

Female Circumcision: Cultural right or human wrong?

Van Zyl, P. (1994). ***Female Circumcision: Cultural right or human wrong?*** Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 8, 26 October.

Seminar No. 8, 1994

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Date: 26 October 1994

Venue: Centre for the Study of Violence and Reconciliation, Johannesburg, South Africa

Introduction

A recent United States asylum hearing has once again raised the question of female circumcision¹ as a human rights issue. A Nigerian woman applied for asylum on the basis that, should she and her daughter be returned to Nigeria, her daughter would be compelled to undergo circumcision.² In granting her asylum the U.S tribunal ruled that circumcision violated a woman's human rights calling it a "cruel, painful and dangerous procedure."³ This finding is in accord with the French authorities' views on female circumcision in Mali where the practice has been defined as persecution in terms of the Geneva Convention.⁴ The retort to these findings from those who defend female circumcision has been predictable: the view that female circumcision is cruel or amounts to persecution is a western perspective unacceptable to Africans. It fails to take cognisance of African cultural values or traditions and particularly ignores the African conception of human rights. This article will therefore examine female circumcision from a specifically African perspective. It will rely on the conception of human rights as laid down in the African Charter on Human and People's Rights (hereafter ACHPR) as the standard against which to evaluate female circumcision. By evaluating this practice from within Africa, according to definitions and standards of human rights agreed upon by African states, the article side-steps the argument forwarded by those who defend the practice: that the condemnation of circumcision is grounded in "western" value systems or universalist approaches to international human rights law which are inapplicable to Africa.⁵

The central issue to be confronted when assessing female circumcision is consent. This essay will approach the practice from three "consent scenarios":

- Where the woman does not consent
- Where the woman is too young to provide informed consent
- Where the woman provides informed consent

Where the Woman does not Consent

At first blush this may seem to pose no legal difficulties. If a woman does not wish to have the ritual performed on her then it seems that her individual rights should be respected. However, the ACHPR does approach the protection of individual rights from a different perspective to comparable regional and international human rights instruments. Individual rights are counterbalanced by corresponding social duties specifically to ones family and to uphold African culture and traditions.⁶ It may be argued that a woman's individual right to refuse to be circumcised is overridden by her social duties to her family, her culture and society at large. This may be anathema to a jurisprudential tradition which sets a premium on liberty but it is possible to argue that a far more communitarian conception of rights is embodied in the ACHPR.

However a commitment to a communitarian conception of rights should not entail the acceptance of a violation of the rights of an individual for the sake of the collective. The central contribution of the communitarian conception of rights to jurisprudence is the belief that groups such as the family and the community can and should make an important contribution to the improvement of an individual's quality of life. The difference between a communitarian and a libertarian approach to human rights is one of means not of ends. They are both concerned with an improvement in an individual's quality of life – the former argues that this is best achieved by placing obligations on individuals and groups vis a vis each other, whereas the latter argues that this end is best served by maximising individual liberty. It is, therefore, a distortion of the communitarian project to allow it to be interpreted as a crude form of utilitarianism (an individual's rights may be violated for the greater social good). In this section it will be argued that female circumcision is a powerfully non-communitarian ritual because it violates an individual's rights at the same time as causing those who compel women to undergo this ritual to renege on their social duties to improve the quality of life of others. For purposes of coherence this section will first list those rights violated by the imposition of circumcision on a woman and then examine the ways in which such a practice causes others to renege on their, (specifically African) duties to their families, culture and society.

Rights violated

The right to life is protected in all relevant international human rights instruments and is explicitly protected in the ACHPR in Article 4. Both medics and academics conducting research on female circumcision have documented numerous deaths which have resulted from the practice.⁷ Reliable figures as to the exact numbers of deaths are hard to obtain. This is because family members are reluctant to take their daughters to hospital should medical complications arise from circumcision. Operators and parents alike fear that they might be prosecuted or suffer serious consequences should the authorities discover that their child died due to circumcision. For this reason there is a conspiracy of silence on circumcision-related deaths. In legal terms,

one death resulting from the operation is too many. However, some researchers estimate that as many as 100 million women have undergone circumcision in Africa. This means that should death result from even a small percentage of these cases the ritual would amount to a massive violation of the right to life.

