

**HARMFUL CULTURAL PRACTICES AS VIOLATIONS OF GIRLS' HUMAN  
RIGHTS: FEMALE GENITAL MUTILATION IN TANZANIA AND SOUTH  
AFRICA**

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## Table of Contents

LIST OF ABBREVIATIONS AND ACRONYMS.....	ii
ACKNOWLEDGEMENT.....	iii
1 INTRODUCTION.....	1
2 FACTUAL OVERVIEW OF FEMALE GENITAL MUTILATION.....	5
2.1 Definition of female genital mutilation.....	5
2.2 Categories of female genital mutilation.....	6
2.3 Reasons for female genital mutilation.....	7
2.4 Prevalence of female genital mutilation.....	8
2.5 Impacts of female genital mutilation.....	10
3 STATES' OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS WITH REGARD TO FEMALE GENITAL MUTILATION.....	12
3.1 Female genital mutilation as violation of human rights.....	12
3.2 Obligations under international human rights instruments.....	14
3.2.1 The obligation to eliminate harmful traditional practices.....	15
3.2.2 Obligations in relation to health care and information.....	16
3.2.3 Obligations to modify or abolish discriminatory customs.....	18
3.2.4 Obligations to protect children against torture and abuse.....	20
3.2.5 Obligation to respect right to freedom of culture and religion.....	21
4 IMPLIMENTATIONS OF HUMAN RIGHTS OBLIGATIONS WITH REGARD TO FEMALE GENITAL MUTILATION IN TANZANIA AND SOUTH AFRICA.....	23
4.1 TANZANIA.....	23
4.1.1 Measures taken by Tanzania to combat female genital mutilation.....	23
4.2 SOUTH AFRICA.....	27
4.2.1 Measures taken to combat female genital mutilation.....	28
5 CONCLUSION AND RECOMMENDATIONS.....	32
5.1. Conclusion.....	32
5.2. Recommendations.....	33

## LIST OF ABBREVIATIONS AND ACRONYMS

<b>ADC</b>	Archives of Deceases Childhood
<b>AHRLJ</b>	African Human Rights Law Journal
<b>APCS</b>	Aids Patient Care STDs
<b>ASR</b>	African Studies Review
<b>CEDAW</b>	Convention on Elimination of all forms of Discriminations Against Women
<b>CHS</b>	Culture, Health and Sexuality
<b>CRC</b>	Convention on the Rights of the Child
<b>CRR</b>	Centre for Reproduction Rights
<b>EAMJ</b>	East Africa Medical Journal
<b>FGM</b>	Female Genital Mutilation
<b>HRLR</b>	Human Rights Law Review
<b>HVHRJ</b>	Harvard Human Rights Journal
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IJD</b>	International Journal of Dermatolology
<b>LHRC</b>	Legal and Human Rights Center
<b>MJM</b>	McGrill Journal of Medicine
<b>PEPUDA</b>	Promotion of Equality and Prevention of Unfair Discrimination Act
<b>PRB</b>	Populations Reference Bureau
<b>RSA</b>	Republic of South Africa
<b>SAPL</b>	South Africa Public Law
<b>UNICEF</b>	United Nations Children's Fund
<b>UNFPA</b>	United Nations Populations Fund
<b>WHO</b>	World Health Organization
<b>WW</b>	Womankind Worldwide

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## 1 INTRODUCTION

A series of international and regional human rights instruments explicitly or impliedly provide the promotion of the rights of girls and women, in particular the prevention of their rights against all harmful practices.<sup>1</sup> The Protocol on the Rights of Women in Africa defines harmful practices as “all behaviour, attitudes and or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.....”<sup>2</sup> Many societies practise different customs and traditions that can be detrimental to the life, health, dignity or welfare of women and young girls.<sup>3</sup> The practices that are globally recognised as detrimental to girls include, among others, female genital mutilation (FGM), child marriage and virginity testing. But for the purpose of this paper, the focus will be on female genital mutilation.

FGM, an ancient ritual, is believed to be practiced by 28 African countries particularly sub-Saharan and Northeastern African communities.<sup>4</sup> While no definitive statistics are available with regard to the prevalence of female genital mutilation, it is estimated that 100 and 140 million girls and women have undergone FGM worldwide.<sup>5</sup> Despite global efforts to promote elimination of the practice, it remains widespread in Africa and an approximate 2 million girls are at risk of undergoing the practice of FGM in Africa annually. It is commonly performed by traditional practitioners using instruments such as scissors, razor blades or broken glass upon girls between the ages of four and fourteen as a rite of passage.<sup>6</sup> However, in some societies FGM seems to be practiced at earlier age as well as prior to marriage or after first pregnancy which varies according to traditions and circumstances.<sup>7</sup>

The World Health Organisation has adopted specific clinical terms to classified FGM into four major types namely clitoridectomy, excision, infibulation and all other

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- 1 WHO, UNICEF, OHCHR, UNAIDS, UNHCR *Eliminating female genital mutilation* 8.
  - 2 Article 1 of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* 2005 (hereafter The Women Protocol)
  - 3 Wellerstein *Loyola International and Comparative Law* 6.
  - 4 Althaus *International Family Planning Perspective* 130 ; Mendelsohn *Rutgers Law Review* 2.
  - 5 UNICEF 2005 [http://www.unicef.org/publications/files/FGM-C\\_final\\_10](http://www.unicef.org/publications/files/FGM-C_final_10)
  - 6 Muteshi and Sass *Female Genital Mutilation in Africa* 12.
  - 7 Wellerstein *Loyola International and Comparative Law* 2.

harmful procedure of female genitalia.<sup>8</sup> Most literatures indicate that the practice has been continued to prevail around the world for various reasons including custom and tradition, religious believes,<sup>9</sup> purification/hygiene, family honour, preserves a girl's virginity, protect her from becoming promiscuous and prevent a girl or woman from engaging in immoral behaviour.<sup>10</sup> One of the most common ground for continuing of this practice is local custom. Girls and women themselves are unwilling to refuse and a community sees it as being conventional practice.<sup>11</sup>

Essentially, FGM is known to be the harmful cultural practice which violates the fundamental human rights of girls and women.<sup>12</sup> It infringes the right to life, dignity, health, security, bodily integrity, education as well as right against torture and non-discrimination on any grounds. The practice may be regarded as torture<sup>13</sup>, abuse, cruel, inhuman or degrading treatment because it involves severe pain and trauma to a victim. Indeed it carries extensive immediate and long-term consequences<sup>14</sup> to girls and women as perceived to leave long last psychological problem and may adversely affect their full emotional development.<sup>15</sup>

The human rights dimension of female genital mutilation has subsequently been addressed by numerous international and regional instruments. For decades FGM has been recognised as a serious matter which has implications on human rights of women and girls.<sup>16</sup> With this regard, a range of international human rights treaties and conventions endeavour to address this matter on which they explicitly enshrine rights for women and children against FGM. The important and supportive legal instruments which focus on rights of women and children in particular include among others, the Convention on the Rights of the Child (hereafter CRC)<sup>17</sup> and the Convention on the Elimination of all Forms of Discriminations Against Women

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8 WHO, UNICEF, UNIFPA, *Eliminating Female Genital Mutilation* 4.

9 Trueblood *The Denver Journal of International Law and Policy* 3.

10 WHO, UNICEF, UNIFPA, *Eliminating Female Genital* 17.

11 UNFPA "A Holistic Approach to Abandonment of FGM" 5.

12 Lewis *Harvard Human Rights Journal* 5.

13 Idowu *Research Journal of International Studies* 18-19.

14 CRR 2009 [www.reproductiverights.org](http://www.reproductiverights.org)

15 Pais "Promoting the abandonment of female genital mutilation" 221-222.

16 Toubia and Izett *Female Genital Mutilation* 23.

17 *Convention on the Rights of the Child* 1989 (hereafter CRC).

(hereafter CEDAW).<sup>18</sup> These instruments have been subsequently supplemented by African regional treaties such as the African Charter on Rights and Welfare of the Child (hereafter African Charter) and the African Charter on Human and Peoples Rights (hereafter Banjul Charter). Importantly, all those instruments, which are legally binding on states parties, contain provisions concerning right to life, health, non discrimination on ground of sex and gender, dignity and physical or mental integrity which indeed FGM violates each of these rights.

Moreover, the above mentioned instruments and other international human rights treaties impose obligations on states parties to ensure highly protection of women and children's rights against harmful cultural practices.<sup>19</sup> Once a state has ratified these instruments, it automatically acquires binding obligations to adopt all necessary measures to combat and eradicate FGM.<sup>20</sup> Thus international human rights law binds governments not only to enact laws that prohibit FGM, but also to work effectively to change the believes and values that facilitate this practice.<sup>21</sup>

Tanzania and South Africa are member states in most of international human rights instruments. With this regard, both governments are internationally obliged to comply with their responsibilities aiming to combat FGM.<sup>22</sup> Under international law, states have duty not only to refrain from violating people's rights but also to ensure protection as well as universally enjoyment of rights in their jurisdiction.<sup>23</sup> The government's failure to take measures to cessation this harmful practice and prevent from reoccurring may constitute the breach of international obligation. However, it is observed that international law itself may have no impact on elimination of FGM. Rather, individual countries must adopt effective measures as well as to implement them to increase force behind the international endeavour.<sup>24</sup>

The main purpose of this study is to examine the international obligations imposed to the respective governments with regard to combat FGM. For comprehensive study,

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18 *Convention on Elimination of Discrimination Against Women* of 1979 (hereafter *CEDAW*).

