, Turkey and Ukraine. Romania is the only country where the decision is left only to the victim.

45 *Opuz v Turkey* (Application n. 33401/02, ECHR 2009, parr. 88-89).

46 Data from preliminary police investigation (K152756-08, Johnsdotter’s research archive).

7 Rumours

A strong tendency in the collected data is that rumours often state that girls are brought to their communities' countries of origin to undergo FGM. Regarding rumours about movements within Europe, the UK is most often mentioned in country experts' reports as a target country for FGM. This is the case despite the fact that the UK government has made the prevention of FGM a priority and has introduced a range of policy and legislative measures to provide protection for girls at risk.

In one case, related in the French country report, the custodians of two six-year-old girls planned to have them go through FGM in London:

The project was thwarted in time by services of police and justice in 2011. The two cousins of Indian origin (ethnic group Bohra) from the educated upper class living in two different departments of the Ile-de-France were about to be brought to London, where a doctor from their community was supposed to perform the FGM. A member of their relatives' circle alerted the CSO [Civil Society Organisation] of the imminent journey (two days before the departure). A report form was submitted to the public prosecutor in each of the departments. They proceeded as a matter of urgency to a prescription of temporary custody of the girls, to shield them from the risk of FGM while investigating their families and relatives.

[Country report, France]

The case was reported by an interviewee from the organisation involved. Unfortunately, we have not been able to access any documents to authenticate the story, a fact that means that we have no choice, for the time being, but to categorise the case as a 'rumour' despite its detail. This case is interesting because it is the only one in our interviews that describes transnational movement within the EU to have FGM performed and is full of details.

A stronger tendency in the collected data (than the focus on London) is that rumours concern movement for FGM to neighbouring countries. For example, in Finland there are rumours about Finnish residents travelling to Sweden to have FGM performed, and in Germany and France about FGM taking place during journeys to neighbouring countries. In Switzerland there are rumours about Germany (and a suspicion regarding a specific woman who would have planned to have it performed in Denmark). In 2010, Austria had a mass media debate about an aesthetic surgeon in Hungary – just across the border – who offered female 'circumcision'.⁴⁷ A female journalist, who made a phone call to the clinic pretending to be a prospective client for 'circumcision', initiated the public debate in Switzerland. The clinic no longer offers 'circumcision', and it remains unclear whether any 'circumcisions' actually were performed, and if so, on children.

47 In German, 'Beschneidung'.

The Austrian country expert offered a list of possible questions to pose at assessing rumours or vague information:

By whom is the suspicion brought forward? Can it be considered a reliable source? (Age, origin, profession, relation to the concerned family etc.) Is the suspicion based on manifest evidence, or does it result from mere speculations? Is there detailed and trustworthy information about the persons/family concerned? Is the accusation linked to ethnic or racist arguments? To what extent is FGC practiced in their country of origin?

[Country report, Austria]

In many countries, also vague suspicions regarding specific young girls or families must be reported for further investigation by child protection authorities or the police. However, such questions have the potential to put in perspective *some* of the rumours about what is allegedly going on among immigrant communities.

8 Reasons for not reporting

If professionals and NGOs hear rumours about specific girls that have been cut or are at risk of being so, why do they not more often report these cases to authorities?

Many of the rumours recounted in the country reports are precisely rumours, and do not point at identifiable persons or families. This is not to say that rumours about FGM (in host societies, in countries of origin, or after transnational movement within Europe to have FGM performed) are false, only that they in most cases remain unverified. Such rumours are not necessarily 'a tip of the iceberg'. One has to consider the qualification of this matter as a titillating ingredient in slander, among immigrant communities as well as among other citizens in European countries. Hence, one has to keep in mind both the general nature of rumours and the probability that some of these rumours might be reflecting true events. As long as they are rumours, and do not identify specific persons, there is no way to take legal action.

The discussion of this question is influenced by the fact that the data in the country reports vary – country experts interpreted the questions asked in this section differently. Some of them let the interviewees talk more generally about reasons for the lack of reports on FGM in their country, while others focused on rendering why interviewees had not reported cases that they had heard about.

