A JANUS-FACED NATURE OF HUMAN RIGHTS IN REFUGEE LAW? THE CASE OF GENDER BASED PERSECUTION IN THE LIGHT OF THE UNIVERSALISM VS. CULTURAL RELATIVISM DEBATE

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Abstract

Human rights are in the constant focus of political, religious, social, cultural debates on the international level. The controversy about human rights lies in the question whether human rights are really universal as it is proposed in the Universal Declaration on Human Rights and other international human rights instruments, or they are dependent on the various cultural, religious, national traditions in different regions of the world. While the universalism vs. cultural relativism debate surrounding human rights appears mostly on an abstract theoretical level in the human rights literature, in reality this controversy has repercussions in practice. The system of refugee protection appears to offer a practical example with the problem of gender based persecution. Building on the recent developments in the field of refugee law relating to gender based persecution, in particular, female genital mutilation as one of the most controversial topics between universalists and cultural relativists, this thesis argues, that being organic part of the international human rights system, the refugee regime is moving towards a comprehensive protection of universal human rights standards.

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List of Abbreviations

BIA – Board of Immigration Appeals

ECHR – European Convention on Human Rights

FGM – female genital mutilation

UN – United Nations

UNESCO - United Nations Educational, Scientific and Cultural Organization

UNHCR – United Nations High Commissioner for Refugees

UDHR – Universal Declaration of Human Rights

WHO – World Health Organization

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Introduction

Human rights are in the constant focus of political, religious, social, cultural debates on international level. The controversy about human rights lies in the question whether human rights are really universal, as it is proposed in the Universal Declaration on Human Rights and other international human rights instruments, or they are dependent on the various cultural, religious, national traditions in different regions of the world. This question is of major importance to determine whether a thoroughly universal protection of human rights is possible, and it is translated into the major debate surrounding human rights, namely the universalism vs. cultural relativism controversy.

The universalism vs. cultural relativism dichotomy of human rights is present in a wide range of writings about human rights. Those protecting universal human rights standards argue that there are certain essential values and rights individuals are entitled to by the simple fact that they are human beings. These rights are protected by internationally recognized human rights standards that were elaborated based on consent between various religious and cultural traditions. On the contrary, the defenders of cultural relativism consider human rights as dependent on particular cultural traditions. Therefore, they reject the imposition of universal human rights standards that conflict with different cultural norms regarding the international human rights regime as a form of Western imperialism. Between the two sides of the debate, some argue that conciliation is possible, using universalism or cultural relativism to limit the abuses of the other part and to reach a common denominator in the form of some fundamental rights that need universal protection and other rights that might differ according to different cultures. The above described debate is an integral part of the human rights literature. However, it is mostly discussed on an abstract theoretical level, so that some even

consider it as an insignificant discussion that has no practical relevance.[1] The first chapter will provide an overview of the debate reviewing the important literature firstly on the universalist, secondly on the cultural relativist and thirdly on conciliatory arguments, in order to provide a conceptual background.

This thesis does not intend to engage into the theoretical discussions or to take side in the debate. It proposes to bring the abstract debate of universalism vs. cultural relativism of human rights closer to the practical field and to present a concrete domain where the debate has repercussions over the development of the international human rights regime. The chosen domain is the international refugee system.

Strongly connected to the international human rights regime and in parallel with its development, a particular regime for refugee protection was configured in order to address the specific problems of refugees. Generally speaking, human rights law and refugee law constitute the "two broad legal systems created by the international community to address human rights abuses".[2] As an integral part of the global human rights framework, evolutions within the international refugee system contribute to the field of human rights protection.

The general question of this thesis addresses the relation between refugee law and the universalism vs. cultural relativism debate. In specific, the question is whether the universalism vs. cultural relativism dichotomy of human rights has any implications for refugee law. I will develop the argument in the second chapter concluding that refugee law is an organic part of the international human rights regime. Therefore, the universalism – cultural relativism debate concerns refugee law. As Deborah Anker argues, "refugee law … reflects the human rights community's own tensions and dilemmas".[3] In order to address the specific question, this dichotomy will offer the conceptual framework for the analysis of the

[1] Costas Douzinas, "The End(s) of Human Rights," 26 *Melbourne University Law Review* 445 (2002): 734-735
[2] D. E. Anker and Paul T. Lufkin, „Gender and the Symbiosis Between Refugee Law and Human Rights Law," http://www.migrationinformation.org/Feature/display.cfm?id=107 (11.05.2010).
[3] *Ibid.*

recent developments in the refugee field related to a specific issue: gender based persecution and women's rights that will be introduced in the last section of the second chapter.

This analysis will lead to answer the more specific question of the thesis concerning the position of refugee law in the universalism vs. cultural relativism debate, specifically whether refugee law is promoting the universality of human rights. In order to answer the question, the thesis provides an examination of gender based persecution and women's rights in refugee law, women's rights being a widely debated topic between Universalists and cultural relativists. The thesis will identify the evolutions in the refugee regime in order to demonstrate that being part of the international human rights framework, the refugee system is moving towards a more comprehensive promotion of the universalism of women's rights in the larger framework of human rights.

Through the analysis of the important legal documents, declarations, guidelines, and the recent case law the thesis will analyze the problem of gender based persecution. The analysis will focus in the third chapter on a specific case, namely, female genital mutilation, (FGM) as ground for persecution, and examine the related case law in the US and the UK. The case of FGM is relevant for this inquiry because it concerns a widely practiced tradition that has been recognized by the international community as human rights violation, but it is defended by many cultural and religious traditions in a large number of countries mostly in Africa and Asia. Therefore, it represents a key issue in the discussions about the universalism – cultural relativism of human rights.

The cases are taken from the asylum case law of the US and the UK, two countries that receive a large number of asylum claims annually. According to the recent statistics of the UNHCR the US is for the last years on the top of the list of countries with the largest number of lodged asylum applications and the UK is among the major receiving countries in

Europe beside France and Germany.[4] In both countries important landmark cases have been decided that offer a precedent for future asylum claims based on FGM. The Kasinga case in the US and the Fornah case in the UK have contributed to the development of refuge law in relation to gender based persecution and women's rights.

The above described analysis intends to demonstrate that the refugee system is promoting a universal language of human rights. The findings will show that the refugee regime is moving towards a more comprehensive protection of universal human rights standards for women, offering more protection to women facing persecution because of their gender, thus, the refugee system is developing towards an effective promotion of a universal language of human rights.

Starting from the theoretical concepts and debate and applying it to a particular field relevant for the development of the international human rights regime, the thesis will offer a practical application of the universalism vs. cultural relativism debate of human rights and bring it from an abstract level of discussion to a more practical level. Doing so the thesis will demonstrate that the universalism vs. cultural relativism debate is not only a theoretical discussion and the promotion of universal human rights is not only rhetorical.

[4] UNHCR, „Asylum Levels and Trends in Industrialized Countries 2009: Statistical overview of asylum applications lodged in Europe and selected non-European countries, „ http://www.unhcr.org/4ba7341a9.html, (24/05/2010).

CHAPTER 1

CONCEPTUAL FRAMEWORK

UNIVERSALISM AND CULTURAL RELATIVISM

1.1 The International Human Rights Regime

"We the Peoples of the United Nations, determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small..."

(UN Charter)

The configuration of international human rights regime started in the 20th century when fundamental human rights were first declared on the international level in the Universal Declaration on Human Rights (UDHR) adopted by the United Nations General Assembly in 1948, which was followed during the next decades by various other international instruments regarding special areas of human rights. These instruments include both soft law documents and conventions. The most important of these acts are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Together with the UDHR these three documents represent the International Bill of Rights. Other major legal documents in the human rights field on global level are the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Elimination of Racial Discrimination, Convention on the Rights of the Child, and many others, including the Convention Relating to the Status of Refugees.

Based on the international standards, various regional human rights instruments have been elaborated like the African Charter of Human and Peoples' Rights, The American Convention on Human Rights or the European Convention for the Protection of Human Rights and Fundamental Freedoms (usually known as the European Convention on Human Rights).

These instruments delineated a legal regime for human rights on international level, and the human rights language has become part of everyday discourse of international relations[5] besides entering the legal, political, social, anthropological field. The international human rights regime proposed to establish universal human rights for all human beings in all parts of the world. In the later development of the international human rights regime critical voices emerged against the imposition of human rights standards as universally applicable to all people in all parts of the world, claiming the relativism of human rights and the respect of the particularities of different cultures. This criticism was translated into the concept of cultural relativism, and a debate emerged between the two camps, with one advocating the universalism of human rights, while the other defended the cultural relativism of these rights.

The abundant literature concerning human rights defines the two concepts of the debate: universalism and cultural relativism. There is hardly any book dealing with human rights that does not have a chapter or shorter section mentioning the universalism and cultural relativism controversy surrounding human rights. The following section offers an overview of the debate as it can be found in the literature on human rights and an introduction into the universalism – cultural relativism dichotomy proposing to prepare a conceptual framework for the more practical discussion of the question whether the international refugee regime defends a universal view of human rights.

[5] Chris Brown, "Universal Human Rights? An Analysis of the Human Rights Culture and its Critics," in *Universal Human Rights*, ed. Robert G. Patman (New York, 2000), 31.

1.2 Universal Human Rights

"All human beings, whatever their cultural or historical background, suffer when they are intimidated, imprisoned or tortured . . . We must, therefore, insist on a global consensus, not only on the need to respect human rights worldwide, but also on the definition of these rights . . . for it is the inherent nature of all human beings to yearn for freedom, equality and dignity, and they have an equal right to achieve that."
(The Dalai Lama)

At the moment of its elaboration 56, mostly Western states voted for the UDHR with only 8 abstentions. Today it has 160 state parties, representing every geographic region and different religious traditions. The universal character of the UDHR is affirmed in the document itself. The preamble states that this act should constitute "a common standard of achievement for all peoples and all nations" and "every individual and every organ of society" should "promote respect for these rights and freedoms" and "secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[6] The declaration continues to emphasize its universality in the next articles, affirming in art. 1 that "all human beings are born free and equal in dignity and rights" and underlining in art. 2 that "everyone is entitled to all the rights and freedoms set forth in this Declaration" without any distinction based on "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", and without distinction based on "the political, jurisdictional or international status of the country or territory to which a person belongs".[7] The use of the terms "everyone", "all human beings", "all people", "all nations" suggests that the Declaration sets universal standards applicable for everyone.

