FEMALE GENITAL MUTILATION AS A FORM OF VIOLENCE AGAINST WOMEN AND GIRLS: AN ANALYSIS OF THE EFFECTIVENESS OF INTERNATIONAL HUMAN RIGHTS LAW

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A mini-thesis submitted in partial fulfilment of the requirements for the degree Magister Legum in the Faculty of Law, University of the Western Cape.

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KEYWORDS

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ABSTRACT

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In the development of women's rights, the focus has been on the formal equality of men and women, and not on the reality of the forms of violence that women and girls experience on a daily basis. In fact, an unequivocal prohibition of violence against women and girls is absent from the United Nations Convention on the Elimination of All Forms of Discrimination Against Women of 1979, and was only explicitly prohibited in the Declaration on the Elimination of Violence Against Women of 1993.

FGM is a cultural practice, mainly signifying the rite of passage into womanhood. It is indigenous to Africa, some Latin American, Asian and Middle East countries. There are three main types of FGM, each with serious short-term and long-term physical consequences, including death, infections, sexual dysfunction and susceptibility to HIV infection. Psychological consequences include continuous nightmares, stress and extreme fear and anxiety.

It is argued that FGM is a form of violence, preventing girls and women who undergo the procedure from fully enjoying fundamental rights. Rights that are violated include the right to equality; the right to freedom from all forms of torture and cruel, inhumane and degrading treatment; the right to life; the right to freedom from all forms of violence; the right to freedom from harmful traditional practices; the rights of the child; and the right to health.

It follows thus that the continued practice of FGM breaches several international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

There are major problems with the enforcement of these instruments, such as the State's ability to place reservation on provisions and poor reporting procedures. In addition longstanding legal principles such as the public/private dichotomy and State sovereignty contribute to inadequate domestic legal frameworks.

This mini-thesis examines the instruments offering protection to women and girls, concluding that they are ineffective because States that are parties to these instruments are not held accountable for their failure to fulfil treaty obligations.

There is a tension between the protection of women's rights and the right to cultural self-determination, which begs an inquiry into whether human rights are universal, or culturally relative.

Recommendations include the proposal that international rights laws governing the strategies to eradicate all forms of violence against women receive the status of *jus cogens*. Suggestions are also offered to both governmental and non-governmental institutions, recognizing that FGM is a multi-dimensional issue, requiring a collaborative effort from multiple role players.

November 2005

DECLARATION

I declare that *Female Genital Mutilation As A Form Of Violence Against Women And Girls: An Analysis Of The Effectiveness Of International Human Rights Law* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Karin Chinnian-Kester November 2005

Signed: .....

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Appreciation is extended to Professor Lovell Fernandez, my supervisor, who was always accessible, providing advice, support and encouragement. I am also indebted to Professor Jeremy Sarkin for his guidance and for constantly motivating me.

I acknowledge and value the assistance of the administrative staff of the Law Faculty of the University of the Western Cape as well as the staff of the Women and Human Rights Documentation Centre of the Community Law Centre.

DEDICATION

This mini-thesis is dedicated to the memory of my late mother, Winifred Chinnian, and to my dear father Edward and sister Bernadette, who are my constant source of support, love and encouragement.

To Carmen Johnson, Lesley Buckton, Rowena Lakay and Fazlyn Bharoochi. Thank you for always believing in me.

ACRONYMS AND ABBREVIATIONS

African Charter	African Charter on Human and Peoples Rights
Beijing Conference	1995 Fourth UN World Conference on Women
CEDAW	Committee on the Elimination of All Forms of Discrimination of Violence Against Women
Children's Convention	Convention on the Rights of the Child
DEVAW	Declaration on the Elimination of Violence Against Women
ECSOCO	Economic and Social Council of the United Nations Organisation
FGM	Female genital mutilation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-governmental Organization
UN	United Nations Organization
Universal Declaration	Universal Declaration of Human Rights

UNCHR	United Nations Commission on Human Rights
Vienna Declaration	World Conference on Human Rights
Vienna Convention	Vienna Convention on the Law of Treaties
WHO	World Health Organization
Women's Convention	Convention on the Elimination of All Forms of Discrimination Against Women

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CHAPTER 1

INTRODUCTION

Human rights have been traditionally classified into first, second and third generation rights. A jurisprudence in women's rights is still evolving but the establishment of international legal norms as well as the rate at which this discourse is developing has led to the view that women's rights should be classified as the fourth generation of rights.[1] Despite the rapid development of women's rights, a scrutiny of treaty law indicates that there are major problems relating to the implementation at the national levels.

Historically, women's rights have been marginalized because our patriarchal system enables male domination of public institutions, neglecting the private sphere, where women are situated and are in need of protection. This mini-thesis uses female genital mutilation[2] as a lens through which the effectiveness of the current laws aimed at protecting women and girls can be explored.

The aim is to illustrate the tension that exists between protecting women and girls from the harm that FGM causes, and the right to cultural self-determination. The scope of the research is limited to the analysis of international laws and institutions, with the purpose of determining their effect on governments. The important question is whether the creation of legal norms has had positive outcomes for the development of women's rights and led to the decrease in the prevalence of FGM.

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[1] Coomaraswamy, R *Reinventing International Law: Women's Rights as Human Rights in the International Community* (1997) at 25.
[2] Hereinafter referred to as FGM.

Chapter 2 contextualizes the practice by providing a definition and the classifications of FGM. The geographical prevalence is highlighted, distinguishing between countries of origin and countries of destination. This paper also explores the various arguments presented for the justification of FGM as well as the lifelong effects that females experience as a result of being cut.

Chapter 3 lists and analyses the rights that FGM violates. These include the rights to dignity, the right to life, the right to freedom from violence, the right to freedom from torture, the right to all forms of discrimination, the right to health care and the rights of the child. A historical account traces the international community's response to gender-based violence and FGM specifically.

The effectiveness of international human rights laws is evaluated in Chapter 4. There are numerous obstacles to the effective practical application of legal norms such as the high number of State reservations, the sovereign status of the State and poor reporting and monitoring mechanisms. A deep-rooted cultural belief system finds a voice in the argument that human rights do not find universal application because they are Western ideals and do not take traditional practices into consideration. This paper examines the merits of such a claim. The problems related to the public/private dichotomy are discussed, with the theory that this principle is yet another impediment to the eradication of FGM.

This literature study involves an exposition of the specific rights and human rights instruments that are violated by the practice of female genital mutilation. The primary sources are the conventions and treaties that deal with the topic. The secondary sources are comprised of books, journal articles and websites.

Recommendations will be offered to international bodies, governments and non-governmental institutions, which would assist in ensuring the compliance with international human rights law.

It must be noted that whilst researching and writing this mini-thesis it became evident that female genital mutilation is a practice shrouded in secrecy and mysticism, and that there are many conflicting opinions and data on it. Although there is a huge multi-disciplinary body of work on the subject[3], huge parts of it still remain under-researched, making it difficult to determine what is accurate for the purposes of this study. It is for this reason that I have relied on the updated official reports and data of the United Nations Organization.[4]

[3] FGM is not only studied in the legal field, but also in the fields of medicine, sociology, anthropology and gender studies.
[4] Hereinafter referred to as the UN.

CHAPTER 2

AN EXPLANATION OF THE PRACTICE OF FEMALE GENITAL MUTILATION

1. What Is Female Genital Mutilation?

1.1 Defining Female Genital Mutilation

According to the World Health Organization[5] FGM "comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural, religious or other non-therapeutic reasons."[6]

In addition to the partial or complete removal of the clitoris and surrounding tissue, certain types of FGM could also include the stitching of the outer lips of the reproductive organs.[7] Efua Dorkenoo cites and endorses Gérard Zwang's definition of FGM which he describes as:

> Any definitive and irremediable removal of a healthy organ is a mutilation. The female external genital organ normally is constituted by the vulva, which comprises the labia majora, the labia minora or nympha, and the clitoris covered by its prepuce, in front of the vestibule to the urinary meatus and the vaginal orifice. Their constitution in female humans is genetically programmed and is identically reproduced in all the embryos and in all races. The vulva is an integral part of the natural inheritance of humanity. When normal, there is absolutely no reason,

[5] Hereinafter referred to as the WHO.
[6] World Health Organization: Female Genital Mutilation, Fact Sheet 241, June 2000 at http://www.who.int/mediacentre/factsheets/fs241/en/print.html (accessed on 17 February 2005).
[7] Toubia, N *Female Genital Mutilation: A Call for Global Action* (1995) at 9.

medical, moral, or aesthetic, to suppress all or any part of these exterior genital organs.[8]

FGM is usually performed on girls between the ages of four and twelve, but may vary depending on the practices of the traditional group concerned.[9]

In some countries, FGM may be performed anytime from shortly after birth,[10] until shortly before marriage,[11] thus indicating that there is a wide spectrum when the ritual can take place.[12] An elder woman usually performs the ritual, but there are instances where it is performed by a midwife, the mother of the female and, recently, by medical practitioners.[13] The fact that the person performing the cutting is a woman, and often a relative of the female being cut, has been the focus of controversy as it is used to validate the practice.

1.2 Terminology Surrounding FGM

A variety of terminology is used to describe the practice of FGM. It is also called female circumcision, female genital cutting and female genital surgery. The use of terminology is shrouded in a history of controversy and politics and the terms that commentators prefer to use are indicative of their personal standpoint within in the debate. An explanation of the various terms is necessary to create a complete understanding of the arguments espoused.

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[8] Dorkenoo, E *Cutting the Rose* (1994) at 4.
[9] Rahman, A and Toubia, N *Female Genital Mutilation: A Guide to Laws and Policies Worldwide,* (2000) at 3.
[10] Ethiopia.
[11] Nigeria.
[12] Smith, J *Visions and Discussions on the Genital Mutilation of Girls: An International Survey* (1995) at 11.
[13] Rahman and Toubia *op cit* note 9 at 9.

1.2.1 The term "female genital mutilation"

The UN officially recognizes and uses this term[14] and experts in the field have endorsed it.[15] This term indicates the force that is applied in the ritual as well as the extent of the damage that is incurred.

Even though some writers are opposed to the practice, they criticize the use of this term, arguing that Western feminists perceive this cultural practice as being a human rights violation because it deviates from what Western culture regards as being acceptable behaviour.[16] It is also claimed that FGM is labelled as violence against women without understanding the reasons for it and the symbolism involved.[17]

The term "mutilation" is also regarded as being offensive to the women who have undergone the procedure, and those who advocate its retention as a cultural practice.[18]

1.2.2 The terms "female genital cutting" and "female genital surgery"

Some writers[19] prefer these terms because they are perceived as being neutral. These writers are challenged, however, because the terms "cutting" and "surgery" detract from the severity of the practice and its dire consequences.

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[14] Female Genital Mutilation Report of a WHO Technical Working Group, Geneva, 17-19 July 1995 www.who.int/frh-whd/FGM/Technical.htm. (accessed on 20 November 2004).

[15] See for example Dorkenoo *op cit* note 4.

[16] Boddy, J 'Violence Embodied? Circumcision, Gender Politics, and Cultural Aesthetics' in *Rethinking Violence Against Women* Dobash, ER and Dobash, RP (eds) (1998) at 89.

[17] *Ibid.*

[18] Rahman and Toubia *op cit* note 9, in the preface.

[19] Masterson, JM and Swanson, JH *Breaking the Silence, Enabling Change* (2000); Gunning, IR "Women and Traditional Practices: Female Genital Surgery" *Women and International Rights Law* (1999) Volume 1 651 at 652.

1.2.3 The term "female circumcision"

This term is also used because it is regarded as not being offensive to those who believe in and practice the ritual.[20] Writers using this terminology have not escaped disapproval though as it equates this practice with male circumcision. Whilst male circumcision is not condoned, it is argued that even though the two practices have some similarities, they also have significant differences.

The procedure in both males and females involves the removal of healthy tissue. The procedures are performed on both sexes, normally during childhood and without the consent of the person being cut. Alternatively, consent may be obtained under duress, as those about to undergo the ritual might fear that their objections would result in being ostracized in their particular communities.

The significant difference is that in females, the procedure can include the removal of the clitoris, the male equivalent of which would amount to castration.[21] The correct practice of male circumcision does not involve the amputation of the sexual organ itself. In addition, there is a difference in the motivation for cutting girls and boys. In males, the ritual signifies the transition into manhood and an elevated position in society. In females, the ritual is aimed at controlling the woman's sexuality. This is indicative of the gendered roles afforded to each, and particularly to the subservient status of women and the girl-child.

[20] Boddy *op cit* note 16 at 78.
[21] Toubia *op cit* note 7 at 9.

After considering the debate within the discourse, I elected to use the term "female genital mutilation" and all subsequent arguments would seek to justify this alignment.

1.3 Types of FGM

Although FGM takes on many forms, it is classified into four basic categories and these differ from region to region where practiced. The names given to the types of mutilation also depend on the country or traditional group practicing it. It is important to note that these operations are often performed without anesthetic in unsanitary conditions.

1.3.1 Type 1: Clitoridectomy

This involves the partial or complete removal of the prepuce and the partial or complete excision of the clitoris.[22] This is also referred to as "Sunna," which means "tradition" in Arabic.

This is the mildest form of the practice, and is often performed with sharpened stones, knives or razor blades with the woman or girl being forced onto the ground with her legs pulled apart by the older women. It is also reported that this may be performed in the dark, adding to the trauma as well as the possibility of the inaccuracy of the cutting.[23] Bleeding can be stopped by stitching the cut or by applying pressure to it.

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[22] *Ibid* at 10.
[23] Hosken, FP *The Hosken Report: Genital and Sexual Mutilation of Females* (1994) 4th Edition at 33.

1.3.2 Type 2: Excision

This form of FGM refers to the removal of the clitoris and the *labia minora.*[24] Once again, stitching or pressure may be used to stop the bleeding. Excision accounts for 85 percent of FGM rituals.[25]

1.3.3 Type 3: Infibulations

This procedure is also referred to as Pharaonic circumcision, which refers to its common practice in Ancient Egypt.[26] It is the most extreme form of FGM whereby the clitoris and *labia minora* are removed and the *labia majora*[27] is cut and then stitched together so that most of the vagina is closed up. A small hole is left to allow for urinal and menstrual excrements. The legs are usually bound for forty days to allow the tissue to heal, a process often referred to as scarification.[28] De-fibulation, that is the loosening of the stitches, takes place to enable sexual intercourse and childbirth and re-fibulation, that is the restitching of the vagina, will take place afterwards. Thus, an infibulated female may be cut and re-stitched several times during her lifetime.

