

## Curbing the Surge of Female Genital Mutilation

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**Abstract:** *The United Nations has declared the 6<sup>th</sup> of February annually as the International Day of Zero Tolerance against Female Genital Mutilation (FGM). The purpose is to raise global awareness about this issue and reaffirm the strongest commitment to eradicating this extremely harmful practice that violates the rights of girls and women to physical and mental integrity. The article highlights the need to classify FGM as torture in order to strengthen the law against FGM and bring perpetrators to justice. Classifying an act as torture has significant implications, as there are well-established international legal obligations and consequences that flow from torture. These include the obligations to criminalize acts of torture, to prosecute perpetrators and provide restitution to victims. The article highlights that these obligations derive from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT). It is against the backdrop of these harmful and destructive tendencies specifically targeted at women and girls that there is need to bring this act within the purview of the CAT. The article emphasises that CAT is considered as the instrument that is most potent in dealing with this practice because it prohibits in entirety any act or acts of torture; it also strengthens women's claims with regard to the prevention, protection and rehabilitation of torture victims.*

**Keywords:** female genital mutation; torture; human rights; United Nations; Amnesty International; World Health Organization

### Introduction

Despite modernisation and civilisation, one of the most violent and humiliating abuses women are subjected to in the society and the world over is female genital mutilation (FGM). This practice infringes upon their physical as well as psychological integrity and presents a perception of women as beings with no rights (Touzenis, 2005). Every year, three million girls and women undergo the FGM procedure (UNICEF, 2005). It is submitted from the outset that this practice amounts to torture (Giffard, 2000) and yet it is tolerated and condoned in many countries (WHO, 1995), and sometimes is sheltered within cultural or religious beliefs and ideologies (Bay Watch, 2008). The World Health Organisation (WHO, 1998) has confirmed that FGM is a violation of internationally accepted human rights and estimates the number of women and girls who have undergone genital mutilation globally to be between 100 and 140 million, with a further 2 million girls at risk annually (WHO, 1996).

FGM is endemic in a number of countries and the rate at which the practice is growing is appalling. It is estimated that the practice features in 29 out of the 54 (Loughran, 2007) African member countries of the African Union (Crawley, 1997). Instances of FGM have also been reported worldwide (IRIN News, 2004). Curbing the scourge and bringing perpetrators to justice are the strategies of the international community. The Assistant Director-General for Family and Community Health of WHO describes FGM as a form of torture that must be stamped out, even if the procedure is performed by trained medical personnel (BBC News, 2005). She also emphasized that 'medicalising' FGM will

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condone the practice that is a violation of a child's body and the basic human rights of an individual (BBC News, 2006).

The extensive physical, emotional, mental and sexual traumas that accompany this procedure have resulted in the practice being labelled 'barbaric and abhorrent' and being equated with torture (Joseph, 1996). It inflicts severe pain on the victim with permanent scarring (DeMause, 1998). It is also a direct attack on a woman's sexuality and reproductive organ (Jordan, 1994).

There are two different schools of thoughts on whether the practice of FGM is good or bad. On the one hand, proponents assert that it is an important cultural ritual that symbolizes a rite of passage which must be preserved in order to maintain cultural identity (Barstow, 1999). On the other hand, opponents of the practice argue vehemently that the consequences of the procedure are unbearable and the practice should be banned because it amounts to an extreme form of child abuse; it is a non-consensual torture of a woman's body as it causes permanent physical damage and sometimes death; and it is targeted in the most gender-specific way possible at the female genitalia (Schroeder, 1994). The latter view seems to be the consensus worldwide (AWO, 2005). It is in this regard that the international community and governments around the world should strive to put the practice under international scrutiny and to have it characterized as a form of gruesome torture in order to place it within the ambit of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and its enforcement mechanisms. This could serve as a step towards total eradication. In the same vein, this would also enable the Committee against Torture under CAT to prosecute and punish perpetrators of the practice and the institutions that have developed around it (Knowles, 1998).