The universality of the rights set forth in the UDHR is sustained by various arguments in the human rights literature. Those promoting the universality of human rights argue that there are certain essential values, which are truly universal and shared by all cultures, and there can be a universal consensus regarding the universality of these basic values common

[6] The Universal Declaration of Human Rights, preamble.
[7] *Ibid.*, article 1 and 2.

for all humankind, that should be respected. As Chris Brown points out human rights are universal because they are based on genuinely universal principles rooted in a universal moral code and common morality. The fact that the human rights regime was established on the basis of Western European and North-American standards does not mean that they are not universal.[8]

Similarly, Thomas Franck posits that the "universal human rights canon" is "universal", not "Western" or "imperial",[9] pointing to three arguments against "cultural exceptionalism": first, those defending cultural relativism do not legitimately represent those on whose behalf the claim is made; second, human rights are based on modern transcultural social, economic and scientific developments; third, individual rights contribute to the development of new, multilayered and voluntary affiliations that supplement those imposed by tradition, territory and genetics.[10] Consequently, the universal human rights standards do not reflect any Western cultural imperialism, but they are the result of culturally independent modernizing processes.[11]

In addition, Mary Ann Glandon considers that the UDHR was based on widely shared fundamental rights recognized by various cultural traditions. To sustain this argument she draws attention to the fact that before the adoption of the UDHR, the UNESCO had released a questionnaire collecting reflections on human rights from Islamic, Chinese, Hindu, American and European points of view. This research suggested that the principles underlying the draft of the UDHR were present in many cultural and religious traditions and the conclusion was

[8] Brown, 41.
[9] Thomas M. Franck, "Is Personal Freedom a Western Value?" *The American Journal of International Law* 91, no.4 (1997): 627.
[10] Thomas M. Franck, "Are Human Rights Universal?" *Foreign Affairs* 80, no. 1 (2001): 196-197.
[11] *Ibid.,* 202.

that it is possible to have an agreement between different cultures regarding some fundamental human rights rooted in man's nature and the fundamental right to live.[12]

Another interpretation leads to the same conclusion of the existence of some fundamental standards that must be universal. In this sense, in Cassesse's opinion the universal human rights documents constitute a minimum standard, define certain essential human rights and freedoms to be applicable for all states in the world and all people on the earth, but at the same time each state can restrict fundamental rights and freedoms in order to safeguard public order, national security, morality or health. He points to the fact that the interpretation and implementation of human rights might vary, as it varies even within the most homogenous group of states like the Council of Europe in implementing the European Convention of Human Rights. Supporting the idea of universality of human rights, Cassesse identifies the existence of a set of general standards, the gradual emergence of a restricted core of values and criteria universally accepted by all the states and the role of the three major human rights documents as standards of achievement for states as the three fundamental elements of convergence.[13] The conclusion is again that some universally shared values exists that overcome cultural differences and makes possible the configuration of a universal human rights system.

Sieghart's opinion comes close to the former recognizing the existence of values and rules common in all traditions. Similarly to Glendon he emphasizes that the elaboration of the human rights acts was based on free consensus between various cultural traditions. While arguing against the voices that depict the human rights concept as exclusively Western, a form of intellectual, legal or political neo-colonialism or neo-imperialism, Sieghart considers that the concepts of legitimacy, the justice of law, the integrity and dignity of the individual,

[12] Mary Ann Glendon, *A World Made New: Eleanor Roosewelt and the Universal Declaration of Human Rights* (Random House, 2001).
[13] Antonio Cassese, *Human Rights in a Changing World* (Philadelphia: Temple University Press, 1990), 51, 63-67.

safeguard against arbitrary rule, freedom from oppression and persecution, individual participation in collective endeavors can be found in similar forms in different cultures throughout the world and history. Furthermore, the international legal instruments including these concepts have been freely negotiated, adopted and ratified by nations of all cultural, religious and political orientations from all over the world[14].

Fernando Tesón defends a universal vision of human rights in the name of universal moral norms possessed by all people. He defines cultural relativism as the position according to which local cultural traditions determine the existence and scope of civil and political rights enjoyed by individuals in a given society. Thus, substantive human rights standards and the meaning of human rights norms vary among different cultures. What may be regarded as a human rights violation in one society might be considered lawful in another.[15] Tesón rejects the cultural relativist arguments, stating that if there is international human rights standard, then its meaning is uniform across borders, and if there is a possibility of meaningful moral discourse about rights, then it is universal in nature and applies to all human beings despite cultural differences[16].

Likewise, Rhoda Howard and Jack Donnely advocate the moral universality of human rights, since if human rights are the rights one has simply as a human being then they are held "universally" by all humans. Furthermore, today, human rights are almost universally recognized by different governments and people from all over the world at least as normative standards.[17] Their argument draws on two parallel theoretical lines. The natural law argument posits that human rights are universal as inherent rights of human beings. In the positivist view human rights are universal being internationally recognized on normative level.

[14] Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 15.
[15] Fernando R. Tesón, "International Human Rights and Cultural Relativism," in *Human Rights in the World Communit: Issues and Action*, eds. Richard Pierre Claude and Burns H. Weston (University of Pennsylvania Press, 1992), 43.
[16] *Ibid.*
[17] Rhoda E. Howard and J. Donnelly, "Liberalism and Human Rights: A Necessary Connection," in *The Human Rights Reader*, ed. Micheline R. Ishay (New York, 1997), 268.

However, Howard and Donnelly recognize that human rights are not universal in a broader, cross-cultural and historical perspective, since human rights represent a distinctive approach to realizing a particular conception of human dignity, a mechanism of rights in order to seek social justice and human dignity originated in the modern west.[18] Their main argument is that the current international normative hegemony of human rights represents the only reasonable vision of human dignity that has been able to establish itself widely in practice in the conditions of life that have been created all over the world by modern markets and states.[19]

Based on the above summarized opinions, some major arguments in favor of the universalism of human rights can be emphasized as follows. Human rights represent some general standards, fundamental moral rules and values, universal principles that should be respected all over the world. People possess these rights by the simple fact that they are human beings. The elaboration of the international human rights standards was based on a consensus between various cultural and religious traditions so that their universality should not be contested on cultural base. After describing the universalism argument the paper turns now to present the other part of the debate.

1.3 The Cultural Relativist Challenge

"Cultural relativity is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability."

(Jack Donnelly)

The counterpoint of universalism in the debate is represented by the cultural relativism of human rights. In one definition, cultural relativism "reflects the claim that international human rights regime should not apply or should apply only with a special interpretation to certain groups because the provisions in their normal form of application are alien to the

[18] *Ibid.*
[19] *Ibid.,* 269.

groups in question".[20] In another definition cultural relativism sustains that the civil and political rights of the persons are determined by the local cultural traditions, and human rights standards vary among different cultures.[21] According to the definitions, the core of the cultural relativism approach is that human rights are rooted in the local traditions of different groups and therefore they may vary, making a universal interpretation of human rights impossible.

Supporters of cultural relativism often argue that the present international human rights system has its roots in the Western value system, and that it was imposed globally by the developed Western powers. The most important criticism of the universal human rights regime that promotes cultural relativism comes from the part of Islamic, Asian and African countries. It is important to note that the majority of these countries were under the colonial rule of Western countries at the time of the elaboration of the UDHR. The debate addressing the universalism and cultural relativism of human rights is based on the assumption that the current international human rights regime is a form of cultural imperialism promoting the values of the Western civilization, which are considered to be the heritage of Christendom, Judaism, and the Greek and Roman antiquity.[22]

In this context Richard Shweder puts the question whether "we really want to support a global system that permits those powerful groups to project their values, beliefs, and practices outward, using the resources at their disposal to impose their ideas and ideals on others?"[23] He argues that the governments and activists from the "rich nations" are imposing their cultural preferences without regard to cultural particularities and preferences of the poor

[20] Michael Singer, "Relativism, Culture, Religion and Identity," in *Religious Fundamentalism and the Human Rights of Women*, ed. C. W. Howland (New York, 1999), 46.
[21] Teson, 43.
[22] Christian Tomushat, *Human Rights: Between Idealism and Realism*, (Oxford University Press, 2008), 82.
[23] Richard A. Shweder, "When Cultures Collide: Which Rights? Whose Tradition of Values? A Critique of the Global Anti-FGM Campaign," in *Global Justice and the Bulwarks of Localism: Human Rights in Context*, eds. Christopher L. Eisgruber and András Sajó (Leiden, 2005), 187, 197.

countries, violating in this way several human rights.[24] In this opinion human rights appear as an instrument of imperialism in the hand of powerful nations that want to impose their values on the less developed countries.

In a similar approach Lawrence Rosen defends cultural relativism considering that the universality of human rights calls for rethinking the concept of culture itself and he considers cultural differentiation as central and fundamental for humankind, sustaining that a "common denominator of shared conceptualizations" does not exist and "any degree of uniformity can only be achieved through the expression of some form of power that one culture exercises over another".[25] In this sense it seems impossible to agree upon some basic common values that can create the core of an international human rights regime.