The prohibition against torture is contained in Article 5 of the ACHPR as well as being widely recognised as a preemptory norm in international law.⁸ There are generally no limitations on the prohibition against torture in international law nor is derogation permitted during States of Emergency.⁹ Female circumcision is a form of cruel, inhuman and degrading treatment. In the overwhelming majority of cases it is performed without anaesthetic and is so painful that young girls may faint on several occasions during the ritual. In addition, the practices of infibulation (the sewing together of the labia majora so as to make intercourse impossible) and clitoridectomies (the excision of the clitoris) are a suppression of a woman's sexuality, a destruction of her capacity to experience sexual pleasure and a limitation on her personal liberty which amount to form of degrading treatment.

What constitutes cruel, inhuman and degrading treatment must be "interpreted in the light of present day conditions".¹⁰ The fact that female circumcision has become increasingly unacceptable in Africa over the past 20 years is demonstrated by the fact that at a joint World Health Organisation (WHO) and United Nations Children's Fund (UNICEF) conference 21 African states agreed to form an Inter-Africa Committee to abolish circumcision. Ghana has become the most recent in a growing number of African States to outlaw circumcision.¹¹ Furthermore in the Tyrer case (see *supra* note 6) the European Court of Human Rights held that the fact that a certain practice "may not outrage opinion" in a certain community did mean that it would not be considered as a form of degrading treatment. Thus although circumcision may be accepted in certain communities in certain African States, despite a general continental rejection of the practice, does not mean that it will escape definition as cruel, inhuman or degrading.

Female circumcision is a form of discrimination against women and therefore violates both article 2 and 18 of the ACHPR. Although men in certain cultures do undergo circumcision, the form and therefore consequences, of female circumcision are qualitatively different.¹² Circumcision has such adverse physical and psychological consequences for women that it seriously undermines their capacity to attain social equality. Numerous documented cases of prolonged terror, anxiety, fear of intercourse and intimacy, feelings of betrayal at the hands of one's family and deep-rooted developmental problems have been attributed to the effects of female circumcision.¹³ This places women at a social and psychological disadvantage in relation to men and violates their rights to dignity and integrity as protected in articles 4 and 5 of the ACHPR.

The circumcision of women is gravely injurious to their physical health. Circumcisions are most commonly performed in unhygienic conditions with unsuitable instruments by operators with no medical or anatomical knowledge. Circumcisions have resulted in tetanus, severe haemorrhaging, acute infection, septicaemia, fractured bones, infertility, severe complications during childbirth, dyspareunia (continual severe pain during intercourse) and haematocolpos (the retention of menstrual blood).¹⁴ To expose a woman to such severe and wide-ranging health risks violates her right to health as protected by article 16 of the ACHPR.

Female circumcision violates a woman's rights to family. The family, which is afforded particular status within African culture, and is recognised in article 18 of the ACHPR as the natural unit of society, is either weakened or destroyed by female circumcision. Women who have been rendered infertile or for whom childbirth is extremely difficult as a result of female circumcision, cannot fulfil their important reproductive role. In addition women are given special protection within the family context by article 18(3) of the ACHPR. Rembe in a discussion of this article notes that "[m]any customary practices and institutions, connected with marriage, matrimonial home and property, inheritance, *circumcision* need re-examination" (my emphasis).¹⁵ Female circumcision further erodes the family unit because a growing number of women are fleeing their homes in order to escape circumcision.¹⁶

Female circumcision, because it is usually performed on girls under the age of 18, violates not only their rights as women but also as children. The guiding principle of the African Charter on the Rights and Welfare of the Child contains hold that action taken by either the authorities or a child's parents should always be in its *best interests*. While parents do have specific rights to respect in African law, as contained in article 29(1) of the ACHPR, to provide direction in the guidance and upbringing of their children, these rights are limited to the extent that the parent's conduct is in the child's best interests. If parents were to be given unfettered discretion to determine what was in their child's best interests then there would be no way of explaining the provision which allow authorities to place children in protective custody contained in both the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. In summary, the definition of a child's best interest cannot be equated in all cases with what her parents may subjectively believe the child's best interests to be. Since female circumcision poses serious mental and physical health risks for children, as well as violating a range of their other human rights, it cannot be held to be objectively in their best interests. It therefore violates both African and international law on the rights of the child.

Duties reneged upon

Defenders of female circumcision justify its administration in the African context by claiming that women are obliged to undergo circumcision because of the duties which complement the rights granted under the ACHPR. It is true that during the deliberations within the OAU surrounding the drafting of a regional human rights instrument for Africa, states debated whether to sign a brief statement of intent committing themselves to the human rights contained in international instruments or whether they should draft a charter outlining a specifically African approach to human rights. States decided upon the latter and the drafters of the ACHPR accordingly "put forward a distinctive conception of human rights in which civil and political rights were seen to be balanced by duties of social solidarity."¹⁷ It is the duties to one's family¹⁸ and duty to preserve African cultural values¹⁹ that could be cited to justify female circumcision.