19 Lewis *Encyclopedia of Human Rights* 206; Kwoka M *Female Genital Surgeries* 2007 8.

20 Pais "Promoting the abandonment of female genital mutilation" 222-223.

21 CRR Briefing Paper: *Female Genital Mutilation and other harmful practices* 1.

22 *Ibid* 2.

23 CRR 2006 *Female Genital Mutilation: A Matter of Human Rights* 17.

24 Wellerstein *Loyola International and Comparative Law* 8.

this paper aims to analyse human rights violated by FGM on the background of international laws. The study intend also to focus on the extent by which the states comply with international obligation and what measures have been so far taken to combat the practice of FGM in those countries.

Accordingly, the methodology of this paper seeks firstly to provide the general overview and impacts of FGM on human rights domain. This part will discuss the types, causes, as well as prevalence of FGM particularly in Tanzania and South Africa. Secondly, this paper will explore the international human rights obligations imposed to the states parties with regard to combat FGM. Thirdly, the paper will further critically examine the compliance with international obligations by both governments to find out to what extent these states implement international human rights law to abolish this practice. To this regard, analytical overview on measures whether legislative or other measures which have been taken by these states with respect to combat FGM, will constitute part of this paper. Finally recommendation and conclusion shall be drawn.



## 2 FACTUAL OVERVIEW OF FEMALE GENITAL MUTILATION

### 2.1 *Definition of female genital mutilation*

FGM does not have a clear-cut definition among scholars in the area. However, this terminology can be described in a general term as to mean “several traditional practices that constitute partial or total removal of female external genitalia or other injury to the female genitals, whether for cultural or other non-therapeutic reasons.”<sup>25</sup> FGM or sometimes referred as female circumcision often involves cutting which is much more severe and extensive to the pubic part of a girl or woman. In most cases it is considered to impair girl’s sexual and reproductive functions.<sup>26</sup> The origin of the practice has not yet been precisely established but it is believed that FGM predates Christianity and Islam. It has been practised under difference reasons, mostly as one element of rites of passage preparing a young girl from childhood to womanhood or marriage.<sup>27</sup>

In most communities, FGM is typically performed upon girls aged between four and fourteen years.<sup>28</sup> However, the age bracket varies from society to society due to diversity in culture and reasons for the practice. It may be performed during childhood, marriage or first pregnancy.<sup>29</sup> In some areas it is performed on infants on the first few months of life and these can be attributed to different perceptions. For instance, some societies believe that such practice reduces the trauma to children. Moreover, parents desire to avoid government’s interference and resistance from girls when they are already matured and can understand the impacts.<sup>30</sup>

FGM is normally practiced by traditional practitioners or lay persons who are specifically appointed for this task in a community.<sup>31</sup> However, recently, in some countries, it is also performed by trained health professionals such as midwives,

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25 Rahman and Toubia *Female Genital Mutilation* 3; WHO *Eliminating Female Genital Mutilation* 1.

26 Trueblood *The Denver Journal of International Law and Policy* 2.

27 Althaus *International Family Planning Perspective* 130.

28 WHO *Female Genital Mutilation* 3; Trueblood *The Denver Journal of International Law and Policy* 2.

29 Rahman and Toubia *Female Genital Mutilation* 3.

30 UNICEF Date unknown [www.unicef.org/protection/index](http://www.unicef.org/protection/index)”.

31 Rahman and Toubia *Female Genital Mutilation* 3.

nurses and physicians.<sup>32</sup> The traditional practitioners often use a variety of instruments which may be unhygienic and unsterilised condition. Antiseptic substances and anaesthesia are generally not used, nonetheless, devices such as scissors, razor blade, kitchen knives, or pieces of glass are frequently used on several girls simultaneously.<sup>33</sup> The advocates of FGM argue that the practice can be carried out by trained health practitioners or medical personnel as a strategy to reduce harm and immediate risks to girls and women; however, the World Health Organisation (WHO) firmly condemns the medicalization of FGM even with the involvement of health professionals<sup>34</sup> since it may not reduce the degree of severity. Also, the performance by medical personnel may wrongly legalise the practise and indeed violates the girls and women rights to health and physical integrity.<sup>35</sup>

## **2.2 Categories of female genital mutilation**

Diversity in the practice of FGM varies among ethnic groups and geographical locations. Following this diversity, WHO and other international agencies recognise the necessity to classify the practice into four main types.<sup>36</sup> The first type is commonly known as *clitoridectomy*<sup>37</sup> which involves cutting of prepuce with or without part of the whole clitoris. Bleeding is usually stopped by covering the wound with gauzes or similar substances and applying pressure bandage. The second type is commonly referred as *excision* in which partial or total cutting of clitoris and labia minora with or without removal of labia majora.

The third type is normally known as *infibulation*.<sup>38</sup> It involves removal of part or whole external genitalia and narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner and sometimes outer, labia minora. This is the most extreme form because it may involve the complete removal of the clitoris and labia minora. Lastly, the fourth type is unclassified category which encompasses all other harmful procedures to the female

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32 Ibid.

33 Wellerstein *Loyola International and Comparative Law* 3.

34 WHO *Female Genital Mutilation* 1998 4.

35 Ibid 12.

36 WHO, UNICEF, UNIFPA *Eliminating female genital mutilation* 4.

37 Oxford dictionary 7<sup>th</sup> ed "Partial or total removal of clitoris".

38 Oxford dictionary 7<sup>th</sup> ed "To obstruct the female genitals especially by sewing together the labia majora so as to prevent sexual intercourse".

genitalia for cultural or any other non-therapeutic reasons. These include pricking, piercing, stretching or incisions of the clitoris and/or labia; cauterization by burning the clitoris and surrounding tissue; incision to the vaginal wall; scraping or cutting of the vagina and surrounding tissue; introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purpose to tightening or narrow it.

### **2.3 Reasons for female genital mutilation**

Perceived reasons perpetuating the practice of FGM include, among other things, cultural, social and religious factors within communities. Generally, the causes for this practice are complex, interrelated and difficult to encapsulate them in a single category. This is due to the fact that they vary across cultures and communities.<sup>39</sup> The major reasons of the practice are summarised in the following paragraphs.

FGM can be attributed to some traditions and customs. In some societies, FGM is considered necessary for girls as a rite of passage from childhood to womanhood.<sup>40</sup> Thus, it has been performed to prepare a girl for marriage on which she is taught about customary marital and how to take care of her family. In other words, it prepares her to be a responsible member of the community.<sup>41</sup> In many communities, the practice appears to be an important ritual for the cultural identity of girls.<sup>42</sup> In Tanzania, for instance, the practice is often accompanied by ceremonies and it is a time for initiation of a girl to adulthood.<sup>43</sup>

Religion can also be another cause. Some believers consider FGM as a way for spiritual cleanness and the assumption that it makes girls spiritually pure. Although FGM is frequently perceived to prevail in the Islamic communities, it is actually practiced by Christians, Jews, and other indigenous societies in Africa.<sup>44</sup> However, some religious scholars argued that FGM is in fact pre-dates Islam and Christianity and hence it is not main cause of the practice.<sup>45</sup> Despite the fact that FGM is not even mentioned in the *Q'uran*, *Sunnah* or *Hadith* as the primary source of Islamic

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39 Rahman and Toubia *Female Genital Mutilation* 5.

40 Ibid.

41 Lewis *Encyclopedia of Human Rights* 202.

42 WHO, UNICEF, UNFPA *Eliminating female genital mutilation* 6.

43 Legal and Human Rights Centre Report *Female Genital Mutilation* 27.

44 Wellerstein *Loyola International and Comparative Law* 5.

45 Rahman and Toubia *Female Genital Mutilation* 6.

law,<sup>46</sup> it is strongly practiced in many Muslim communities in Africa.<sup>47</sup> However, recently one of the Islamic leaders in Egypt supported the action to ban FGM which was initiated by Egyptian Minister of Health and made it clear that the practice is not a religious matter.<sup>48</sup>

Besides, social influence can significantly be a possible factor. The pressure from family and community in general is considered as the strongest catalyst on the practice of FGM in many societies.<sup>49</sup> This is because of socio conventional constructions<sup>50</sup> embedded in the daily life of girls. If a girl does not undergo the procedure, she may be excluded from her family and disqualified from marriage. Girls themselves may desire to undergo the procedure because of peer or family pressure and fear of stigmatization and isolation from the community.

