

Female Genital Mutilation should be recognised as a form of torture

 blogs.lse.ac.uk/wps/2017/03/27/female-genital-mutilation-should-be-recognised-as-a-form-of-torture/

FGM inflicts immediate and long-term pain and suffering on those who undergo it and is internationally recognised as a human rights violation. [Antonia Mulvey](#) argues that FGM could constitute a form of torture under international law.

This is the first of a two-part series looking at how FGM is framed in the international legal context.

[At least 200 million girls and women](#) alive today have undergone female genital mutilation (FGM). Each day, [approximately 8,200 girls and women](#) undergo FGM. FGM is the term used to describe the cutting of female genitalia. It is commonly carried out by traditional birth attendants or circumcisers and sometimes performed by medically trained personnel. FGM is mostly carried out on young girls between infancy and age 15, but adult and married women are sometimes subjected to cutting. Globally it is now recognised by many states that FGM is a harmful practice, and FGM has either been criminalised or banned in nearly every state in which it is practised.

These are steps in the right direction, but the prevalence of FGM in many countries is still very high and more needs to be undertaken to prevent it. I contend that all forms of FGM can constitute torture under international law. We should not be afraid to say that FGM is 'torture', treat this crime with the gravity required and provide victims with the protection they deserve.

The prohibition of torture is absolute and is recognised as a fundamental principle under international law. The most authoritative source on the definition of torture is [Article 1 of the UN Convention Against Torture](#) (CAT) which provides identifiable criteria for establishing whether an act amounts to torture. There are four key criteria which should be considered to determine if FGM constitutes torture.



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Firstly, the individual must have undergone severe pain and suffering. FGM causes immediate and long-term

pain and suffering, both physically and mentally and is sufficiently severe to meet the threshold under CAT. In countries, such as Somalia, FGM involves the complete removal of the clitoris and labia minora and only a small hole is left for the passage of urine and menstrual blood. In some cases, the wound is sewn together using thorns. The hole must be cut open for the woman to have sexual intercourse and again to give birth. **Anaesthetics are not usually available or commonly used, and the act is generally carried out using knives, scissors, scalpels, razor blades or pieces of glass.** However, even in countries where a 'less invasive' form of FGM is undertaken, research shows that immediate and long-term pain and suffering for the victim occurs, including urinary tract pain and infection and pain and infection of the vulva and vagina. The Committee Against Torture has stated that the **test for 'severe pain and suffering' is subjective** (as opposed to objective), and therefore factors such as age, gender and mental condition of the victim are relevant. The growing trend towards 'medicalisation of FGM' has created a false impression that FGM performed by medically trained staff reduces the pain and suffering endured by the girls and women, thus making it more acceptable. This is incorrect. The pain and suffering caused by FGM can continue for a lifetime.

At this point it is worth underscoring the importance of the psychological impact in determining the existence of 'severe pain or suffering.' The psychological impact of FGM, and its long-term impact of mental health, is an area that requires a much greater level of study. Not only could such research bring further clarity to discussion about the status of FGM as a form of torture, but this could also bring about a much better informed understanding of how to address the mental health issues faced by victims of this practice.

If a woman is over the age of 18, can she consent to undergo FGM, whether medicalised or not? Is her consent genuine or is she coerced by the circumstances in which she finds herself? In certain communities, there is immense societal pressure on women and girls to undergo FGM and the refusal to do so can often result in expulsion from their community with limited or no prospect of marrying. Duress or coercion which vitiates consent in rape cases is a well-defined and an accepted principle in criminal jurisprudence and a parallel argument can and should be made in the case of FGM. However, if we define FGM as torture, then the prohibition of FGM is absolute and a woman, of any age, cannot consent to torture. Moreover, those who assist in carrying out FGM, including health workers, would be contributing towards torture if they undertook or participated in FGM. Could and should this be an argument used by women to 'shield' themselves from community pressure to undergo FGM?

Secondly, to constitute torture, the harm must be intentionally inflicted. Parents of daughters who have undergone FGM often argue that their 'intent' was not to harm their daughters but rather to comply with a cultural practice. However, the Committee Against Torture has stated that "[t]he elements of intent and purpose in Article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances." The argument given by parents is akin to the argument given in rape cases. The perpetrator may say that his intent was to sexually gratify him/herself and not to hurt, but objectively the intent is to harm. In the context of FGM, the objective intent is to cut and remove part of a woman/girl's body and therefore objectively it inflicts harm on the victim.

Thirdly, for FGM to constitute torture the purpose must be prohibited. The text of Article 1 of CAT explicitly includes "discrimination of any kind" as a prohibited purpose, required for the existence of torture. FGM is inherently discriminatory, as only women and girls are subjected to it and therefore it is by nature prohibited. In 2008, the Committee Against Torture emphasised that "the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture." While a state may discriminate where such action is prescribed by law and in pursuit of a legitimate aim, there is no legitimate aim in allowing FGM to be undertaken. The very young age of the victims (the majority of victims globally are aged between 4-15) highlights another type of discrimination (age) and contributes towards the argument that FGM can constitute torture.

Fourthly, to constitute torture a public official(s) must have instigated, consented or acquiesced to the act. The perception that a public official must be the perpetrator of torture is often an argument against FGM constituting torture. However, closer review of the law shows that this can be addressed. International law does not require

torture to have been committed by a public official or state actor – it is enough that they consent or acquiesce to the act. The Committee Against Torture recognises the role of non-state actors in torture where “[the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States Parties’ failure to prevent and protect victims from gender-based violence such as \[...\] female genital mutilation.](#)” International human rights jurisprudence clearly establishes state liability via lack of due diligence to protect persons under the state’s jurisdiction. Duty to protect from torture is an obligation of the state.

Robust arguments can be made that FGM constitutes torture under international law. However, will victims better served by framing FGM as torture? Legal remedies seek to repair and replace what is lost. Is it possible to repair the damage of FGM and how does one seek meaningful compensation from parents or countries of low income or where there is an absence of the rule of law? These are important questions which need to be considered.

The next blog in this series will discuss these questions and whether FGM can constitute an international crime.

About the author



Antonia Mulvey is the Founder and Executive Director of Legal Action Worldwide (LAW). She is an international human rights lawyer with extensive experience in addressing sexual violence in fragile and conflict affected states, both with the UN and INGOs.