In order to stress the Western origin of universal human rights standards, Pollis and Schwab have a short overview about the historical foundations of the modern human rights concepts adopted in the 20th century that have their roots in the legal and political developments occurred in England, France and the United States during the previous four centuries. In addition, pointing to the fact that the United Nations by its moment of establishment in 1945 at the San Francisco Conference was dominated by the West and the majority of Third World countries were under colonial rule, Pollis and Schwab argue that sustaining a universal view of human rights contradicts historical reality.[26] In Non-western States the concepts of human rights and human dignity are limited due to particular factors, namely the cultural pattern, developmental goals and ideological framework.[27] In order to formulate more universal human rights these should not be viewed ahistorically and isolated from the social, economic and political context and Pollis and Schwab conclude that the

[24] *Ibid.*
[25] Lawrence Rosen, "Power and Culture in the Acceptance of Universal Human Rights," in *Global Justice and the Bulwarks of Localism: Human Rights in Context*, eds. Christopher L. Eisgruber and András Sajó (Leiden, 2005), 5-6.
[26] Adamantia Pollis and Peter Schwab, „Human Rights: A Western Construct With Limited Applicability," in *Human Rights, Cultural and Ideological Perspectives*, eds. Adamantia Pollis, Peter Schwab, (Praeger Publishers, 1979), 4.
[27] *Ibid*., 8

Western conception of human rights is inapplicable, meaningless and of limited validity to third world countries.[28]

Another important feature of cultural relativism is that this approach is often used by the state in order to legitimize arbitrary use of power "that cannot be justified by philosophic claims or cultural distinctiveness.[29] Pollis argues that while Western democratic values and state model expanded throughout the world, the human rights doctrine did not follow this track and has not been universalized.[30] Therefore, Pollis concludes, the concept of the modern state must be incorporated into the debate between universalists and cultural relativists for the reason that a state`s claim of cultural distinctiveness is not necessarily consistent with its culture`s conception of fundamental rights or human dignity, and often traditional values are exploited in order to exercise power and repress.[31] The same idea is expressed by Abdullahi An-Na'im, who also notes that cultural norms and values are often manipulated by powerful elites and groups according to their own interest.[32]

To sum up the major characteristics of the cultural relativist point of view, those rejecting the universalism of human rights in the name of cultural relativism see human rights as the expression of Western imperialism having their roots in the Western system of values. Imposing its own definition of human rights, the West is interfering in the internal affairs of Third World countries.[33] Thus, the universalism – cultural relativism dichotomy appears in this sense as the eternal antagonism between rich and poor, developed and developing countries, the West and the rest. Cultural relativism rejects the projection of the Western

[28] *Ibid.*, 16-17.
[29] Adamantia Pollis, "Cultural Relativism Revisited: Through a State Prism," *Human Rights Quarterly* 18, no.2 (1996), 320.
[30] *Ibid.*, 321.
[31] *Ibid.*, 323-324.
[32] Abdullahi Ahmed An-Na`im, „Toward a Cross-Cultural Approach to Defining International Standards of Human Rights," in *Human Rights in Cross-Cultural Perspective*s, ed. Abdullahi Ahmed An-Na`im (University of Pennsylvania Press (1992): 28.
[33] Christina M. Cerna, „Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts," *Human Rights Quarterly* 16, no.4 (1994): 740.

values without respect to cultural differences and refuses the idea that compromise is possible based upon some widely shared fundamental values.

1.4 Conciliatory Efforts

> *"We have the ability to achieve, if we master the necessary goodwill, a common global society blessed with a shared culture of peace that is nourished by the ethnic, national and local diversities that enrich our lives."*
> (*Mahnaz Afkhami*)

The previous two sections offer an overview of the debate between universalism and cultural relativism of human rights. As it can be observed, while some, in particular international lawyers seem to promote universalism, others, specifically anthropologists seem to favor cultural relativism. There is a category of scholars who situate themselves in between the two camps trying to find a conciliatory way to interpret and implement universal human rights with respect to cultural traditions. As Dembour argues, the idea that universalism and cultural relativism are opposite and irreconcilable moral principles should be rejected and she sustains that they cannot be considered independently from each other.[34] Moreover, cultures have influenced one another in a variety of ways spreading their values so that an inter-cultural evaluation of shared beliefs and values is possible.[35]

Donelly advocates the "limited relativity" of human rights, which leaves the posibility to recognize both the universality and particularity of human rights. He sees the rights formulated in the UDHR as abstract, general statements of an orienting value, and on this level he claims that cultural relativism fails.[36] Donelly defends still a weak relativist position in which the concept of human rights is in fact well-accepted, although there may be some legitimate debates concerning interpretation and limitations of rights.[37]

[34] Marie-Benedict Dembour, "Following the Movement of a Pendulum: Between Universalism and Relativism," in *Culture and Rights: Anthropological Perspectives*, eds, Jane K. Cowan, Marie-Benedict Dembour and Richard A. Wilson (Cambridge: Cambridge University Press, 2001), 56.
[35] Christina Boswell, *The Ethics of Refugee Policy* (Ashgate, 2005), 147.
[36] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989).
[37] *Ibid.*

To summarize the major arguments, Donnelly defends an approach that maintains the fundamental universality of human rights while accommodating the historical and cultural particularity of these. He categorizes the universal and cultural relativist approaches and rejects radical or strong cultural relativism that considers culture a sole source of validity of a moral right or rule, and also rejects radical universalism that sees culture as irrelevant to these rules that are universally valid. What he defends is a weak cultural relativist view that advocates that culture may be an important source of validity of a moral right or rule and it serves as a check on potential accesses of universalism, consequently, it recognizes particular universal fundamental rights but allows sometimes limited local derogations.[38]

To follow up the argument, the basic question in the debate is whether human rights can be relative in any fundamental way since human rights are based in human nature, and Donnelly answers that human nature is itself somewhat culturally relative, culture shaping individuals and leading to various social behaviors in different cultures, like the problem of women in the Western and Islamic societies. This cultural variability of human nature allows cross-cultural variations of human rights.[39]

The solution Donnelly suggests is a differentiation of human rights between those that enjoy a cross-cultural consensus like right to life, the prohibition of torture and inhuman or degrading treatment, the right to family, and those other civil, economic and social rights, like freedom or conscience, speech, association, that might be more relative.[40] Consequently, it is possible to have consent about some fundamental rights that should be universal and respected in all parts of the world, while some other rights remain determined according to particular cultural traditions.

Similarly, Steven Lukes proposes to keep the list of human rights reasonably short and reasonably abstract, including the basic civil and political rights, the rule of law, freedom of

[38] *Ibid.*, 109-110.
[39] *Ibid.*, 112.
[40] *Ibid.*, 113, 123.

expression and association, equality of opportunity, and the right to some basic level of material well-being, although contradictions will occur when it comes about the implementation of these abstract rights.[41]

Donnelly's weak cultural relativist position is sustained also by Baehr who identifies three main criticisms of the UDHR, thus criticisms of the universality of human rights: it was drafted at the time when most Third World nations were still under colonial domination, the rights included reflect mainly western views, the individualistic approach to human rights is not suitable for societies promoting collective values. Cultural relativism goes further emphasizing the plurality of cultures and the role regional cultural, religious, political, economic, legal traditions have in defining human rights[42]. Weak cultural relativism can serve as a check on potential excesses of universalism, but he leaves fundamental rights unharmed and argues that although cultural relativism is harshly opposed, it must be recognized given that the implementation of human rights varies from a culture to another.[43]

In another opinion, cultural relativists consider the rights enumerated in the UDHR as culturally, ideologically and politically non-universal, being ethnocentrically Western, while universalists argue that human rights are grounded in human nature and entitlements of all persons.[44] Preis criticizes viewing culture as homogenous, immutable, unitary whole. She suggests a re-conceptualization of the notion of culture itself and a more dynamic approach to culture with an analysis of culture as practice embedded in local contexts and in the multiple realities of everyday life, which is needed in order to understand the meanings of human rights in various cultures and a cross-cultural acceptance of human rights.[45]

[41] Steven Lukes, "Five Fables about Human Rights," in *The Human Rights Reader*, ed. Micheline R. Ishay (New York, 1997), 233.
[42] Peter B. Baehr, *The Role of Human Rights in Foreign Policy* (Great Britain, 1996), 14-15.
[43] *Ibid*, 14-15.
[44] Ann-Belinda S. Preis, "Human Rights as Cultural Practice: An Anthropological Critique," *Human Rights Quarterly* 18, no. 2 (1996): 288.
[45] *Ibid*, 290.

The same idea is stated by Rao who claims that "culture is not a static, unchanging, identifiable body of information, against which human rights may be measured for compatibility and applicability,…but, rather, culture is a series of constantly contested and negotiated social practices whose meanings are influenced by the power and status of their interpreters and participants".[46]

In addition, An-Na'im admits that humans are by virtue relativists because they belong to different places, cultures, values, but he emphasizes that universality should be constructed in order to create structure, concepts, set of ideas, laws and institutions to promote social justice and individual freedom and to create solidarity across boundaries.[47] He argues for the development of internal and cross-cultural legitimacy for human rights standards in order to develop an international consensus regarding human rights considering that the "lack or insufficiency of cultural legitimacy of human rights standards is one of the main underlying causes of violations" of human rights.[48] An-Na'im constructs his thesis on the assumption that people are more likely to follow rules and respect rights if they face sanctions according to their own cultural traditions, since international human rights standards might be rejected by cultural traditions that had little to say in their elaboration, therefore, the respect for human rights can be achieved through developing the cultural legitimacy of these rules.[49] The cultural legitimacy thesis proposed by An-Na`im advocates an internal dialog to enhance cultural legitimacy within major cultural traditions in the interpretation and implementation of fundamental human rights that can be followed thereafter by broadening the cross-cultural legitimacy of human rights standards on international level.[50]

[46] Arati Rao, "The Politics of Gender and Culture in International Human Rights Discourse," in *Women's Rights, Human Rights: International Feminist Perspective*, eds. Julie Peters and Andrea Wolper (Routledge, 1995), 745.
[47] An-Na`im, 19.
[48] *Ibid.*
[49] *Ibid.*, 20.
[50] *Ibid.*, 21.

An-Na`im`s approach is greeted by Richard Falk who proposes a rethinking, reinterpretation of culture and internal dialog in achieving better prospects for the respect of universally recognized human rights standards.[51] In this sense, Falk considers that "without mediating international human rights through the web of cultural circumstances, it will be impossible for human rights norms and practices to take deep hold in non-Western societies".[52] Describing the two poles of the debate referring to universalists as those who completely ignore culture and cultural relativists who consider culture the "supreme guide to moral behavior" Falk condemns both approaches stigmatizing them as two forms of fundamentalism.[53]

As we can see in some opinions the universalism-cultural relativism debate is essential, but in other opinions this debate is insignificant and abstract. For example, Costas Douzinas takes a neutral position between universalism and cultural relativism suggesting that both reflect a constructed meaning of human rights, human rights struggles are actually "symbolic and political" and they do not belong to humans but construct humans.[54] According to this opinion the debate appears as insignificant for the ongoing process of definition and promotion of human rights.