Lastly, proponents of FGM believe that a woman has an extreme desire for sex. They argue that if her genital is not partially or totally excised, she will be sexually uncontrollable.<sup>51</sup> Some communities believe that FGM is a way to safeguard girls against premarital sexual activity and married women from extramarital sexual intercourse.<sup>52</sup> Moreover, the practice is often deemed as a means to preserve girl's virginity. Some parents believe that to have a daughter with virginity is like to own a property, hence parents themselves mutilate their daughters to preserve virginity since it is regarded as one of the qualification to receive high bride price.<sup>53</sup>

#### **2.4 Prevalence of female genital mutilation**

Despite global efforts to combat the practice, FGM remains widespread in many African countries.<sup>54</sup> It is estimated that three million girls are at risk of undergoing FGM annually.<sup>55</sup> The most recent data indicated that 91,5 million of girls and women

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46 Asmani and Abdi *De-linking Female Genital Mutilation/Cutting from Islam* 6.

47 Kedar Islam and "Female Circumcision" 403.

48 Trueblood *The Denver Journal of International Law and Policy* 3.

49 WHO 2008 Fact sheet No 241 [www.who.int/mediacentre/factsheet/fs241](http://www.who.int/mediacentre/factsheet/fs241)

50 Muteshi and Sass *Female Genital Mutilation in Africa* 15.

51 Iweolmour and Scholar Date unknown

[http://forms.gradsch.psu.edu/diversity/mcnair/mcnair\\_jrnl2005/files](http://forms.gradsch.psu.edu/diversity/mcnair/mcnair_jrnl2005/files)

52 Womankind Worldwide "Female Genital Mutilation: Religious and Legal perspectives" 15.

53 Wellerstein *Loyola International and Comparative Law* 5.

54 Kaime *African Human Rights Law Journal* 234.

55 WHO, UNICEF, UNIFPA *Eliminating female genital mutilation* 4.

age ten and older in Africa experienced the practice in 2004-2005.<sup>56</sup> Today, an approximate 100 to 140 million women and girls have undergone the practice worldwide. Statistics show that majority of them, who underwent especially type I, II and III, live in 28 countries in Africa and few countries in Asia and Middle East. However, the prevalence varies widely from country to country.<sup>57</sup>

In Tanzania, data collected in 2004 show that 15% of women aged 15-49 underwent FGM, compared with the 1996 statistics which indicated that 18% of women and girls aged same was estimated to experience FGM.<sup>58</sup> The 2004 statistics indicate that 81% live in Arusha, 67% live in Dodoma, 43% live in Mara and 2% live in ten other regions.<sup>59</sup> Residence prevalence data shows that women who live in urban areas are less likely to pass through FGM. This may be due to the availability and accessibility of information in urban than rural areas. In addition to that, statistics show that 10% of urban women experienced FGM as compared to 20% of women living in rural areas.<sup>60</sup>

In South Africa, it is generally known that this practice is performed by immigrants, refugees and foreign nationals, for instance, Somali population.<sup>61</sup> Despite the fact that initiation school is one of the traditional practices in widely black society in South Africa,<sup>62</sup> no academic research or literature uncovers the practice with empirical data. However, that does not mean that FGM is not practiced at all in South Africa. It is in fact practiced in some part of the Eastern Cape and KwaZulu Natal.<sup>63</sup> In March 2009, in her speech on harmful traditional practices, the South African Minister in the Presidency state that, ".....FGM is not widespread in the country but it is occurring; perhaps much of it is imported from the rest of Africa through migration and refugees...".<sup>64</sup> There is, however, no statistical data in Demographic Health Survey

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56 DHS Working Paper on Number of women circumcised in Africa: The Production of a total 15. Statistics were conducted in 20 African countries.

57 Hisel L M (ed) *Abandoning Female Genital Cutting* 8.

58 UNICEF 2006 [http://www.childinfo.org/files/Tanzania\\_FGC\\_profile\\_English](http://www.childinfo.org/files/Tanzania_FGC_profile_English)

59 Muteshi and Sass *Female Genital Mutilation in Africa* 15, LHRC Report 41.

60 Hisel (ed) *Abandoning Female Genital Cutting* 9.

61 South Africa CEDAW Report 2008 15-16.

62 Maseko *OBITER* 204 "State's Legislation are clear, accessible and precise as they regulate the initiation schools and the manner in which traditional circumcision is to be practised".

63 UNHCR South Africa 2003 <http://www.unhcr.org/cgi-bin/texis/vtx/refworld>; Iweolmour and Scholar Date unknown [http://forms.gradsch.psu.edu/diversity/mcnair/mcnair\\_jrnl2005/files](http://forms.gradsch.psu.edu/diversity/mcnair/mcnair_jrnl2005/files) 36.

64 Minister M Tshabalala-Msimang 2009 <http://www.info.gov.za/speeches/2009>

which show the prevalence of FGM in South Africa. This may base on the idea that it is only small percent of the population who actually perform FGM.

### **2.5 Impacts of female genital mutilation**

FGM imposes a long list of health and psychological complications as well as serious risk to health and life development of a girl.<sup>65</sup> The degree of effects, however, varies depending on the type of FGM performed, the hygienic condition and the health status of a girl who underwent the procedure. The practice may consequently cause immediate physical problem. Thus immediately after the procedure, the victim may enter a state of shock from an intense pain and psychological trauma.<sup>66</sup> Severe bleeding is the commonly immediate impact due to the cutting of female genital organ. As the procedure is mostly conducted in unhygienic environment, infections including tetanus are inevitable.<sup>67</sup> It can also appear within few days after the procedure as the wound become contaminated with urine or faeces.<sup>68</sup> Moreover, damage to other organs may occur due to the fact that no anaesthesia is used as well as inexperienced and unskilled practitioners may fail the procedure. Chronic urine retention is another immediate effect which results from pain, swelling or blockage of urethra.<sup>69</sup>

Moreover, FGM results in long-lasting physiological and psychosocial damages to the victim. In this case, type II and III are mostly considered to carry severe complications.<sup>70</sup> The infection in the urethra may cause repeatedly and continues urinary tract infections as a result it may lead to irreparable damage to the reproductive organs as well as cause infertility;<sup>71</sup> stones in the bladder and urethra due to prolonged obstructed and infections.<sup>72</sup> Another common complication is feeling of pain during sexual intercourse,<sup>73</sup> incompleteness in sexual feeling and psychological distressing as a result of other complications.<sup>74</sup> A girl who underwent

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65 Althaus *International Family Planning Perspective* 131.

66 Karanja *Female Genital Mutilation in Africa* 51; WHO *Female Genital Mutilation* 24.

67 Dirie and Lindmark *East Africa Medica Journal* 480.

68 WHO *Female Genital Mutilation* 25.

69 Brady *APCS* 708; Dirie and Lindmark *East Africa Medica Journal* 479.

70 Ibid.

71 Obermeyer *Culture, Health and Sexuality* 451.

72 Iweolmour and Scholar [http://forms.gradsch.psu.edu/diversity/mcnair/mcnair\\_jrnl2005/files](http://forms.gradsch.psu.edu/diversity/mcnair/mcnair_jrnl2005/files) 37.

73 Dirie and Lindmark *East Africa Medica Journal* 481.

74 Karanja *Female Genital Mutilation in Africa* 2003 63.

the procedure may be at risk of being affected with HIV virus, as a result of using unsterilised implements since the procedure are done simultaneously to several girls.<sup>75</sup>

In addition, particularly to many girls who underwent infibulation, deep infection resulting from faulty healing or an embedded stitch can result in formation of abscess which may later require surgical incision.<sup>76</sup> Infibulated girls also undergo serious pain during menstruation as blood cannot pass freely. They may also accumulate blood clots around their vagina opening.<sup>77</sup> Another common effect is the possibility of a victim to get wound scar that is slow and incomplete healing of the injured part.<sup>78</sup> Furthermore, girls may experience mental and social consequences as a result of deception due to their vulnerable nature, intimidation, coercion and violence from parents, relatives and friends.<sup>79</sup> In some society, they are also made to observe the mutilation of other girls.<sup>80</sup> All in all, communities which perform FGM violate the rights of women and girls. As a result, the international community calls upon states to take steps to address this problem effectively.

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75 Keown Date unkown <http://www.fgmnetwork.org/gonews.php?subaction> ; Brady APCS 710.

76 WHO *Female Genital Mutilation* 1998 14.

77 Morrone *International Journal of Dermatology* 261.

78 WHO *Female Genital Mutilation* 14.

79 Morrone *International Journal of Dermatology* 261.

80 Karanja D N *Female Genital Mutilation in Africa* 2003 54.

### **3 STATES' OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS WITH REGARD TO FEMALE GENITAL MUTILATION**

International Human Rights Law (IHRL) governs only the conducts of governments upon their citizens.<sup>81</sup> With regard to the practice of FGM, one may argue that, it is unfair to hold governments accountable due to the fact that FGM is mostly appeared to be practiced by private actors such as traditional practitioner or midwives.<sup>82</sup> However, the absence of direct state action on this practice, does not exempt them from being accountable before the international law.<sup>83</sup> Under IHRL, states have a duty not only to respect the rights but also to ensure the full enjoyment of those rights to every individual.<sup>84</sup> Failing to do so, a state may therefore be held responsible for non-compliance of international obligations.<sup>85</sup> To ensure comprehensive understanding of this chapter, it is essential to present some of the rights violated by FGM and then move on to examining the governments' responsibilities under international human rights law.