1.3.4 Type 4: An unclassified Form of FGM

The UN recognizes an unclassified type of FGM.[29] This category allows for any other ritual carried out on the female genitalia, which falls outside the other categories. Examples include the genitals being pricked, pierced, scraped and stretched.[30]

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[24] These are the inner lips of the female genitalia.
[25] Toubia *op cit* note 7 at 10.
[26] *Ibid* at 11.
[27] These are the outer lips of the female genitalia.
[28] Toubia *op cit* note 7at 10.
[29] Rahman and Toubia *op cit note* 7at 8.
[30] *Ibid.*

1.4 Consequences of FGM

The effects of FGM can be both short-term and long-term and have been classified into physical and psychological consequences, but it is important to note that women who suffer from these also endure social pressure when their communities ostracize them.

1.4.1 Physical consequences

An immediate physical consequence is extreme pain because the clitoris and the surrounding tissue are extremely sensitive with many nerve endings. The pain is compounded in non-surgical settings where anesthetic is not used.[31]

Bleeding is another short-term effect, irrespective of the type of FGM practiced.[32] In extreme cases, women and girls may die from profuse bleeding. There is little or no data on how many women and girls have died because the reason for the deaths and sometimes the deaths themselves are not reported.

FGM is usually performed in unsanitary conditions with instruments that are unsterilised. This leads to various infections of the bladder, anus, ovaries, fallopian tubes, womb and vaginal walls. These infections could lead to infertility or ectopic pregnancies, and in some instances, the accumulation of toxins could result in death.[33]

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[31] Toubia *op cit* note 7 at 14.
[32] *Ibid* at 13.
[33] *Ibid.*

Group cutting, where several women are cut at the same time without cleaning the instrument between each cutting, could promote the spread of HIV/AIDS, even though such connection has not been proven.

Other physical problems include the formation of cysts and abscesses, scarring, fistulae, incontinence and problems during sexual intercourse, pregnancy and childbirth.[34]

1.4.2 Psychological Consequences

Most studies have focused on the physical and not the psychological consequences of FGM and thus there is a huge area in the discourse that is under-researched, and many women's experiences are consequently undocumented.[35]

Initial tests indicate that psychological consequences include anxiety attacks, hallucinations and depression. Infertility caused by infections could also result in the woman becoming an outcast due to her inability to bear children.

1.5 Historical Overview of the Practice of FGM

Researching the origins of FGM, one is once again confronted with the lack of clarity on the subject. Fran Hosken clearly highlights the barriers to obtaining an accurate account of this history when she claims:

> To write a true history of FGM would require tracing the many migrations of African peoples from West to East Africa and back across the huge, inhospitable African deserts and the enormous, and almost empty savannahs. It would require investigating the

[34] Toubia *op cit* note 9 at 9.

[35] Wood, AN "A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective" (2001) Volume 12 (2) *Hastings Women's Law Journal* 347 at 366; Toubia, *op cit* note 7 at 19.

> wanderings of migrant ethnic groups and tribes, to examine their feuds, conquest and local wars. It would be necessary to follow the voyages of Arab traders by land and sea and to investigate their far-flung commercial activities and their extensive slave trade; especially their trade of women, in West and East Africa and the Middle East.[36]

Hosken also raises concern for the absence of historical documentation of FGM compared to male circumcision.[37] This seems to be indicative of the secondary position women's rights and the low ranking of related issues of the development of women's health.

This uncertainty with regard to the origin of the practice is evident by the diversity of claims from the multi-disciplinary studies. Some claim that it originated in Africa, whilst others believe that it began in the Arabic regions.[38]

A distinction is made between Arab African and Black African regions, with conflicting theories regarding the precise regions in which it originated.[39] One theory claims that FGM originated in Egypt (an Arab African country) and transferred to the other Northern African countries such as Sudan and Somalia (that is the Black African region),[40] whilst another suggests that it originated in the Black African regions and became assimilated into the practices of the Arabic dominated parts of Africa.[41]

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[36] Hosken *op cit* note 23 at 71.
[37] *Ibid.*
[38] Masterson and Swanson *op cit* 23*t* note at 8.
[39] Dorkenoo *op cit* note 8 at 33.
[40] *Ibid.*
[41] *Ibid.*

Hosken makes reference to the Ancient Roman practice of infibulation, which is explained as being a derivative of the Latin word "fibula" which means clasp.[42] The fibula was used by the ancient Romans to tie their togas, and a similar ring-like device was used to pierce the clitoris of female slaves, to prevent them from participating in sexual intercourse and possibly falling pregnant.[43]

The common but incorrect perception is that FGM has its roots in Islam and is thus religious specific. Studies prove that this practice transcends religion as Christians, Jews and animists practice FGM.[44] Thus, FGM is a cultural and not a religious practice, notwithstanding the fact that it finds strong support in certain religious sectors. Religious texts such as the Bible, Koran and Torah, however do not advocate its practice.[45] In fact, it is suggested that these texts are incorrectly interpreted to justify the retention of the practice.[46]

Evidence reveals that in the eighteenth century, the Roman Catholic Church officially supported the practice and failed to campaign for its eradication,[47] and that western countries continued the practice until as recently as the 1950's.[48] Dorkenoo even cites claims of Sigmund Freud performing clitoridectomies on women in North America to prevent clitoral orgasms.[49]

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[42] Hosken *op cit* 23 at 74.
[43] Jawad, HA *The Rights of Women in Islam: An Authentic Approach* 1998 at 52.
[44] Toubia *op cit* note 7 at 21.
[45] *Ibid.*
[46] Dorkenoo *op cit* note 8 at 36.
[47] *Ibid* at 38.
[48] *Ibid.*
[49] *Ibid,* with Dorkenoo citing the work of Robin Morgan and Gloria Steinem.

2. The Prevalence Of FGM

By 2000, approximately 130 million women and girls underwent some form of FGM, with 2 million females undergoing the practice annually.[50] In order to contextualise the severity of FGM, one needs to provide an overview of the areas where it is practiced as well as the reasons provided to justify its initial and continued practice.

2.1 Countries Where FGM is Practiced

Any discussion about the practicing countries must include a distinction between indigenous practice and countries where FGM was brought to through immigration.

2.1.1 Indigenous Practice

FGM is indigenously practiced in twenty-eight African countries,[51] the Arabian Peninsula,[52] Asia[53] and Latin America.[54] There are conflicting reports regarding the precise origin of the practice. Countries where there is indigenous practice account for the highest prevalence.

2.1.2 Immigration and FGM

Immigration to non-practicing States has resulted in the global spread of FGM. Immigrants, whether legal or illegal, have continued with traditional practices. This means that receiving countries must develop policies for a practice that is

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[50] Rahman and Toubia *op cit* note 9 at 7.
[51] Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d' Ivoire, Djibouti, Egypt, Ethiopia, Eritrea, Gambia, Ghana, Guinea Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda and Zaire. Refer to Annexure A for the prevalence rate.
[52] Oman, Saudi Arabia, United Arab Emirates and Yemen.
[53] India, Indonesia, Malaysia and Pakistan.
[54] Brazil, Mexico and Peru.

foreign to them. Receiving countries include Australia, Canada, Denmark, Sweden, Switzerland, the United States of America, and the United Kingdom. These countries have adopted legislation prohibiting FGM. The United States of America criminalized FGM in 1996 with the enactment of the Illegal Immigration reform and Immigrant Responsibility Act, whilst France and Canada amended existing penal laws to outlaw the practice. [55]

2.2 Reasons specified for the practice of FGM

Successful eradication of FGM requires that all the role players understand the reasons that have been offered to justify the continuation of the practice. Some of the reasons under discussion form part of the analysis and criticisms offered by those advocating the termination of FGM.

The various reasons to be discussed are not exhaustive, but have to be narrowed to those most commonly cited by authors who contribute to this discourse. An analysis of the justifications is indicative of the inequality of women and their submissive societal roles.

2.1.1 Socio-cultural Reasons

> ...It was said that a girl who did not undergo this operation was liable to be talked about by people, her behaviour would become bad, and she would start running after men, with the result that no one would agree to marry her when the time for marriage came. My grandmother told me that the operation had only consisted in the removal of a very small piece of flesh from between my thighs, and that the continued existence of this small piece of flesh in its place would have made me unclean and

[55] Rahman and Toubia *op cit* note 9 at 121, 152 and 237.

impure, and would have caused the man whom I would marry to be repelled by me.[56]

The preservation of culture is often tendered as a reason for the continuation of the practice. It is argued that the ritual marks the trajectory of a girl into womanhood, and the accompanying elevated status within the community, increasing her chances of getting married.[57] Family honour is thus also linked to the adherence to cultural practices.[58] The passage into womanhood is challenged because this does not explain or justify the practice on babies and young girls.

The practice is inherited from the previous generation in order to preserve the cultural heritage of the group.[59] Even in the context of the protection of cultural rights, one still needs to balance the observance of those rights and the right of women and girls to be protected from harmful practices.

2.1.2 Religious Reasons

A misconception is that FGM is an Islamic practice but the authorities on the subject emphasize that it is a cultural and not a religious practice. As stated above, research indicates that Christians, Jews and animists practice it.[60] Moreover, the religious texts do not sanction it. The interpretation of these texts favouring the continuation of the practice should therefore be challenged.

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[56] El Saadawi, N *The Hidden Faces of Eve: Women in the Arab World* 1980 at 35.
[57] Wood *op cit* note 35 at 357.
[58] *Ibid.*
[59] Rahman and Toubia *op cit* note 9 at 5.
[60] *Ibid* at 6.

2.1.3 *Economic Reasons*

In many FGM practicing communities, the female is only considered as suitable for marriage if she has undergone the procedure, and in addition, her family will receive a dowry for her, increasing her "value".[61] If she is uncut, she will not be able to get married, thus the family will not receive a dowry and the female is regarded as useless and in fact a financial burden on her family.[62]

2.1.4 *Hygienic Purposes*

The clitoris is often regarded as dirty and harmful to the penis during intercourse and to the baby during childbirth, necessitating its removal.[63] The opposite is true because FGM causes bleeding, sores, infections and the constant flow of urine due to incontinence, is extremely unhygienic.[64]

2.1.5 *Controlling Women's Sexuality*

FGM is usually used as a method of controlling women's sexuality, by ensuring that they remain virgins and refrain from participating in premarital sex.[65] Infibulation of a married woman also ensures that she remains faithful to her husband, as she can only be de-fibulated when he wants intercourse. FGM was performed on women to "cure" them of masturbation, lesbianism and hysteria.[66] The above justifications should be seen in the broader context of the deep-rooted socio-cultural inequality of women, thus necessitating fundamental international and domestic legal reform.

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[61] Smith *op* cit note 12 at 14.
[62] *Ibid.*
[63] *Ibid* at 14.
[64] *Ibid* at 12.
[65] Wood *op cit* note 35 at 358.
[66] *Ibid* at 361.

CHAPTER 3

INTERNATIONAL HUMAN RIGHTS LAW AND FEMALE GENITAL MUTILATION

This chapter lists the various human rights that are violated by the continued practice of FGM and provides a historical account of the efforts by the international human rights community to eradicate it. The focal point will be the instruments of the UN.

1. Rights Infringed By FGM

1.1 The Right to Life and the Right to Dignity

The right to integrity and dignity is generally regarded as the foundation upon which all other rights are based, and thus it is interwoven with the right to life.

Notwithstanding the absence of official data in this regard, FGM can lead to death, violating the right to integrity and the right to life. These rights are guaranteed in the Universal Declaration of Human Rights[67] and the International Covenant on Civil and Political Rights.[68]

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[67] Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly Resolution 217A (III), December 10, 1948. Hereinafter referred to as the Universal Declaration. Article 3 provides: "Everyone has the right to life, liberty and security of person."

[68] International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR 21st Session, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, adopted December 16, 1966. Entered into force on 23 March 1976. Hereinafter referred to as the ICCPR. Article 6(1) provides for the right to life and Article 10(1) provides for the right to dignity.

1.2 The Right to Freedom from Physical Violence

The Declaration on the Elimination of Violence Against Women[69] is the first document to expressly denounce violence against women, by highlighting its negative impact. Article 1 of DEVAW states:

> [T]he term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women ... whether occurring in public or in private life.

This provision is important as it affords protection from violence from private sources too. Article 2(a) is even more specific, as it categorizes FGM as violence against women, when it provides that:

> Violence against women shall be understood to encompass, but not be limited to ... female genital mutilation and other traditional practices harmful to women

The problem with DEVAW is that it is a declaration and not a convention, making it a non-binding document. Thus there is a problem with its status, and in turn presents problems regarding implementation.

1.3 The Right to Freedom from Torture

Article 1 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[70] defines "torture" as:

> ...Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidation or coercing him or a third person, or for any

[69] Hereinafter referred to as DEVAW.

[70] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 39th Session, Supp. No. 51, UN Doc. A/39/51 (1985), adopted December 10, 1984. Entered into force on 26 June 1987. Hereinafter referred to as the Convention Against Torture.

> 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.

It is argued that FGM constitutes torture as well as cruel, inhuman and degrading treatment not only because of the extreme pain experienced during the cutting process, but also due to the suffering that is endured throughout the female's life, exacerbated by sexual intercourse and childbirth.[71] It is also a systematic violation perpetuated against persons because they belong to a specific group.

1.4 The Right to Freedom from All forms of Discrimination

The Convention on the Elimination of All Forms of Discrimination Against Women[72] defines discrimination as:

> ...Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[73]

In order for FGM to fall within the ambit of this provision, it must fulfil two requirements. Firstly, it must be conduct which creates a distinction based on sex and secondly, it must prevent women from enjoying fundamental rights equally with men. FGM meets the first criterion because the practice is based on sex, even though men also undergo circumcision. The cutting that women experience seeks to significantly alter healthy tissue with far reaching long-term effects.

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[71] Wood *op cit* note 35 at 380.
[72] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR 34th Session, Supp. No. 46, U.N. Doc A/34/36 (1980) adopted December 18, 1979. Entered into force on 3 September 1981. Hereinafter referred to as the Women's Convention.
[73] Article 1.

The second criterion is also met because the underlying reasons for the cutting also differ substantially, with men receiving an elevated status within the community, whilst women's sexuality is restricted and controlled through the practice. The extreme physical and psychological consequences caused by FGM, deprives women and girls of fundamental rights and freedoms thereby preventing such females from being equally situated with men. As both requirements are met, the continued practice of FGM is a violation of the Women's Convention.

1.5 The Right to Health

Numerous instruments provide for the right to health as a fundamental right. The African Charter on Human and Peoples' Rights provides that:

> Every individual shall have the right to enjoy the best attainable state of physical and mental health[74]

The Universal Declaration provides:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family.[75]

The United Nations Fourth World Conference on Women[76] confirms this, adding:

> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[77]

Rahman and Toubia argue that this right can also be read in the negative, namely, that any act that would impede not only the physical and mental, but also the sexual and social health of a person, must be prevented.[78]

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[74] Article 16 of the African Charter.
[75] Article 25 of the Universal Declaration of Human Rights, G.A. Res.217A (III), U.N. GAOR 3rd Session (Resolutions, part 1), U.N. Doc. A/810, adopted December 10, 1948. Hereinafter referred to as the Universal Charter.
[76] Hereinafter referred to as the Beijing Conference.
[77] Paragraph 89 of the Platform for Action.
[78] Rahman and Toubia *op cit* note 9 at 27.