GENERAL REFLECTIONS ON LACK OF REPORTING

Professionals

- lack of knowledge about FGM / insufficient training
- difficulties in assessing the authenticity of rumours
- unclear risk-assessment frameworks
- lack of knowledge about reporting pathways
- difficulties in tackling the issue in encounters with community members / wish not to disrupt the trustful relationship with a family
- fear of encouraging xenophobic sentiments / FGM is a 'private' affair / FGM is seen as a cultural practice
- fear of grave consequences for a family if FGM is reported
- little point in reporting cases in which FGM has already been performed

Immigrant communities

- positive views of FGM / cases being kept in secret within communities
- lack of knowledge about the host country's legal system
- fear of the host country's authorities
- unwillingness to file charges against family members / fellow community members
- cultural change after migration among immigrants

The reasons stated in the list above are speculations in general among the interviewees (discussing the wider question, 'Why are there so relatively few reports on FGM in my country?'). The stated reasons do not necessarily have anything to do with personal experiences of specific cases.⁴⁸

The list of reasons for not reporting knowledge about *specific* cases boils down to two factors:

REASONS FOR NOT REPORTING SPECIFIC CASES

- Lack of first-hand information
- Suspicions too vague to report

When suspicions are vague, the person who holds suspicions may hesitate to report out of fear of disproportional measures, considering the best interest of the child. As stated in the Swiss country report: 'Professionals try to find alternative solutions in order to avoid reporting to authorities, who might use disproportionate measures (i.e. parents under arrest, institutionalisation of their children) and cause harm to the whole family if the suspicion proves to be unfounded.' One needs to remember that children at risk of FGM are not in abusive environments but the system responds as if that were the case.

These fears are not without ground, as has been discussed in a former report about the implementation of FGM legislation within the EU (Johnsdotter 2009). Cases from Sweden show that even vague suspicions reported to the police may result in extensive measures taken in the form of compulsory genital examinations, custodians being detained, and children taken into custody by force. In none of those cases, the criminal inquiries ended in prosecution,⁴⁹ and rather the local authorities

48 The Swiss country report presents a profile of a family at risk, based on the interviews with professionals: The parents are natives of a risk country (i.e., with a high prevalence of FGM); they are newly arrived in the host country; the family is isolated; the mother can not speak the official language; the mother is cut; they have daughters; an older daughter already had FGM done in the country of origin; the age of the daughter without FGM is consistent with the average age of FGM in the country of origin; they plan holidays in a country of risk; their relatives are in favour of FGM. Moreover, two additional features immediately lead to suspicions even though the criteria mentioned above are not met: the mother is in favour of FGM; the mother spontaneously express a desire to do a ritual on her daughter. [Country report, Switzerland]

49 Sweden has had two criminal court cases, both ending up with imprisonment sentences. Both cases were initiated by the offended girls themselves, who turned to Swedish authorities and testified

were charged with ethnic discrimination due to the disproportional response and the harm caused to the Swedish Somalis under suspicion.

As already mentioned, a contrasting situation presents itself in the Netherlands, where professionals do not have a duty to report, only a duty to *assess* the case. This empowers the professionals who retain control on when to report and how to develop preventive work with a certain family. In the Netherlands, it is thus possible to take action without fearing that measures will be taken before the suspicion becomes grounded. Yet, such a system may challenge the balance between tasks performed by different authorities. For the judicial system, the fewer people who have talked to the presumptive offenders about FGM, the better. When and if a criminal inquiry is initiated, legal actors prefer having the possibility to investigate the case without too much interference from other actors or systems (Johnsdotter 2009).

about FGM (Johnsdotter 2009).

9 Immigrant communities at risk of FGM

The eleven countries that were included in this overview all differ in their immigrant community profiles. In some countries the ethnic communities associated with FGM are primarily from West Africa, in others they primarily originate from countries in East Africa. A few countries have communities from different parts of practicing countries in Africa and Asia. Some host countries have large groups of residents from countries that practice FGM, while other host countries' immigrants primarily are from non-practicing countries of origin.

The rationale for collecting data on ethnic background of immigrant communities and their migration history was to see whether there were any consistent patterns cross-nationally. We were interested in finding out, for instance, whether defendants in court cases tended to be from specific countries of origin, or whether rumours tended to regard newly arrived immigrant groups rather than immigrant communities that are well established in their host societies.

No such consistent patterns could be found. The ethnic backgrounds of defendants in FGM criminal court cases were not surprising given the composition of the ethnic communities in the host countries. For example, court cases in France involved West Africans, as can be expected given the relative size of the concerned immigrant groups in France, and in the Swedish FGM criminal court cases the defendants were Somalis, the Somalis (East Africans) being the largest Swedish immigrant group from an FGM-practicing country. Worth noting is that it is difficult to draw any even tentative conclusions about the possible relation between the ethnic background of defendants and the communities' migration history. Many criminal court cases in Europe concern FGM activities that took place long before the cases were taken to court; consequently, the idea that it would be possible to determine whether defendants are 'newly arrived' or members of established or even well integrated communities becomes futile.