The duty to one's family cannot and should not be interpreted so as to grant parents a *carte blanche* as to how they may treat their children.²⁰ Furthermore, a duty to one's family is not simply unilateral in operation. A parent has as much of a duty to their child as a child has a reciprocal duty to its parent. The content of this duty is best discovered by reference to the other social duties contained in the ACHPR.²¹ These

include the duty to maintain relations aimed at promoting mutual respect and tolerance, to preserve the harmonious development of the family and to work for the cohesion of, and respect for, the family,²² as well as the duty to preserve and strengthen social solidarity. Because female circumcision poses serious physical and psychological health risks for children and it causes certain children to flee their homes or societies it is impossible for a parent to simultaneously force their child to undergo the ritual and fulfil the duties listed above. Therefore, should parents either compel a child to undergo circumcision or perform circumcision without the child's informed consent, it is the parents (and not the child) who reneges on their specifically African social duties.

Similarly, the duty to strengthen African cultural values²³ cannot be interpreted as a justification for female circumcision. The wording of ACHPR Article 29(7) is instructive because it places a duty on individuals only to strengthen *positive* African cultural values and by implication therefore not to promote *negative* African cultural values. Female circumcision, for reasons cited above, is a negative cultural practice and thus should not be promoted. In addition ACHPR Article 17 contains the right to freely take part in the cultural life of ones community. Furthermore, a people's right to cultural development, as contained in ACHPR Article 22, shall occur with regard to *freedom* and the equal enjoyment of the common heritage of humanity. This express choice of the word freedom in both clauses implies a strong commitment to choice and liberty in relation to cultural practices. To compel a child to undergo circumcision against her will or without a proper appreciation of the consequences is therefore a violation her cultural rights.

Where a Woman is too Young to Provide Informed Consent

When considering the legality of female circumcision on young women it may be tempting to draw an analogy between male and female circumcision. Both, it could be argued, occur when the child is very young and while there is no positive consent there is generally no active opposition. There has been almost no opposition to male circumcision as practised in Jewish communities as well as certain Muslim communities. The analogy is, however, misleading because the operations are radically different in consequence. Male circumcision may have beneficial effects from the perspective of personal hygiene while female circumcision has no such benefits. While both are equally irreversible, male circumcision (largely because the operation involves minimal cutting) poses almost no health risks whereas a well-documented range of potentially life-threatening and severe medical complications often arise from female circumcision.

If female circumcision is performed on a very young girl, it effectively denies her the choice to retain the capacity to experience sexual pleasure. This is particularly oppressive because the girl will not have experienced sexual pleasure and will therefore be unable to make an informed decision as to what she is forfeiting. The insistence of circumcised mothers that their daughters be circumcised is often based on the fact that they as young children were likewise denied a choice and therefore have no real appreciation of the advantages and disadvantages of the practice. This is one of the reasons why the ritual has such resilience. It is therefore submitted that, on the basis of the fundamental life-consequences attached to female circumcision

that it not be performed on a girl until she is able to effectively and meaningfully decide whether it is in her best interests to do so.

It may be contended that parents have the right to subject their daughters to circumcision in the same way as they may subject their children to any form of medical treatment. It is a generally accepted rule of law that a parent may give consent for a medical operation notwithstanding either a child's refusal or inability to consent due to age or incapacity.²⁴ However female circumcision is not performed for medical reasons nor is it an operation necessary to safeguard the life of a child. This form of parental power cannot therefore be used to justify the circumcision of girls.

The issue of medical experimentation involving children raises similar ethical considerations to that of female circumcision. This is because issues of parental consent and the tension between individual and collective rights present themselves in both instances. The legality of female circumcision turns on whether a parent can consent to the procedure on behalf of the child. Those who defend the procedure claim that there are important social and cultural benefits to be derived from circumcision. Likewise, proponents of experimentation on children claim that medical science and society as a whole benefit from the procedure. These arguments would fail if it could not be established that either circumcision or experimentation were socially beneficial. This is because it would be impossible to justify the health risks in both instances unless some form of social good were to be derived from the procedures. For reasons asserted throughout this paper – particularly those relating to the physical and psychological health of circumcised women – the social advances made by circumcision – if indeed they can be seen in this way at all – should not outweigh the costs to the individual. Parents can thus not rely on the "experimentation doctrine" to justify the circumcision of their children.