1.6 The Rights of the Child

The Convention on the Rights of the Child[79] and the African Charter provide that the "best interests of the child" is vital.[80] Both instruments expressly prohibit that traditional practices be performed on children. Article 24(3) of the Children's Convention provides:

> State Parties are to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

Article 21(1) of the African Charter states the following:

> State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
> (a) those customs and practices prejudicial to the health or life of the child; and
> (b) those customs and practices discriminatory to the child on the ground of sex or other status.

FGM falls within the ambit of prohibited cultural practices referred to in these respective provisions. Moreover, duties are placed on member States to actively adopt mechanisms to eradicate and prevent such rituals.

2. A Historical Overview Of The Legal Responses To The Eradication Of FGM

After the Second World War, the international community emphasised the protection of human rights on a global level. The discussion below traces the UN's response to FGM.

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[79] Hereinafter referred to as the Children's Convention. Refer to Annexure B for the status of the Member States and ratifications to the Children's Convention.
[80] Article 3(1) of the Children's Convention and Article 4(1) of the African Charter.

In 1958, the Economic and Social Council of the UN[81] attempted to place FGM on the agenda by inviting the WHO to investigate the practice and to adopt measures to stop it. In 1959 the Assembly of the WHO declined the request and shortly thereafter, declined two more similar offers.

The UN declared the period between 1975 and 1985 the Decade of the Woman and it was during this period that FGM once again surfaced as an issue within the UN. In 1980 the UN Mid-Decade Conference on Women and the Non-governmental Organization Forum in Copenhagen was organised as part of the events of the decade, and it was at this forum that FGM was raised as a cultural practice affecting the health of women and children. The complexities of the matters were not discussed though, and in fact, the Non-Governmental Organisations dealt with the related issues in more detail.[82]

The Women's Convention was adopted in 1979 and subsequently came into force in 1981. This was the first document to address the issue of discrimination against women and its adoption was applauded and hailed as a beacon for women's rights. The jubilation was short-lived though as the shortcomings of the instrument became evident. An express prohibition of violence against women was conspicuously absent thus not affording enough protection for women. The Women's Convention has been widely signed and ratified,[83] but its reception into countries is slow.

Another criticism of the Convention was and still is that its goal is to establish formal equality, that is, to position women as being on an equal footing to men. It is

[81] Hereinafter referred to as ECOSOC.
[82] Rahman and Toubia *op cit* note 9 at 60.
[83] Refer to Annexure A. The United States of America is not a Member of the Women's Convention.

acknowledged that this is important, but it does not take enough cognisance of the fundamental, historical and systematic discrimination of women. Therefore, substantive equality needs to be explored, firstly due to the disadvantages women have suffered based purely on their gender; and secondly, because it must be recognised that women and men are different and thus cannot always be treated the same. The most obvious example of this is the biological differences, which in turn means that there must be special laws and rights just for women with regard to reproductive and maternity rights that would not apply to men. Critics highlighted these problems, overshadowing the progress that was made.

It was during this period that Mrs Halima Embarek Warzazi was appointed as the Special Rapporteur on Traditional Practices Affecting the Health of Women and Children. The international community regarded this as advancement in the eradication of FGM.

In 1989 the Committee on the Elimination of Discrimination Against Women[84] adopted General Recommendation No.12 on Violence Against Women,[85] but it was the adoption of the General Recommendation No. 19 which expressed violence against women as a form of discrimination. General Recommendation No.14 was issued in 1990, expressing CEDAW"s concern about FGM. Recommendations were also made to reduce the high rate of mutilation. This later recommendation provided for state responsibility for violence against women whether from a public or private source. The lobbying of activists resulted in violence against women becoming a significant issue in 1993 at the UN First World Conference on Human Rights in

[84] Hereinafter referred to as CEDAW.
[85] Report of the Committee on the Elimination of Discrimination Against Women: General Recommendation No. 12 (8th Session 1989).

Vienna, and subsequently, was catered for in the Vienna Declaration and Programme of Action.[86]

As a result of this advocacy, the General Assembly of the UN adopted DEVAW in 1993 and in 1994 Radhika Coomaraswamy was appointed as the UN Special Rapporteur on Violence Against Women to monitor its adoption and implementation by member states. DEVAW extended the definition of violence against women to include harmful traditional practices and provided that member states could also be a source of violence against women. Article 2(a) categorizes FGM as a specific form of gender –based violence.[87]

This development acknowledges violence against women as discrimination because the gender imbalances and inequality experienced in all spheres of society prohibits women and girls from the full enjoyment of rights.[88]

1995 UN Fourth World Conference on Women with the Beijing Platform of Action where FGM was once again addressed with the emphasis on the development and implementation of international policies.[89]

Since the Beijing Conference, programmes have been developed to implement the concerns raised at that forum.

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[86] Hereinafter referred to as the Vienna Declaration.

[87] Article 2 of DEVAW provides: "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battery, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation."

[88] O'Hare, UA "Realising Human Rights for Women" *Human Rights Quarterly* (1999) 364 at 374.

[89] Toubia *op cit* note 7 at 11.

CHAPTER 4

AN ANALYSIS OF THE EFFECTIVENESS OF THE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1. Factors Impeding The Effective Enforcement Mechanisms Of International Law

At a first glance of the international human rights laws, one could be inclined to believe that women's rights are adequately protected. A closer study of the application of these norms reveals that there are serious flaws with the enforcement mechanisms of laws protecting women. The factors contributing to the ineffectiveness must be studied in order to promote development.

1.1 Cultural Relativism

The question of whether human rights are universal or culturally relative needs to be examined because this argument is the centre of the FGM debate. Cultural relativism is often used to defend the continued practice of FGM and other harmful traditional practices.

The query is whether Western ideologies are imposing their dominant ideas and perceived morals on other groups and cultures. The sovereignty of states and cultural independence are used as arguments to resist the application of this dominant and universal ideal or the so-called "one size fits all approach".[90] The survival of the identities of cultural groups seems to be the rationale for resistance to the enforcement of Western ideas.

[90] Obiora, LA "Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision" *Case Western Law Review* (1997) Volume 47 275 at 276.

Rhadika Coomaraswamy argues that many Third World states and academics in particular, renounce the universality of human rights as it is viewed as being the outcome of the period called the European or Western Enlightenment.[91] This is described as the period that constructed the fundamental core of what underpins human rights law, namely, the rationale of men who are essentially equal to each other.[92] This principle, it is argued, must be extended to apply to women too.[93] Coomaraswamy, however, claims that this could mean that culturally, the European Enlightenment and the Western world has triumphed over the non-western world.[94]

The Enlightenment period is criticized because it also gave birth to the colonization and imperialism and Coomaraswamy makes the important observation that in order to overcome the problems regarding cultural relativism, the international legal community must be critical of imperialism whilst simultaneously being a supporter of human rights.[95] The question is whether this balance can be achieved.

The answer is essentially twofold. Firstly, the development of human rights must be viewed as a necessity in reaction to the Second World War and thus must be isolated from the experience of colonization. Secondly, it must be acknowledged that basic human rights principles are present in most cultures and traditions.[96] This argument ultimately supports the idea of the universality of human rights. This provides for a working platform to apply basic norms whilst still having regard for traditions of the non-western world.

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[91] Coomaraswamy *op cit* note 1 at 4.
[92] *Ibid* at 4.
[93] *Ibid* at 5.
[94] *Ibid* at 5.
[95] *Ibid* at 6.
[96] *Ibid.*

Obiora challenges the postulation that individual rights and group/collective rights are polarized and thus mutually exclusive, claiming that they are in fact co-existent.[97] This idea is reiterated by Bonny Ibhawoh, who claims that in recent times there has been a departure from the polarized approach and a general acceptance that there is a core set of universal rights, but qualifies this by adding that even universalism must be "complemented and strengthened with the specific cultural experience of various societies."[98]

Anti-abolitionists could argue that certain provisions in human rights instruments, namely the right to culture and the right to religion, strengthen their quests for the retention of FGM. It is vital though that these rights be examined in their contexts and not in isolation.

1.1.1 Freedom of Culture

The right to freely practice one's culture is protected in several instruments. The protection of this right seems to conflict with the rights which FGM violates. Article 27(1) of the Universal Declaration of Human Rights provides:

> Everyone has the right to freely participate in the culture of the community.

Article 15(1)(a) of the CESCR states that:

> The State Parties to the present Covenant recognize the right of everyone to take part in cultural life

In an extensive clause, Article 5 of the Declaration on Race and Racial Prejudice provides that:

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[97] Obiora *op cit* note 90 at 278.
[98] Ibhawoh, B "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State" *Human Rights Quarterly* (2000) Volume 22(3) 838 at 843.

> Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognize that they should respect the rights of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international contexts.

Article 29(7) of the African Charter provides individuals with the duty to:

> ...Preserve and strengthen positive African cultural values in his relation with other members of the society.

Article 1(1) of the Declaration of the Principles of International Co-operation states the following:

> Each culture has a dignity and value which must be respected and preserved... Every people has the right and the duty to develop its culture.

Notwithstanding that the above provisions enunciate the importance of the cultural life of individuals and communities, and its inextricable interwoveness with identity, they are not without their limitations. Article 30 of the Universal Declaration of Human Rights limits the right to culture by claiming that:

> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

This provision is echoed verbatim in the CESCR and a similar limitation is found in Article XI(2) of the Declaration of the Principles of International Co-operation, which states:

> The principles of this Declaration shall be applied with due regard for human rights and fundamental freedoms.

Article 27(7) of the African Charter has a self-limitation built within it, by claiming that *positive* African cultural values must be preserved. Thus, as all the qualifications and limitations of the aforementioned articles, it is required that in providing for cultural freedom, it must be ensured that other rights guaranteed in the instruments are not violated.[99]

1.1.2 Freedom of Religion

The right to religious freedom is vital as it is closely linked with the identity and fundamental values of the individual. This right is also guaranteed in several international instruments and as with the right to culture, conflicts with the provisions that protect against FGM.Article 18 of the Universal Declaration provides that:

> Everyone has the right to freedom of thought, conscience and religion.

This provision, however, cannot be read in isolation, but must be read together with Article 30, which limits the application of this right, in that private or public sources may not use it to destroy or violate any other rights which the instrument seeks to protect.

The same provision is found in Article 18(1) of the ICCPR, but Article 18(3) elaborates on this, by once again adding a limitation, stating:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

[99] For example the right to freedom from physical violence.

The protection of religious freedom is also provided for in Article 8 of the African Charter with the following:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 8 is not unqualified as it is limited by Article 27(2) of the Charter, prohibiting this provision from being used to limit other fundamental rights protected in the document.

1.1.3 The Right to Self-determination

Pluralism and the right to self-determination are vital principles in human rights law. This right finds application in three established areas. External self-determination is in response to colonialism and to protect States from foreign military occupation, whereas internal self-determination intends to protect racial groups from being denied the access to government structures.[100] This right is provided for in several major instruments. In terms of Article 1 (1) of both the ICCPR and the ICESCR:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In 1960 the General assembly of the UN adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, reaffirming the commitment to the conventions' guarantee of this right. This declaration acknowledges the effects of imperialism in precluding the colonized countries from full development and independence.

[100] Cassese, A *International Law* (2000) at 106.

The progression of women's rights creates the perception that the right to self-determination of groups will be eroded, and hence, in many States women's sexual and reproductive rights are neglected in the quest to achieve pluralism.[101] Thus how do we respect diversity and simultaneously strive for the universality of human rights? The two concepts seem to be situated at extreme ends of a continuum.

Coomaraswamy offers a solution to the problem by suggesting that in such instances, women be given the choice to participate in the traditional activities of the group she belongs to, as such choice is integral to cultural diversity.[102] The problem with this point of view is that in reality women are seldom aware of the options available to them, or might find the available resources inaccessible. If educated about alternatives, the woman could still fear not participating in the customs of her group as she might be ostracized. The proposal by Coomaraswamy also fails to acknowledge the vulnerable position that a girl-child is in, and that her choices, knowledge and positioning in society provides her with even less power than her adult counter-part.

Thus, even though the protection of culture, religion and pluralism are important rights, they are not indiscriminate because the corresponding limitation clauses restrict their application. Where there are conflicting rights, certain rights, such as the protection from physical harm, will supersede the right to culture and religion. It is therefore argued that any culture (even though protected), which enables and condones FGM, may be limited in order to protect the rights that the practice violates.

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[101] Coomaraswamy *op cit* note 1 at 23.
[102] *Ibid* at 24.

1.2 The Public / Private Dichotomy

The public/private dichotomy refers to a system whereby the State and the international community have power in the public domain but must refrain from intervening in the private sphere. However, it is in the private sphere where women and girls are vulnerable and need State protection. It is in the private realm where acts such as domestic violence, *sati*[103] and FGM occur.

Celina Romany claims that in terms of feminist perspective, this distinction between the private and public spheres is a symptom of our patriarchal society, which reflects a male jurisprudence.[104] This means that the State power is dominated and controlled by the masculine construction, resulting in the subjugation of women.[105] The gender inequality is not just limited to political and economic life, but also informs the private lives of individuals. The strict application of the divide ensures that women remain in a submissive position in both spheres, and provides obstacles to the implementation of rights.

FGM is firmly entrenched in the private sphere and even though some practicing countries have abolished it, the dichotomy has prevented the State concerned from prosecuting the violators.[106] The reluctance of States to protect women and girls form FGM and to punish those who perform it will also be discussed below in terms of the State liability for third party actions.

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[103] Widow burning.

[104] Romany, C 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in *Human Rights of Women: National and International Perspectives* Rebecca J Cook (ed) (1994) at 92.

[105] *Ibid* at 93.

[106] Wood *op* cit note 35 at 374. Wood refers to the Sierra Leone's Major Koroma who expressly stated his support for traditional practices such as FGM.

1.3 State Sovereignty

The Second World War signalled a fundamental shift in the rules regarding the interaction between States. Prior to the war, three core principles regulated this interaction, namely, "freedom, equality and, effectiveness."[107] These principles were relaxed in nature and not legally binding, allowing countries unencumbered freedom.[108]

This approach changed dramatically in 1945 when the UN Charter was adopted, in response to the Second World War. The Charter included stringent provisions enunciating the sovereign equality of States in order to promote peace amongst nations. Article 1 of the Charter states that the purposes of the UN are to achieve and maintain the co-operation, peace, security and friendly interaction between member States.[109] Article 2 of the Charter elaborates on the purposes of Article 1 by listing rules according to which member States must adhere.[110]

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[107] Cassese *op* cit note 100 at 86.

[108] *Ibid.*

[109] Article 1: "The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonising the actions in the attainment of these common ends."

[110] Article 2: "The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organisation is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventative or enforcement action.