### **Methodology**

The research methodology for this article involved massive analysis, examination and evaluation of literature relevant to the prohibition of torture. In so doing, the study indicates that, by bringing perpetrators to justice, this will be a disincentive to the would-be perpetrators and thus curb FGM. Insights on why it is very significant to classify FGM as torture was well articulated and discussed and it is submitted that the perpetrators should be brought to justice by using national, regional and international instrument and enforcement mechanisms.

### **Literature Review**

The first historical mention of FGM was in 450 BC by the Greek historian Herodotus (Barstow, 1999). While the origins of the custom are obscure (Elizabeth and Gail, 2001), the practice of FGM is now widely practised (Mackie, 1996). There has been public outcry for the prohibition because it is considered harmful to female children and women (Hosken, 1989). For FGM to be performed successfully, it requires the cooperation of a child's parents and sometimes the whole community

(Broussard, 2008). While, in some instances, the practice would succeed, in others, it would not (The Concoction, 2007).

According to Amnesty International, the procedure requires the use of different techniques and basic tools, which range from scalpels, pieces of broken glass, blunt knives, scissors and razor blades (Amnesty International USA, 2008). Even though the practice is considered as a form of torture (Rajali, 1994), due to the financial gain involved in the performance of FGM (Richardson, 2004), trained medical personnel, including physicians, nurses and midwives, also perform FGM (Rahman and Toubia, 2000). WHO, in its 1995 report, confirmed that there are four types of female genital mutilation discussed as follows: first type, *sunna*, which is the most common practice and involves the removal of the hood or prepuce of the clitoris; second type, *clitoridectomy*, or total removal of the clitoris; third type is referred to as *excision*, and signifies the removal of the prepuce, clitoris, upper labia minora and perhaps the labia majora; and the last, and most traumatic type, is called *infibulation* and includes the removal of the prepuce, clitoris, the labia minora, and the labia majora.

The victims are expected to go through the procedure but if death or fatalities occur, neither the operator nor the operation is ever blamed - the society has a way of shifting the burden to some sort of negative supernatural intervention or, at times, the victim is accused of promiscuity (Hosken, 1989). The victim is subjected to various inhuman and degrading treatments (Dorkenoo, 1995) because "the mutilation is usually performed on rough ground, under septic conditions, with the same unsterilized knife or tool used on all the girls in a group operation, which is still the custom among many ethnic groups in the rural areas" (Chessler, 1997). The practice is justified on the grounds of religious obligation (Hosken, 1989), family honour, enhancing men's sexual pleasure and the aesthetic appearance of FGM scars as evidence of one having undergone the practice (Lightfoot-Klein and Shaw, 1991). According to its proponents, "FGM ensures virginity, and virginity ensures the absence of 'loose morals', the absence of loose morals guarantees a high bride-price, and the practice is often supported and maintained by the community's patriarchal social structures and institutions" (Akate, 1991).

Aside from the obvious resultant pain and torture that these children and women must endure, there are several other serious and fatal effects such as pain, shock and haemorrhage, and damage to the organs surrounding the clitoris and labia can occur. The use of the same unsterilized instruments on several girls can put them at the risk of contracting and spreading infectious diseases including HIV, which, in most cases, can lead to AIDS (Hrdy, 1987). According to Amnesty International, *infibulation* has long-term effects, and the constant cutting and re-stitching can result in tough scar tissue (Amnesty International USA, 2008). Suffice it to mention that the vicious ripping of a child's genitals with a dirty knife or other similar instruments constitutes torture or cruel treatment (Chessler, 1989).

### **FGM and International Human Rights Law**

International human rights law “currently exists primarily as an ethical ideal by exposing morally inhuman practices in the world and the modern root of international human rights law, was intended to set out universal common standards or targets of achievement for all humanity” (Robinson, 2002). The most authoritative human rights instrument that characterizes FGM as a form of torture is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT, 1984). Because the prohibition against torture is widely considered to constitute a peremptory norm of *jus cogens* under international law, this means that the law against torture is unequivocal; torture is absolutely prohibited in all circumstances (Banda, 2005). Article 1 of CAT can be interpreted as offering protection to women from genital mutilation. It states that:

“For the purposes of this Convention, torture means any act which causes severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity....” (CAT, 1984)

The phrase ‘any act’ is self-explanatory because it envisages and encompasses any act that will cause severe pain or discomfort in whatever manner (Wendland, 2002). The practice of FGM falls within the ambit of the phrase and it is therefore proposed that FGM should be characterised and categorised as one of the prohibited acts envisaged by CAT.