Where the Woman Provides Informed Consent

Women who do decide to undergo circumcision pose real difficulties for those who maintain that female circumcision is oppressive and entails very serious health risks. The question of people's control over their own bodies lies at the heart of this dilemma. What considerations should prevail in deciding whether a person should be permitted to subject their bodies to certain substances or forms of treatment? The examples of quandaries in this field are as numerous as they are controversial. Should a woman be allowed to abort a foetus? Should a man be allowed to subject himself to continued assault in the boxing ring? Should a person be allowed to use narcotics? Should people be allowed to take their own lives (or authorise another to do it for them)?

The answers to these questions involve a careful balancing of an individual's rights to freedom, privacy and autonomy with the potentially harmful social or moral results which may arise from granting an individual the freedom to treat their bodies as they choose. Implicit in this formulation is the extent to which one wishes to permit an individual to violate their own rights.

The unresolved debates relating to abortion and euthanasia occur largely in the domain of the first set of considerations ie. the extent to which the exercise of these individual freedoms have deleterious social or ethical effects. Drug policy involves an

appraisal of both sets of considerations – whether drug use causes anti-social or pathological behaviour which outweighs the granting of the individual right to use drugs, as well as whether it is justifiable to allow a person to subject themselves to potential physical or psychological harm. Boxing is an instructive example for it seems that a general consensus has emerged that in this instance it is justifiable to allow a person to expose their body to what amounts to a serious health risk. Factored into the equation is also the assumption that boxing does not pose a threat to society at large.

Based on these examples it is suggested that the following approach be adopted with reference to consensual or voluntary female circumcision. Firstly, it should be asked whether it is justifiable to allow a woman to violate her own rights in this regard. Secondly, it must be considered whether female circumcision poses a threat to society at large. In relation to the first enquiry it is useful to revisit section 1 and consider those rights which are violated by female circumcision. These can be grouped into three categories:

- The rights to life, health and fertility
- The prohibition on torture, cruel, inhuman and degrading treatment
- The prohibition against discrimination

The rights to life, health and fertility

The threats to a woman's life, health and infertility posed by female circumcision are considerable. There exists a vast corpus of medical literature which puts this matter beyond dispute. However, the extent of the risk depends greatly on the skill of the operator, the nature of the operation and conditions under which it is performed. The majority of circumcisions are performed in rural areas, by elderly women in unhygienic conditions with inappropriate instruments. Circumcisions under these circumstances constitute serious risks to both the health and life of women. The form of operation termed an "infibulation" also poses serious health risks. By all but sealing the vaginal lips, this operation often leads to serious infections caused by the retention of urine and menstrual blood.

Conversely, circumcisions (excluding infibulations) which are performed by skilled medical workers in hygienic conditions with appropriate instruments pose lesser health risks. This does not, however, mean that the risks are negligible or even minor. Shock, acute urinary retention, severe scarring, infections, hypersensitivity, complications during childbirth as well as an array of sexual problems may arise as a result of any form of circumcision.²⁵

Does the fact that even circumcisions performed in "optimal" circumstances pose health risks necessitate their complete prohibition regardless of whether a woman wishes to undergo the operation or not? A utilitarian response would be that the complete criminalisation of circumcision would only serve to drive the practice underground, making it more difficult to detect, and thereby defeating the very objective one wishes to achieve. A more principled reply would be the following: it is accepted in most societies that an individual may subject their body, in instances where this is not medically necessary, to health risks or a certain level of harm should they do so willingly. Cosmetic surgery, boxing and smoking are all pertinent examples. However it is equally accepted that a person should be completely aware

of the full consequences of the activity they embark upon or the treatment they consent to.

In relation to female circumcision, the issue that must be confronted in this context is the reality and quality of this consent. For purposes of this argument, the notion of "informed consent" as developed in medico-legal literature and case law is relied upon and developed. Informed consent is defined, variously, as:

Knowledge and appreciation – these are the two basic elements of consent As a general rule there is no question of legal consent unless the party concerned is fully au fait with what he is consenting to..to enable a patient to come to a rational decision he must be given a general idea of the nature, scope, administration, importance, consequences, risks, dangers, benefits, disadvantages and prognosis as well as the alternatives to the proposed intervention.²⁶

While this reference is concerned with a doctor/patient relationship it is equally relevant (or perhaps particularly relevant) to a context where the person who is performing the operation has no formal medical training. Female circumcision may have tremendous cultural value and corresponding social benefits. It may be the gateway to communal acceptance and a ritual which helps to stitch the fabric of society together. However it, also has very tangible consequences from the physical perspective of health and fertility as well as the psychological perspective of pleasure. If only one side of the equation is expressed then the potential dangers become hidden dangers and a person then makes a decision in the absence, not of incidental or even useful information, but of essential and indispensable information.