Despite these provisions, the relations between States within the UN had to be re-negotiated when new members (such as developing countries) joined this forum.[111] The new principles agreed upon included non-intervention in the affairs of other States, whether internal or external affairs, as well as the self-determination of peoples.[112] These provisions seem to make it difficult for States to raise complaints where countries have violated human rights. The low positioning of women's rights, and specifically FGM, on the international agenda, makes intervention in this regard a rarity.

The ban is extended to the following categories: non-interference in the internal administration and the internal affairs of another country as well as the prohibition on organising activities that may prejudice a foreign country.[113] Thus individuals and States that are vocal about the eradication of FGM are accused of contravening the principle of State sovereignty by intervening in the internal affairs of the practicing countries.

A vital question though is whether the ban on intervention is unlimited. New forms of intervention have emerged that fall outside of the recognised categories. An example of this is "economic coercion" whereby countries exert economic pressure on countries in order to make them more submissive to adopting a stance, or acting in a particular manner.[114] Hence this seemingly strict principle is subject to

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6. The Organisation shall ensure that states that are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of peace and security.
7. Nothing contained in the present Charter shall authorise the United nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[111] Cassese at 87.
[112] This was provided for in the United Nations Declaration on Friendly Relations of 1970.
[113] Cassese *op cit* note 100 at 98.
[114] *Ibid* at 99.

limitations. Article 1 of the Montivideo Convention on the Rights and Duties of States defines a State as:

> ...A person of international law should possess the following qualifications: (a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.

Although this Convention is a regional instrument, adopted by the International Conference of American States, it provides useful insights to the elements of a State and the problem it presents. This definition does not include a requirement for the necessary observance of human rights.[115] This configuration of statehood is problematic as it permits a State to be able to participate in the creation of international law if it meets with he criteria formulated in Article 1, despite possible violations of human rights.[116]

Karen Knop provides important criticism of the international community's contribution to the development of the sovereign State in her discussion of the distinction between the concepts of statism and the centrality of the State in international law.[117] Statism refers to the international perspective that the State is an independent political organ and this is problematic because it omits the State responsibility to justice.[118] The centrality of the state in international law on the other hand, is where the international legal system is structured in a manner that

[115] Knop, K 'Why rethinking the Sovereign State is Important for Women's International Human Rights Law' *Human Rights of Women: National and International Perspectives* Rebecca J. Cook (ed) (1994) at 155.
[116] *Ibid.*
[117] *Ibid* at 153.
[118] *Ibid.*

empowers the State to be the sole decision-maker[119] to the exclusion of other role-players (such as individuals and NGOs).[120]

1.4 Reservations of Instruments

International instruments have various degrees of binding power on States. Declarations such as DEVAW are non-binding whereas treaties such as the Women's Convention, The Children's Convention, ICCPR and ICESCR have binding powers on member States. These binding powers are not absolute though as they are subject to reservations, unless that specific treaty expressly precludes reservations.

1.4.1 *Defining Treaty Reservations*

The Vienna Convention on the Law of Treaties[121] regulates the application and interpretation of treaties including the procedure for lodging reservations. Article 2(1)(d) of the Vienna Convention provides that:

> 'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, where it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

A reservation system may take one of three forms. Firstly, there could be an isolation of the provisions that may be reserved. The rationale of this form is to ensure that reservations are not lodged against the core provisions of the treaty, so

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[119] The State is the sole decision-maker with regard to the drafting, interpretation and implementation of international laws.
[120] Knop *op cit* note at 153.
[121] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969); 63 A.J.I.L. 875 (1969). Entered into force in 1980. Hereinafter referred to as the Vienna Convention.

that the object and purpose of the treaty is not nullified.[122] Article 12(1) of the Geneva Convention on the Continental Shelf is an example of this isolation. It provides that "...any State may make reservations to the convention other than to Articles 1 to 3 inclusive." The second position that may be taken is that of a general prohibition whereby a rigid approach is adopted in order to retain the integrity of the treaty. States must either accept or reject the document in its entirety.

The United Nations Convention on the Law of the Sea has adopted this approach. Article 309 states that "no reservation or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." A third approach in the reservation regime is where the establishment of compatibility is through collective or third party determination. An example of this more favourable approach is the International Covenant on the Elimination of All Forms of Racial Discrimination, which provides that "a reservation shall be considered incompatible or inhibitive if at least two-thirds of the State Parties ... object to it."

A State's ability to opt out of certain provisions through reservations detracts from the international principle of *pacta sunt servanda* (agreements are to be kept).[123] This presents a huge impediment to the successful implementation of treaties because reservations provide protection to a party State, where that country may be in violation of human rights and may face serious consequences.[124] Rebecca Cook states that in an instrument and particularly in the Women's Convention, reservations serve as the "paradox of maximizing its universal application at the

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[122] Redgwell, C 'The Law of Reservations in Respect of Multilateral Conventions' in *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* Gardner, JP (ed) (1997) at 12.

[123] Cook, RJ "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" *Virginia Journal of International* Law (1990) Volume 30 643 at 649.

[124] *Ibid* at 650.

cost of compromising its integrity."[125] This means that reservations are included in a treaty to make it as widely applicable as possible, but could result in the main intention of the instrument being nullified.

1.4.2 Reservations to Core Provisions and Lack of Specificity of Reservations

The Women's Convention has one of the greatest numbers of reservations lodged against it, 88 substantive reservations and 25 reservations to the provision on dispute settlement.[126] Cook observes that because the nature of this treaty is about eradicating discrimination from all spheres and structures, countries that object to this, demonstrate their refusal to meet this standard.[127] In comparison, 170 States ratified or acceded to the Children's Convention but there are 41 substantive reservations.

It is necessary to examine the patterns of reservations of the Women's Convention that affect the eradication of FGM. In practice, countries have made or attempted to make reservations with regard to key provisions of these Conventions that are incompatible with object and purpose of the treaty. Bangladesh, Egypt and the Maldives lodged reservations against Article 2 of the Women's Convention.[128] This provision is the heart of the Convention, prohibiting discrimination in all its forms from all government organs. Furthermore, this article obliges governments to "take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise."[129] This means that discrimination, whether from a public or private source, must be abolished. Because Article 2 is the core of the Women's

[125] *Ibid* at 644.
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid* at 687.
[129] Article 2(e) of the Women's Convention.

Convention, one should question whether it is permissible to entertain reservations that are incompatible with it. In terms of the Children's Convention, Djibouti made a very broad reservation, stating that it would not be bound by provisions of the Convention that were "incompatible with its religion and its traditional values."[130] Pakistan, Egypt and Jordan have also lodged reservations based on the conflict with Islamic law.[131]

Iraq made reservations to Article 2(f) of the Women's Convention. This provision requires Member States to "take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. Iraq also lodged a reservation against Article 2(g), which requires States to "repeal all national penal provisions which constitute discrimination against women."

Malawi made reservations regarding provisions of the Women's Convention that would oblige that State to eliminate traditional practices.[132] This reservation was later withdrawn. New Zealand opted out of Article 2(f) on behalf of the Cook Islands and also placed a reservation on Article 5(a) which requires the elimination of discriminatory social and cultural patterns. In *Lovelace v Canada*[133] the Human Rights Committee held that it was cautious of reservations lodged on the grounds of culture and tradition. Any reservations made in this regard must be objectively

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[130] Kuper, J 'Reservations, Declarations and Objections to the 1989 Convention on the Right of the Child' in *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* Gardner,JP (ed) (1997) 106.

[131] *Ibid.*

[132] Byrnes, A 'The Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights of Women: International Instruments and African Experiences* Benedek, W, Kisaakye, EM and Oberleitner, G (eds) (2002) at 127.

[133] *Lovelace v Canada, Communication No. R.6/24, 36 U.N. GAOR Supp. (No. 40).*

necessary.[134] Necessity may be absent when such practices are in contravention of women's equality provided for in the Women's Convention.[135]

The reservations lodged against the Women's and Children's Conventions are also problematic because their phrasing is broad and often ambiguous. In the *Death Penalty* case the observation of the Inter-American Court is that one cannot interpret a treaty without also interpreting the treaty reservations.[136] The inference is that the reservation becomes part of the original treaty with regard to the application of the treaty between the reserving State and the other Parties. In *Belilos v Switzerland*[137] the European Court of Human Rights interpreted the Swiss reservation to the European Convention. The court held that Switzerland had not fulfilled the requirements of the European Convention in terms of specificity of the reservation accompanied by a statement of the laws affected.[138]

In contrast, the Vienna Convention is not as explicit regarding the specificity required in a reservation. This does not provide any assistance in resolving the broad reservations to the Women's Convention. The sweeping reservations that Egypt and Bangladesh made to the Women's Convention due to its contradiction to Islamic *Sharia* falls far short of being reasonably specific. What parts of Sharia law does the Convention conflict with? How is Sharia law to be interpreted? Even other Islamic countries that apply Sharia law would disagree on its interpretation.[139] In addition, whose duty is it to interpret the domestic laws of a country in order to

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[134] Cook *op cit* note 123 at 689.
[135] *Ibid.*
[136] *Ibid* at 653.
[137] *Belilos v Switzerland* 1988 Eur. Ct. H.R. Ser. A No. 132. Hereinafter referred to as the *Belilos* case.
[138] Cook *op cit* note 123 at 655.
[139] Clark, B "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women" *American Journal of International Law* (1991) Volume 85 281 at 310.

determine whether its reservation is in conflict with the test for compatibility? Even though these are questions that pose serious problems regarding the validity of a reservation, and notwithstanding the fact that objections were made, they were still given effect.

The result is that an accepted reservation that is drafted in ambiguous and uncertain language creates uncertain relationship between the reserving State and the objecting State. It also makes it difficult for the monitoring body to determine whether there has been any progress in the implementation of the treaties. When the reservation is related to religious principles, then it can be questioned whether a point will ever be reached when conflict will be resolved. The inconsistency between international treaties and the religious laws of a State may continue indefinitely unless there is a clear attempt to reconcile the two.

1.4.3 Acceptance of Reservations that are Incompatible with the Object and Purpose of the Treaty

Historically, contracting States had to unanimously agree to a reservation before it was permissible and the reserving State was allowed as a party to the treaty.[140] The International Court of Justice dispatched with this approach in the *Genocide Case*[141] where a flexible approach was adopted. This system allows reserving States to become parties to treaties even though other States object to those reservations.[142] A requirement is the reservation compatibility with the object and purpose of the treaty concerned. Despite criticisms, the Vienna Convention followed the approach

[140] Redgwell *op cit* note 122 at 5.
[141] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion, 1951 I.C.J. Rep.15 at 29.
[142] Redgwell *op cit* note 122 at 6.

adopted in the *Genocide Case.* This is evident in Article 19(d) of the Convention. Article 19 provides that:

> A State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
>
> (b) the treaty provides that only specified reservations, which do not include the reservations in question, may be made; or
>
> (c) in the case of not falling under sub-paragraphs (a) and
>
> (d) the reservation is incompatible with the object and purpose of the treaty.

At a first reading, the compatibility provision in Article 19(d) seems as though it retains the integrity and credibility of the instrument but a closer scrutiny reveals that Article 19, which should be read together with Article 20,[143] does not complement it, but conflicts with it, leading to confusion and uncertainty.

Article 20(4)(b) in particular presents problems. It provides contracting States with the option of accepting or rejecting reservations, thus, making the provision in question not apply between itself and the reserving State. Conflict arises as Article 19(d) limits the scope of reservations if incompatible with the "object and purpose"

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[143] Article 20 of the Vienna Convention provides:

"1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all States.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting States;
(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed consent to be bound by the treaty, whichever is later."

of the treaty. On the other hand, Article 20 (4) allows States autonomy by enabling them to accept the reservation even though it might be incompatible.[144] In fact Article 20(4)(b) ultimately fragments the multilateral treaty into smaller bilateral treaties between the other contracting States and the reserving State.[145]

Article 21 of the Vienna Convention[146] stipulates that in this instance the objecting State determines whether it would have a treaty relationship with the reserving State. The objecting State decides whether the treaty could be applicable in whole or in part with the reserving State. Thus, the resolution of this conflict and the determination of the acceptability of reservations are subjective in nature because the contracting States themselves make this decision.[147]

It is interesting to note that in the case of the Women's Convention, none of the objecting States opted to prohibit the application of the convention between themselves and the reserving State.[148] Belinda Clark makes an important criticism in this regard when she states: "but therein is a paradox. By keeping the Convention in force between themselves and the reserving states, the objecting states are in effect allowing a reserving state to be a party without having to adhere to central tenets of the treaty, i.e., permitting a standard of adherence below what they

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[144] Redgwell *op cit* note 122 at 8.
[145] Cook *op cit* note 123at 652.
[146] Article 21 of the Vienna Convention provides that:
"1 A reservation established with regard to another party in accordance with articles 19, 20 and 23:
(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
(b) modifies those provisions to the same extent for that other partying its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *per se*.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."
[147] Redgwell *op cit* note 122 at 9.
[148] Clark *op cit* note 139 at 307.

consider acceptable."[149] The subjective nature of acceptability is evident in the inconsistency of objections that have been made with regard to the Women's Convention and the Children's Convention.

Because the determination of appreciation of the reservation is subjective, relationships between countries can determine how aggressive an objecting state is with regard to the reservation. The Federal Republic of Germany challenged the compatibility of a reservation by Thailand and Tunisia on the basis that it was imprecise and unspecific. Germany displays inconsistency though as it accepted a similarly vague reservation by France who claimed that the Women's Convention could not prevail over unspecified provisions of its Civil Code.[150] Mexico regularly and vehemently objected to reservations viewed as incompatible with the Women's Convention[151] but did not raise an objection to similar reservations from Brazil, its neighbour.[152]

Smaller and less powerful countries are also less likely to challenge the reservations of their powerful counter-parts, whom they might be dependent on for economic assistance. They might even be involved in a bilateral agreement with a State and be reluctant to blemish that relationship.

1.4.4 Possible Impact of Reservations on the Eradication of FGM

It is crucial to analyse the reservations to the Women's Convention in order to determine the reason that States are unwilling to fully commit to laws that are aimed at improving women's well-being.

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[149] *Ibid* at 308; Redgwell *op* cit note 122 at 5.
[150] Clark *op cit* note 122 at 311.
[151] Mexico objected to reservations by Egypt, Bangladesh, Mauritius, Turkey, Jamaica, Cyprus and Korea.
[152] Clark *op cit* note 122 at 301.

The Vienna Convention is silent in terms of the form that a reservation should take. Aside from the requirement that it must be in writing, it does not state that specific reasons must be forthcoming regarding the necessity for the reservation. There is no obligation for the reservation to precisely include the domestic laws that are in conflict with the treaty at the time that the reservation is made. In the *Belilos* case the European Court of Human Rights held that an interpretative declaration was not a reservation and consequently did not have the same effect.[153] On what basis though is a distinction made between a declaration and a vague reservation, especially in the instance where a State does not expressly declare its intention.