Most importantly, Article 2(2) of CAT provides that this article is without prejudice to any international instrument or national legislation that does or may contain provisions of wider application. “This paragraph broadens the scope of definition of torture and affords victims the protection which can be derived from other international instruments or from national legislation of wider application”. This presupposes that if other international instruments or national laws give better protection, individuals are entitled to the benefits thereof. But it must be pointed out that other international instruments or national law can never restrict the protection that an individual enjoys under CAT (Wendland, 2002).

Similarly, the Universal Declaration of Human Rights (the UDHR, 1948) is generally accepted as customary international law, and the human rights principles referred to in the Charter of the United Nations are well articulated in the UDHR (Newman and Weissbrodt, 1996). The UDHR provides for universal standards of human rights for all peoples and all nations (Newman and Weissbrodt, 1990). Common practice by nations over the past sixty years has established these rights as customary international law. A customary norm binds all governments, including those that have not recognized it, so long as they have not persistently objected to its development (D'Amato, 2010). Article 5 of the UDHR prohibits acts of torture and inhuman treatment. “It must be stressed that violent treatment whereby perfectly healthy body parts of a girl child are cut and mutilated should be recognized and treated as torture. Therefore, the fundamental guarantees of the CAT and UDHR should protect these

infants and be utilized in the abolition of FGM". The prohibition against torture is also echoed in the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).

There are other relevant recently adopted treaties such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) and the Convention on the Rights of the Child (CRC, 1989), which provide a sound basis for arguing for the eradication of FGM (Tempest, 1993). Except for CRC, these treaties provide for the eradication of the practice although they do not ban it (Chessler, 1997). The UN Declaration on the Elimination of Violence Against Women (1993) recognizes that "violence against women does not only deprive them of their civil and political rights, but also their social and economic rights. Continued practice of FGM violates several provisions of the more recent CRC" (Toubia, 1994). The CRC contains the only 'codified prohibition' of FGM in human rights law (Fitzpatrick, 1994). Article 24(3) of the CRC (1989) requires nations to abolish traditional practices that jeopardize the health of children. The article's scope is said by its drafters to encompass FGM (Fitzpatrick, 1994). Although this was not specifically mentioned, the term 'harmful traditional' practices is meant as a prohibition on FGM (Van Buren, 1995). Article 37(a) of the CRC requires State parties to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment. Subjected to circumcision, a child's privacy is violated, moreover, the child falls victim to extreme physical and mental violence.

The rights of women and girls to protection from FGM are also implicit in the African Charter on Human and Peoples' Rights, 1986 (the African Charter). Several articles of the treaty can be interpreted to proscribe female circumcision, although the "African Charter recognizes the importance of traditional practices and its purpose is to protect human rights." Since the fundamental basis of the African Charter is "to protect human and peoples' rights, it is contradictory if FGM is considered a legitimate traditional practice", as held in the case of *Shibi v Sithole*; *SA Human Rights Commission V President of the RSA* 2005(1) BCLR 1(CC) par 189-196. Article 29(7) clearly reiterates the aim of the African Charter, namely: "[t]o preserve and strengthen positive African cultural values." *Shibi's* case emphasised that it is "not culture or practices which are considered barbaric and bad and cannot withstand international human rights scrutiny". Many practising communities may, from a cultural perspective, view FGM as a positive value worthy of preservation. However, considering the effect of FGM, no worthy society would advocate for its preservation on any ground.

The African Charter, in Article 4, states that: "Human beings are inviolable and that there should be respect for life and dignity". Article 5 proclaims that "torture, cruel, inhuman or degrading punishment or treatment shall be prohibited." Article 16 declares that all are entitled to the highest level of physical and mental health. Article 18 calls for State assurance of non-discrimination against women as well as "the protection of the rights of the woman and the child as stipulated in international declarations and

conventions.” FGM is clearly in violation of the terms of these articles. “If women are entitled to the highest level of health maintenance, FGM must be considered a violation of this right. Women experience great physical and psychological complications as a result of the inhuman treatment inflicted upon them” (Chessler, 1997). The African Charter on the Rights and Welfare of the Child (ACRWC, 1990), in Article 21(1), urges State parties to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of a child. Article 2(1)(b) of the ACRWC clearly proclaims against those customs and practices discriminatory to the child on the grounds of sex or other status.