Rumours in the host societies also tend to be associated with the largest immigrant groups in those societies – there is not any specific community that stands out in a cross-country perspective.

10 Policy suggestions

Similar to the material we received on reasons for not reporting, the responses to our queries about policy suggestions show a wide variation because of how country experts and interviewees interpreted our questions.

Many country reports discuss responses to the more general question, 'How can we protect girls in Europe from FGM?'. These are presented in the list below:

General suggestions to combat FGM within the EU

- Extensive preventive efforts in host countries *and* FGM-practising countries.
- Awareness-raising in relevant communities, especially among newly arrived immigrants.
- Use of grass-root commitment in preventive work.
- Awareness-raising and education for professionals.
- Guidelines and standardisation of procedures.
- Better networks among professionals and guidelines to steer their activities.
- Public discourse: focusing on the positive effects of preventive work/cultural change.
- Further research.

Many country reports call for awareness-raising, both in relevant communities and among professionals; and some of them emphasise that such efforts should be characterised by respectful and sensitive education, primarily on children's and women's rights, current legislation, and information about access to care and support, rather than focused on threats of criminal prosecution. These recommendations are in line with the suggestion that the mass media are encouraged to represent this issue in a balanced and respectful way, focusing on positive change in immigrant groups. Awareness-raising in concerned immigrant communities could make use of grass-root commitment ('peer education'), and resources are needed to keep the question alive. Many country reports emphasise the importance of including men in awareness-raising initiatives.

Likewise, some country experts highlight the importance of *regular* training of professionals, to make sure that they have access to up-to-date information about legislation, guidelines, and recommended procedures in their respective fields. It was also suggested that the question of FGM should be included in the curricula of students in medicine, nursing care, social work, and so on.

Further quantitative but also qualitative research among the immigrant communities in the host countries would be valuable, in order to understand the scope of the problem and the cultural contexts in which these practices are embedded. Such

research could form the basis of more targeted preventive efforts, implemented where they are most needed and in a form that promotes cultural change.

One suggestion (in the Swedish country report) aims at dealing with the issue of lack of reports on illegal FGM: “better service provisions for affected women and girls – as an incentive to report.” This suggestion deals with the problem mentioned in the section *Reasons for not reporting*: “fear of grave consequences for a family if FGM is reported”, “little point in reporting cases in which FGM has already been performed”. This suggestion tries to counterbalance the idea many professionals have that reporting will only make things more difficult for the affected family, as special services and provisions are not in place (such as specific health care for girls and women, sexual rights and health information services, and so on). The idea is not to link the access to services or rights to the willingness of victims themselves to cooperate or report, but the establishment of a circuit of services that professionals can use when reporting such cases. A stronger emphasis, in awareness-raising campaigns among professionals and communities, on medical and social support for affected girls and women would possibly strengthen the incentive to report.

Regarding awareness-raising and guidelines for professionals, the document disseminated by the Home Office in the UK in October 2015 may serve as a good example of information about new legislation and clearly expressed guidelines for concerned professionals (Home Office 2015).

All in all, most suggestions go back to the awareness and knowledge building. Below we focus in some more detail on policy suggestions aiming at counteracting transnational movement specifically:

Specific suggestions to counteract transnational movement to have FGM performed

- Creation or promotion of a unified European legal framework, so that all states reflect the same procedures for reporting, investigating, and prosecuting in cases of FGM
- Better cooperation between judicial authorities (police and prosecution) at a European level / International alerts.
- Official statements/letters in various languages from governmental bodies describing what custodians risk if a child returns to the host country with FGM.
- Screening of all girls/genital check-ups of girls who have been abroad.

Creation of a unified European legal framework.

As already mentioned, the common framework is established by the *Istanbul Convention* which originates not from EU law but from the Council of Europe. The system of protection is, on paper, rather standardised, but the practices vary, as we have also pointed out, because different legal systems and legal cultures deal with cases in a different manner. The Convention calls for integral policies, including criminal policy and cooperation, in the fight against FGM that would now need to be developed. The disparities we have detected not only in the procedures for reporting or not reporting, as well as prosecuting or not prosecuting, would decrease if all countries’ legislations were adapted to the Istanbul standard. Using existing frameworks may be of use, as well (the European order of protection for victims of gender violence could be an example), but this goes beyond the scope of this report.

Better cooperation between judicial authorities (police and prosecution) at a European level. / International alerts.

Several country reports give examples of transnational cooperation that has worked well. The Netherlands reports that their police contacted the London police in a specific case of suspected FGM, and in the alleged case of the Bohra Muslims in France the French authorities are said to have contacted the London police. Existing tools for judicial cooperation among European states could be better adapted to deal with FGM cases through formalising networks or protocols regarding cross-country FGM prevention.