#### ***3.1 Female genital mutilation as violation of human rights***

It is internationally accepted that, apart from serious threat to the health, FGM is considered to be the most offensive form of violation of fundamental human rights of girls and women as recognised by various international legal instruments.<sup>86</sup> Indeed, female genital mutilation violates and impairs or nullifies the enjoyments of human rights of girls and women.<sup>87</sup> It associates with violation of children's right to health which are protected under article 24 of the CRC. The article recognises the right of the child to the enjoyment of the highest attainable standard of health. Moreover, article 14(1) of the African Charter entitles every child the right to enjoy the best attainable state of physical, mental and spiritual health. FGM is understood as an act of injuring which involves cutting, disfiguring or removing some part of external female genitals. With this regard, it results in physical and mental health complications which basically impair the enjoyment of right to health.

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81 Cook (ed) *Human Rights of Women: National and International Perspectives* 167.

82 Packer *Using Human Rights to Change Tradition* 50.

83 Doebbler C F *International Human Rights: Cases and Material* 2004 86.

84 Sepulveda M M *The Nature of obligation under the ICESCR* 164.

85 Rahman A and Toubia N *Female Genital Mutilation* 44.

86 Packer *Using Human Rights to Change Tradition* 49.

87 *Ibid* 57.



Besides, the practice violates children and women's right to life. This right is fundamental and has direct interpretation in most of the conventions. The CRC specifically guarantees to every child inherent right to life.<sup>88</sup> This implies that no one shall deprive a child his or her right to life by any means. More generally, the CCPR entitles to every human being the inherent right to life which shall be protected by law.<sup>89</sup> Although the main intention of FGM is not to kill a girl or woman, death can obviously result from its complications.<sup>90</sup> For instance some reports show that over 114 million women and girls worldwide lost their lives through FGM.<sup>91</sup> Furthermore, FGM can be considered to violate right to equality and free from discrimination. A child has right to be protected from all form of discrimination irrespective of his or her sex or other status.<sup>92</sup> Likewise, CCPR stipulates that every child shall have, without any discrimination as to sex and other grounds, rights to such measures of protection as are required by his status as a minor, on the part of his or her family, society and the state.<sup>93</sup> The African Charter also entitles to every child the enjoyment of the rights and freedoms regardless of the child's sex or other status.<sup>94</sup> There is no equality of rights to protection when girls are subject to FGM practices even on the presence of their parents.

Moreover, the practise strongly violates the right against torture, cruel and all form of inhumanity. The CRC expressly protects every child against this violation. It states that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment."<sup>95</sup> It can be argue that, the action of cutting away sexual part of a girl with razor blade or kitchen knife is torture *per se*.<sup>96</sup> Apart from health complications that result from the practice, a girl undergo severe pain and suffering during the procedure. FGM may also be determined to violate child's right to privacy. Article 16(1) of CRC and article 10 of the African Charter respectively recognise a child's right to privacy and require that "no child shall be subject to arbitrary or unlawful

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88 Article 6 of *CRC*.

89 Article 6 of *CCPR 1966*.

90 *WHO Female Genital Mutilation 13*.

91 Inter-African Committee Report on Female Genital Mutilation in Nigeria 1996 4-8.

92 Article 2 of *CRC*.

93 Article 24 of *CCPR*.

94 Article 3 of African Charter.

95 Article 37(a) of *CRC*.

96 Trueblood *The Denver Journal of International Law and Policy* 8.

interference with his or her privacy. The African Charter reinforces that the child has right to the protection of the law against such interference. Subjecting a girl to the FGM practice without her consent and sometimes under duress constitutes an interference of her privacy.

### **3.2 Obligations under international human rights instruments**

The International obligation upon states to combat FGM has its foundation under international treaties and conventions<sup>97</sup> on which states themselves voluntarily entered into ratification. Upon ratification of the relevant human rights instruments, Tanzania and South Africa (states parties) undertake legal obligation to respect, protect and fulfil or promote the individual rights<sup>98</sup> and more in particular to eliminate and prevent the practice of FGM among their citizens and others in their jurisdiction. These responsibilities are visible in a plain text in those documents and they are subjected to monitoring and evaluation by respective human rights committee. The duty to respect rights requires states to refrain from interference with individual enjoyment of these rights. The duty to protect rights obliged that states to prevent infringements of these rights by private actors or institutions. Lastly, the duty to promote or fulfil requires governments to adopt measures as well as raising awareness of the rights to every citizen to ensure realization of these rights.<sup>99</sup> This classification of duties is, however, a crucial strategy to hold governments accountable for their failure especially when human rights included under socio-economic and cultural rights.<sup>100</sup> This is because the realisation of the socio-economic rights does not impose immediate obligation to the governments rather implemented progressively.<sup>101</sup>

Besides those general duties to respect, protect and promote, international human rights law in relation to FGM, imposes specific obligations upon states parties: the obligation to abolish traditional practices detrimental to the health of children; the obligation to modify or abolish customs that discriminate against woman; the

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97 Skogly S I *Beyond national borders* 59.

98 Sepulveda M M *The Nature of obligation* 161-162.

99 Committee Economic, Social and Cultural Rights: General Comment No 14 para 33.

100 Sepulveda M M *The Nature of obligation* 157.

101 Sepulveda M M *The Nature of obligation* 157.

obligation to ensure health care and access to health information; and the obligation to ensure the protection of women and children's rights to be free from FGM

### 3.2.1 The obligation to eliminate harmful traditional practices

The article 24(3) of CRC under compels states to adopt all effective and appropriate measures aiming to abolish harmful traditional practices that impede the health of children. The provision states that;

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

Even though the provision does not directly mention the FGM<sup>102</sup>, it however implies that FGM is among the harmful traditional practices and the Convention makes reference to it in the context of the right of health to mean those practice which are “prejudicial” to the health of a child.<sup>103</sup> The inclusion of the word “shall” imposes mandatory obligation to take such measures, however, this obligation does not require the states parties to take immediate measures to abolish the practice.<sup>104</sup> Rather it will be progressively realised “with a view” to eliminate this practice.<sup>105</sup> The provision also requires that measure to be taken by states parties must be “effective” and “appropriate”. This can be interpreted as to impose a certain degree or qualification of measures to be taken that is not just “a mere measure” rather effective and appropriate to ensure elimination of these harmful practices. At the same time, despite the article does not clarify which measures in fact should be taken by the states, the word “all” includes *inter alia* legislative, administrative, social and educational measures with the aim to achieve full eradication of harmful traditional practises.<sup>106</sup>

Furthermore, this obligation is strengthened by the African Charter. The obligation to eliminate FGM does not only stem under international law, but also under regional level. Considering the critical situation of child girls in Africa and the complicated

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102 Tobin Harvard *Review Law Review* 378.

103 UNICEF 2008 <http://www.unicef-irc.org>

104 Tobin Harvard *Review Law Review* 375-376.

105 Tobin Harvard *Review Law Review* 376.

106 Tobin Harvard *Review Law Review* 377.

causes associated,<sup>107</sup> the African Charter emphasises that “any custom, tradition or culture or religious practice that is inconsistent with the rights, duties and obligations contained in the present charter shall, to the extent of such inconsistency, be discouraged.<sup>108</sup> The phrase implies that any patterns of conduct which are repugnant to the provisions in the Charter shall be deterred. More in particular with regard to abolish FGM is found under article 21 of the Charter which requires states parties to take all appropriate measures to eliminate customs and practices harmful to the welfare, dignity, normal growth and development of the child. The provision stipulates that those measures to be taken by states parties shall, among other things, focus on those customs and practices prejudicial to the health or life of the child<sup>109</sup> and those customs and practices discriminatory to the child on the ground of sex or other status.<sup>110</sup> Indeed, Tanzania and South Africa are member states of the Charter<sup>111</sup> and to this effect they are bound to eliminate FGM practices.

Moreover the Protocol on the Rights of Women in Africa<sup>112</sup> (hereafter the Protocol) by considering the position of women in Africa, provide a specific provision for elimination of harmful practices. Article 5 of the Protocol obligates the states parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and calls upon the states parties take all necessary measures to eliminate such practises. Since Tanzania and South Africa are member state of this Protocol, they must therefore, comply with the obligation therein to eliminate FGM.<sup>113</sup>

### **3.2.2. Obligations in relation to health care and information**

The duty to ensure health care and access to health information has been imposed in several international instruments<sup>114</sup> however, the focus here will be on CRC, the

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107 Preamble of the African Charter on the Rights and Welfare of the Child.