The overview of various positions related to the debate around the universalism or cultural relativism of human rights reveals some possible conciliatory ways to the debate. From the most extreme positions considering that this debate is insignificant, like Douzinas, on the one hand, to the other extreme seeing universalism and cultural relativism as two strongly interconnected concepts that cannot exists without each other, like Dembour, various authors propose different approaches in order to reconcile the two camps. While Baehr and Donnelly advocate a limited relativity that puts some limits on the possible abuses of a

[51] Richard Falk, "Cultural Foundations for the International Protection of Human Rights," in *Human Rights in Cross-Cultural Perspectives*, ed. Abdullahi Ahmed An-Na`im (University of Pennsylvania Press, 1992), 49.
[52] *Ibid*, 45.
[53] *Ibid.*
[54] Douzinas, 734-735.

universal human rights system, Falk and Preis calls for a reinterpretation of the notion of culture. Lukes recognizes the existence of some fundamental values that are common for different cultural traditions and An-Na'im promotes the idea of a cross-cultural dialog.

As the list of examples about views related to the debate concerning the universalism and cultural relativism of human rights show, opinions are numerous and taking place mostly on abstract level. This thesis does not propose to engage into the theoretical debate concerning the universalism or cultural relativism of human rights neither to suggest any solution to find a golden mean. It intends simply to bring closer an abstract debate to the reality and to map a field where the debate can have practical impact in the development and implementation of international human rights standards, namely the international system of refugee protection.

CHAPTER 2

REFUGEE LAW, HUMAN RIGHTS AND THE UNIVERSALISM AND CULTURAL RELATIVISM DEBATE

2.1 Refugee Protection and the International Human Rights System

"Refugees are a reflection of our unsettled time."

(W. R. Smyser)

The problem of refugees goes back early in the history. Whenever conflicts occurred and people were persecuted various numbers of individuals fled their countries in order to find protection in other places. Refugees existed in all times and all regions of the world. As Loescher's states, the "refugee movements have been a political as well as humanitarian issue for as long as mankind has lived in organized groups where intolerance and oppression have existed".[55] Looking to the causes of refugee flight it becomes clear that the violation of fundamental rights of humans and the problem of refugees are strongly interconnected. As Steiner underscores, "the refugee problem is fundamentally a human rights problem."[56]

Human rights violations determine people to leave their homes and seek protection in states where their rights are protected. Refugees flee from countries where major conflicts and

[55] Gil Loescher, *Beyond Charity: International Co-operation and the Global Refugee Crisis* (Oxford University Press, 1993), 32.
[56] Niklaus Steiner, *Arguing about Asylum: The Complexity of Refugee Debates in Europe* (New York, 2000), 16.

gross human rights violations occur. Refugee flows almost always involve human rights violations, and these human rights violations as a cause exist in a "complex environment of economic strains, political instability, tradition of violence, ecological deterioration and ethnic tensions".[57] The violations of civil, political, cultural, social, economic rights continuously nourishes refugee flows, in other words it "creates" refugees.[58] Since the causes of refugee flight are deeply rooted in human rights violations, the problem of refugee protection must be integrated into a larger framework of human rights protection.

Accordingly, the international legal refugee regime has developed in a strong connection with the international human rights regime. Today refugees derive protection of their fundamental rights both from the refugee instruments and the international human rights instruments.[59] The aim of the international instruments on refugee protection is to protect the basic human rights of refugees when their own government fails to do so.[60] This implies the protection of internationally recognized human rights standards.

Beside the international instruments regulating refugee issues, the international and regional human rights documents affect the rights of asylum seekers and refugees. These legal documents position the asylum seeker and refugee within a human rights framework that extends beyond the Geneva Convention relating to the status of refugees.[61]

Noticeably, the UDHR declared the universal right to seek and enjoy in other countries asylum from persecution. Article 14 of the UDHR constitutes in this sense the ground for a connection between human rights and refugee law[62]: "everyone has the right to

[57] "The State of the World's Refugees: The Challenge of Protection," in *International Refugee Law: A Reader*, ed. B.S. Chimni (Sage Publications, 2000), 276.
[58] Daniele Joly, *Refugees, Asylum in Europe? (*Minority Rights Publications, 1992), 138.
[59] James C. Hathaway and John A. Dent, "Refugee Rights: Report on a Comparative Survey," in *International Refugee Law: A Reader*, ed. B.S. Chimni (Sage Publications, 2000), 203.
[60] Guy S. Goodwin Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), 8.
[61] Richard Plender and Nuala Mole,"Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments," in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge University Press, 1999), 105.
[62] Joanne van Selm-Thorburn, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* (The Hague, Martinus Nijhoff Publishers, 1998), 47.

seek and enjoy in other countries asylum from persecution". Other articles of the UDHR defining universal human rights have a specific relevance in refugee cases. Article 5 prohibits torture or cruel, inhuman or degrading treatment or punishment, which is translated in the refugee instruments into the non-refoulment principle. Article 13 states that all people have the right to freedom of movement and residence within the border of each state and similarly, the right to leave any country, including his own, and to return to his country. Freedom of movement is regarded as a fundamental right of human beings and it becomes in this sense a universal human right. The UDHR and the following human rights declarations and conventions both on international and regional level set forth a general framework for refugee protection.

In this international human rights framework a "refugee-specific system"[63] has developed in order to address the particular problems of refugees. The Geneva Convention on the status of refugees is the "cornerstone" of modern international refugee law[64] being the earliest convention inspired by the UDHR.[65] It was between the first major achievements not only in the refugee regime but also in the human rights field. The UDHR was a key secondary source for the refugee convention that represented the second major human rights convention adopted by the UN.[66]

The preamble of the Refugee Convention has a strong human rights language.[67] The first point of the preamble affirms the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. The second point emphasizes the aim of the drafters to incorporate human rights standards in the recognition and treatment of refugees emphasizing that the UN has a profound concern for refugees, and it endeavors to assure

[63] Hathaway, Dent, 204.
[64] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 91.
[65] *The United Nations Today* (New York: United Nations, 2008), 242.
[66] *Ibid*., 92, 119.
[67] *Handbook on Procedures and Criteria for determining Refugee Status, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, 1.

refugees the widest possible exercise of their fundamental rights and freedoms.[68] As it is stated in one opinion, the 1951 Convention and the 1967 Protocol can be seen as the "modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger" reflecting a fundamental human value on which global consensus exists.[69] In conclusion, the international refugee regime that is built on the Geneva Convention is promoting universal human rights for people seeking protection.

To see in more details how human rights and the problem of refugees are interrelated, the following connections can be identified. Firstly, a persons' refugee status is determined based on human rights violations he would face in his country of origin. Secondly, the protection of refugees in their country of asylum requires the respect of their human rights and thirdly, the possibility of return is determined based on the improvement of human rights protection in the country of origin.[70] Consequently, the link between refugees and human rights appears in different phases refugees go through.

These phases include the phase of taking the decision to flee based on the overall background in the country of origin, the actual journey, and the moment of arrival to a particular destination and finally the status of the refugee in the host society.[71] The most important human rights connections, also relevant from the universalist and cultural relativist point of view, is related to the initial phase in the country of origin and the phase of determination and recognition of refugee status in the country of asylum.

Relating to the first phase, summarized in one definition "the refugee's need for international protection arises from the violation of his or her rights combined with the state's palpable failure in its duty to defend citizens against such violations-which includes the duty

[68] *Ibid*.
[69] Volker Türk and Frances Nicholson, "Refugee protection in international: an overall perspective," in *Refugee Protection in International Law*, eds. Erika Feller, Volker Türk and Frances Nicholson (Cambridge University Press, 2003), 3.
[70] van Selm-Thorburn, 43.
[71] Based on Demuth's scheme on the phases of migration, Andreas Demuth, "Some Conceptual Thoughts on Migration Research," in *Theoretical and Methodological Issues in Migration Research*, ed. Biko Agozino (Ashgate, Aldershot, 2000), 30-32.

to refrain from violations itself".[72] As it was mentioned at the beginning of this section, human rights violations represent the main cause of refugee flights. From a human rights perspective, this requires the promotion and monitoring of universal human rights values[73] and the respect for the internationally recognized human rights standards in order to prevent human rights abuses and to forego the flight of individuals.

Turning to another phase, if the causes of flight are not solved and refugees arrive in the countries of refuge, based on international legal obligations, these countries have to protect refugees. As Selm-Thorburn suggests, "the moral basis to the entire refugee issue involves the upholding of human rights and dignity, and is standardized by international legal obligations established in a number of documents."[74] In this phase the refugee definition comes into the forefront of discussions that involve the determination of the level of persecution and human rights violations in order to decide upon the refugee claims.

The Geneva Convention on the status of refugees offers the basic definition stating that a refugee is a person that "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality or being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[75] The definition clearly recognizes five grounds of persecution that can justify a refugee claim. The problem emerges when other serious human rights violations that do not clearly have their base on one of these five grounds can constitute a legitimate premise for refugee recognition. In one opinion the refugee definition protects against violations of internationally recognized human rights regardless of whether the

[72] The State of the World's Refugees, 276.
[73] van Selm-Thorburn, 89.
[74] *Ibid*., 104.
[75] Geneva Convention on the Status of Refugees, art. 1A(2).

threatened harm is premised on the five grounds enumerated by the Convention.[76] In this sense the definition of refugee can be interpreted in accordance with international human rights instruments. This is the case of gender based persecution.

The example of gender based persecution demonstrates that the refugee determination is moving towards a more inclusive interpretation of the convention grounds. Gender based persecution includes the various forms of violence against women and strongly connects refugee law and human rights law.[77] As the following case analysis will demonstrate, although gender is not included among the five Convention grounds of persecution, based on the continuously developing human rights standards relating to gender based violence and discrimination, there is a tendency to recognize refugees threatened by gender related persecution. [78]

To sum up this section, there are no fixed boundaries between human rights law and refugee law. As the UNHCR training manual considers "The international refugee law, like humanitarian law, is in fact a branch of human rights law".[79] The refugee regime has developed in parallel with the international human rights system and both are mutually contributing to the development of the other. Human rights law offers a general, basic framework for human rights protection; refugee law establishes more specific norms. Refugee instruments and the asylum case law contribute to the development of fundamental human rights standards.[80] Since this interconnectedness exists between human rights and refugees,

[76] Daniel J. Steinbock, "The refugee definition as law: issues of interpretation," in *Refugee Rights and Realities, Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge University Press, 1999), 29.
[77] Anker, Lufkin.
[78] Jean-Yves Carlier, "The Geneva refugee definition and the 'theory of the three scales'," in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge University Press, 1999), 38-39.
[79] Jerzy Sztucki, "Who is a refugee? The Convention definition: universal or obsolate?" in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge University Press, 1999), 63.
[80] Deborah E. Anker, "Refugee Law, Gender, and the Human Rights Paradigm" http://www.law.harvard.edu/students/orgs/hrj/iss15/anker.shtml (17/05/2010)

refugee law is also confronted with the universalism or cultural relativism debate of human rights.[81] More insight into this connection is offered by the following section.