This cooperation should also be encouraged between countries of origin and destination, taking into account also what has been said about the duty of care, the inapplicability of the clause of error of prohibition, and the protection of children abroad.

Official statements/letters in various languages from governmental bodies describing what custodians risk if a child returns to the host country having undergone FGM.

This measure is already in place in several countries, such as Spain and France. Whether the court issues the statement, or the social services or the health authorities, the statement is a tool parents can use against the pressures in their homelands from their elders, and can thus be empowering.

Screening of all girls/genital check-ups of girls who have been abroad.

Screening of girls in the form of genital check-ups may be realised in different ways; either as an actual screening – that is, an examination of all girls whether or not there are suspicions that an illegal act has occurred, or as a measure directed toward certain ethnic groups or, to narrow it down even more, effected only regarding girls in suspected cases.

Screening is a method in medicine to find instances of a certain condition by examining a large number of people, and includes those who show no signs or symptoms. In discussions about implementing screening, one must weigh the benefits of finding cases against the adverse effects of the screening itself (for instance, stress and anxiety caused by the screening procedure). According to a report published by the WHO in the 1960s, there are some principles that should be considered at implementing a screening procedure, such as that the condition should be an important health problem, that there should be a treatment for the condition, that the procedure is acceptable to the population concerned, and that case-finding should be a continuous process and not a ‘once and for all’ project (WHO 1968).

Benefits from *general* screening procedures in European countries would include the possibility of detecting and finding evidence of FGM, as well as possibly preventing cases. *Selective* screening (targeting specific risk groups) would not only raise issues of discrimination but also have the problem of deciding who to include in the category ‘at risk for FGM’ and who to consider being out of risk. Further, if enforced in a context that frames the issue in terms of crime detection, it would jeopardise the relationship between health care staff and immigrants – a relationship ideally built on trust (and in fact many screening procedures, such as mammography, build on voluntariness).

In some of the countries in this overview, such as Spain, regular check-ups of girls' external genitalia (as well as boys') already are in place within general health controls.⁵⁰ But given the disparities detected in the different countries, more research is needed to get a clearer picture of health control routines within the EU, how such procedures are justified and whether they are framed in ways that show how health prevention and crime prevention and detection are intertwined, especially in cases of gender-based violence.

⁵⁰ It is worth noting that two of the Spanish criminal court cases were initiated by paediatricians who found modified external genitalia of girls at health check-ups.

11 Summary and conclusions

In this study we aim at making a comparative overview of recent criminal court cases regarding FGM in Europe, and at making an exploratory survey of transnational movement to have FGM performed among European residents. We base our analysis on country reports from Austria, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland, and the UK.

Although there are limitations to our analysis – limitations that are related to our incomplete access to the full cultural and legal contexts in all these countries – we attempt to identify issues that are salient in a comparative perspective in order to offer some new perspectives and point to possible future policy measurements within the EU.

We emphasise the *Istanbul Convention*, ratified by all countries in this overview, as a fruitful starting point for discussions on a unified legal framework for FGM-related legislation at the EU level. The embracing of the due diligence standard by all countries to fight gender-based violence can represent a major advance in the fight against FGM because of its preventive effects and the procedural standards it establishes. It has already improved some local contexts and can build up the shared minimum standard for prevention, investigation, and protection against FGM in Europe. When it comes to processes of FGM-reporting in the eleven countries, we emphasise the difference between existing provisions and their lay interpretations, thereby stressing the importance of guidelines regarding duties to report, both among professionals and other citizens.

In the section about criminal court cases we present some authentic cases and sort them into ‘typical’ and ‘atypical’ FGM-cases with the purpose of demonstrating the difficulty inherent in classifying (or counting the number of) such legal cases. We conclude that the criminal court cases do not reflect a transnational movement within the EU, but either FGM taking place in the defendants’ host society (cases in France, Italy, Switzerland, and possibly Spain) or in the defendants’ countries of origin (a majority of the cases).

We discuss the issue of type IV in the WHO classification, a category that in most forms presents a problem for legal proceedings since most law provisions (and also the wording in the *Istanbul Convention*) do not necessarily cover these procedures.

In a section about novel approaches in prosecution and prevention, we focus on two legal concepts, as a result of issues that are salient in the comparison of criminal court cases: ‘error of prohibition’ and ‘neglect of care’. We argue that these two aspects ought to be further explored in future discussions of how criminal legislation is implemented in European countries, not primarily for their potential to result in more criminal court cases of conviction, but because of their potential power as preventive tools.