The irony is that, nearly all of the African countries in which FGM is practised are parties to the African Charter and to almost all the international instruments condemning violence against women and banning torture and other related practices (Chessler, 1997). Still, the practice is prevalent and widespread (Annas, 1995). The best legal remedy to address FGM on a worldwide scale, however, may be the application of CAT in particular and, in addition, the combined application of CRC, ACRWC, African Charter, customary international law, and existing domestic laws (Chessler, 1997).

#### **Duty to take preventive measure against FGM**

Sometimes, perpetrators of FGM have deprived their victims of their liberty by forcefully coercing them to submission before the ritual is performed. A fleeing girl or woman may be ambushed and roughly handled and brought down to be mutilated, with the cooperation of the whole community being enlisted. Currently, it seems apparent that there is hope for these victims. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT, 2006) “has come to rescue as a preventive measure against this barbaric and undignified ritual practice”. Article 1 provides that “The objective of this OPCAT is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.” The foregoing provision can be invoked in order to access the place where the victim is being held and to prevent FGM. “This approach could serve as a safeguard against perpetration and abuse, thereby achieving the preventive measure envisaged in OPCAT as opposed to merely responding to violations after they have occurred”.

It is worth mentioning that there are various human rights instruments specifically pertaining to the prohibition and eradication of FGM, but these instruments have not been able to realize their set objectives fully. In addition to the practice of FGM not being eradicated, reports indicate that the practice continues to be carried on by various perpetrators in secrecy and at an alarming rate. Article 5 of OPCAT has brought some hope for the victims of violence against women because private custodial settings, where such nefarious and outrageous traditional practices are being perpetrated,

can now be visited by domestic bodies for the purpose of preventing these practices and rescuing FGM victims.

### **State responsibility to prevent and protect against FGM**

In order to give proper interpretation to CAT, the Committee Against Torture has adopted a traditional understanding of torture, as defined in Article 1 of CAT, as “an act of severe pain and suffering intentionally inflicted by or with the consent or acquiescence of a public official for the purpose of obtaining information, a confession, or for any other reason based on discrimination”. As a result of its narrow interpretation of torture, the committee has made less progress on integrating a gender perspective into its work when compared with other human rights treaty-monitoring bodies.

However, it is worth mentioning that the traditional public/private divide is a major obstacle to bringing violence against women within the consideration of the Committee. FGM sometimes takes place in a private sphere (Amnesty International, 2008), which shows significant parallels to acts of ‘classical’ torture with respect to the methods used, the trauma inflicted, the total control over the victim, which translates into a feeling of complete isolation, the centrality of the fear element, and the stages of exhaustion. The summary of this assertion is that FGM should be considered and recognized as constituting torture (UNHCHR, 2007).

In the past, a strict judicial interpretation made states responsible only for actions committed by state agents, and not those of private individuals. Today, however, the “body of international law has led to the recognition of state responsibility to address the acts of private individuals”. “The state’s unwillingness to take all possible measures to prevent FGM and to protect children and women from such violence suggests official consent or acquiescence to torture under Article 1 of CAT” (Amnesty International USA, 2008).

### **Conclusion**

It has been demonstrated that FGM is a blatant violation of the rights of victims. The practice cannot be justified under any circumstances because there are no medical or scientific reasons in support of it. The practice amounts to torture therefore, the justifications tendered by proponents of the practice do not withstand any moral-legal-ethical scrutiny, neither are they worth considering. Consequently, the practice should be prohibited in its entirety. Those who practice FGM should be educated on the health danger on the victims. However, in order to curb the culture of impunity, states should bring perpetrators to justice as this will serve as deterrence to other aspiring perpetrators. States that do not have legislation banning the practice are encouraged to emulate examples of member states of international community that have put appropriate law in place to enforce the prohibition against FGM.

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