Article 28(2) of the Women's Convention and Article 51(2) of the Children's Convention permit reservations, reverberating the provision in Article 19(d) of the Vienna Convention, which requires that reservations be compatible with the "object and purpose of the treaty."[154] The problem is that there are no clear procedures to test for incompatibility.[155] The other States to the treaty have the authority to object to the reservation As the discussions above reveal, the reservations to the Women's and Children's Conventions, fail to meet with the compatibility requirement, yet they have not be classified as invalid.

Instead, this matter is dealt with by the State parties themselves. The Children's Convention seems to be more favourable amongst States in comparison to the

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[153] Harris, DJ *Cases and Materials on International Law* (1991) 4th Edition at 758.

[154] Article 28 of the Women's Convention:

"1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by Sates at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received."

[155] Byrnes at 127.

Women's Convention. One of the broadest reservations to the Women's Convention is from Egypt, a country with approximately 97% prevalence of FGM. Djibouti on the other hand, lodged a sweeping reservation to the Children's convention and it has approximately 98% prevalence of FGM.

There is a general resistance to the process of elevating the status of women and girls and consequently, there is a resistance to abolishing the traditions and practices that enable and entrench inequality. The making and acceptance of broad reservations to core provisions of treaties allows countries to circumvent the very nature of the instrument, and use the reservation as a justification for the continued practice of FGM. It is interesting to note that similar obligatory provisions in ICCPR and ICESCR have not met with reservations yet the ones in the Women's Convention have. This is indicative of the level of commitment to the fulfilment of women's rights.

In reaction to this situation, CEDAW has regularly reviewed the status of reservations in the State reports. Countries must explain the reasons for the reservations and the effects they have on domestic laws. In addition, they must provide a timeline indicating when the reservation can be limited or withdrawn.[156]

1.5 Complaints Process

Human rights instruments provide for complaints procedures to allow individuals, groups and States to submit grievances regarding the non-compliance with the

[156] Byrnes *op cit* note 132 at 128 and 129.

particular treaty. A distinction must be made between complaint recourse procedures and complaint information procedures.[157]

In terms of complaint recourse procedures, the relevant international body concerned is obliged to hear and decide every case before it, with the goal of establishing whether a violation of treaty has occurred and providing a remedy for the plaintiff or redressing the violation.[158] Complaint information procedures do not result in remedial steps being taken, but refers to new data that is received regarding the human rights infringements that affect the entire population.[159]

The complaints process also takes the form of hybrid procedures, whereby there is a combination of the information and recourse elements, such as creation of Special Rapporteurs, who have the authority to investigate violations and to confront the State in question regarding an individual claim of non-compliance.[160]

The scope of this research is limited to the complaints procedure of CEDAW because it is specifically focused on the eradication of discrimination against women. A significant and controversial point of concern was the omission of an individual complaints procedure under CEDAW. NGO's were instrumental in the advocacy for the adoption of an Optional Protocol, which would make provision for individuals to raise grievances.

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[157] Byrnes, A 'Enforcement Through International Law and Procedures' in *Human Rights of Women: National and International Perspective* Cook RJ(ed) (1994) at 195.
[158] *Ibid* with Byrnes citing Maxime Tardu.
[159] *Ibid*.
[160] *Ibid* at 196.

The process to establish the Optional Protocol has been a long one, beginning with a proposal for it at the 1993 Vienna Conference. In 1994 the International Human Rights Law Group arranged a meeting in Maastricht where a preparatory work was completed for the draft of the optional protocol, followed by CEDAW's adoption of Suggestion No. 7 in 1995.[161] In 1996 the Commission on the Status of Women[162] reviewed the comments and submissions made by governments and NGO's. By 1997 a working draft had been completed and in 1999 the general Assembly of the UN adopted the Optional Protocol.[163] Whilst the establishment of an individual complaints process is a positive achievement, the procedure is still problematic, making the application of this instrument difficult.

The admissibility criterion of the Optional Protocol to CEDAW limits the scope of the individual complaints to be reviewed by the Committee. Article 2 of the Optional Protocol provides that only individuals or groups (or those acting on behalf of such individuals or groups) who are under the jurisdiction of the State Member may submit a complaint.[164] Article 3 provide that:

> Communications shall be in writing and shall not be anonymous. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

This provision is problematic as it enables a State to be a party to the substantive provisions of CEDAW itself, but escape obligations under the Optional Protocol that

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[161] Byrnes *op cit* note 132 at 139.
[162] Hereinafter referred to as CSW.
[163] Byrnes *op cit* note 132 at 140.
[164] Article 2 of the Optional Protocol to CEDAW provides that: "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on behalf without such consent."

contains the individual complaints procedure. In such an instance, an individual or group's complaint would be inadmissible as there would be no recourse under the treaty. The individual or group would thus have to seek another treaty to submit its complaint to. If precluded from utilising CEDAW, an individual could use Article 26 of ICCPR[165] (if the country in question is a member of the ICCPR and its First Optional Protocol), but CEDAW might provide the complainant with a more favourable decision as its substantive content is specifically designed to protect women from *public and private* acts of violence and discrimination.[166] Disuse of CEDAW in favour of another treaty would result in the lack of development of a jurisprudence of women's human rights. Article 4(1) of the Optional Protocol to CEDAW states that:

> The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

This provision is common to all the treaties requiring individuals to first utilize and exhaust the national laws of the State concerned before seeking redress from an international treaty. This process could be slow and years may pass before the national remedies are exhausted and the individual complaint is admissible.[167] Even if it reaches the international legal system, years could go by before an outcome is forthcoming. Victims thus seldom experience immediate relief.

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[165] Article 26 of ICCPR provides that: "All persons are equal before the law and are entitles without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[166] Byrnes *op cit* note 157 at 197; also refer to Article 2 of the Women's Convention.

[167] *Ibid* at 199.

1.6 Inadequate Domestic Legal Frameworks

The reluctance to ratify the instruments protecting women's rights and the absence of adequate national laws contributes to the continuation of FGM being practiced.

The development of national legislation raises the issue of whether FGM should be regulated or abolished. Regulation instead of complete abolition may seem to be a useful compromise because it involves practicing less severe forms of FGM and the respect for cultural beliefs. It could also involve medical practitioners performing the operation in sanitised conditions. In reality, this compromise is not effective. Dorkenoo claims that there is "...no evidence to show that a policy of promoting the less drastic forms of female genital mutilation in hygienic surroundings has led to its eradication."[168] Evidence of this is the Sudanese government that prohibited infibulation but allowed clitoridectomies, and found that fifty years of applying this policy did not decrease the prevalence of the practice, and that infibulations were still taking place at a high rate.[169] Another example is that of Djibouti where clinics perform less drastic forms of FGM in sanitary conditions with the women under local anaesthetic, but once these women and girls return to their communities they are forced to undergo the more severe form of cutting.[170]

Abolitionists thus argue that FGM cannot be regulated but legislation must abolish it completely. This means that the medicalized form of the practice must also be abolished. The WHO clarified this issue in 1982, when it stated that medical or health professionals should not perform FGM.[171]

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[168] Dorkenoo *op cit* note 8 at 9.
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid* at 10.

Domestic legal protection against FGM can take different forms. Constitutions could guarantee the protection from harmful traditional practices as well as the right to life, health, integrity and freedom from violence. Constitutional protection is a vital tool as any laws or conduct must be consistent with the constitution (unless they pass the limitation test). None of the counties of origin have express prohibitions against FGM in their respective constitutions.[172] Three of these countries, namely, Ghana, Ethiopia and Uganda, have provisions that could be interpreted to include FGM as a harmful practice.[173]

Another means of dealing with FGM is by not enacting specific statutes but through existing legislation. The existing legislation would be extended to apply to FGM. Countries could use criminal laws or civil laws to regulate the practice. The adoption of specific legislation is a new phenomenon in countries of origin and countries of destination.[174] Most of these statutes are inadequate though, without sufficient substantive content. The Central African Republic, Guinea, Djibouti and Tanzania have vague provisions, merely stating that FGM is a prohibited act, and the provisions of sanctions.[175]

The problem with these statutes is that they do not clearly define what FGM is. Thus, not only must a clear definition of the prohibited practiced be outlined, but the various types of FGM must be clarified. This is important so that citizens are clear about what actions are criminalized. In addition, any legislation providing sanctions

[172] Toubia and Rahman *op* cit note 9 at 60.
[173] *Ibid*, also refer to Annexure A.
[174] *Ibid* at 62 and 63. Countries of origin with specific legislation on FGM: Burkina Faso, Central African Republic, Guinea, Djibouti, Tanzania Ghana, Togo, Côte d'Ivoire and Senegal. Countries of destination with specific legislation on FGM: Australia, Canada, New Zealand, Norway, Sweden, United Kingdom and the United States of America.
[175] Toubia and Raham *op* cit note 9 at 63.

must clearly state who the possible perpetrators are.[176] Laws could also provide for increased penalties to be incurred where the practice results in death,[177] or if it is performed on minors.[178] Females who have undergone FGM could also use the civil law as a remedy to claim damages from the operators for the harm that they have suffered.[179] Individuals have not utilised civil remedies very often though.[180]

FGM has been identified as a ground for the seeking asylum under the Geneva Convention, the Convention on the Rights of the Child as well as the Convention on the Status of Refugees. Canada has developed a their national laws to grant asylum to women and girls where they fled their countries to escape undergoing FGM.[181]

2. State Liability for the Actions of Private Parties

International human rights law generally recognises the status of individuals and private institutions but the context is normally as the bearers of rights. Consequently, an individual's conduct that constitutes an infringement of the Women's Convention will not attract liability.[182] State Parties to a treaty, however have obligations in this regard and could be liable.

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[176] *Ibid.* Those who are liable might include those who perform the operation, parents who consent to their daughters undergoing the ritual and even those who have knowledge of and co-operate with those performing FGM.

[177] Côte d'Ivoire, Burkina Faso, Togo and Senegal.

[178] France provides for extra penalties for FGM performed on minors under 15 years of age. France uses existing penal law to prohibit the practice.

[179] Toubia and Rahman *op* cit note 9 at 67.

[180] *Ibid.*

[181] Oosterveld, V "Refugee Status for Female Circumcision Refugees: Building a Canadian Precedent" *University of Toronto Faculty of Law Review* (1991) Volume 51 277 at 285.

[182] Cook, RJ 'State Accountability Under the Convention on the Elimination of All Forms of Violence Against Women' *Human Rights of Women: National and International Perspectives* Cook, RJ (ed) (1994) at 237.

The ICCPR places the obligation on States to "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..."[183] The Women's Convention compels governments to "condemn discrimination against women in all its forms" and to "agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women."[184] Furthermore, States must "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."[185]

Heléne Combrinck adopts Henry Shue's general theory on State duty and applies it to the positive responsibilities with regard to eradicating violence against women.[186] This formulation consists of three legs and can be applied to protecting the physical security of women. Firstly, there is a duty on the State not to violate the particular right being scrutinized, which in this case is the right to physical security.[187] Secondly, the State has the duty to protect individuals from having their physical security violated by others, and thirdly, the obligation to provide security to individuals who are incapable of protecting themselves.[188]These duties seem stringent, as they require more than mere omission from the State with regard to the security of individuals, especially where the State itself was not a party to the actual infringement.

General Recommendation 19 to CEDAW makes up for the controversial absence of provisions on violence against women in the Convention itself, by stating that

[183] Article 2(1) of the ICCPR.
[184] Article 2 0f CEDAW.
[185] Article 2 (e) of CEDAW.
[186]Combrinck, H "Positive State Duties to Protect Women from Violence: Recent South African Developments" *Human Rights Quarterly* (1998) Volume 20 666 at 668. Henry Shue's model is (a) a duty to violate violating the right in question, (b) a duty to protect from violation of the right and (c) the duty to provide aid to those who have had their rights infringed.
[187] *Ibid.*
[188] *Ibid* at 669.

"states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.[189]" DEVAW reiterates the state obligations provided for in General recommendation 19.[190]

Even though a government is not directly liable for the transgressions of private parties (whether natural or juristic persons), the international law stated above establishes that it has a duty to take measures, whether legislative, executive or judicial to deter the occurrence of violence against women. In addition, investigations must be carried out and punishment must be meted in the event of such acts, irrespective of the source of the violence.[191] A further element is that victims must be compensated where human rights violations occur and the State did not take the appropriate measures. A State will be liable if it fails to meet its international obligations in any of these areas.

The Inter-American Court of Human Rights adopted these factors in *Velásquez Rodríguez v Honduras.*[192] The courts held the government of Honduras accountable not only for its failure to prevent the numerous disappearances of political activists, but also because it did not investigate the incidents or punish the perpetrators. The court thus held that in its failure to execute these obligations, the government of Honduras acted without due diligence.

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[189] Paragraph 10 of General Recommendation 19.
[190] Article 4 (c) of DEVAW.
[191] Cook *op cit* note 182 at 237.
[192] *Velásquez Rodríguez v Honduras* Case 7920, Ser. C, No. 4, Inter-Am Ct. H.R. 35, O.A.S. Doc. OEA/Ser.L/V/III. 19, doc 13 1988. Hereinafter referred to as the *Velásquez Rodríguez* case.

What does "due diligence" entail though? The International Law Commission's Articles on State Responsibility[193] provides for the international obligations of countries. Article 1 contains a widely accepted rule in international legal practice.[194] It provides that:

> Every internationally wrongful act of a State entails the international responsibility of that State."

This provision is developed in Article 2, which defines an internationally wrongful act by stating:

> There is an internationally wrongful act of a State when:
> (a) conduct consisting of an action or omission is attributable to the State under international law; and
> (b) that conduct constitutes a breach of an international obligation of the State.

This means that international law objectively determines what constitutes a breach of international law, irrespective of the provisions of the domestic laws of the country concerned.[195]

When determining if a country has failed to meet its obligations in terms of due diligence, the conduct of the State organs must be examined.[196] This could be in the form of the State's participation in victimization of citizens. However, it could also comprise the lack of legislative reform, the failure of the police to timeously respond to complaints from victims of domestic violence or the neglect of the policies and programmes to eradicate gender inequality. It is clear that the State responsibility extends to the passivity of a government where positive action is required.[197] In

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[193] ILC Commentary 2001, A/56/10, 2001.
[194] Shaw, M *International Law* (2003) 5th Edition at 697.
[195] *Ibid.*
[196] Cook *op cit* note 182 at 244.
[197] *Airey v Ireland* 1979 32 Eur. Ct H.R. (Ser. A).

cases where the States fail to meet the due diligence standard, the complainants would be able to seek reparations, monetary or otherwise. The construction of the tripartite obligation as determined in the *Velásquez Rodríguez* case, together with the provisions in the Women's Convention and the State Responsibility Articles, require countries practicing FGM to enact legislation criminalizing the practice, with clear provisions regarding sanctions.

3. Problems With Reporting Procedures Under CEDAW

It is necessary to scrutinize the way governments implement treaties in order to establish progress. To this end, the Women's Convention has a monitoring process and the Human Rights Commission has appointed thematic Rapporteurs to determine compliance. These procedures are also riddled with problems, contributing to the ineffective application of treaties.