Furthermore, we bring forward the conclusion that future researchers in this field would find fruitful material for analysis in the category 'Identified cases that do not reach conviction'. Those cases concern identifiable persons – in contrast to cases that are mere rumours – and offer opportunities of deeper analysis of factors that hamper prosecution. Those cases can be located in different societal spheres in the different countries, due to different routines in handling suspected cases and different organisation of the Public Prosecution office. In some EU member states, these cases will be found in the criminal court system, in others they will only be known in the police or social services sectors; in yet other countries, such cases may be identified within FGM help centres.

Regarding rumours circulating in the eleven countries, no clear conclusions can be drawn. London is the place most often mentioned as a possible target for a transnational movement to have FGM performed. Stronger tendencies that can be discerned include rumours that girls are taken back to their countries of origin to have FGM performed, and also rumours about FGM being performed in some neighbouring countries. No specific ethnic group stands out as a target for suspicions in the material: rumours tend to focus on the host societies' largest immigrant groups from FGM-practising countries.

In the 'Reasons for not reporting' section we first present more general reflections among the interviewees on why there is a relative scarcity of FGM-reports within the EU. After that, we present the reasons why professionals and NGOs do not report cases they hear about. Two reasons are highlighted: lack of first-hand information and the fact that suspicions are too vague to report. We discuss the fear expressed among some professionals that an FGM-report based on too vague a suspicion may produce legal measures that have serious consequences for the family involved. Such fears may hamper the willingness to report suspicions. Briefly we mention some possible pros and cons of the system in the Netherlands, where there is no duty to report, but only to *assess* suspected cases.

In a section on policy suggestions we present what interviewees in the eleven countries put forward as possible future improvements in this field. We finally discuss proposals aimed at counteracting, specifically, a transnational movement to have FGM performed. These suggestions include a unified EU legal framework, and better cooperation between judicial authorities (police and prosecution) at a European level, including international alerts. Official statements or letters in various languages from governmental bodies, describing what custodians risk if a child returns to the host country after having undergone FGM, are also suggested as a fruitful measure – and the use of such formal statements are already in place in some of the countries. Genital screening of all girls, or check-ups of girls in risk groups who have been abroad visiting FGM-practising countries are also suggested by some interviewees. We briefly discuss the legal and ethical implications of these policy suggestions.

To conclude this overview, we would like to raise some final reflections: the first one on the relation between legislation and protocols, the second on the issue of cultural change.

Most international instruments on human rights protection, and specifically those dealing with women's rights, impose the duty on states to develop 'the necessary legislative or other measures' to ensure the full enjoyment of the rights established in them. This is a clear recognition of the limits and potentials of legislative change in promoting social change. Of course, laws are reasons for action (we make rational decisions about the things we do and the things we do not), and certainly criminal law has to record all the acts that are reproachable for a society. But criminal law

acts *ex-post*; once the harm has been done. The use of soft-law and protocols in the areas of state intervention has expanded because it provides a framework for action and decision for the different stakeholders and operates *ex-ante*, without establishing a unique path or consequence for a certain situation. However, only under certain conditions (i.e., a clear institutional structure and support, realistic budgets, professional protocols built up from below, and so on), the law, be it soft or hard, can promote a social change.

The issue of social and cultural change after migration is a topic that is gaining ground in the international academic field of studies on FGM. The question is whether illegal FGM takes place on a large scale, but goes unnoticed and is thus unreported to authorities. The issue is sometimes presented as if it is evident that the numbers of unrecorded cases are large.⁵¹ The figure of criminal court cases in Western countries – all in all some fifty court cases (a vast majority of them in France in the 1980s and 1990s) – is surprisingly small in view of the fact that there are, in European and other Western societies, hundreds of thousands people from countries where FGM is practised. It is reasonable to believe that an important explanation for the scarcity of confirmed cases reflects substantial cultural change after migration in many immigrant communities – a view that is gaining ground at the international level, especially in the context of attempts to estimate prevalence and incidence of FGM in Western host societies.⁵²

The question for the future is how such processes of social and cultural change are best promoted under the umbrella of the due diligence standard.

51 E.g., WHO (2008), Isman et al. (2013).

52 E.g., Johnsdotter 2002, Talle 2010, Pharos 2011, Farina & Ortensi 2012, Belmaker 2012, Exterkate 2013, EIGE 2015, Wahlberg 2015, Johnsdotter & Essén 2015.

References

Basil F (2013). "Il reato di 'pratiche di mutilazione degli organi genitali femminili' alla prova della giurisprudenza: un commento alla prima (e finora unica) applicazione giurisprudenziale dell'art. 583 bis c.p.'" *Stato, Chiese e pluralismo confessionale: Rivista telematica* 24: 1–23.