2.1.1 Refugee Protection in the Light of the Universalism-Cultural Relativism Debate

> "Refugee law … reflects the human rights community's own tensions and dilemmas."
> (Deborah Anker)

The previous section concludes that the connection between human rights and refugees is well established. Human rights violations force people to leave their homes and to seek refuge in foreign countries. In a particular translation of the universalism–cultural relativism dichotomy into the field of refugee protection, related to the ethics of immigration, the universalist and the particularist approach to refugee protection can be observed. The universalist approach is in favor of freedom of movement and international redistribution favoring open borders based on universal moral principles and universal human rights.[82] This universalist approach defending refugees and asylum seekers can be included into the liberal universalist theories that give equal moral weight to the welfare of all individuals, regardless of nationality.[83] In contrast, the particularizing trend wants to close borders based on institutional, cultural, practical differences that might be endangered by the newcomers.[84]

From another point of view, if we apply the universalism vs. cultural relativism debate to the refugee problem, it can be observed that a lack of respect for internationally recognized human rights standards in the name of cultural relativism can determine violations of universally recognized human rights norms and cause refugee flows. Moreover, the debate can have repercussion when it comes to the recognition of refugee status. The question is whether countries of asylum do promote the universalism of human rights recognizing

[81] *Ibid.*
[82] Veit Bader, "The Ethics of Immigration," *Constellations* 12 (2005): 335.
[83] Christina Boswell, *The Ethics of Refugee Policy(*Ashgate, 2005), 4.
[84] Bader, 336.

refugees based on universal human rights standards or they reject applicants accepting cultural relativist arguments and closing their eyes upon human rights violations when it is justified in cultural relativist terms. As the following sections analyzing the problem of gender based persecution, in particular asylum claims grounded on the fear of FGM will show refugee law is moving towards a more comprehensive promotion of universal human rights standards.

As it was outlined in the previous chapter concerning the larger debate, reaching a consensus on the universality of human rights across various cultures is difficult.[85] Related to the problem of refugees an active promotion and implementation of universal human rights standards would address the roots of the refugee problem lying in human rights violations.[86]

The Geneva Convention on the status of refugees is a universal legal instrument with universal application[87] as the other international human rights instruments. As a universal legal instrument it should protect and promote universal human rights standards contributing to the recognition that human rights violations cannot be justified on cultural, traditional or religious grounds.[88] The question is whether the Geneva Convention based on universal principles truly defends universal human rights standards since its criteria for persecution have been widely criticized.[89] The evolutions in the refugee field related to gender based persecution can shed light on a positive development in this sense.

To sum up, the problem of universalist or cultural relativist view of human rights appears particularly when determining refugee status. The universalist view of human rights would lead to a more inclusive recognition of refugees while a more cultural relativist position would justify exclusions from refugee status. Being part of a larger human rights

[85] Claudia Tazreiter, *Asylum Seekers and the State: The Politics of Protection in a Security-Conscious World* (Ashgate, 2004), 52.
[86] Joly, 139.
[87] Goodwin Gill, 8.; Christina Boswell, "European Values and the Asylum Crisis," *International Affairs* 76, no.3 (2000), 539.
[88] Rodger Haines, "Gender-related persecution," in *Refugee Protection in International Law*, eds. Erika Feller, Volker Türk and Frances Nicholson (Cambridge University Press, 2003), 333.
[89] Peter Nyers, *Rethinking Refugees: Beyond States of Emergency* (Routledge, 2006), 47.

framework that is favoring a universal view of human rights, the refugee system should promote this universality. The fact that the regime of refugee protection is moving towards a more comprehensive promotion of universal human rights standards will be demonstrated taking the example of women's rights and gender based persecution.

2.2 Women's rights and gender based persecution

> "Harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds"
> (UNHCR Guidelines on Gender-related persecution)

One main divergence between the cultural relativist views and universal human rights is concerning women's rights.[90] While the international human rights regime is promoting equality of all human beings and universal human rights for all men and women, in different societies still exists a concrete gender-based distinction between individuals.[91]

To overcome these differentiations the international human rights instruments promote a universal protection of human rights for all humans, indifferent of sex, culture, religion. Sustaining this universalist view, the Declaration on the Elimination of Violence Against Women, for example, prescribes that custom, tradition or religious consideration cannot be invoked in order to avoid obligations to the elimination of violence against women.[92] In addition, the Convention on the Elimination of All Forms of Discrimination Against Women calls upon states to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[93] In sum, international human rights

[90] Brown, 33.
[91] Tomushat, 86.
[92] Declaration on the Elimination of Violence Against Women, art. 4.
[93] Convention on the Elimination of All Forms of Discrimination Against Women, art. 5(a).

instruments about women's rights are promoting a universal language against practices legitimized in cultural relativist terms.

However, women's rights are violated in different societies in various ways that force women to seek refuge outside of their countries. As the report of the Commission on Human Rights affirms, "the tension between universal human rights and cultural relativism is played out in the everyday lives of millions of women".[94] Women can be exploited by national groups or nation-states, they can be constrained to give birth to more children or, on the contrary, they can be sterilized by force and often become key targets in conflicts.[95] Women in particular societies face different treatment based on well established religious and cultural norms, because "transgressed their society's laws or customs regarding their role of women"[96] suffering because of sanctions in the name of culture and tradition.[97] Related to cultural relativist arguments, some acts of women might be persecuted because of their behavior is against particular religious or political rules in that society,[98] gender related persecution having in this sense political purpose in order to enforce the respect of particular religious, cultural or social traditions.[99] Moreover, practices justified in traditional terms like female genital mutilation, forced marriages, domestic violence, widow burnings come in contradiction with internationally recognized human rights standards. These practices can be considered forms of persecution that can justify the flight of women from their country of origin and their claim for refugee status.

[94] UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women*, 31 January 2002, E/CN.4/2002/83, http://www.unhcr.org/refworld/docid/3d6ce3cc0.html, 27 /05/2010, 7.
[95] Philip Marfleet, *Refugees in a Global Era* (Palgrave Macmillan, 2006), 153.
[96] Susan Forbes Martin, *Refugee Women* (Lexington Books, 2004), 28.
[97] Carole Nagengast, "Women, Minorities and Indigenous Peoples: Universalism and Cultural Relativity," *Journal of Anthropological Research* 53, no.3, 359; UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendations Nos. 19 and 20, 1992 (A/47/38)*, 1992, A/47/38, http://www.unhcr.org/refworld/docid/453882a422.html, 27/05/2010.
[98] Handbook on Procedures and Criteria for determining Refugee Status, 8.
[99] Goodwin-Gill, 82.

In addition the Geneva Convention on the status of refugees offers universal protection for both male and female refugees without any discrimination based on gender. Nevertheless, the condition set by the convention refers to the establishment of a well-founded fear of persecution based on five grounds of persecution. Gender is not included. According to the GC a refugee is a person that "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality or being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[100]

The Convention definition clearly states the five grounds of persecution that are taken into account when deciding about refugee claims: race, nationality, religion, member of a particular social group, political opinion. Critical voices often considered that the absence of gender as an enumerated ground for a well founded fear of persecution is an omission that should be ameliorated.[101] Having a gender-neutral language the Convention fails to consider that women are persecuted in many societies because they are women.[102] Persecution might be gender related in the sense that the method used to persecute is related to sex or gender.[103] Obviously many women fall into one of the five categories because their nationality, race, religion or political opinion makes them targets of persecution.[104] However, it might happen that none of these reasons but only the fact that they are women make them subject of persecution.

[100] Geneva Convention on the Status of Refugees, art. 1A(2).
[101] K. J. Greatbach, "The Gender Difference: Feminist Critiques of Refugee Discourse," *International Journal of Refugee La*w 1, no.4, (1989), 34.
[102] Victoria Foote, "Refugee Women as a Particular Social Group: A Reconsideration," *Refuge* 14, no.7 (1994): 8.
[103] "Handbook on Procedures and Criteria for determining Refugee Status, 8.
[104] Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, May 2002, 6.

The universalism-cultural relativism dichotomy emerges related to women's rights questioning whether the international refugee regime offers protection to women facing violations of universally recognized rights but justified on cultural relativist grounds. Women's rights in refugee cases can be discussed related to the concept of gender based persecution. In more specific terms gender-related persecution refers to persecution of women because they are women and gender-specific persecution describes the persecution in form of a serious harm specific to women.[105] Gender had a long way till it was considered as a ground for persecution that can lead to the recognition of refugee status. Continuous efforts resulted in an elaboration of various guidelines that refer to the problem of gender based persecution. Some examples follow.

For instance, the Canadian guidelines for Women Refugee Claimants issued by the Canadian Immigration and Refugee Board in 1993 recognize that gender related persecution provides a basis for refugee status in Canada. Four types of gender based persecution are recognized: fear based on one of the five grounds of the GC, fear of reasons entirely related to kinship, fear which is due to severe gender-based discrimination, fear resulting from failure to conform to laws and practices which discriminate based on gender.[106]

The expert roundtable organized by the UNHCR and the International Institute of Humanitarian Law in San Remo discussing problems related to gender-related persecution concluded that the text, object and purpose of the refugee Convention requires a gender-inclusive and gender-sensitive interpretation and the refugee definition, properly interpreted, covers gender-related claims. Therefore, there is no need to include an additional sixth ground of persecution to the Convention.[107] The summary conclusion of the expert roundtable further

[105] Haines, 327.
[106] Haitan Lu, "Women`s Human Rights Universalism and Cultural Relativism," http://sookmyung.tongkni.net/admin/issue/upfileen/10.PDF (01/06/2010).
[107] "Summary Conclusions: gender-related persecution, expert roundtable organized by the UNHCR and the International Institute of Humanitarian Law , "San Remo, Italy, 6-8 September 2001, in *Refugee Protection in International Law*, eds. Erika Feller, Volker Türk, Frances Nicholson (Cambridge University Press), 351.

refer to the fact that gender can influence the type of persecution or harm suffered and the reason of persecution and a gender-sensitive interpretation must be given to each of the convention grounds in order to determine the existence of a well-founded fear.[108]

Particularly, the ground defined as membership of a particular social group offers the best option to accept gender based persecution as justifying refugee claims. However, membership of a particular social group constitutes the most controversial convention ground and the acceptance of a refugee based on this ground must take into account the "individual's past and prospective situation in a particular social, cultural, political and legal context judged from a broad humanitarian perspective".[109]

Asylum seeking women have to demonstrate that they have a well-founded fear of persecution, additionally, that they are part of a particular social group, and most of all that their well-founded fear exists particularly because of their membership of this group.[110] In a basic definition in determining whether a particular group of people constitutes a particular social group within the meaning of the Convention, it must be determined whether a linking or uniting factor exists such as ethnicity, culture, language, education, family, economic activity, shared values.[111] In the case of women it must be demonstrated that their gender is that linking factor.