3.1 Reporting procedures under CEDAW

The Women's Convention requires the State Parties to submit regular reports with regard to the "legislative, judicial and administrative or other measures which they have adopted to give effect to the provisions of the Convention."[198]

There are several documents available to assist governments in drafting reports. These include the *Consolidated Guidelines*, aimed at assisting with the compilation of the first report to be submitted.[199] The *Guidelines for the Preparation of Reports* provide direction for periodic reports.[200] In addition, the UN has also produced a

[198] Article 18(1).
[199] Byrnes *op cit* note 132 at 132.
[200] *Ibid.*

comprehensive manual called *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination Against Women.*[201]

The report mechanism serves several purposes. The State's national measures and policies must be examined to determine the extent of conformity with the Women's Convention.[202] The reports enable the specific State to evaluate their progress in the development of women's rights and communicate the problems encountered in the implementation of the provisions of the Convention.[203] The reports provide vital information to CEDAW with regard to the practical problems in the realisation of the Convention's standards. Subsequent reports must provide an account of the *de facto* circumstances since the previous submission.[204]

Once submitted to the secretariat of CEDAW, a Committee member is assigned as a country rapporteur with the responsibility of studying the report and presenting initial observations, questions and recommendations.[205] The Women's Convention does not officially provide a role for NGO's in the reporting process. In 1999, however, CEDAW invited NGO's to participate in the process by disseminating information on their country's efforts in implementing the Convention.[206] This decision is indicative of progress as it acknowledges that the development of women's rights is a multi-faceted process, with various role-players. Another advantage of NGO participation is the pressure they can exert on governments by providing CEDAW with information regarding non-compliance.

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[201] *Ibid* at 133.
[202] *Ibid* at 132.
[203] *Ibid*.
[204] *Ibid* at 133.
[205] *Ibid* at 135.
[206] *Ibid* at 137.

The NGO's have raised a concern that financial constraints prevent them from reporting to CEDAW because the sessions take place in New York, Vienna or Geneva. An additional problem is that the country's rapporteur remains anonymous. This prevents a greater level of interaction between the NGO's and CEDAW.

Reports must be submitted within a year of the specific State's ratification and every four years thereafter.[207] The problem with regular reports is twofold. Firstly, most countries have fallen behind with the submission of reports. Secondly, the Committee is experiencing a backlog in terms of scrutinizing the reports. In addition, the Committee's responsibilities have expanded since the adoption of the Optional Protocol to the Women's Convention because it also has to entertain individual complaints.[208]

The irony is that the more States adhere to the obligations of regular submission, the greater the Committee's workload becomes. In order to remedy this situation, countries with outstanding reports may combine two or more reports for as long as the Committee permits. The problem with this situation is that some countries may only end up submitting one report every eight to ten years and this will make the reporting procedure practically obsolete.[209]

3.2 The Special Rapporteurs on Violence Against Women and on Traditional Practices Affecting the Health of Women and Children

The UN has appointed several thematic rapporteurs to afford special attention to patterns of human rights abuses. They are essentially officials who carry out

[207] Article 18(1)(a) and (b).
[208] Byrnes *op cit* note 132 at 130.
[209] *Ibid* at 134.

fieldwork in various countries and then compile reports on their findings. They also offer recommendations to States to assist in effecting change and improvement. Two rapporteurs are of relevance to FGM. The Special Rapporteur on Traditional Practices Affecting the Health of Women and Children was appointed to deal with cultural practices that adversely affect women and girls, with the Special Rapporteur on Violence Against Women appointed to deal with gender-based violence in general.

These two officials have reported on the developments to eradicate violence and specifically FGM, but it has only been approximately ten years since their appointments and it is perhaps too soon to evaluate their level of success. Despite their creation though, the incident rate of FGM is still extremely high, leading on to question their effectiveness.

CHAPTER 5

RECOMMENDATIONS TO CHANGE THE STATUS QUO

The discussions in the previous chapters provide evidence of the problems encountered in the implementation of treaties dealing with the rights of women and girls. Measures need to be adopted at various levels and with different institutions in order to improve that status quo. The recommendations below are an attempt to facilitate discussion in the discourse.

1. International Institutions

Major improvements have been made at the international level to develop the human rights of women. The Women's Convention, the Children's Convention and DEVAW are some of the measures taken to this end. This proves the commitment of the UN to end the subjugation of women and to specifically eradicate FGM. Analyses of the treaties reveal that they are flawed and that additional developments must take place at this level.

It is necessary therefore to explore the possibility of *jus cogens* as a source of law and the merits of establishing violence against women as a peremptory norm.

1.1 The Establishment of Women's Rights as *Jus Cogens*

Seventeenth and eighteenth century legal scholars divided the law into three categories. The first category is internal law, which refers to the domestic legal

order of a particular State. The second category is the international law regulating the relationship between States and which required the voluntary consent of countries to be bound by it. The third classification is natural law, which was regarded as a necessary body of law, in that it "derived from reason and humanity."[210] Natural law was regarded as enjoying a higher status than ordinary international laws.

In the 1960's socialist and developing countries pressurized the international community to elevate the status of certain norms above that of other instruments, such as treaties.[211] The rationale for this recommendation was expressed at the Vienna Conference in 1968. The socialist countries[212] argued that the existence of peremptory norms would facilitate the amiable relationships between States with diverse social and economic programmes. The developing countries[213] on the other hand, claimed that *jus cogens* would signify the denouncement of colonialism and slavery.[214]

Western countries reluctantly accepted the notion on the condition that the International Court of Justice serves as a mechanism for the establishment of the peremptory norms.[215] Article 53 of the Vienna Convention establishes the *jus cogens* as a source of international law by providing:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of

[210] Cassese *op cit* note 100 at 139.
[211] *Ibid* at 138.
[212] For example Romania and the Ukraine.
[213] For example Sierra Leone.
[214] Cassese *op cit* note 100 at 139.
[215] *Ibid* at 138.

> States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

The superior status of these norms is further entrenched in Article 64 of the Vienna Convention, which states that:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates

The hugest criticism of *jus cogens* is that it violates the principles of *pacta sunt servanda* and State sovereignty. Jimenez de Aréchaga, the Uruguay delegate to the Vienna Conference expressed his concerns regarding the Article 53 definition of *jus cogens*, claiming that it fails to describe the true meaning of peremptory norms, instead, only providing for the legal effects that they have if breached.[216]

On the other hand, supporters of *jus cogens* claim that its benefit is the individual States must sacrifice independence and questionable conduct for the improvement of the international community.[217] The establishment of a body of peremptory norms creates international constitutional principles similar to national constitutions.[218] *Jus cogens* constitutes norms prohibiting and criminalizing colonization, genocide, slavery, apartheid, torture and war crimes.[219] In fact, it is argued that the "fundamental principles of humanitarian law belong to *jus cogens*."[220] This argument was entrenched by various courts. This view was reverberated by the International

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[216] *Ibid* at 140.
[217] Charlesworth, H and Chinkin C "The Gender of *Jus Cogens*" *Human Rights Quarterly* (1993) Volume 15 Number 1 63 at 64.
[218] *Ibid*; Cassese *op cit* note 100 at 144.
[219] *Ibid* at 141; Dugard, J *International Law: A South African Perspective* 2nd Edition at 40.
[220] *Ibid*.

Criminal Tribunal for the former Yugoslavia[221] and the Constitutional Court in Hungary stated that:

> The rules relative to the punishment of war crimes and crimes against humanity are *jus cogens* norms of international law, because these crimes threaten mankind and international co-existence in their foundations. A State refusing to undertake this obligation may not participate in the international community.[222]

It is argued that the importance of *jus cogens* is symbolic rather than practical because firstly, it establishes fundamental laws as superior, and secondly, it creates a body of law that is universal in nature.[223] Peremptory norms may not be derogated from, contributing to its elevated status in the hierarchy of laws. In addition, they cannot be modified or abolished by any treaty, but only by another peremptory norm.[224]

The important question for the purposes of this paper is whether the superior nature of *jus cogens* affords protection for women against systematic oppression. It is argued that women are not granted protection by these principles because they are gendered in nature.[225]

Charlesworth and Chinkin claim that "the manner in which the norms have been constructed obscures the most pervasive harms done to women".[226] They explain that the right to life, which is also a customary international law, is a fundamental right but despite its guarantee, women's lives are constantly under threat, purely

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[221] *Kupreškić et al* 2000 ITCY Trial Chamber II. Also see Cassese *op cit* note 100 at 141.
[222] *Az Alkotmánybirosg Hatà rosatai* 1993 Decision No. 53.
[223] Charlesworth, and Chinkin *op cit* note 217 at 64.
[224] Shaw *op cit* note 194 at 117; Dugard *op cit* note 219 at 41.
[225] Charlesworth and Chinkin *op cit* note 217 at 65.
[226] *Ibid* at 66.

because they are female. This threat begins intrauterine, with sex-selective abortions and a continued pregnancy could end in female infanticide.[227] These acts are carried out because sons are deemed to be valuable whereas daughters are regarded as a burden on the family.[228]

A study in China revealed that 12% of all female embryos were aborted whilst a survey in India found that 10 000 cases of female infanticide occur yearly.[229] Girls are prone to death through malnutrition because boys and girls do not have equal access to food, shelter and medicine. Due to these practices "60 million women are simply missing from the population statistics...on the basis of general demographic trends."[230]

Harmful traditional practices such as FGM are performed on women and girls, the effects of which could lead to death. 130 million females have been subjected to FGM, with 2 million cut annually. In addition, women in certain cultures are in danger of honour killings, acid attacks, *sati* killings and dowry related murders. There is a 20 to 50 percent global increase of domestic violence, often resulting in femicide.[231]

The data provided is evidence of the systematic patterns of abuse that women experience, often resulting in death, or significantly altering the quality of life. These events take place in the private sphere at the hands of individuals. The problem though is that generally, international law gives effect to the public/private

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[227] *Ibid.*
[228] UNICEF "Domestic Violence Against Women and Girls" *Innocenti Digest* 2000 No. 6 Preliminary Edition at 51.
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid* at 49-52.

dichotomy. The same is true of peremptory norms, which protects human rights in the public domain. Thus, governments are prohibited from certain behaviour such as torture, whether against their citizens, or those of another State. Charlesworth and Chinkin argue that this is evident of the male construction of human rights.[232] *Jus cogens* does not provide for the protection of women's rights and is therefore gendered.

The development of women's rights as a fourth generation of rights is rejected because it will marginalize women's rights.[233] Instead, it is suggested that the private acts of individuals form part of the peremptory norms. This means that the private domain, which is where women operate, would receive protection from the highest international norms.

1.2 Enhancing The States' Reporting Procedure

Most States are late in submitting their initial and periodic reports to CEDAW. This mechanism is vital in monitoring governments' programmes and strategies for implementing the Women's Convention. The data provided in Chapter 4 is evidence of the generally poor response to this obligation. The only consequence to the non-compliance with this duty is the public shaming of the State concerned. Thus, more accountability is required in this process.

CEDAW must insist that the contents of the reports comply with the minimum standards regarding accurate information. This data is vital for the international

[232] Charlesworth and Chinkin *op cit* note 217 at 68.
[233] *Ibid.*

agencies to be effective in their work.[234] It would also form part of global statistics so that that all interested parties, such as monitoring bodies, NGOs and researchers can have an accurate idea of the status of women's rights. This is crucial for the elimination of traditional practices such as FGM that are seeped in culture and embedded in the private realm and thus not often spoken about. The discussion above confirms that there is either a lack of statistics or conflicting information of FGM.

CEDAW must reduce the backlog of reports that must be considered. The practice of combining reports is a short-term remedy and creates uneasiness because in practice, States could end up submitting one report in ten years. This creates leeway for States who are non-compliant to begin with.

1.3 State Reservations

Reservations present obstacles to the full implementation of treaties. The discussions above[235] reveal the sweeping reservations made to central articles of conventions. These derogations are often permitted even though they fail to meet the compatibility test.

The Women's Convention has the notorious reputation as having the most reservations. This undermines the importance of women's human rights and dilutes the effect and legal status of the Convention. The legitimacy of such reservations must be scrutinized because they must not be permitted when being incompatible with the object and purpose of the treaty. The Vienna Convention is flawed because

[234] Cook, RJ "Women's International Human Rights Law: The Way Forward" *Human Rights Quarterly* (1993) Volume 15 231 at 253. Cook relates the ideas of Norma Forde, a member of CEDAW.
[235] Reservations are discussed in this mini-thesis between pages 38 and 49.

it enables an illegitimate reservation to be accepted. It is recommended that the Human Rights Committee address this problem by formulating a policy document that clearly specifies the requirements that States must fulfil in the compilation of the reservation. The legal effect of reservations must be clarified, especially with regard to the relationship that exists between reserving and objecting States.

1.4 The Creation Of A Treaty To Eradicate Violence Against Women

Initially, the greatest problem with the Women's Convention was the oversight by the drafters to define violence against women as a form of discrimination. NGOs expressed their disdain with the position and advocated for it to be remedied.

DEVAW was drafted to overcome the shortcomings of the Convention. It provides an open list definition of gender based violence[236] and positions it as a form of discrimination against women. DEVAW is a declaration though and unlike treaties, does not have binding powers. It is necessary to formulate a treaty that acknowledges the subjugation, disempowerment and inequality of women due to the systematic acts of violence. Such a treaty must contain non-derogable provisions and identify public and private sources of violence.

2. Government Institutions

2.1 Review and Withdraw Reservations

Governments must review their reservations to the Women's and Children's Conventions with the aim of eventually withdrawing them. There must be a paradigm shift in countries' outlook on protecting women. Instead of heavily

[236] Article 2 of DEVAW. FGM is listed as a form of violence against women.

reserving core provisions, governments must amend national laws so that they become progressively compliant with the treaty in question.

2.2 Incorporation of International Law into the Domestic Legal Framework

Upon ratification, countries agree to subsume the provisions of the treaty into the national legislation. This means that there is practical application of an international norm to various countries. This process is to be done progressively, bearing in mind that not all countries have the same resources available to them. However, States must not use the lack of resources to justify their non-responsiveness. National laws are the "first line of defense for women"[237]when exposed to violence. Remedies must first be exhausted at the national level before redress can be sought from international institutions.

The national legal framework must therefore provide adequate policies, legislation and judicial infrastructure. When drafting legislation that prohibits FGM, careful consideration must be given to the definition of the practice and whether to criminalize the continued practice. If FGM is criminalized, then the penalties must be clear an unambiguous.[238]

In addition, officials must receive extensive training regarding the new policies as well as the correct manner of dealing with persons traumatised by violence. Education and awareness campaigns must facilitate the dissemination of information regarding amendments to law and to make women knowledgeable of the rights and the accessibility of resources.

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[237] Cook *op cit* note 234 at 258.
[238] Toubia and Rahman *op cit* note 9 at 63.