Belmaker RH (2012). "Successful cultural change: The example of female circumcision among Israeli Bedouins and Israeli Jews from Ethiopia." *The Israeli Journal of Psychiatry and Related Sciences* 49(3): 178–183.

Boldelón E, Aedo M (2015). "Las niñas en el Sistema de Justicia Penal." *Anales de la Cátedra Francisco Suárez* 49: 219–236.

Consultative Council of European Judges and Consultative Council of European Prosecutors (2010): Joint Opinion of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on 'Judges and prosecutors in a democratic society' (The Bordeaux Declaration)

The Council of Europe (2010): Convention on preventing and combating violence against women and domestic violence (The Istanbul Convention).

The Council of Europe and Amnesty International (2014). *The Istanbul Convention: A Tool to End Female Genital Mutilation*. Available at: <https://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/IstanbulConventionFGM%20Guide%20EN.pdf>

DEWA (1994). *Declaration on the Elimination of all forms of Violence Against Women*. U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

Earp, B. D. (2015). "On the supposed distinction between culture and religion: A brief comment on Sir James Munby's decision in the matter of B and G (children)". Practical Ethics. University of Oxford. Available at: <http://blog.practicaethics.ox.ac.uk/2015/02/on-the-supposed-distinctionbetween-culture-and-religion-a-comment-on-sir-james-munbys-decisionin-the-matter-of-b-and-g-children/>.

EIGE (2013a). *Female genital mutilation in the European Union – Report*. Vilnius: European Institute for Gender Equality.

EIGE (2013b). *Study to map the current situation and trends on FGM – Country reports*. Vilnius: European Institute for Gender Equality.

EIGE (2015). *Estimation of girls at risk of female genital mutilation in the European Union*. Vilnius: European Institute for Gender Equality.

Exterkate M (2013). *Female genital mutilation in the Netherlands: Prevalence, incidence and determinants*. Utrecht: Pharos.

Farina P, Ortensi L (2012). *Migration effect on the future of female genital mutilation: the case of African women in Italy*. Accessed 18 June 2015. Available from: <http://epc2012.princeton.edu/papers/120790>

Hasselbacher L (2010). “State obligations regarding domestic violence: the European Court of Human Rights, Due Diligence and International legal minimums of protection.” *Northwestern Journal of Human Rights*, 8(2): 190–215.

Home Office (2015). Mandatory Reporting of Female Genital Mutilation – Procedural Information: Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469448/FGM-Mandatory-Reporting-procedural-info-FINAL.pdf

Igareda N (2015). “El problema de los matrimonios forzados como violencia de género.” *Oñati socio-legal Series* 5(30): 613–624.

Isman E, Ekéus C, Berggren V (2013). Perceptions and experiences of female genital mutilation after immigration to Sweden: An explorative study. *Sexual & Reproductive Healthcare* 4: 93–98.

Johnsdotter S (2002). Created by God: How Somalis in Swedish exile reassess the practice of female circumcision. Doctoral dissertation. Lund: Lund University; 2002.

Johnsdotter S (2004). FGM in Sweden. *FGM in Sweden: Swedish Legislation Regarding “Female Genital Mutilation” and Implementation of the Law*. Research Report in Sociology 2004:1. Department of Sociology, Lund University. (National report, EC Daphne project “Evaluating the impact of existing legislation in Europe with regard to female genital mutilation.”)

Johnsdotter S (2008). “Popular notions of FGC in Sweden: The case of Ali Elmi.” *Finnish Journal of Ethnicity and Migration* 3(2): 74–82.

Johnsdotter S (2009). *Discrimination of certain ethnic groups? Ethical aspects of implementing FGM legislation in Sweden*. Malmö: Malmö University. (National report, EC Daphne project “Towards an improved enforcement of FGM-legislation in Europe: Dissemination of lessons learned and capacity building of actors in legal and para-legal fields.”)

Johnsdotter S, Essén B (2015). “Cultural change after migration: Circumcision of girls in Western migrant communities.” Accepted for publication in *Best Practice & Research Clinical Obstetrics & Gynaecology*.

Kool R (2010). “The Dutch approach to female genital mutilation in view of the ECHR: The time for change has come.” *Utrecht Law Review* 6(1): 51–61.

Leye E, Deblonde J, García-Añón J, Johnsdotter S, Kwateng-Kluytse A, Weil-Curiel L, Temmerman M (2007). “An analysis of the implementation of laws with regard to female genital mutilation in Europe.” *Crime, Law and Social Change* 47(1): 1–31.