108 Article 1(3) of the African Charter on the Rights and Welfare of the Child(hereafter African Charter)

109 Article 21(a) of African Charter.

110 Article 21(b) of African Charter.

111 Tanzania ratified the Charter on March 2003 and South Africa ratified the Charter on January 2000 see also in [http://www.africa-union.org/Official\\_documents/Treaties](http://www.africa-union.org/Official_documents/Treaties) 2009.

112 The Women Protocol 2005.

113 Tanzania has ratified the Women Protocol on March 2007 and South Africa has ratified the Women Protocol on December 2004 see also in <http://www.africa-union.org/root/au/Documents/Treaties/> (date of use 17 November 2009).

114 Rahman A and Toubia N *Female Genital Mutilation* 50.

African Charter and CEDAW. Article 24(1) of the CRC requires states parties to recognise the child's right to health and to facilitate for the treatment of illness and rehabilitation of health. This provision emphasises further that, states parties shall endeavour to ensure that no child is deprived for his or her rights of access to such health care services. The latter obligation can be interpreted to mean that governments have responsibilities not only to ensure provision of medical assistance, but also to ensure that children and their parents have access to health information and specific education concerning health<sup>115</sup> and the well-being of the child particularly the health risks that arise from FGM.<sup>116</sup> In addition, this obligation has implication to the girls who underwent FGM (victims) and are suffering from the complications of the procedure. The governments are responsible to provide treatments for victim girls in order to prevent further suffering and to ensure they are physically and psychologically rehabilitated.

Moreover, CEDAW under article 12 protects women's right to health and requires states parties to eliminate discrimination against woman in the area of health care, including reproductive health care. More emphasis on this provision lies on Committee's general recommendation which endorse that <sup>117</sup>

The duty of States Parties to ensure, on a basis of equality of men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12.

Acknowledging that FGM is detrimental to the women and girls health in general and that it may result into irreparable effects, the states parties should take all action to prevent the practice of FGM. Governments are also required to raise awareness of women about their reproductive rights and the harms that result from FGM.

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115 Committee on CRC: General Comment No 4 2003 para 24; Packer *Using Human Rights to Change Tradition* 58.

116 Committee on CRC: General Comment No 4 2003 para 10.

117 CEDAW Women and Health: General Recommendation No 24 1999 para 13 [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/77bae3190a903f8d80256785005599ff?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/77bae3190a903f8d80256785005599ff?Opendocument)

Moreover, the African Charter reinforces this obligation under article 14(2) which requires states parties to take measures to ensure the provision of necessary medical assistance and health care to all children<sup>118</sup> and to develop preventive health care and family life education and provision of health services.<sup>119</sup> Health education and health information are among the most essential strategies to eradicate the practice. Girls should be provided with a foundation on health issues and have access to health information.<sup>120</sup> This will make them to be aware of the health risks resulted from the practice as well as their right to health in general.

The international obligations to ensure health care manifested further under the CESCRC in which both governments have ratified. The Covenant obligates states parties to recognise the right of every one to the enjoyment of the highest attainable standard of physical and mental health.<sup>121</sup> The Covenant however, acknowledges constrains within states parties due to scarcity of resources<sup>122</sup> and therefore emphasis that “the steps to be taken to achieve full realization shall include *inter alia* the provision for the health development of the child”.<sup>123</sup> Taking into account resource constraints, this obligation will depend on available resources in order to achieve progressively realisation of the right to health.

### **3.2.3 Obligations to modify or abolish discriminatory customs**

Tanzania and South Africa are member states of CEDAW<sup>124</sup> and therefore bound with the provisions imposed under CEDAW with regard to eliminate FGM. CEDAW calls for an end to all forms of gender-based discrimination and expressly requires states parties which condemn discrimination against woman, to pursue by all appropriate means and without delay a policy of eliminating discrimination against woman.<sup>125</sup> In doing so, states parties are obliged to undertake to take all appropriate measures including legislation to abolish existing customs and practices which

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118 Article 14(2)(b) of the African Charter .

119 Article 14(2)(f) of the African Charter.

120 Rahman A and Toubia N *Female Genital Mutilation* 50.

121 Article 12(1) of the CESCRC.

122 CESCRC General Comments No 14 para 30.

123 Article 12(2)(a) of the CESCRC.

124 Tanzania has ratified on August 1985, South Africa has ratified on December 1995.

125 Article 2 of CEDAW, Portela A Program of Action for Elimination of FGM 2009 <http://www.umarfeminismos.org/documentostemp/PoAIngles.PDF> (date of use 16 November 2009).

constitute discrimination against woman.<sup>126</sup> Moreover, taking into consideration that FGM discriminate women on the ground of sex and gender, CEDAW also affirmatively impose obligation to the states parties to take all appropriate measures to modify the social and cultural norms of men and women, in order to achieve elimination of prejudices and customary and all other practices which are based on stereotyped roles for men and women.<sup>127</sup> It obliges states parties to take actions against all social inequality against women and its calls for abolition of all practices and laws that harm women's well-being. A state can not achieve to eliminate FGM if fundamental rights of other member in the society such girls and women are violated.<sup>128</sup> With this concern CEDAW provides an affirmative obligation to states to take all effective measures with the aim to combat FGM through prevention of discrimination within the community or family as well as to maintain equality between man and woman.<sup>129</sup>

In 1990, the UN Committee on CEDAW, in its General Recommendation No 14 on female genital mutilation, strongly condemned the practice of FGM.<sup>130</sup> It recommends states parties to "take appropriate and effective measures" with a view to abolish the practise of FGM. Although the Committee did not explicitly recommend for criminalisation of FGM at a national level, it outlined integrated approach such as education campaigns, funding local institutions and adopting health policies to the roles of governments in supporting to eradicate FGM.<sup>131</sup> The background of this approach is to the fact that law itself does not change attitudes of a society toward FGM. Rather by educating people, raising awareness on the general concept and effects of FGM will in fact change the surrounding poor believes of the people.

Furthermore, article 2 of the Protocol explicitly indicates the governments' responsibilities to eliminate discrimination against women. It obliged the states parties to "commit themselves to modify those customs and culture that are discriminatory against women with a view to eliminate harmful traditional and cultural

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126 Article 2(f) of CEDAW.

127 Article 5(a) of CEDAW, Rahman A and Toubia N *Female Genital Mutilation* 47.

128 Kwoka *Harvard Human Rights Journal* 10.

129 Lewis *Encyclopedia of Human Rights* 208.

130 UN *Committee on the Elimination of Discrimination Against Women (CEDAW)*, *CEDAW General Recommendation No. 14: Female Circumcision*, 1990 <http://www.unhcr.org/refworld/docid>

131 Kwoka *Harvard Human Rights Journal* 11.

practices.<sup>132</sup> The substantial purpose of the Protocol is to protect women against practices which normally undermine them in making decisions concerning their body. In that effect, governments are compelled to use public education, to provide information and to apply information strategies to educate their people about discriminative nature of FGM. In addition, governments' duty to take action against FGM has also its basis in the provisions of CCPR which obligates states parties undertake to respect and to ensure protection of rights guaranteed therein. To this effect they are responsible to ensure all individuals rights recognise in the Covenant without distinction of any kind such as sex or other status.<sup>133</sup> Similar to that, the Covenant laid down provision which associates with non-discrimination and obliges states parties to ensure the equal right of men and women to the enjoyment of rights in the Covenant<sup>134</sup> such as right to inherent life or right not to be subjected to torture.

#### **3.2.4 Obligations to protect children against torture and abuse**

FGM may generally be regarded as an act of torture and abuse to minor girls since it involve severe pain and suffering.<sup>135</sup> Governments, as the trustee of children, are responsible to protect them not to be subjected to the practice. Article 19(1) of the CRC requires states Parties to protect children from all form of abuse. It oblige the states parties to all appropriate legislative, administrative, social and educational measures to protect a child from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation including sexual abuse, while in the care of parent, legal guardian or any other person who has the care of the child. This is the positive obligation of the states parties to take all effective and appropriate measures to ensure girls are not exposed to any form of abuse for instance FGM practices.<sup>136</sup>

Furthermore, the CRC provides that "states parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."<sup>137</sup> While some may regard FGM as inhuman and degrading treatment, it is the duty for both governments to ensure that children are enjoying their human

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132 Article 2(2) of the Women Protocol.