It is suggested that national gender units are created to ensure that women's rights are firmly placed on the national agenda. This would require that a portion of the budget be allocated to women's rights, with countries prioritising their specific problems that must be addressed.

Countries must provide the monitoring bodies with detailed time-lines on the rollout strategies for the implementation of treaties and that they are held accountable for failing to do so.

2.3 Compliance With Reporting Obligations

Member countries must make every effort to meet their responsibilities of reporting to the treaty monitoring bodies. The report must contain the necessary information and this includes statistics outlining the problems facing women and a record of the programmes and developments to eradicate gender inequality in general and specifically FGM.

Reports must be submitted on or close to the due date so that the monitoring body can scrutinize it in the scheduled session. This would contribute to decreasing the pressure on the monitoring bodies so that there is eventually the situation where there is no longer a backlog of reports.

2.4 Embark on Partnerships with NGOs

A commitment to the elimination of FGM and other gender-based violence requires a multi-dimensional approach involving all the role players. NGOs have always been instrumental in the development of women's rights through research, advocacy, education at grassroots' levels and pressurising the international

community to pursue particular avenues of action. An example is the role that the NGO delegation played in the Copenhagen Conference, when their collective voice demanded the recognition of violence against women as a form of discrimination. This result was the creation of DEVAW, which in fact classified violence against women as discriminatory. In turn, DEVAW expressly defines FGM violence. The role of NGOs extends beyond advocacy.

CEDAW has invited NGOs to present their findings at the session prior to their country's report. They may raise important concerns about the *de facto* situation in the country. In addition, NGOs could reach areas where the national institutions are unable to. For these reasons, it is essential that governments form partnerships with NGOs.

2.5 Develop Educational Programmes

Community educational policies are necessary to sustain a change in attitudes regarding violence against women and FGM in particular. Women and men are very often only exposed to the traditions that encourage the subjugation of women. Outreach programmes must provide information that will empower women regarding the options available to them.

Illegal immigrants who practice FGM in their country of destination pose an additional problem. Traditional practices could become even more subterfuge due to the fear of being deported. Governments must develop an educational package that will be inclusive of immigrant communities whether legal or illegal.

2.6 Develop Statistics on Gender-based Violence

Gender specific violence must be acknowledged and classified so that the patterns and trends can be recorded. Statistics are invaluable when compiling the reports for the international monitoring bodies and for governments to measure the scope of the initial problems and then effects of their intervention.

2.7 Alternative Ceremonies to FGM

Cultural groups claim that the ritual of FGM celebrates the transition of girls into womanhood. These are deep-rooted beliefs and customs that have been practiced for hundreds of years and cannot just be dispelled by the passage of legislation. Despite opposing the practice, it is believed that those who participate in it must be respected and not just be dictated to. FGM will not just disappear because it is prohibited by statute. In fact, the prohibition could result in FGM going underground.[239]

Experience has proven that any strategy to eliminate FGM requires working closely with practicing communities.[240] Through education and dialogue, the communities themselves must acknowledge that FGM disempowers women and that it has dire consequences. The suggestions for alternative, non-violent rites of passage must be forthcoming from those who are part of the culture.

The Kenyan government together with NGOs have vigorously worked to change attitudes about harmful traditional practices, with the communities involved in the decision-making process. A ritual known as *Ntanira na Mugambo* was adopted as

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[239] Ibhawoh *op cit* note 98 at 857.
[240] *Ibid.*

an alternative to cutting.[241] It is also known as "circumcision through words" and involves a celebration where the women or girls are educated about sexuality and gender issues. They spend a short period of time in isolation, and are eventually awarded with certificates to attest to the transition into womanhood. Initial studies indicate that in certain communities FGM has decreased significantly, from 95 to 70 percent.[242]

The Kenyan example is the result of years of collaborative efforts and even though it is still in the initial stages, it lends credibility to the arguments that FGM can be regulated if those practicing it are part of the process.

3. Non-Governmental Organisations

NGOs have played a huge role not only in putting pressure on their governments but also in contributing to the research and fieldwork to combat gender-based violence in all spheres. They are vital tools in the fight against FGM.

A new and important role is emerging for NGOs, namely, the direct communication with monitoring bodies such as CEDAW. This means that they can make their findings available at the international level and this in turn would make governments cautious about the compilation and content of their reports.

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[241] *Ibid* at 858.
[242] at 859.

CHAPTER 6

CONCLUSION

The discussions above undoubtedly prove that huge inroads have been made into the area of women's rights. The UN has created the institutional infrastructure to oversee the creation of instruments such as the Women's Convention and the Children's Convention. However, the establishment of international laws in itself has not deterred violations of women's rights.

The treaties together with enforcement and monitoring mechanisms are riddled with flaws and this ultimately dilutes the powers of CEDAW and undermines the objectives that are to be achieved. Reservations of instruments, failing to submit adequate reports on time and the resistance to receive the treaties into municipal legal frameworks are huge obstacles that must be attended to.

There are certain areas, such as Kenya, where FGM is decreasing, due to the strategies embarked on by the State. For the most part though, the impediments to the implementation of human rights laws have ensured that this practice is still a reality for most women whose cultures dictate its use. Djibouti has a 98 percent[243] prevalence of FGM yet the State has placed reservations on key provisions of the Women's Convention. Egypt's reservations to the Women's Convention are based on its incompatibility with Islamic law, yet it has a 97 percent occurrence of FGM.[244]

[243] Rahman and Toubia *op cit* note 9 at 138.
[244] *Ibid.*

The elevation of women's rights to the status of *jus cogens* could eliminate some of the problems reservations and the reluctance to object to an incompatible reservation.

It would be futile to attempt to eliminate FGM without acknowledging that it forms part of a larger system of patriarchal and institutionalized oppression of women, which is aimed at the subjugation of a group of people, based on their gender.

There must be sensitivity to the relationship between culture and identity, thereby not forcing practicing cultures to merely end traditions. States must fully commit to the long-term multifaceted and integrated approaches to the eradication of FGM and violence against women in general.

Aside from the institutional and legal changes, the empowerment of women in is central to the successful elimination of all forms of violence, including cultural practices like FGM.

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ANNEXURE A

PREVALENCE OF FGM IN AFRICAN COUNTRIES

State	Prevalence of FGM (%)	Type of FGM
Benin	50	Type II
Burkina Faso	70	Type II
Cameroon	20	Types I and II
Central African Republic	43	Types I and II
Chad	60	Type II
Côte d'Ivoire	43	Type II
Democratic Republic of Congo	5	Type II
Djibouti	98	Types II and III
Egypt	97	Types I, II and III
Eritrea	95	Types I, II and III
Ethiopia	90	Types I and II
The Gambia	80	Type II
Ghana	30	Type II
Guinea	50	Type II
Guinea-Bissau	50	Types I and II
Kenya	50	Types I and II
Liberia	60	Type II
Mali	94	Types I and II
Mauritania	25	Types I and II
Niger	20	Type II
Nigeria	60	Types I and II
Senegal	20	Type II
Sierra Leone	90	Type II
Somalia	98	Type III

Sudan	89	Types I, II and III
Tanzania	18	Type II and III
Togo	50	Type II
Uganda	5	Types I and II

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ANNEXURE B

STATUS OF MEMBERSHIP AND RATIFICATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMENAND ITS OPTIONAL PROTOCOL

*A=Accession; b=Declarations or reservations; c=Reservation subsequently withdrawn; d=Succession.

**The countries that have been highlighted indicate the Members States that indigenously practice FGM.

State	Date of signature	Date of receipt of the instrument of ratification, accession or succession	Date of signature to ptional Protocol	Date of ratification of Optional Protocol
Afghanistan	14 August 1980	5 March 2003 a/		
Albania		11 May 1994 a/		June 2003
Algeria		22 May 1996 a/ b/		
Andorra		15 January 1997 a	9 July 2001	October 2002
Angola		17 September 1986 a/		
Antigua & Barbuda		1 August 1989 a/		
Argentina	17 July 1980	15 July 1985 b/	February 2000	
Armenia		13 September 1993 a/		
Australia	17 July 1980	28 July 1983 b/		
Austria	17 July 1980	31 March 1982 b/	December 1999	September 2000
Azerbaijan		10 July 1995 a/	June 2000	June 2001
Bahamas		6 October 1993 a/ b/	September 2000	September 2000
Bahrain		18 June 2002 a/		
Bangladesh		6 November 1984 a/		

		b/		
Barbados	24 July 1980	16 October 1980		
Belarus	17 July 1980	4 February 1981 c/	April 2002	February 2004
Belgium	17 July 1980	10 July 1985 b/	December 1999	June 2004
Belize	7 March 1990	16 May 1990		December 2002
Benin	**11 November 1981**	**12 March 1992**	**May 2000**	
Bhutan	17 July 1980	31 August 1981		
Bolivia	30 May 1980	8 June 1990	December 1999	September 2000
Bosnia & Herzegovina		1 September 1993 d/	September 2000	September 2002
Botswana		13 August 1996 a/		
Brazil	**31 March 1981 b/**	**1 February 1984 b/**	**March 2001**	**June 2002**
Bulgaria	17 July 1980	8 February 1982 c/	June 2000	
Burkina Faso		**14 October 1987 a/**	**November 2001**	
Burundi	17 July 1980	8 January 1992	November 2001	
Cambodia	17 October 1980	15 October 1992 a/	November 2001	
Cameroon	**6 June 1983**	**23 August 1994 a/**		**January 2005**
Canada	17 July 1980	10 December 1981 c/		October 2002
Cape Verde		5 December 1980 a/		
Central African Republic		**21 June 1991 a/**		
Chad		**9 June 1995 a/**		
Chile	17 July 1980	7 December 1989 b/	December 1999	
China	17 July 1980 b/	4 November 1980 b/		
Colombia	17 July 1980	19 January 1982	December 1999	

Comoros		31 October 1994 a/		
Congo	29 July 1980	26 July 1982		
Costa Rica	17 July 1980	4 April 1986	December 1999	September 2001
Cote d'Ivoire	**17 July 1980**	**18 December 1995 a/**		
Croatia		9 September 1992 d/	June 2000	March 2001
Cuba	6 March 1980	17 July 1980 b/	March 2000	
Cyprus		23 July 1985 a/ b/	February 2001	April 2002
Czech Republic		22 February 1993 c/ d/	December 1999	February 2001
Democratic People's Republic of Korea		27 February 2001 a/		
Democratic Republic of the Congo	17 October 1986	16 November 1986		
Denmark	17 July 1980	21 April 1983	December 1999	February 2001
Djibouti		**2 December 1998 a/**		
Dominica	15 September 1980	15 September 1980		
Dominican Republic	17 July 1980	2 September 1982	March 2000	August 2001
Ecuador	17 July 1980	9 November 1981	December 1999	February 2002
Egypt	**16 July 1980 b/**	**18 September 1981 b/**		
El Salvador	14 November 1980 b/	19 August 1981 b/	April 2001	
Equatorial Guinea		23 October 1984 a/		
Eritrea		**5 September 1995 a/**		
Estonia		21 October 1991 a/		
Ethiopia	**8 July 1980**	**10 December 1981 b/**		

Fiji		28 August 1995 a/ b/		
Finland	17 July 1980	4 September 1986	December 1999	December 2000
France	17 July 1980 b/	14 December 1983 b/ c/	December 1999	June 2000
Gabon	17 July 1980	21 January 1983		November 2004
Gambia	**29 July 1980**	**16 April 1993**		
Georgia		26 October 1994 a/		July 2002
Germany	17 July 1980	10 July 1985 b/	December 1999	January 2002
Ghana	**17 July 1980**	**2 January 1986**	**February 2000**	
Greece	2 March 1982	7 June 1983	December 1999	January 2002
Grenada	17 July 1980	30 August 1990		
Guatemala	8 June 1981	12 August 1982	September 2000	May 2002
Guinea	17 July 1980	9 August 1982		
Guinea-Bissau	**17 July 1980**	**23 August 1985**	**September 2000**	
Guyana	17 July 1980	17 July 1980		
Haiti	17 July 1980	20 July 1981		
Honduras	11 June 1980	3 March 1983		
Hungary	6 June 1980	22 December 1980 c/		December 2000
Iceland	24 July 1980	18 June 1985	December 1999	March 2001
India	**30 July 1980 b/**	**9 July 1993 b/**		
Indonesia	**29 July 1980**	**13 September 1984 b/**	**February 2000**	
Iraq		13 August 1986 a/ b/		
Ireland		23 December 1985 a/ b/ c/	September 2000	September 2000
Israel	17 July 1980	3 October 1991 b/		
Italy	17 July 1980 b/	10 June 1985	December 1999	September 2000

Jamaica	17 July 1980	19 October 1984 b/		
Japan	17 July 1980	25 June 1985		
Jordan	3 December 1980 b/	1 July 1992 b/		
Kazakhstan		26 August 1998 a/	September 2000	August 2001
Kenya		**9 March 1984 a/**		
Kiribati		17 March 2004 a/		
Kuwait		2 September 1994 a/ b/		
Kyrgyzstan		10 February 1997 a/		July 2002
Lao Peoples Democratic Rep.	17 July 1980	14 August 1981		
Latvia		14 April 1992 a/		
Lebanon		21 April 1997 a/ b/		
Lesotho	17 July 1980	22 August 1995 a/ b/	September 2000	September 2004
Liberia		**17 July 1984 a/**	**September 2004**	
Libyan A. Jamahiriya		16 May 1989 a/ b/		June 2004
Liechtenstein		22 December 1995 a/ b/	December 1999	October 2001
Lithuania		18 January 1994 a/	September 2000	August 2004
Luxembourg	17 July 1980	2 February 1989 b/	December 1999	July 2003
Madagascar	17 July 1980	17 March 1989	September 2000	
Malawi		12 March 1987 a/ c/	September 200	
Malaysia		**5 July 1995 a/ b/**		
Maldives		1 July 1993 a/ b/		

Mali	5 February 1985	10 September 1985		December 2000
Malta		8 March 1991 a/ b/		
Mauritania		10 May 2001 a/		
Mauritius		9 July 1984 a/ b/	November 2001	
Mexico	17 July 1980 b/	23 March 1981	December 1999	March 2002
Micronesia		1 September 2004 a/		
Monaco		18 March 2005 /a		
Mongolia	17 July 1980	20 July 1981 c/	September 2000	March 2002
Morocco		21 June 1993 a/ b/		
Mozambique		16 April 1997 a/		
Myanmar		22 July 1997 a/ b/		
Namibia		23 November 1992 a/	May 2000	May 2000
Nepal	5 February 1991	22 April 1991	December 2001	
Netherlands	17 July 1980	23 July 1991 b/	December 1999	May 2002
New Zealand	17 July 1980	10 January 1985 b/ c/	September 2000	September 2000
Nicaragua	17 July 1980	27 October 1981		
Niger		8 October 1999 a/		September 2004
Nigeria	23 April 1984	13 June 1985	September 2000	November 2004
Norway	17 July 1980	21 May 1981	December 1999	March 2002
Pakistan		12 March 1996 a/ b/		
Panama	26 June 1980	29 October 1981	June 2000	May 2001
Papua New Guinea		12 January 1995 a/		