Leye E, Sabbe A (2010). *Striking the right balance between prosecution and prevention of female genital mutilation in Europe*. Ghent University.

Martín Pastor J, García Marqués P, Eloy Azevedo L (2014). *O Ministério Público na Europa*. Lisboa: Fundação Francisco Manuel dos Santos.

Mestre i Mestre RM (2011). “Las MGF en el contexto europeo: Qué se ha hecho y qué se puede hacer.” *Las violencias machistas contra las mujeres* R Rodríguez y E Bodelón (eds.). pp. 57–74, Barcelona: Servei de Publicacions UAB.

Mestre i Mestre RM (2014). “Sobre la evolución en el reconocimiento de algunos derechos sexuales en Europa”. *Historia de los Derechos Fundamentales. El derecho positivo de los derechos humanos*. Libro II. *Derechos individuales, civiles y políticos*. Vol. VI, pp. 215–240. Madrid: Dykinson/IDH Bartolomé de las Casas.

Talle A (2010). *Kulturens makt. Kvinnelig omskjæring som tradisjon og tabu* [The power of culture: Female circumcision as tradition and taboo]. Kristiansand: Høyskoleforlaget.

Vloeberghs E, Knipscheer J, van der Kwaak A, van den Muijsenbergh M (2011). *Veiled Pain: A study in The Netherlands on the psychological, social and relational consequences of female genital mutilation*. Utrecht: Royal Tropical Institute & Pharos, 2011.

Wahlberg A (2015). "A community-based participatory intervention to change attitudes towards female circumcision among Somali immigrants in Sweden: Study protocol for a cluster randomised controlled trial." Abstract. The Congress of Somali Studies International Association, August 2015, Helsinki Finland.

WHO (1968). *Principles and Practice of Screening for Disease*. J.M.G. Wilson, G. Jungner. Geneva: World Health Organization.

WHO (2008). *Eliminating female genital mutilation: an interagency statement*. Geneva: World Health Organization, Department of Reproductive Health and Research.

Court cases in regional systems of human rights protection

Bevacqua and S. v. Bulgaria, App. No. 71127/01, ECHR, 2008.

Opuz v. Turkey, App. No. 33401/02, ECHR, 2009.

Velasquez Rodriguez v. Honduras, 1998, IACHR.

Court cases analysed for the report

DENMARK

Dom fra Retten på Frederiksberg (Decision of the Frederiksberg Court), 23rd of January 2009.

FRANCE

Greffe de la Cour d'Assises de Nevers, Arrêt criminel n°3/1 du 1 juin 2012, Extrait des minutes du Greffe du tribunal de Grande Instance de Nevers, demandé le 31 août 2015

ITALY

Tribunale di Verona, sent. 14.4.2010, n. 979

Corte d'appello di Venezia, sez. II penale, sentenza 23/11/2012, n. 1085

SPAIN

Sentencia de la Audiencia Provincial de Barcelona SAP B 4991/2013 de 13 de Mayo (Barcelona's Provincial Audience)

Sentencia de la Sala de lo Penal de la Audiencia Nacional SAN 1323/2013 de 4 de Marzo (National Audience)

Sentencia Tribunal Supremo STS 835/2012 de 31 de Octubre (Supreme Court)

Sentencia del Tribunal Supremo STS 2750/2015 de 26 de Mayo

Sentencia de la Sala de lo Penal de la Audiencia Nacional 5/2014 de 24 de Febrero

SWITZERLAND

Arrêt du Tribunal Fédérale Suisse du 19 May 2011 (1B_128/2011)

Arrêt du Tribunal Fédérale Suisse du 3 Julliet 2012 (1B_190/2012)

Arrêt de la Chambre Pénale du Tribunal Fédérale Suisse du 2 Février 2015 (BGer 6B_207/2014)

Arrêt de la Chambre Pénale du Kassationsgericht des Kantons Zürich (Cantonal Supreme Court of Zurich) du 26 Juin 2008 (SE080004)

Arrêt de la Chambre Pénale du Tribunal Cantonal de Fribourg du 3 Julliet 2012 (501 2011-1)

SWEDEN

Mölnads tingsrätts dom 2006-10-02 i mål B 854-06 (Mölnadal District Penal Court)

Göteborgs tingsrätts dom 2006-06-26 i mål nr B 3206-06 (Göteborg District Penal Court)

Hovrättens för Västra Sverige dom 2007-01-30 i mål B5015-06 (Västra Sverige Court of Appeal)

Högsta domstolens dom 2006-12-22 i mål B4407-06 (Supreme Court)