133 Article 2(1) of CCPR.

134 Article 3 of CCPR.

135 Wassuna *McGrill Journal of Medicine* 107.

136 Committee on CRC: General Comment No 4 2003 para 12.

137 Article 37(a) of CRC.



rights and living free from any kind of torture and inhumanity. The African Charter uses similar language in this obligation under article 16 to emphasis on protection of children against torture and abuse. It significantly imposes duty upon states parties to apply all effective protective measures such as special monitoring bodies to provide supports for the children. This obligation can be also found under the CCPR which protects individual including children by granting them right to be free from torture, cruel, inhuman or degrading treatment.<sup>138</sup> Moreover, the Covenant asserts that the protection of the child should be on the part of his or her family, society and state.<sup>139</sup> With this respect, states parties acquire legal responsibility to protect girls against FGM. In point of fact, many girls are at risk to undergo this practice every year. It is mandatory for governments to adopt concrete measures to ensure no girl is subjected to the procedure. Accordingly, failing to provide protection to children and to eliminate this practice, states are in fact violating their obligation to protect children under this Covenant.<sup>140</sup>

### **3.2.5 Obligation to respect right to freedom of culture and religion**

Under the CRC, states parties have obligations not only to protect but also to respect rights of the child. The child's right to freedom of thought, conscience and religion is recognised under the CRC whereby states parties are refrained from interfering someone's religion and thought.<sup>141</sup> However, freedom to manifest one's religion or belief may be subject only to such limitation as are prescribed by law and are necessary to protect public safety, order, health or the fundamental rights and freedom of others.<sup>142</sup> This is the negative obligation of the states on which governments have a duty not to interfere with the existing rights of individual. However, this does not imply that states may not take any action to restrain cultural or religious freedom when it interferes with the child's fundamental human rights.<sup>143</sup> In addition, states parties are obliged under international law to prevent, investigate

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138 Article 7 of the *CCPR*.

139 Article 24(1) of the *CCPR*.

140 Trueblood *The Denver Journal of International Law and Policy* 6.

141 Article 14 of the CRC states that States Parties shall respect the rights to freedom of thought, conscience and religion.

142 Article 14(3) of the *CRC*.

143 Wellerstaein *Loyola Los Angels International and Comparative Law Review* 9.

and punish any form of violence against girls and women.<sup>144</sup> The United Nations Declaration on the Elimination against Woman similarly provides that;

States should not invoke any custom, tradition, or religious consideration to avoid their obligation to eliminate violence against woman and girls and ....they must exhibit due diligence in investigation and imposing penalties for violence, and establishing effective protective measures.<sup>145</sup>

The potential tension between human rights and culture became obvious where there are deeply rooted practices that fall within the culture domain but at the same time violate human rights especially for children and women.<sup>146</sup> This seems to be very fragile concept under international community on which it may defeat the whole entire concept of universal human rights if no action is taken upon it. In this regard, states parties are obliged to take all appropriate measures to modify or abolish existing customs and traditional practices which contribute to the discrimination of women and girls as well as to eradicate all harmful cultural practices detrimental to the health of the child.<sup>147</sup> Accordingly, justification of this obligation can be applicable once harmful cultural practices are abolished.

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144 UNFPA Global Consultation on Female Genital Mutilation/Cutting 2008 <http://www.unfpa.org/publications/detail>

145 Article 4 of UN General Assembly on Declaration on the elimination of violence against Woman 1993 <http://www.unhchr.ch/huridocda/huridoca.nsf/> Article 2 specifically includes female genital mutilation in the definition of violence against women.

146 Ziegler 2007 [www.ssrn.com/link/oxford-legal-studies](http://www.ssrn.com/link/oxford-legal-studies) 18.

147 Article 5 of *CEDAW* and Article 24 of *CRC*

## 4 IMPLIMENTATIONS OF HUMAN RIGHTS OBLIGATIONS WITH REGARD TO FEMALE GENITAL MUTILATION IN TANZANIA AND SOUTH AFRICA

### 4.1 TANZANIA

Like many other countries, Tanzania has ratified international and regional human rights treaties, which impose binding obligations upon it in relation to combat FGM.<sup>148</sup> By ratifying these treaties, Tanzania committed to fulfil its legal obligation to ensure abolition of FGM practices.<sup>149</sup> Legal framework in Tanzania has a dual system with regard to international legal instruments.<sup>150</sup> Thus, international conventions and treaties do not operate in Tanzania until they are incorporated in the national laws.<sup>151</sup> However, this approach does not exempt the government from being held responsible for its non-compliance of international obligation to combat FGM.<sup>152</sup> Tanzania is obliged to use all effective and appropriate measures to ensure implementation of human rights in the country particularly to eradicate FGM.

#### 4.1.1 Measures taken by Tanzania to combat female genital mutilation

In 1998, Tanzania attempted to outlaw and criminalise the practice of FGM under its legislations.<sup>153</sup> The state enacted Sexual Offences Special Provisions Act (SOSPA) which prohibits female genital mutilation of girls under the age of 18 years. Section 21 of SOSPA which amends section 169 of Penal Code 130 states that;

Any person who, having the custody, charge or care of any person under eighteen years of age, ...causes female genital mutilation or procures that person to be assaulted', ill treated, neglected or abandoned in a manner likely to, cause him suffering or injury to health, including injury to, or loss of sight or hearing, or limb or organ of the body or any mental derangement, commits the offence of cruelty to children.

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148 Rahman A and Toubia N *Female Genital Mutilation* 222.

149 Rahman A and Toubia N *Female Genital Mutilation* 58.

150 LHRC Report on Human Rights 169.

151 *Transport Equipment and another v D P Valambia* (Civil application No 19 of 1993 Court of Appeal, Dar es Salaam) "although Tanzania has ratified the international covenant on Civil and Political Rights admittedly, our legal position is that these instruments are not self executing. There has to be an act of parliament to make them operative."

152 *Transport Equipment and another v D P Valambia* "the fact that an international covenant to which Tanzania is a party is not incorporated into Tanzania, law does not absolve the governments of its duty to adhere to its undertakings in the agreements."

153 Winterbottom A *et al* "Female Genital Cutting: Cultural Rights and Rites of Defiance in Northern Tanzania" ASR 2009 49.

This provision explicitly imposes penalty for perpetrator of FGM whereby any person who commits this offence to children is liable on conviction to imprisonment for a term between five and fifteen years and/or fine of three hundred thousand Tanzanian shillings.<sup>154</sup> Despite these legal penalties, the provision is criticized for it does not contain a minimum sentence to offender. This has resulted to courts exercising their discretionary power to impose marginal sentence to the offender.<sup>155</sup> In the most recent case of *R v Musa Daudi and others*<sup>156</sup> the accused persons were charged by an offence of FGM under section 21 of SOSPA. After all evidence to be proved, the trial Magistrate convicted and sentenced them to pay fine of ten thousand Tanzanian shillings. The accused paid immediately. It is also argued that this provision proved to be weak, discriminatory and ineffective to eradicate FGM. This is to the fact that it continues to legalise the practice of FGM to the women over 18 years of age who are mostly coerced to undergo the practice.<sup>157</sup> Moreover, the enforcement and implementation of this provision has been proved difficult due to inadequate police resources to conduct investigation, corruption in the country, poverty (some traditional practitioner uses FGM as a source of income), ignorance of law, and the victims' reluctant to testify against their parents or family members.<sup>158</sup> Despite of legal measure to criminalise this practice, FGM continues and is widespread in some parts of the country.<sup>159</sup> Since the entry into force of SOSPA, few cases have been reported though the perpetrators were not convicted due to lack enough evidence.<sup>160</sup>

Some Ministries dealing with women and children affairs in Tanzania attempted a number of measures to eliminate the practice. Some reports show that Ministry of Community Development, Women Affairs and Children (MCDWAC) has established advocacy campaign towards prevention of FGM. The Ministry launched informative measure by preparing an information kit which contains leaflets, posters and other information papers and widely distributed within the country.<sup>161</sup> In conjunction with

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154 Section 169A(2) of SOSPA.

155 LHRC Report 2008 79

156 Criminal case no 257 of 2002 Dar-es-Salaam

157 CEDAW Concluding observations United Republic of Tanzania 2008 para 121

158 WLAC Shadow Report: The implementation of CEDAW 53, Immigration and Refugee Board of Canada Tanzania: The practice of female genital mutilation; state protection available to victims. <http://www.unhcr.org/cgi-bin/texis> date of use 21 November 2009.

159 Winterbottom *ASR* 49.

160 UN Human rights Committee on CCPR Geneva 2009 3.

161 LHRC Reports on Female Genital Mutilation 2005 47.

Ministry of Health (MOH), MCDWAC organises ant-FGM campaigns in some districts where FGM is substantially practiced. In such campaigns, the Ministries achieved to involve about 560 traditional elders from 17 clans who are in fact decision maker of FGM.<sup>162</sup> Moreover the Ministry of Health and Social Welfare which governs health and social affairs, includes its Reproductive Health strategies in a national plan of action for the prevention of female genital mutilation and other harmful traditional practices (2001-2015).<sup>163</sup>

The government has also supported NGOs working toward abolition of FGM. In 2002 the Government established the Tanzania Chapter of the East Africa Network on the Elimination of FGM which focuses to facilitate the sharing of information materials and experiences among members on the elimination of FGM in their respective areas.<sup>164</sup> The Government, NGOs and private practitioners are engaged in community mobilization, advocacy and training of service providers on how to rehabilitate victims such as circumcised women during pregnancy, labour and postpartum period.<sup>165</sup> They are also involved in community awareness programmes and behaviour changes. In addition to that, NGOs have significantly contributed towards eradication of FGM through research, awareness campaigns and country sensitization not only to the general public but also to law and policy makers.<sup>166</sup> In 2002 the Tanzanian Media Women Association (TAMWA) conducted a countrywide education and information campaign known as "STOP FGM"<sup>167</sup> through media in areas where FGM is highly performed.<sup>168</sup> TAMWA also organised sessions for media institutions, other NGOs, community based organisation to raise awareness of FGM. It emphasised the use of appropriate language and approaches in order to educate the entire public.<sup>169</sup> Moreover, Legal and Human Rights Centre (LHRC) plays a crucial role in advocacy, networking and complementing towards elimination of FGM.<sup>170</sup> Apart from conducting research, LHRC held sensitization training workshop

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162 LHRC Report on Female Genital Mutilation 47.