To sum up, strongly integrated into the international human rights system a universal language of women's rights is promoted through the various human rights documents. Women's rights and gender based persecution is an important field in which human rights law and refugee law find a common ground.[112] Due to the strong connection to the human rights regime, refugee law has an important role in the promotion of universal human rights

[108] *Ibid*., 352.
[109] *Ibid*, 313.
[110] "United States INS Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims from Women," Memorandum, 1995, in *International Refugee Law: A Reader*, ed. B.S. Chimni (Sage Publications9, 47-49.
[111] Guy S. Goodwin Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2007), 75.
[112] Anker, Lufkin.

standards.[113] The following chapter will examine particular cases of asylum claims from female individuals who are facing persecutions justified in cultural relativist terms, particularly female genital mutilation. The cases are taken from the refugee case law of the United Kingdom and the United States, two countries dealing continuously with a large amount of asylum claims. The analysis of the case law is going to illustrate that the refugee system is moving towards a more comprehensive protection of the universal language of human rights.

[113] Anker.

CHAPTER 3

CASE ANALYSIS

ASYLUM CLAIMS BASED ON FGM AND THE PROMOTION OF UNIVERSAL HUMAN RIGHTS STANDARDS

3.1. Background about FGM as a Particular Form of Gender Based Persecution

"Our sacred weapons of pleasure
Are being destroyed by the day
Rendered useless
By our overseeing Lords and Ladies
Of ancestral descent
…..
They mutilate our pride and say it is 'tradition'
"The initiation to womanhood""
("Our Dilemma" by Chinwe Azubuike)

The practice of female genital mutilation (FGM) is an extensively debated human rights issue among those who argue for the universalism of human rights and those defending cultural relativism. FGM is a typical form of gender based persecution.

FGM or female genital cutting/operation/surgery has a large variety of forms in practice. Generally speaking, according to the definition provided by the World Health Organization, FGM comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons. The WHO further emphasizes that this practice is mostly carried out on young girls or adult women without anesthesia by traditional circumcisers, who frequently lack medical training

to perform surgeries. Between 100 and 140 million girls and women worldwide are living with the consequences of FGM. This practice is most common in the western, eastern and north-eastern regions of Africa, in some countries in Asia and the Middle East, and among certain immigrant communities in Europe and North America.[114]

As a human rights problem, FGM is a key issue in the debate between universalists and cultural relativists.[115] From a universalist standpoint, FGM is a violation of fundamental rights of girls and women, reflecting deep-rooted inequality between sexes and constituting an extreme form of discrimination, justified in the name of culture.[116] FGM violates several internationally recognized universal human rights: the rights of children, when carried out on minors who cannot give their consent; the right to health, security and physical integrity of the person; the right to corporeal and sexual integrity; the right to be free from torture and cruel, inhuman or degrading treatment; the right to life, when it causes the death of the girl or woman; the equality between man and woman, FGM representing male dominance in societies where women's voices are not considered[117].

The WHO further states that FGM has no health benefits, but it damages the healthy and normal female genitalia, interfering with the natural functions of the female body[118]. It has negative effects on short and long term physically and psychologically, immediately after the procedure as well as later at the consummation of a marriage and childbirth.

The above enumerated human rights violations by the procedure of FGM reveal a universalist view that condemns this practice. The universalist arguments sustain that FGM is used to control women's sexuality and to assure male dominance and

[114]World Health Organization on Female genital mutilation, http://www.who.int/mediacentre/factsheets/fs241/en/index.html, (17/05/2010).
[115] Rosemarie Skaine, *Female Genital Mutilation: Legal, Cultural and Medical Issues* (McFarland&Co., 2005)
[116] Rogaia Mustafa Abusharaf, "Introduction: The Custom in Question," in *Female Circumcision*, ed. Rogaia Mustafa Abusharaf (University of Pennsylvania Press, 2006), 10.
[117] C. Acus Love, "Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law," http://www3.law.columbia.edu/hrlr/hrlr_journal/40.1/Love_Final.pdf, (17605/2010), 219.
[118] *Ibid.*

exploitation,[119]moreover, considers that FGM is an act of violence that violates multiple human rights and a number of international conventions on human rights like the UDHR, the UN Convention on the Rights of the Child, the UN Convention on the Elimination of All Forms of Discrimination Against Women. Continuous international actions are initiated by international organizations like the WHO or UN agencies in order to raise awareness and support advocacy for the elimination of this practice.[120]

While the international community fights against this practice in the name of universal human rights, cultural relativist arguments, on the other hand, defend the practice of FGM based on socio-cultural, hygienic, aesthetic, spiritual, religious and sexual reasons. Relativists argue that FGM facilitates sexual relations and childbirth and increases fertility, it facilitates the integration of the girl into the community, it ensures that the girl keeps her virginity before marriage and she remains faithful to her husband during the marriage. As the WHO recognizes, FGM is a social convention within the communities who practice it, it prepares a girl for adulthood and marriage. In many places it has also religious support.[121] It is supported equally by men and women in many societies, exercising severe pressure on girls and their families to continue the tradition.[122] In cultural relativist terms FGM is not torture or persecution, since it is accepted by the girl's family and community.[123] Consequently, the fact that it is considered in many societies a cultural tradition supported or tolerated by the authorities makes it more difficult to abandon this practice in the name of universal human rights standards.

[119] In re Fauziya Kasinga, 3278, United States Board of Immigration Appeals, 13 June 1996.
[120] *Ibid*.; For example: UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 14: Female Circumcision*, 1990, A/45/38 and Corrigendum, http://www.unhcr.org/refworld/docid/453882a30.html, (27/05/2010)
[121] World Health Organization.
[122] Acus Love, 183.
[123] Acus Love, 218.

3.2. FGM in Asylum Claims

> "Women and girls will nevertheless continue to be in need of international protection as long as the authorities in their own countries are either unable or unwilling to protect them effectively from the practice." (UNHCR)

FGM is a form of gender based persecution that threatens girls and women because they are women and they have to be subjected to this practice according to the tradition. The international community fights against this form of persecution in the name of universal human rights standards. Due to the strong link between human rights and refugee law, the latter has to consider the problem of FGM as a form of persecution that is invoked in applications for refugee status because the problem of FGM appears in a growing number of asylum claims. What makes it difficult to deal with this problem is the wide support this practice enjoys by various cultures and religions. Even if international law protects the right to participate in cultural life and the freedom of religion, this protection has limitations necessary to protect fundamental human rights and freedoms of others.[124]

Accordingly, it is accepted in the terms of the international human rights regime that FGM constitutes a grave violation of human rights resulting in serious harm. In accordance with the international human rights instruments, the refugee system should protect internationally recognized universal human rights. Still, when it comes to the asylum criteria, refugee recognition must be fulfilled by the applicants. Not all forms of human rights violations are accepted by the refugee system as legitimate grounds for asylum. Asylum seekers have to demonstrate first that they are faced by persecution in their countries of origin, and in the case of women claiming asylum based on the fear of FGM this persecution consists in the forced practice they would face if returned. Second, the ground for persecution must be one of the five grounds enumerated in the Geneva Convention. Asylum seekers for FGM are usually included into the fourth category: membership in a particular social group,

[124] World Health Organization, "Eliminating Female Genital Mutilation: An interagency statement," http://www.who.int/reproductivehealth/publications/fgm/9789241596442/en/index.html (16/05/2010).

this category being the most appropriate and most common for applicants having a well founded fear of FGM.[125] From the different categories of social groups[126] the members of this group are linked by an innate, immutable characteristic, namely their female gender, moreover, they all are connected by the fact that they did undergo or they are forced to undergo in the future FGM in their countries of origin. Thirdly, there must be a link between the persecution and the protected ground. In this case, women have to prove not only that they face FGM or suffered from FGM and their membership in a particular social group, but they also have to demonstrate that the form of persecution they face is because of their membership in a particular social group.

The fact that FGM is supported by cultural relativist arguments is a reason why it is considered in some opinions that asylum claims based on FGM have been rejected earlier by asylum adjudicators.[127] However, the evolution of the case law demonstrates a recent positive turn in granting asylum to women having past or fearing future FGM experience. This turn shows a tendency toward defending the universal view of human rights based on the rejection of violent acts justified in cultural relativist terms and the protection of universally recognized rights for all women around.

The following section is going to analyze landmark cases from the US and the UK that constitute important precedents in recognizing FGM as a form of gender based persecution that can justify asylum claims. The two major cases examined are the Kasinga case from the US asylum case law and the Fornah case from the UK. The other cases analyzed are going to show how asylum claims based on FGM are building on the previous case law, contributing to the evolution of a positive case law in the field of gender based persecution.

[125] Zsaleh E. Harivandi , Invisible and Involuntary: Female Genital Mutilation As A Basis For Asylum, http://legalworkshop.org/2010/04/21/cornell-law-review-post (16/05/2010).
[126] Goodwin-Gill, McAdam, 78.
[127] Acus Love, 219.

3.3. The US Case Law

The following section is focused on court decisions in asylum claims grounded on persecution by FGM. These cases have set precedents in asylum case law for future similar claims and are relevant because by these decisions the authorities set standards and examples shaping the international legal system relating to the refugee problem.[128] The overview of the most important decisions in the US and UK asylum case law will reveal a positive move towards the recognition of FGM as a human rights violation that can justify asylum claims.

