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Testing the Boundaries of Torture: Forced Circumcision as a Crime Against Humanity

By: Marina Coriale



Female genital mutilation (FGM) has history that extends across countless cultures and regions, impacting women and girls around the world still searching for redress and reparations. Knowing this, the international community should understand the necessity of providing a space for FGM survivors in the International Criminal Court (ICC).

Female genital mutilation, also known as FGM, female sexual mutilation, female circumcision, or female genital cutting (FGC), refers to “[a]ll procedures involving partial or total removal of the female external genitalia or other injury to the female genital organs for non-medical reasons,”[1] with over 200 million women and girls alive today who have undergone the procedure.[2] While the practice continues to be pervasively perpetuated in at least thirty-one countries, the continuation of the FGM practice is generally opposed by girls and women.[3] The practice itself is often considered or categorized as a religious tradition, obligation, rite of passage, or purifying cultural ritual; significantly, there are no medical, hygienic, or

other forms of benefit derived from undergoing the so-called procedure.[4] FGM varies based on how the anatomy is cut or altered, and four categories have been classified by the World Health Organization.[5]

Rates of FGM incidents are most concentrated in Africa, the Middle East, and Asia, although it is important to note that cases are reported worldwide every year.[6] The origin of FGM is not specifically known, but there are many historical traces of the act being committed in every corner of the world—it does not belong to one religion or culture.[7] Regardless, FGM has long been recognized as a human rights violation and has been criminalized in nearly all countries where the practice is pervasively prevalent, although enforcement of such a crime varies drastically from state to state.[8] Once domestic recourse fails or has been exhausted, survivors should be able to pursue redress from the international legal system.

In 1998, the Rome Statute established the ICC and addressed an array of international crimes, including genocide, war crimes, crimes against humanity, and the crime of aggression.[9] While FGM is not directly enumerated within the Rome Statute, it meets the criteria and elements necessary to qualify as a crime against humanity. Currently, while FGM is not specifically listed under Article 7 as a crime against humanity, it falls neatly within the crime of torture.[10]

To date, there has never been a case before the ICC prosecuting FGM.[11] Perhaps this is because there is discourse over whether it falls under a crime against humanity under the Rome Statute; however, it seems evident that it absolutely and undeniably is tantamount to torture. In order to bring a case of FGM before the ICC, it must be established that FGM constitutes torture as a matter of law and meets all the required elements of the crime.[12] Specifically, there are five elements recognized that stake a claim for the crime against humanity of torture: "(1) [t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons[,] (2) [s]uch person or persons were in the custody or under the control of the perpetrator[,] (3) [s]uch pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions[,] (4) [t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population[, and] (5) [t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population." [13]

The act and consequences of FGM fall plainly within each one. Undeniably, the intentional infliction of severe physical and mental pain or suffering on girls and women is inextricably tied to the practice of FGM. To reiterate, FGM has no known medical benefits, and has a deep disruption on women's physical, sexual, and psychological wellbeing, disrupting the function of all dimensions of health.[14] The procedure causes immense and persisting physical harm and psychological trauma in conjunction with an array of other negative health consequences.[15] This rises to the first element necessary under Article 7(1)(f).[16] Interestingly, women and girls also face backlash for not undergoing the procedure, and may face social or societal repercussions that upset their reputations and overall livelihoods.[17]

Next, FGM is typically carried out on individuals who are in the custody or control of their families and communities, as survivors are usually minors who lack the legal capacity to provide informed consent.[18] FGM is typically performed non-consensually[19] and violates the individual's right to bodily autonomy. Social pressure and reputational-based consequences influence the perpetuation of the practice, as many communities will reject women who have not been cut, stigmatize them, prevent them from rising in social strata, or deem them unfit for marriage.[20] Older women such as mothers or grandmothers who have been cut themselves can be amongst the perpetrators of the practice, and often are the ones performing the actual cutting.[21] At the mercy of their parents and guardians, those who undergo FGM are almost always under the control of their perpetrators.