Paraguay		6 April 1987 a/	December 1999	May 2001
Peru	**23 July 1981**	**13 September 1982**	**December 2000**	**April 2001**
Philippines	15 July 1980	5 August 1981	March 2000	November 2003
Poland	29 May 1980	30 July 1980 b/		December 2003
Portugal	24 April 1980	30 July 1980	February 2000	April 2002
Republic of Korea	25 May 1983 b/	27 December 1984 b/ c/		
Republic of Moldova		1 July 1994 a/		
Romania	4 September 1980 b/	7 January 1982 b/	September 2000	August 2003
Russian Federation	17 July 1980	23 January 1981 c/	May 2001	July 2004
Rwanda	1 May 1980	2 March 1981		
Saint Kitts and Nevis		25 April 1985 a/		
Saint Lucia		8 October 1982 a/		
St. Vincent & the Grenadines		4 August 1981 a/		
Samoa		25 September 1992 a/		
San Marino	26 September 2003	10 December 2003		September 2005
Sao Tome and Principe	31 October 1995	3 June 2003	September 2000	
Saudi Arabia	**7 September 2000**	**7 September 2000 b/**		
Senegal	**29 July 1980**	**5 February 1985**	**December 1999**	**May 2000**
Serbia and Montenegro		12 Mar 2001 d/		July 2003
Seychelles		5 May 1992 a/	July 2002	
Sierra Leone	**21 September**	**11 November 1988**	**September**	

	1988		2000	
Singapore		5 October 1995 a/ b/		
Slovakia		28 May 1993 d/	June 2000	November 2000
Slovenia		6 July 1992 d/	December 1999	September 2004
Solomon Islands		6 May 2002		May 2002
South Africa	29 January 1993	15 December 1995 a/		October 2005
Spain	17 July 1980	5 January 1984 b/	March 2000	July 2001
Sri Lanka	17 July 1980	5 October 1981		October 2002
Suriname		1 March 1993 a/		
Swaziland		26 March 2004 a/		
Sweden	7 March 1980	2 July 1980	December 1999	April 2003
Switzerland	23 January 1987	27 March 1997 a/ b/		
Syrian Arab Republic		28 March 2003 a/		
Tajikistan		26 October 1993 a/	September 2000	
Thailand		9 August 1985 a/ b/ c/	June 2000	June 2000
The former Yugoslav Republic of Macedonia		18 January 1994 d/	April 2000	October 2003
Timor-Leste		16 April 2003 a/		April 2003
Togo		**26 September 1983 a/**		
Trinidad and Tobago	27 June 1985 b/	12 January 1990 b/		
Tunisia	24 July 1980	20 September 1985 b/		
Turkey		20 December 1985 a/ b/	September 2000	October 2002

Turkmenistan		1 May 1997 a/		
Tuvalu		6 October 1999 a/		
Uganda	30 July 1980	22 July 1985		
Ukraine	17 July 1980	12 March 1981 c/	September 2000	September 2003
United Arab Emirates		**6 October 2004 a/**		
United Kingdom of Great Britain & Northern Ireland	22 July 1981	7 April 1986 b/		December 2004
United Republic of Tanzania	17 July 1980	20 August 1985		
United States of America	17 July 1980			
Uruguay	30 March 1981	9 October 1981	May 2000	July 2001
Uzbekistan		19 July 1995 a/		
Vanuatu		8 September 1995 a/		
Venezuela	17 July 1980	2 May 1983 b/	March 2000	May 2002
Viet Nam	29 July 1980	17 February 1982 b/		
Yemen /		30 May 1984 a/ b/		
Zambia	17 July 1980	21 June 1985		
Zimbabwe		13 May 1991 a/		

ANNEXURE C

STATUS OF MEMBERSHIP AND RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD

*A=Accession; b=Declarations or reservations; c=Reservation subsequently withdrawn; d=Succession.

Participant	Signature	Ratification, Acceptance Accession , Succession
Afghanistan	27 Sep 1990	28 Mar 1994
Albania	26 Jan 1990	27 Feb 1992
Algeria	26 Jan 1990	16 Apr 1993
Andorra	2 Oct 1995	2 Jan 1996
Angola	14 Feb 1990	5 Dec 1990
Antigua and Barbuda	12 Mar 1991	5 Oct 1993
Argentina	29 Jun 1990	4 Dec 1990
Armenia	.	23 Jun 1993 a
Australia	22 Aug 1990	17 Dec 1990
Austria	26 Aug 1990	6 Aug 1992
Azerbaijan	.	13 Aug 1992 a
Bahamas	30 Oct 1990	20 Feb 1991
Bahrain	.	13 Feb 1992 a
Bangladesh	26 Jan 1990	3 Aug 1990
Barbados	19 Apr 1990	9 Oct 1990
Belarus	26 Jan 1990	1 Oct 1990
Belgium	26 Jan 1990	16 Dec 1991
Belize	2 Mar 1990	2 May 1990
Benin	25 Apr 1990	3 Aug 1990
Bhutan	4 Jun 1990	1 Aug 1990
Bolivia	8 Mar 1990	26 Jun 1990
Bosnia and Herzegovina 3	.	1 Sep 1993 d
Botswana	.	14 Mar 1995 a
Brazil	26 Jan 1990	24 Sep 1990
Brunei Darussalam	.	27 Dec 1995 a
Bulgaria	31 May 1990	3 Jun 1991
Burkina Faso	26 Jan 1990	31 Aug 1990
Burundi	8 May 1990	19 Oct 1990
Cambodia	.	15 Oct 1992 a
Cameroon	25 Sep 1990	11 Jan 1993
Canada	28 May 1990	13 Dec 1991
Cape Verde	.	4 Jun 1992 a
Central African Republic	30 Jul 1990	23 Apr 1992

Chad	30 Sep 1990	2 Oct 1990
Chile	26 Jan 1990	13 Aug 1990
China 4, 5	29 Aug 1990	2 Mar 1992
Colombia	26 Jan 1990	28 Jan 1991
Comoros	30 Sep 1990	22 Jun 1993
Congo	.	14 Oct 1993 a
Cook Islands	.	6 Jun 1997 a
Costa Rica	26 Jan 1990	21 Aug 1990
Côte d'Ivoire	26 Jan 1990	4 Feb 1991
Croatia 3	.	12 Oct 1992 d
Cuba	26 Jan 1990	21 Aug 1991
Cyprus	5 Oct 1990	7 Feb 1991
Czech Republic 6	.	22 Feb 1993 d
Democratic People's Republic of Korea	23 Aug 1990	21 Sep 1990
Democratic Republic of the Congo	20 Mar 1990	27 Sep 1990
Denmark	26 Jan 1990	19 Jul 1991
Djibouti	30 Sep 1990	6 Dec 1990
Dominica	26 Jan 1990	13 Mar 1991
Dominican Republic	8 Aug 1990	11 Jun 1991
Ecuador	26 Jan 1990	23 Mar 1990
Egypt	5 Feb 1990	6 Jul 1990
El Salvador	26 Jan 1990	10 Jul 1990
Equatorial Guinea	.	15 Jun 1992 a
Eritrea	20 Dec 1993	3 Aug 1994
Estonia	.	21 Oct 1991 a
Ethiopia	.	14 May 1991 a
Fiji	2 Jul 1993	13 Aug 1993
Finland	26 Jan 1990	20 Jun 1991
France	26 Jan 1990	7 Aug 1990
Gabon	26 Jan 1990	9 Feb 1994
Gambia	5 Feb 1990	8 Aug 1990
Georgia	.	2 Jun 1994 a
Germany 7	26 Jan 1990	6 Mar 1992
Ghana	29 Jan 1990	5 Feb 1990
Greece	26 Jan 1990	11 May 1993
Grenada	21 Feb 1990	5 Nov 1990
Guatemala	26 Jan 1990	6 Jun 1990
Guinea	.	13 Jul 1990 a
Guinea-Bissau	26 Jan 1990	20 Aug 1990
Guyana	30 Sep 1990	14 Jan 1991
Haiti	26 Jan 1990	8 Jun 1995
Holy See	20 Apr 1990	20 Apr 1990
Honduras	31 May 1990	10 Aug 1990
Hungary	14 Mar 1990	7 Oct 1991
Iceland	26 Jan 1990	28 Oct 1992
India	.	11 Dec 1992 a
Indonesia	26 Jan 1990	5 Sep 1990
Iran (Islamic Republic of)	5 Sep 1991	13 Jul 1994

Iraq	.	15 Jun 1994 a
Ireland	30 Sep 1990	28 Sep 1992
Israel	3 Jul 1990	3 Oct 1991
Italy	26 Jan 1990	5 Sep 1991
Jamaica	26 Jan 1990	14 May 1991
Japan	21 Sep 1990	22 Apr 1994
Jordan	29 Aug 1990	24 May 1991
Kazakhstan	16 Feb 1994	12 Aug 1994
Kenya	26 Jan 1990	30 Jul 1990
Kiribati	.	11 Dec 1995 a
Kuwait	7 Jun 1990	21 Oct 1991
Kyrgyzstan	.	7 Oct 1994 a
Lao People's Democratic Republic	.	8 May 1991 a
Latvia	.	14 Apr 1992 a
Lebanon	26 Jan 1990	14 May 1991
Lesotho	21 Aug 1990	10 Mar 1992
Liberia	26 Apr 1990	4 Jun 1993
Libyan Arab Jamahiriya	.	15 Apr 1993 a
Liechtenstein	30 Sep 1990	22 Dec 1995
Lithuania	.	31 Jan 1992 a
Luxembourg	21 Mar 1990	7 Mar 1994
Madagascar	19 Apr 1990	19 Mar 1991
Malawi	.	2 Jan 1991 a
Malaysia	.	17 Feb 1995 a
Maldives	21 Aug 1990	11 Feb 1991
Mali	26 Jan 1990	20 Sep 1990
Malta	26 Jan 1990	30 Sep 1990
Marshall Islands	14 Apr 1993	4 Oct 1993
Mauritania	26 Jan 1990	16 May 1991
Mauritius	.	26 Jul 1990 a
Mexico	26 Jan 1990	21 Sep 1990
Micronesia (Federated States of)	.	5 May 1993 a
Monaco	.	21 Jun 1993 a
Mongolia	26 Jan 1990	5 Jul 1990
Morocco	26 Jan 1990	21 Jun 1993
Mozambique	30 Sep 1990	26 Apr 1994
Myanmar	.	15 Jul 1991 a
Namibia	26 Sep 1990	30 Sep 1990
Nauru	.	27 Jul 1994 a
Nepal	26 Jan 1990	14 Sep 1990
Netherlands 8	26 Jan 1990	6 Feb 1995 A
New Zealand 9	1 Oct 1990	6 Apr 1993
Nicaragua	6 Feb 1990	5 Oct 1990
Niger	26 Jan 1990	30 Sep 1990
Nigeria	26 Jan 1990	19 Apr 1991
Niue	.	20 Dec 1995 a
Norway	26 Jan 1990	8 Jan 1991
Oman	.	9 Dec 1996 a
Pakistan	20 Sep 1990	12 Nov 1990

Palau	.	4 Aug 1995 a
Panama	26 Jan 1990	12 Dec 1990
Papua New Guinea	30 Sep 1990	2 Mar 1993
Paraguay	4 Apr 1990	25 Sep 1990
Peru	26 Jan 1990	4 Sep 1990
Philippines	26 Jan 1990	21 Aug 1990
Poland	26 Jan 1990	7 Jun 1991
Portugal 5	26 Jan 1990	21 Sep 1990
Qatar	8 Dec 1992	3 Apr 1995
Republic of Korea	25 Sep 1990	20 Nov 1991
Republic of Moldova	.	26 Jan 1993 a
Romania	26 Jan 1990	28 Sep 1990
Russian Federation	26 Jan 1990	16 Aug 1990
Rwanda	26 Jan 1990	24 Jan 1991
Saint Kitts and Nevis	26 Jan 1990	24 Jul 1990
Saint Lucia	30 Sep 1990	16 Jun 1993
Saint Vincent and the Grenadines	20 Sep 1993	26 Oct 1993
Samoa	30 Sep 1990	29 Nov 1994
San Marino	.	25 Nov 1991 a
Sao Tome and Principe	.	14 May 1991 a
Saudi Arabia	.	26 Jan 1996 a
Senegal	26 Jan 1990	31 Jul 1990
Serbia and Montenegro 3	.	12 Mar 2001 d
Seychelles	.	7 Sep 1990 a
Sierra Leone	13 Feb 1990	18 Jun 1990
Singapore	.	5 Oct 1995 a
Slovakia 6	.	28 May 1993 d
Slovenia 3	.	6 Jul 1992 d
Solomon Islands	.	10 Apr 1995 a
Somalia	9 May 2002	.
South Africa	29 Jan 1993	16 Jun 1995
Spain	26 Jan 1990	6 Dec 1990
Sri Lanka	26 Jan 1990	12 Jul 1991
Sudan	24 Jul 1990	3 Aug 1990
Suriname	26 Jan 1990	1 Mar 1993
Swaziland	22 Aug 1990	7 Sep 1995
Sweden	26 Jan 1990	29 Jun 1990
Switzerland	1 May 1991	24 Feb 1997
Syrian Arab Republic	18 Sep 1990	15 Jul 1993
Tajikistan	.	26 Oct 1993 a
Thailand	.	27 Mar 1992 a
The Former Yugoslav Republic of Macedonia 3 , 10	.	2 Dec 1993 d
Timor-Leste	.	16 Apr 2003 a
Togo	26 Jan 1990	1 Aug 1990
Tonga	.	6 Nov 1995 a
Trinidad and Tobago	30 Sep 1990	5 Dec 1991
Tunisia	26 Feb 1990	30 Jan 1992
Turkey	14 Sep 1990	4 Apr 1995

Turkmenistan	.	20 Sep 1993 a
Tuvalu	.	22 Sep 1995 a
Uganda	17 Aug 1990	17 Aug 1990
Ukraine	21 Feb 1990	28 Aug 1991
United Arab Emirates	.	3 Jan 1997 a
United Kingdom of Great Britain and Northern Ireland 4 , 11	19 Apr 1990	16 Dec 1991
United Republic of Tanzania	1 Jun 1990	10 Jun 1991
United States of America	16 Feb 1995	.
Uruguay	26 Jan 1990	20 Nov 1990
Uzbekistan	.	29 Jun 1994 a
Vanuatu	30 Sep 1990	7 Jul 1993
Venezuela	26 Jan 1990	13 Sep 1990
Viet Nam	26 Jan 1990	28 Feb 1990
Yemen 12	13 Feb 1990	1 May 1991
Zambia	30 Sep 1990	6 Dec 1991
Zimbabwe	8 Mar 1990	11 Sep 1990