163 MCDWAC Report to African Committee of Experts: ACRWC 2006 71.

164 United Republic of Tanzania:Country Report on the Implementation of the Beijing Platform 2005 11-12.

165 Winterbottom *ASR* 62.

166 *Ibid* 46.

167 Lweno-About C "Media Campaign Against FGM in Tanzania" The STOP FGM Project 2003 106.

168 Sheikh L "Levina's song: Supporting woman in Tanzania"115.

169 UNICEF 2005 Changing a harmful social convention: female genital mutilation/cutting 31.

170 LHRC Report on Female Genital Mutilation 50-51.

for eradication of FGM. In such workshop, the organisation train police officers concerning law which criminalising FGM and created a trained team of human rights defenders. The team were equipped with facilities in order to sensitize, monitor and report on FGM cases as well as intervene to protect girls and women against it.<sup>171</sup> These activities were precisely carried out in Morogoro region to those communities where FGM is immensely performed.

Furthermore, Tanzania attempted to adopt several policies which aim at eradicating FGM. Policies which were adopted since 2000 include among others the National Plan of Action to combat FGM (2001-2015),<sup>172</sup> National Plan of Action to Prevent and Eradicate Violence against Women and Children (2001-2015) and National Strategy for Gender Development (2005).<sup>173</sup> The policies purport for creating and sustaining a society that is free from harmful practices, customs and traditions. The objective purpose of these policies is to provide strategies and activities to be implemented by various stakeholders with regard to abandon FGM.<sup>174</sup> They also underscore to focus on legal, social, economic and cultural framework in order to banish violence against children and women by raising awareness and capacity building to men and women to combat FGM.<sup>175</sup> In 1996, MCDWAC established Child Development Policy which recognises the situation of a child girl in Tanzania. The policy acknowledges number of problems facing the girl which affect her survival and development include *inter alia* FGD and gender discrimination.<sup>176</sup> It further emphasis that children need protection against harm practice such as FGM. The policy subsequently purports to take measure to educate mobilise communities on the basic rights of children and to prioritise implementation of those rights.<sup>177</sup>

During the concluding observation, the Committee on the Rights of the Child points out with appreciation the efforts undertaken by Tanzania to address the practice of FGM, including the launch of the East African Network on the Elimination of FGM.

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171 UNFPA Global Consultation on female genital mutilation: Technical Report 2008 16.

172 LHRC Tanzania Human Rights Report 79; CEDAW Concluding observations United Republic of Tanzania 2008 para 121.

173 UN Secretary General Database 2009 <http://webapps01.un.org/vawdatabase/searchDetail>.

174 Statement by Hon. Magreth Simwanza Sitta before the the CEDAW Committee 2008 5.

175 MCDGC A National Plan of Action for the Prevention and Eradication of Violence Against Women and Children 2001-2015 17.

176 MCDWAC Child Development Policy 86.

177 *ibid* 88.

However, the Committee restates its concern that FGM is still widely practiced.<sup>178</sup> The Committee recommends the government to strengthen its legislative measures regarding FGM and raising awareness to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls. Moreover, the Committee recommends the state to establish sensitization programmes for traditional practitioners and the public in general so as to encourage them to change traditional attitudes associates with FGM.<sup>179</sup>

#### **4.2 SOUTH AFRICA**

Various reports indicate in general that the incidence of female genital mutilation is not widespread in South Africa, but the practice in fact exists. It is commonly practised by foreign nationals, the refugee population and immigrants to SA.<sup>180</sup> Given the fact that FGM is not in widespread in South Africa,<sup>181</sup> the state nevertheless entered into binding agreements under international human rights law which consequently impose binding obligation with regard to combating FGM. Similar to Tanzania, South Africa has ratified several international conventions which oblige it to eradicate all harmful cultural practices which violate children's rights. While the South African Constitution acknowledge customary law<sup>182</sup> and entitle everyone the right to enjoy their cultural practices and their religion,<sup>183</sup> those rights are subject to general limitation in the Bill of Rights<sup>184</sup> as well as should not contradict with the provisions under international conventions which South Africa is member state therein. In connection to that, it is imperative for South Africa to comply with international obligations to eliminate FGM particularly to immigrants and refugees who moved to South Africa from countries which it is commonly practiced.<sup>185</sup>

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178 CRC/C/TZA/CO/2 Committee on the Rights of the Child: Concluding observation for United Republic of Tanzania 2006 para 50 [http://www.bayefsky.com/pdf/tanzania\\_t4\\_crc\\_42.pdf](http://www.bayefsky.com/pdf/tanzania_t4_crc_42.pdf)

179 CRC/C/TZA/CO/2 para 51.

180 South African CEDAW Report-Recommendations 12 and 19: Violence against women and the girl-child 163-164.

181 Kouber and Muasher *ASR* 5

182 Article 39(3) of the Constitution states that "the Bill of Rights does not deny the existence of any other rights of freedoms that are recognised or conferred by ...customary law to the extent that the are consistent with the Bill."

183 S 30 and 31 of the Constitution.

184 S 36 of the Constitution provides that;

(1) "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,...."

185 UNICEF 2009 Forced Marriage <http://www.pmg.org.za/report/20090908-forced-marriages-briefing-unicef> date of use 28 November 2009

#### 4.2.1 Measures taken to combat female genital mutilation

South Africa is among the countries which have taken steps to eliminate the practice of FGM.<sup>186</sup> These steps include among others, enactment of legislation that bans FGM.<sup>187</sup> In 2005 South African government enacted the Children's Act<sup>188</sup> which covers a range of topics including *inter alia* protection of children. The harmful practices existing in South Africa such as FGM, virginity testing and early marriage prompted the South Africa legislature to include specific provision dedicated to social, cultural and religious practices. Section 12(3) of the Children's Act specifically prohibits genital mutilation or circumcision of female children.<sup>189</sup> The purpose of this provision is generally to promote the development and wellbeing of children as well as to give effects to the constitutional rights of the children.<sup>190</sup>

Moreover, it is considered as one of the substantial measures to implement international obligations which bind South Africa. Furthermore, while considering being one of legislative measure to combat FGM, the Children's Act finds itself in conflicts with provincial legislations in the country. For instance the Application of Health Standards in Traditional Circumcision Act<sup>191</sup> which governs circumcision operations in the Eastern Cape defines circumcision as "the circumcision of a person as part of a traditional practice".<sup>192</sup> This definition is incompetent and ambiguous and may imply to include the circumcision of both female and male. Also the Northern Province Circumcision School Act<sup>193</sup> provides that a circumcision school involves "a circumcision school for either male or female initiates".<sup>194</sup> It can be therefore arguably interpreted that those provincial legislations influences the practice of FGM or female circumcision and hamper the efforts of other legislations which aim to eradicate FGM. However, legislations must be consistent, applicable and protective

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186 CRR Facts Sheet 2009 [www.reproductiverights.org](http://www.reproductiverights.org)

187 Research Unit Implementation of Recommendations on Reproductive Health Commodity: South Africa Progress Report 2008 2.

188 No 38 of 2005.

189 S 1 of the Children's Act states that circumcision in relation to female child means the removal of the clitoris by any means.

190 S 28 of the Constitution.

191 No 6 of 2001.

192 S 1 of Traditional Circumcision Act No 6 of 2001, S 1 of Free State Initiation School Health Act No 1 of 2004.

193 No 6 of 1996

194 S 1 of Northern Province Circumcision Act.



to all children without any qualification otherwise the whole purpose therein can be defeated.