This raises the question as to whether the information withheld from women when they decide (presuming they do have a choice) whether or not to undergo the ritual is done so wilfully or on the basis of inadequate medical knowledge. Regardless of the answer, the solution to the issue of consent lies in the provision of information both to potential recipients and the broader community alike. Already an impressive range of indigenous non-governmental organisations are providing women with information which will allow them to make the sort of decisions and therefore provide the quality of consent described above. This flow of information has helped to generate debate as to the merits of circumcision *within* communities and cultures. It has also forced those who advocate the ritual to defend its social utility and cultural value against the backdrop of strong medical evidence of the serious health risks that it poses. By empowering people with knowledge to make their own decisions one avoids the paternalism inherent in deciding for people what is in their best interests. In summary, it should only be legal for women to consent to violate their right to health, should they receive in-depth counselling which informs them adequately of the short, medium and long term health consequences of such a decision.

The prohibition on torture, cruel, inhuman and degrading treatment

There are sound reasons both in principle and in practise to grant the prohibition against torture the highest levels of juridical protection. From the perspective of principle, a civilised society should view the deliberate and calculated infliction of pain and suffering on its citizens as reprehensible. From a practical viewpoint one may be inclined to allow no legal exceptions to the infliction of such pain and suffering because it may permit torturers to claim that their conduct lay within what is legally permissible and encourage them to constantly test the boundaries of the law. However, notwithstanding these legitimate concerns, too absolute a definition of torture may lead to absurd results and defeat one's objective of emphatically outlawing torture.

This point is clearly articulated by Judge Fitzmaurice in his dissenting opinion in the Tyrer case. Fitzmaurice contended that it is incorrect to find a violation of the Article 3 of the European Convention on Human Rights²⁷ in all instances where a degree of pain is inflicted which is severe enough to classify as torture.²⁸ He cites examples²⁹ which convincingly demonstrate that in certain circumstances the infliction of extreme (and indeed unbearable) pain cannot be deemed to be torture. Fitzmaurice concludes by arguing that it is not only what *constitutes* torture that should be examined but also whether circumstances exist which *justify* its application.³⁰ In this regard he seems to contend that one of the factors which may justify the application of such treatment is when "the subjection is voluntarily accepted".³¹ In other words if it can be demonstrated that a person genuinely consented to a certain form of treatment (notwithstanding its extremely painful nature) then this would justify the treatment and cause it to fall outside the definition of torture.³²

It is submitted that this is the correct approach to adopt in relation to female circumcision. The problem once more returns to the question of consent. If it can be ascertained that a woman provides genuine and informed consent to the ritual then it should not be classified as torture.

The prohibition against discrimination

The enquiry as to whether it should be permissible for a person to violate their rights to non-discrimination has bearing on the second leg of the test elaborated above ie. whether female circumcision poses a threat to society at large. The equality clauses in virtually all Bills of Rights are a testimony to the fact that modern societies view discrimination (and included in this definition is invariably discrimination against women) as a danger to society. It is for this reason that it is maintained above that female circumcision performed on women without their consent is discriminatory and on this basis, amongst others, should be prohibited.

It does however become much more difficult to establish that a measure is discriminatory when the person upon whom it is being performed views the measure as either desirable or beneficial and therefore consents to it. To prohibit such a measure on the basis that it is discriminatory smacks of paternalism and arrogance. It infringes an individual's personal autonomy and presupposes that an outside body has both the right and the capacity to decide what is in an adult's best interests. Such an assertion does not detract from the argument that female circumcision as a physical and social practice which has adverse effects on women. It merely accepts that once citizens have access to sufficient information to allow them to make free and informed life choices that they should be permitted to make these decisions and accordingly to live with the consequences.

It is therefore submitted that female circumcision should only be permitted under the following circumstances:

- i) The woman attends a counselling session run by trained professionals who provide impartial information detailing both the adverse and positive consequences of the practice.
- ii) That the operation is performed by skilled operators, under hygienic conditions and with medical supervision.