3.3.1 The Kasinga Case

In the US FGM was criminalized by the Congress in 1996 in the Illegal Immigration Reform and Immigrant Responsibility Act that was followed by the legal prohibition of the practice in many states in the US.[129] The first famous asylum case concerning the issue of FGM was in the same year, the case of *Kasinga*[130], in which the Board of Immigration Appeals (BIA) recognized that the practice of FGM can constitute persecution being life-threatening and resulting in permanent disfiguration, thus, it can be the basis to grant asylum. The applicant was a 19 year old native citizen of Togo, member of the Tchamba-Kunsuntu Tribe. She fled Togo because after the death of her father, her aunt and husband forced her to undergo FGM before she got married to a much older man. Moreover, the Togolese authorities, even aware of the practice of FGM, were unlikely to take any steps to protect her. She arrived to the US in 1994 and immediately requested asylum.

The country reports used in the case showed that FGM is practiced by tribes in Togo and around 50% of women are mutilated. Furthermore, the police tolerate FGM and other violent acts against women. The BIA defined the applicant's social group as the group of

[128] W.R. Smyser, "Refugees: A Never-Ending Story," in *Human Rights in the World Community: Issues and Action*, eds. Richard Pierre Claude and Burns H. Weston (University of Pennsylvania Press, 1992), 119.
[129] "Legistaltion on Female Genital Mutilation in the United States, Center for Reproductice Rights, Briefing paper," http://reproductiverights.org/sites/default/files/documents/pub_bp_fgmlawsusa.pdf, (20/05/2010).
[130] *In re* Fauziya Kasinga.

young women members of the Tchamba-Kunsuntu Tribe of northern Togo who have not had FGM, as practiced by that tribe, and who oppose the practice. The BIA concluded that both being a young woman and being a member of the applicant's tribe were immutable characteristics. In sum, the BIA determined that Kasinga had a well-founded fear of persecution on account of her membership in the particular social groups described above and recognized her refugee status. The BIA recognized in this case that FGM is a form of persecution that is tolerated by the authorities in Togo, so that the US has to offer subsidiary protection for the applicant claiming asylum on this grounds. The court took sides by condemning a practice legitimized in cultural relativist terms, condemning indirectly the authorities that do tolerate it and defending universal human rights standards by recognizing that the US has to protect women fleeing FGM. Consequently, the decision shows a positive move towards defending universal human rights standards for women.

This way, since precedence has an important role in the Anglo-American case-law, the Kasinga case created a precedent for recognizing women facing FGM. It constitutes a landmark case since it establishes the right to asylum for women who fear future persecution in the form of FGM if returned to their home country.[131] This case represents a step forward to a more equitable consideration of asylum claims by women based on their specific experiences,[132] thus, introduces a universal protection of the basic human rights of women condemning the practice of FGM justified in cultural terms.

3.3.2 The Abankwah Case

The claim of asylums based on fear of FGM continued in 1999 in the *Abankwah case.*[133] Abankwah was a 29 year old native of Ghana and member of the Nkumssa tribe who

[131] Acus Love, 192.
[132] Arthur C. Helton and Alison Nicoll, "Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In re Fauziya Kasinga and Prospects for more Gender Sensitive Approaches," 28 *Columbia Human Rights Law Review* (1997).
[133] Adelaide Abankwah v. Immigration and Naturalization Service, United States Court of Appeals for the Second Circuit, 185 F.3d 18, 1999.

punishes women engaged in premarital sex with FGM. The applicant claimed asylum on the grounds that if she returned to Ghana she would face this punishment. The US Court of Appeals for the Second Circuit built on the international human rights standards recognizing that "FGM has been internationally recognized as a violation of women's and female children's rights".[134] The court stated in the appeal that her fear of FGM is sufficiently grounded and satisfies the well-founded fear requirement based on her membership in the particular social group of women in the Nkumssa tribe who did not remain virgin until their marriage. Moreover, although criminalized earlier in Ghana, FGM is still practiced and the government does not enforce the law prohibiting it. Based on these motivations, the court of appeal reversed the previous decision and withheld Abankwah's deportation.

In sum, the court expressly referred to FGM as a human rights violation based on international human rights standards and took a position in defending the universal human rights of women against the government of Ghana that tolerates the practice because of the large support of it in the name of tradition. This case contributed also to a more comprehensive promotion of universal standards of women's rights.

3.3.3 The Mohammed Case

The *Mohammed v. Gonzales*[135] case in 2005 further paved the way for future asylum claims based on FGM.[136] Khadija Ahmed Mohamed was a native citizen of Somalia, who claimed that she has a well-founded fear of future persecution on account of her membership in the Benadiri clan. She had already been subjected to FGM and based her claim on this past experience. The court recognized that FGM is a form of persecution within the meaning of the asylum law, rejecting the government's opinion that the practice cannot be a basis for a claim

[134] *Ibid.*
[135] Khadija Mohammed v. Alberto R. Gonzales, Attorney General; Khadija Ahmed Mohamed v. Alberto R. Gonzales, Attorney General, A79-257-632; 03-72265; 03-70803, United States Court of Appeals for the Ninth Circuit, 10 March 2005.
[136] Harivandi.

of past persecution because it is "widely accepted" and "widely practiced".[137] It further stated that because the practice of FGM is not clan specific in Somalia but it is deeply imbedded in the culture and performed on approximately 98% of women, the social group the applicant is part of is that of Somalian females, gender being the innate characteristic that links the members of this group. Moreover, the government of Somalia was unable and unwilling to control the practice of FGM that is a near universal practice in the country and there is no law that prohibits it.

In addition, the court held that women who have undergone FGM in the past are eligible for asylum even without a further showing of a well-founded fear of the future persecution because FGM is a 'permanent and continuing' act of persecution, that permanently disfigures a women causing long term health problems. However, FGM is not the only form of persecution women face in Somalia, which suggests that the fears of the applicants are well sustained.

The court in the Mohammad case also recognized the humanitarian exception that can justify the asylum claim, stating that a victim of past persecution may be granted asylum even without a fear of related future persecution if the applicant establishes compelling reasons for being unwilling or unable to return because of the severity of the past persecution or that a reasonable possibility exists that she may suffer further serious harm upon returning to her country of origin. An important step towards the promotion of universal standards was the rejection of the government's argument that FGM cannot be considered as past persecution because it is widely practiced and accepted.[138] This attitude clearly shows the rejection of cultural relativist arguments in the favor of universal human right standards that condemn FGM.

[137] "9th Circuit finds that female genital mutilation constitutes ongoing persecution," *Immigrants' Rights Update* 19, no.2 (March 31, 2005), http://www.nilc.org/immlawpolicy/asylrefs/ar127.htm (16/05/2010).

[138] Mohammad v. Gonzalez.

3.3.4 In re A.T. Case

A conflicting judgment came out in 2007 in another FGM asylum case. In *In re A.T. (Alima Traore)*[139], the applicant was a 28 year old woman from Mali who had undergone FGM as a child and applied for asylum in 2004 in the US. She stated that she opposes FGM and she would oppose the practice performed on her daughter who she might have in the future. The BIA distinguished the applicant from the applicant in *Kasinga* who had not yet undergone FGM. Therefore, the BIA held that because "FGM is generally performed only once," the respondent could not have a well-founded fear of future persecution. It rejected the continuing harm argument, sustaining that a woman can undergo FGM only once, dismissing in appeal the applicant's claim to withhold deportation. However, later the Attorney General vacated the BIA's decision in the case of A.T., considering that deciding a woman could suffer FGM only once and ignoring the possibility that a woman who suffered FGM in the past could suffer a different form of persecution in the future was erroneous.

3.3.5 The Bah Case

In June 2008 the *Bah v. Mukasey*[140] case concerned an appeal against the BIA's negative decision about an asylum claim. Salimatou Bah, Mariama Diallo and Haby Diallo were citizens of Guinea, belonging to the Fulani ethnic group that practiced FGM, and they alleged that they suffered from FGM, which still has negative consequences on their adult life. Their claim was first rejected by the BIA with the motivation that FGM could not be repeated and they did not present sufficient evidence that they would suffer other forms of torture if returned to Guinea. Later the US Court of Appeal for the Second Circuti vacated the BIA's decision.

[139] In re A.T., US Department of Justice, Executive Officer for Immigration Review, Board of Immigration Appeals , Sept 27, 2007.
[140] Bah v. Mukasey, Diallo v. Department of Homeland Security, Diallo v. Department of Homeland Security, 529 F.3d 99, 103 (2d Cir. 2008), United States Court of Appeals for the Second Circuit, 11 June 2008.

In the appeal the court affirmed that the fact that the applicants have undergone FGM in the past does not mean that their life or freedom is not threatened in the future. The court considered that the BIA had erred in the *In re A.T.* case by assuming that a woman could undergo FGM only once. The court found that the gender of the applicants combined with their ethnicity, nationality and tribal membership satisfies the social group requirement. According to the regulations, once established that past persecution occurred on a protected ground, in this case the membership of a particular social group, the applicant has the benefit of the presumption that her life or freedom would be threatened in the future in the country of origin. Further, the court stated that the BIA erred considering that the applicant can fear other forms of persecution than FGM and the court found that members of the applicant's particular social group commonly suffered many types of harm beyond FGM.

3.3.6 Other Cases

A number of other cases addressed the problem of FGM as persecution based on the ground of membership of a particular social group. To mention some more: the case of Abankwah[141], Sak and Hah[142], Hassan v. Gonzalez[143], Niang v. Gonzalez[144],Uanreroro v. Gonzalez, Balogun v. Ashcroft, Nwaokolo v. INS, etc. Since the case of Kasinga, courts tend to grant asylum as long as the facts are sufficiently proven.[145] The decisions in these cases were built upon former asylum claims based on FGM further showing a tendency to recognize women having a well-founded fear of FGM.

[141] Abankwah v. Immigration and Naturalization Service.
[142] Matter of S-A-K- and H-A-H-, 24 I&N Dec. 464 (BIA 2008), United States Board of Immigration Appeals, 5 March 2008.
[143] Hassan v. Gonzales, Attorney General, 484 F.3d 513 (8th Cir. 2007), United States Court of Appeals for the Eighth Circuit, 7 May 2007.
[144]Niang v. Gonzales, Attorney General, 422 F.3d 1187 (10th Cir. 2005), United States Court of Appeals for the Tenth Circuit, 8 September 2005.
[145] Judith Faucette, "Female Genital Mutilation in US Immigration Law," http://gender-equality-law.suite101.com/article.cfm/female_genital_mutilation_in_us_immigration_law (16/052010).