Regarding the third element, simply put, FGM is not an action that arises from lawful sanctions and is not a legally prescribed punishment or a present practice in the criminal justice system in any form. The cultural justifications from which FGM originates are almost always illegal under domestic systems and the procedure itself is performed outside of the purview of the law.[22]

The fourth element is arguably the murkiest when applied to FGM, as it may be contended that FGM falls short of a widespread or systemic attack directed against a civilian population. While FGM is not commonly orchestrated by the state or its authorities as it persists primarily in community contexts, states conceivably condone this practice through lack of enforcement and prosecution under domestic laws. This state complacency in tandem with high prevalence rates arguably rises to the level of a ubiquitous systemic attack. Furthermore, the systematic pattern of gender-based violence underscores that FGM targets women and girls as a specific group, satisfying the second prong of the fourth element.[23]

Lastly, the perpetrators knowledge and intent may be another contested issue challenging the notion that FGM constitutes a crime against humanity. To be sure, traditional practitioners may perform FGM without a robust understanding of international legal standards, the international human rights legal framework, international humanitarian law, or even the relevant domestic legal landscape. Regardless, as the eradication of FGM has become a globally pursued goal, it seems impractical that anyone currently practicing it exists in a vacuum unaware of its detrimental harms and life-altering consequences.

Outside of trying FGM under torture, there are compelling reasons to include FGM in the Rome Statute in Article 7 outright. This would enable the international community to send a strong message that FGM is a crime of global concern, and it would bolster the United Nations' commitment to ending FGM as a commonplace practice in various corners of the world.

Trying FGM as torture would reinforce global efforts to eliminate the practice, including initiatives by the United Nations. States would be urged to take stronger measures to prevent and respond to FGM, ensuring that perpetrators are held properly accountable for their actions. In the end, categorizing FGM as an act of torture and a definable international crime would equip survivors with vital instruments to safeguard women and girls from violence, and provide the space for proper redress and reparations.

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[1] World Health Organization [WHO], *Eliminating Female Genital Mutilation: An Interagency Statement* (2008), https://iris.who.int/bitstream/handle/10665/43839/9789241596442_eng.pdf; UNICEF, *Female Genital Mutilation (FGM) Statistics*, (Mar. 30, 2021), https://data.unicef.org/topic/child-protection/female-genital-mutilation/#_edn1 [<https://perma.cc/2SXF-ZMJ5>].

[2] World Health Organization [WHO], *supra* note 1.

[3] UNICEF, *supra* note 1.

[4] World Health Organization [WHO], *supra* note 1.

[5] *Id.*

[6] 28 Too Many, *What Are the Origins and Reasons for FGM?* Orchid Project (Feb. 19, 2013), <https://www.28toomany.org/blog/what-are-the-origins-and-reasons-for-fgm-blog-by-28-too-manys-research-coordinator/> [<https://perma.cc/M8XD-ENDX>].

[7] *Id.*

[8]*Id.*

[9] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

[10] *Id.* at art. 7.

[11] Antonia Mulvey, *Female Genital Mutilation Should be Prosecuted as a Crime Against Humanity*, London Sch. of Econ. & Pol. Sci. (Apr. 3, 2017), <https://blogs.lse.ac.uk/wps/2017/04/03/female-genital-mutilation-should-be-prosecuted-as-a-crime-against-humanity/> [<https://perma.cc/6YJD-5QQW>].

[12] ICC, Elements of Crimes for the International Criminal Court, ICC-ASP/1/3 (Part II-A), July 9, 2002, reprinted in 42 I.L.M. 91 (2003).

[13] *Id.* at art. 7(f)(1).

[14] World Health Organization [WHO], *supra* note 1.

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18] *Id.*

[19] World Health Organization [WHO], *supra* note 1.

[20] 28 Too Many, *supra* note 5.

[21] *Id.*

[22] World Health Organization [WHO], *supra* note 1.

[23] UNICEF, *supra* note 1.