Conclusion

This article seeks to counter the knee-jerk assertion by defenders of female circumcision that the only opposition to the practice originates from non-Africans based on western value systems. It has evaluated the practice against an African document, embodying a specifically African set of values and norms. Far from concluding that justification for female circumcision can be found within this value system, it concludes that none of the duties and particularly those relating to the family, culture and society contained in the ACHPR oblige women to undergo circumcision against their will. Secondly, in relation to consent to the practice it argues that the ritual should not be practised on women until they are capable of providing informed consent. This implies that it should not be performed on infants or young girls. In addition it should not be performed until a woman has been given extensive information as to the physical and psychological consequences of the operation. This does not imply a form of "reverse brain-washing" where circumcision is labelled as a social evil. Rather it argues that the most meaningful decisions are those taken after full and informed discussion and debate. Perhaps the most important conclusion reached by this paper is that without a proactive and robust civil society which constantly places issues on the agenda and raises questions of human rights, the rights granted under international law will remain on paper and not translate themselves into the lives of ordinary citizens.

Notes:

¹ The term "circumcision" is actually a misnomer because it refers only to one form of operation on the female genitalia – the removal of the labia majora or minora. Other operations include excision (the removal of the clitoris) and infibulation (the sewing together of the vaginal opening). However, for purposes of convenience the term "circumcision" should be read to include any or all of the above procedures.

² *Time*, Vol. 145, No.15, p8.

³ *Time* Vol. 145, No.14, p12.

⁴ A. Walker & P. Parmar, *Warrior Marks*, 264 (1993).

⁵ By grounding my argument in an "African" conception of human rights, I do not implicitly support a cultural relativism approach to human rights. I merely wish to avoid

the intricate jurisprudential questions about the universality of human rights which are covered at length elsewhere.

⁶ See the Preamble of the ACHPR as well as Articles 19, 20, 27 (1) and 29 (7).

⁷ S. McClean, *Female Circumcision, Excision and Infibulation* 5 (1985) as well as O. Koso-Thomas, *The Circumcision of Women: A Strategy for Eradication* 25 (1987).

⁸ See J. Dugard, *Public International Law in South Africa*, 215 (1994).

⁹ See both the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

¹⁰ See *Tyrer* case 58 International Law Reports 339; *S v Ncube* 1988 (2) 702 ZS; *Ex Parte A-G Namibia: In re Corporal Punishment* 1991 (3) SA 76.

¹¹ The Star Newspaper, Johannesburg, 4 July 1994, p8.

¹² See *infra* on the effects of circumcision on a woman's right to health as well as a more detailed discussion comparison between male and female circumcision.

¹³ See S. McClean *supra*

¹⁴ See O. Koso-Thomas *Supra*

¹⁵ N. Rembe, *The System of Protection of Human Rights under the African Charter: Problems and Prospects* 14 (1991).

¹⁶ The fact that the Eritrean People's Liberation Army has such a high number of woman soldiers has been partly attributed to the fact that the only place young women feeling from circumcision could seek shelter and acceptance was within the ranks of this guerilla movement. (Economist, June 25-July 1).

¹⁷ C. Welsh, in C. Welsh (ed.), *Human Rights and Development in Africa* 15 (1984); See also paragraph 6 of the Preamble and Article 27(1) of the ACHPR for a textual expression of this sentiment.

¹⁸ ACHPR Articles 27 and 29 (1)

¹⁹ ACHPR Article 29 (7)

²⁰ See the section above on the rights of the child.

²¹ ACHPR Article 28

²² ACHPR Article 29 (1)

²³ ACHPR Article 29 (7)

²⁴ S. Strauss, *Doctor, Patient and the Law* 420-423 (1991)

²⁵ Koso-Thomas, Op cit.

²⁶ S. Strauss, Doctor, Patient and the Law 8-10 (1991)

²⁷ "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment"

²⁸ *Tyrer* case 58 International Law Reports 339 at 361

²⁹ For example a mountaineer who has to subject a person to excruciating pain in order to free a trapped limb or a medic who has to operate on a patient, without anaesthetic, on the battlefield.

³⁰ *Tyrer* case 58 International Law Reports 339 at 361

³¹ *ibid*

³² The acceptance of this assertion should not be without reservation. It opens the possibility that torturers may claim that in fact their victims consented to the treatment. However this is not a problem of principle, for the solution to such an objection is to carefully scrutinise the reality and quality of consent not to entirely preclude the possibility of genuine consent being provided.

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