THE NETHERLANDS

Uitspraak LJN BJ7447 Rechtbank Haarlem 11 September 2009

UNITED KINGDOM

Southwark Crown Court decision of February 4th, 2015

Royal Court of Justice, Family Court, Leeds, EWFC3, 2015

Appendix 1

Country experts

Austria	Barbara Giovanelli
Denmark	Karin Helweg-Larsen
Finland	Seija Parekh
France	Saïda Barkat Daoud
Germany	Idah Nabateregga, Linda Ederberg
Italy	Serena Romano
Netherlands	Alicia Dibbets
Spain	Bárbara Tardón Recio
Sweden	Camilla Larsson
Switzerland	Dina Bader
UK	Nisan Zerai Kesete

Appendix 2

Instructions to Country Experts

1. Criminal court cases

1a. Please describe briefly how your Member State frames the principle of extraterritoriality regarding FGM.

1b. Have there been any criminal court cases regarding FGM in your Member State – cases not reported in your country's report in EIGE 2013? If so, please collect data and submit a review of legal decision, rationale for the decision, opinion of the court, evidence collection, and other aspects that are vital for a well-founded understanding of the case.

1c. If there have been criminal court cases in your Member State that were reported in EIGE's country reports, please make a follow-up. Describe briefly the entire legal process including appeal to higher court (if any), higher court decision, opinion of the court, etc.

1d. In every criminal court case described, make sure to include any information about in which country FGM is said to have been performed.

1e. Review all criminal court cases trying to answer these questions:

- Is there evidence on court cases of performance of FGM in a European country? If so, in which?
- Do most or all court cases report FGM performance in countries of origin? If so, in which?
- Do countries with reported cases of transnational movement actually have court cases confirming that idea? If so, what kind of evidence?

2. Relevant immigrant groups

2a. In your Member State, what immigrant groups are affected by FGM in their countries of origin?

2b. What are their migration backgrounds? (See Figure 1 for reference, and Figure 2 for a list of FGM-relevant countries.) If possible, legal status: a majority being refugees, regular or undocumented migrants?

3. Regulation of the duty to report suspected, planned, or performed FGM

What are the legal instructions for citizens of your Member State when it comes to reporting suspected cases of FGM to the police and/or child protection services?

Identify key actors in CSOs working against FGM, and key actors in other fields, such as the police, prosecution, lawyers, or others in your Member State, who are known to be committed to preventing FGM.

Please interview these actors, focusing on the following questions:

3a. In countries with duty to report:

- Are there rumours about performed but unreported FGM cases?
- If yes, what do you think could be the reasons for not reporting?

3b. In countries with no duty to report:

- Are there rumours about performed but unreported FGM cases?
- If yes, do you think this is because there is no duty to report?
- Do you think there could be also other reasons? If so, which would be?

4. Rumours about transnational movement to have FGM performed

Identify key actors in CSOs working against FGM, and key actors in other fields, such as the police, prosecution, lawyers, or others in your Member State, who are known to be committed to preventing FGM.

Please interview these actors, focusing on the following questions:

4a. Are there rumours about performed FGM among concerned immigrant groups? If yes, in the host country, in another European country, or in the country of origin?

4b. Was the information gained reported to the authorities? If not, why not? Please gather as much information as possible about the alleged case of FGM, in order to understand all the circumstances;

4c. Do you, as interviewer, assess the information about a certain rumour about FGM as trustworthy? What are the factors hinting that the alleged case could be an unverified rumour, and what are the factors corroborating the case as an authentic one?

4d. What kind of advice regarding new policies do key actors in the various fields suggest in order to prevent transnational movement related to FGM?

Appendix 3

WHO classification of FGM

Type I

Partial or total removal of the clitoris and/or the prepuce (clitoridectomy). When it is important to distinguish between the major variations of Type I mutilation, the following subdivisions are proposed: Type Ia, removal of the clitoral hood or prepuce only; Type Ib, removal of the clitoris with the prepuce.

Type II

Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision). When it is important to distinguish between the major variations that have been documented, the following subdivisions are proposed: Type IIa, removal of the labia minora only; Type IIb, partial or total removal of the clitoris and the labia minora; Type IIc, partial or total removal of the clitoris, the labia minora and the labia majora. Note also that, in French, the term 'excision' is often used as a general term covering all types of female genital mutilation.

Type III

Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation). When it is important to distinguish between variations in infibulations, the following subdivisions are proposed: Type IIIa: removal and apposition of the labia minora; Type IIIb: removal and apposition of the labia majora.

Type IV

Unclassified: All other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterisation. (WHO 2008)