3.4 The UK Case Law

In the UK FGM was incriminated first in the 1985 Prohibition of Female Circumcision Act re-enacted later by the Female Genital Mutilation Act 2003.[146] However, until recently UK courts were reluctant to accept the fear of FGM as a ground for asylum, having a very restricted interpretation on particular social group and convention grounds.[147] Yet a recent positive evolution can be observed similarly to the US. In 2002 the Immigration Appeal Tribunal overturned the Adjudicator`s asylum decision, recognizing a Kenyan woman[148] on the grounds that being part of a group of young girls living in tribal communities in Kenya where there is an ingrained practice of FGM does not have an immutable characteristic because not all the girls in this tribe undergo forced FGM, as many of the girls undergo it voluntarily.[149] In 2005 the Court of Appeal in P and M v Secretary of State for the Home Department accepted the claim of a young Kenyan woman from the Kikuyu tribe who feared that her father would force her to undergo FGM.[150]

The real turn was brought by the Fornah case[151] that set a precedent in recognizing that FGM can be considered persecution and, that women having a well-founded fear of FGM constitute a particular social group.[152] The highest court in the UK accepted that FGM is a form of persecution in terms of the Geneva Convention and membership of a particular social group as a ground for persecution.[153]

[146] UK Parliament, Prohibition of Female Circumcision Act 1985, http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=42&NavFrom=2&parentActiveTextDocId=1299516&ActiveTextDocId=1299516&filesize=10331, Female Genital Mutilation Act 2003, http://www.opsi.gov.uk/acts/acts2003/ukpga_20030031_en_1#l1g1

[147] Nicola Loughran, Female Genital Mutilation, Child Asylum and Refugee Issues in Scotland, http://www.savethechildren.org.uk/caris/legal/srandi/sr_22.php#ref26, (19/05/2010).

[148] SSHD v. Julia Wanguru Muchomba, Appeal no. CC-25710-2001, 2 May 2002.

[149] "Female genital mutilation, asylum seekers and refugees: the need for an integrated European Union agenda,"Health Policy 70, 2004, 155.

[150] P and M v Secretary of State for the Home Department [2004] EWCA Civ 1640; [2005] Imm AR 84.

[151] Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent), [2006] UKHL 46, United Kingdom: House of Lords, 18 October 2006.

[152] Loughran.

[153] Loughran.

Zainad Esther Fornah was a citizen of Sierra Leone. She arrived to the UK in 2003 and claimed asylum, arguing that if returned to Sierra Leone, she would be at risk of subjection to FGM that is practiced on the majority of girls in this country. Her claim was at first rejected. The House of Lords analyzed the case in appeal. It was accepted that she has a well-founded fear of FGM that amounts to persecution. The question was whether she can be included in a particular social group for reasons of her membership in which she has a well-founded fear of FGM.

Lord Bingham of Cornhill recognized that FGM constitutes treatment which would amount to persecution within the meaning of the Convention; moreover, claims based on FGM have been recognized or upheld in many courts around the world. Lord Bingham further referred to the position of the European Parliament expressed in resolution A5-0285/2001 that the European institutions and member states should recognize women and girls at risk of being subjected to FGM. This approach has been expressed also by the "Gender issues in the asylum claim" by the UK Home Office which states that women who may be subject to FGM can constitute a particular social group, taking into account the conditions of the society the woman comes, from and if there is a well-founded fear of FGM aggravated by the fact that authorities do not offer protection, then refugee status should be recognized.[154] The claim is also consistent with the humanitarian objectives of the refugee instruments. Lord Bingham concluded that the particular social group the appellant is part is that of women in Sierra Leone as a well identifiable group sharing the common characteristic of having an unchangeable position of social inferiority.

Lord Hope of Craighead offered a more precise definition of uninitiated indigenous females in Sierra Leone of the particular social group the claimant is part of. A limited definition of social group was favored also by Lord Rodger of Earlsferry and Lord Brown of

[154] Gender Issues in the Asylum Claim, http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary, (19/05/2010).

Eaton-Under-Heywood. Baroness Hale of Richmond defined the social group as that of Sierra Leonean women belonging to those ethnic groups where FGM is practiced. The appeal was allowed and Fornah was granted asylum in the UK, her case setting an important precedent in asylum claims based on FGM in the asylum case law.

3.5 Findings

As the case-law shows, there is a current trend in the US and UK to grant asylum to women on the basis of FGM, reflecting a positive evolution of the law.[155] It is clearly stated in the cases that FGM is a form of persecution that can determine well-founded fear and justify asylum requests. Furthermore, past FGM experience creates a presumption of a well-founded fear of future persecution. The nature of FGM and the procedure itself causing life-long physical and psychological harm deeply violates internationally recognized fundamental human rights and its serious short and long term repercussions on the women's life make it clear that FGM can be considered a form of persecution.

Recognizing FGM as persecution makes it possible that women who have a well-founded fear of FGM or other persecutions because they were forced to undergo FGM in the past makes it possible to grant asylum for these women based on their membership in a particular social group. According to the case-law, this social group is generally the group of women who had not undergone yet FGM or who were forced to undergo the practice, women from an ethnic group that largely practices this procedure in countries where FGM is tolerated by the authorities. Consequently, the linkages of the members of this group are their gender and their ethnic origin, both innate and immutable characteristics.

In the case of women who have been subjected to FGM in the past, different theoretical frameworks were developed to justify the grant of asylum. Acus Love identifies these theories as the theory of continuing persecution, the humanitarian principle and the

[155] Harivandi.

theory of other serious harm.[156] The first theory was applied in the Mohammad v. Gonzalez case, when the court recognized that FGM constitutes a continuing harm, since it permanently disfigures a woman causing long term health problems FGM being a permanent and continuing act of persecution.[157]In the same case the court affirmed that FGM is a particularly severe form of past persecution, so that it merits a grant of humanitarian asylum based on the humanitarian exception that "individuals who have suffered of such severe persecution that it would be inhumane to return them to their home country".[158] The "other serious harm" theory is based on the presumption that even if an individual would not face the same form of persecution she suffered in the past, she might still be subjected to other forms of persecution, so that asylum should be granted.[159] This theory was affirmed in the Hassan v. Gonzalez case.

Despite the inconsistency based on the fact that there is a difference how different courts treat asylum claims based on past FGM,[160] there is a growing number of cases recognizing FGM as a ground for refugee status.[161] This development in asylum claims based on FGM reveal the fact that the US and UK practice in refugee recognitions is moving towards the fulfillment of international human rights obligations in order to provide protection to all women fleeing persecution[162] and the protection of universal human rights standards.

Accordingly the UNHCR adopted a note in May 2009 that builds on the recent jurisprudence regarding refugee claims based on FGM. The Note establishes in the introduction that "a girl or women seeking asylum because she has been compelled to undergo, or is likely to be subjected to FGM, can qualify for refugee status".[163] Furthermore, the Note recognizes that under certain circumstances even a parent can establish a well-

[156] Acus Love.
[157] Mohammad v. Gonzalez.
[158] *Ibid.*
[159] Hassan v. Gonzalez.
[160] Kim Yule, "Asylum Law and Female Genital Mutilation: Recent Developments," CRS Report for Congress, http://www.fas.org/sgp/crs/misc/RS22810.pdf (15/05/2010).
[161] Loughran.
[162] Acus Love, 230.
[163] UNHCR, "Guidance Note on Refugee Claims relating to Female Genital Mutilation," (Geneva, May, 2009), 4.

founded fear of persecution related to the exposure of his/her child to FGM. As the provision suggests, the Note takes into consideration the forms in which FGM appeared in asylum claims in recent case law: women with well-founded fear of future FGM, women who were forced to undergo FGM and parents who fear that their daughters will be forcibly circumcised.[164]

The Note clearly recognizes FGM as a form of gender-based violence amounting to persecution in accordance with the developments of the international human rights regime. Based on the international jurisprudence and legal doctrine FGM is also recognized here as constituting torture and cruel, inhuman or degrading treatment, so that returning a women to a country where she would be subjected to FGM would amount to the violation of the obligations under human rights law.[165] The guidance states that the irreversible and permanent nature of FGM makes it clear that it constitutes a continuing harm as it was recognized in particular cases.[166]

Taking into account and including the recent developments in the asylum case law based on FGM into the UNHCR guidelines, as the above summarized Note shows, represents a positive and more general evolution towards a more effective promotion of universal human rights standards for women and the commitment of the international refugee regime to protect universal human rights.

[164] *Ibid.*
[165] *Ibid.*, 6.
[166] *Ibid.*, 7.

Conclusion

Universalism and cultural relativism is an ongoing debate in the field of human rights protection. While the wide range of human rights literature often refers to this dichotomy on an abstract theoretical level, it is less written on its practical repercussions. Albeit the importance of the problem lies in the ability to offer effective protection of universal human rights standards in reality.

In order to bring the theoretical debate closer to the practice, this thesis offers an example from refugee law. Due to the strong connections and interactions between the international human rights system and the refugee regime, the universalism vs. cultural relativism controversy comes up in the domain of refugee protection. In addition, because of their interconnectedness, refugee law has an important role in the promotion of universal human rights standards.[167]

Therefore, the thesis uses the conceptual framework of the universalism vs. cultural relativism debate and analysis the developments in the field of asylum law related to gender based persecution and women's rights, a highly controversial issue between universalists and cultural relativists, moreover, o common ground between human rights law and refugee law.[168] In this way this paper contributes to a better understanding of the abstract discussion and predicts the evolution of the international refugee system towards a more comprehensive promotion of the universalism of fundamental human rights.

The argument is built upon the recent asylum case law in the US and UK related to asylum claims based on FGM, a particular form of gender related persecution. These cases have set precedents in asylum case law for future similar claims being relevant for setting standards framing the international refugee system, consequently, the international human

[167] Anker.
[168] Anker, Lufkin.

rights standards as well. The evolution of the case law based on fear of gender based persecution, specifically FGM, clearly indicates that the international human rights system is not a mere abstract rhetorical structure but it offers effective protection to women fleeing oppressive traditional practices.

Due to constrain of space and time the thesis is limited to the US and UK asylum case law and to the specific issue of asylum claims based on FGM. Further research should address other forms of gender based persecution as well as other forms of persecution debated between universalist and cultural relativist taking cases from more countries in order to offer a more complex overview about the evolutions of the international human rights and refugee law systems.

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