The South Africa Law Commission during reviewing the Child Care Act has recommended the imposition of severe criminal sanctions for persons and parents who coerce or allow girl-children to be circumcised.<sup>195</sup> To this effect, the Children's Act imposes penalties for a person who commits an offence of FGM for the purpose of criminalising the practice. The provision states that "a person who commits an act in contravention of the prohibitions set out in section 12(3) is guilty of an offence."<sup>196</sup> Persons found guilty of this offence are liable to a fine or to imprisonment for a period not exceeding ten years, or both a fine and imprisonment.<sup>197</sup> However, this legislation which entails criminal sanction to abolish FGM may be considered ineffective if it does not result in actual punishment of the offenders.<sup>198</sup> Some people are still reluctant to abandon harmful practices attached in their cultural beliefs with perception to maintain cultural identity. This attitude is influenced by lack of awareness concerning FGM and ignorance of law.<sup>199</sup>

South African is among the countries which provide general and specific rights of the children in its constitution.<sup>200</sup> As a point of departure, the South African Constitution, 1996 does not explicitly address or prohibit FGM. However, the Constitution clearly provides some provisions in relation to protect everyone against infringements of their rights. One of the fundamental provisions is the equality clause under section 9. It entitles equal protection to everyone, given the fact that FGM associates with discrimination on sex and gender and violates rights of women and girls. It provides that,<sup>201</sup>

"Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms."

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195 South Africa Law Commission Project 110 2002 115.

196 S 305(1)(a) of Children's Act.

197 S 305(6) of Children's Act.

198 Moodley *SAPL* 81.

199 *Ibid.*

200 S 28 of the Constitution.

201 S 9(1) and (2) of the Constitution.

Generally the provision protects everyone including women and girls against unfair discrimination on any grounds such as sex and gender.<sup>202</sup> To reinforce this provision, the legislature enacted a new legislation to promote equality and prevent unfair discrimination. The Promotion of Equality and Prevention of unfair Discrimination Act<sup>203</sup> aims to protect vulnerable group such as women and children against unfair discrimination. FGM is one of the cultural rites which discriminate women and girls on the ground of sex and gender upon enjoying their human rights. Accordingly the Act also purports to implement rights enshrined under CEDAW as well as to eradicate any practice which impairs the dignity of woman and girls and undermines equality between women and men.<sup>204</sup> Moreover, the Constitution entitle to everyone right to body and psychological integrity and thus everyone including girls and women have right to secure in and control over their body.<sup>205</sup> FGM violates this right on the reason that most of women and girls are coerced to participate in the practice and the manner performance is insecure as may result into health complications or death. Furthermore, it guarantees right to freedom and security of person including the right not to be tortured in any way.<sup>206</sup> The government has to ensure girls are secured from family level to state level. In this respect, any person who commits an act of torture may be charged under the common law offences for instance intentional wound or strikes and assault occasioning grievously body harm or damage.<sup>207</sup>

To fulfil implementation of the CRC, the South African legislature included specific rights for children in the Constitution. This is to ensure that children's rights and their well being development are legally protected. The Constitution stipulates that every child has the right to be protected from maltreatment, abuse or degradation.<sup>208</sup> Some communities in South Africa practice female initiations schools. Girls who attended this school may psychologically and physically be abused.<sup>209</sup> They have no chance to resist when their parents or community leaders forced them. Besides all, the

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202 S 9(3)and (4) of the Constitution.

203 No 4 of 2000 hereafter PEPUDA.

204 Liphapang *Equality update: Advancing Equality for all 5*.

205 S 12(2)(b) of the Constitution.

206 S 12(1)(d) of the Constitution.

207 South Africa Initial Report to the Committee Against Torture 2005 para 67 and 68.

[http://www.bayefsky.com/reports/southafrica\\_cat\\_c\\_52\\_add\\_3\\_2005.pdf](http://www.bayefsky.com/reports/southafrica_cat_c_52_add_3_2005.pdf)

208 S 28(1)(d) of the Constitution.

209 Rooyen, Potgieter and Mtezuka 2006 [www.fhi.org/en/youth](http://www.fhi.org/en/youth)

Constitution provides the foundation principle that in every matter concerning the child, best interests of a child are of paramount importance.<sup>210</sup>

On the other hand, the practice of FGM appears to have minimal support in South Africa. This is due to uneven distribution of healthcare services and unequal access to health information throughout the entire country.<sup>211</sup> Women and girls particularly in the marginalised areas lack information concerning harmful traditional practices such as FGM and its impact on health. Girls are generally unaware of the results of initiation schools and therefore they find themselves circumcised without knowledge of the consequences of the procedure. The Committee on CEDAW during its concluding observation noted with concern that the practice of female genital mutilation was not given much attention. Little research into prevalence of FGM was done as a result no concrete data has been available to the government or public in general.<sup>212</sup> In this regard the state lacks appropriate and effective measures to combat this practice.

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210 S 28(2) of the Constitution.

211 CEDAW A/53/38/Rev.1 Committee on CEDAW: Concluding observation 1998 para 133.

212 CEDAW A/53/38/Rev.1 1998 para 134  
[http://www.bayefsky.com/pdf/southafrica\\_t4\\_cedaw.pdf](http://www.bayefsky.com/pdf/southafrica_t4_cedaw.pdf)

## 5 CONCLUSION AND RECOMMENDATIONS

### **5.1. Conclusion**

As it is depicted in this study, FGM has been considered as one of the most significant human rights violation against young girls and woman. The health and psychosocial dimension of the practice have been addressed in most health and social science studies. However, recently the international community and human right law attempt to address FGM as a serious human right violation and as a result call up on governments and societies to combat the practice. There have been various controversies surrounding the origin and causes of FGM. The practice is believed to predate Islam and Christianity. The practice is generally caused by number of reasons which vary from community to community. Social, religion, tradition and customs are assumed to be among reasons which perpetuate FGM. Despite diversity in reasons for practising FGM and health complications that result from it, FGM goes beyond these as far as human rights are concerned.

As a result of violation of girls and women rights, international human right instruments impose obligations to states parties to use all measures to ensure eradication of FGM. The purpose of the instruments is to protect the vulnerable group from harmful traditional practices that detrimental to the health and well being. It has been well recorded that FGM is practiced in traditional societies in Africa, the Middle East and other parts of Asia. In this study, the compliance of states (two states, namely, Tanzania and South Africa) to ensure implementation of human rights in their respective countries with regard to FGM was assessed. It was learned that only legal measures to impose criminal sanctions to offenders would not be enough to combat FGM. However, policy measures and efforts of NGOs in Tanzania were proved to play crucial roles as far as the attempt is concerned. On the other hand, the South African Constitution and Children's Act protect children and women against discrimination and provide rights to human dignity, body integrity and security as well as right to life. Nevertheless, there are many loopholes in implementing international obligations and thus this hinders efforts of the international community in relation to eliminate FGM.

## ***5.2. Recommendations***

It is observed that the panacea for the abolition of FGM may not lie only on the right entitlement or criminal sanctions. Education is fundamental factor in changing public believes and opinion as well as in offering reasonable alternatives to FGM. Given the differences attitudes among ethnic groups towards the practice of FGM, it is a remote possibility that only legal measure to eliminate the FGM will in fact halt this practice. The governments should take intensive educational measure to educate the public as well as affected populations on FGM. South Africa should launch public education campaigns and particularly health education programs among immigrants in the country. It is only once the public being aware that FGM is harmful and violates rights of women and girls then the justification of imposing criminal sanction will be appropriate. The Governments should collect data and distribute information in schools and public in general about FGM and its affects on health of children and women.

Governments should devote resources to disseminate information to those community which practicing FGM and human rights in general. The information should focus on possible emotional, psychological and physical effects of FGM to girls, women and entire community and promote human rights. Governments should use national media to discuss and demonstrate rights of women and girls in the community in order to raise awareness to practitioners and public in general. Media is a basic tool to supply information in a wide area and for a short time. Government should emphasis media institution to use appropriate language so as information can be comprehensive to the target group and entire public. Moreover, governments should utilise the support of NGOs because NGOs play essential role on sensitization, conducting campaigns and other activities to eliminate FGM.

Furthermore, governments should use resources to empower women and girls in all sectors in the country. FGM cannot be uprooted from the community unless women and girls who are subject matter of this practice are provided with sufficient skills and knowledge with regard to FGM. Governments should ensure that there are equal opportunities for women in the government sectors so as to discourage the economic dependence of women to their husband which always weakened women position. Girls should be given opportunity to education especially health education. Governments should use health care practitioners to facilitate health education and information to schools and

allow them to use demonstration method on how FGM violates girl children's rights. It is imperative especially for those communities where FGM is prevalence to introduce health care subject in schools which addressing the whole concept of FGM and encourage them to report such incidence to any designated institution. Tanzania for instance should employ educational policy measure to the remote areas where majority are illiterate and unaware of consequences of the practice as well as human rights.

Governments should note that substantial change is likely to occur only by changing society's attitudes and perceptions concerning FGM. States should provide special training to local leaders and traditional practitioners on FGM and encourage the abandonment of this practice. Training must be committed to reflect local beliefs and attitudes so as to strengthen efforts to combat and eradicate the practice of FGM. Hence, action on awareness raising programmes for the affected population and the general public to change traditional attitudes is paramount measures to discourage and combat FGM.

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I, Lilian W. Makundi, hereby declare that this assignment is my own original work. Only original sources were consulted and to the best of my knowledge no plagiarism has been committed in the writing of this assignment.

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