

PROTECTING AND PROMOTING THE RIGHTS OF THE GIRL CHILD IN THE AFRICAN UNION

A study of the legal protection of girls in United Nations and
African Union instruments and mechanisms



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Deadline for submission: 02/06/2008

Number of words: 17,878 (max. 18.000)

Acknowledgments

I gratefully acknowledge the help and advice from a number of people. First of all I would like to thank my advisor, Julia Köhler-Olsen at the Institute for Public Law for valuable advice and encouragement throughout this process. It has been very helpful to discuss issues relating to my thesis with you. Secondly, I would like to thank Ann-Kristin Vervik at Plan Norway. Thank you for always answering questions, providing me with great literature and for sharing your knowledge about human rights. I would also like to thank Plan Norway for the opportunity to intern there for the past nine months. My choice of topic would not have been as clear if I hadn't had the opportunity to work in an organization that prioritizes the girl child like Plan Norway does. An additional thank you is due to Plan Norway and Ann-Kristin Vervik for letting me go with you to Ethiopia in February 2008. This trip gave me valuable insight into the situation of the girl child in Africa. Thank you also to Plan Ethiopia, African Child Policy Forum and the Ethiopian Women's Lawyers Association for readily answering questions related to my thesis.

Thank you to my mother for proofreading my thesis and for coming up with useful suggestions.

Lastly, a well-deserved thank you goes to my classmates. Thank you for your encouragement and inspiration during the past two years, and during this writing process.

Katrine M. Vincent

Oslo, June 2008

Abbreviations

ACPF:	African Child Policy Forum
ACRWC:	African Charter on the Rights and Welfare of the Child, 1990
AU:	African Union
CRC:	UN Convention on the Rights of the Child, 1989
CEDAW:	UN Convention on the Elimination of Discrimination Against Women, 1979
CSW:	Commission on the Status of Women
DEVAW:	Declaration on the Elimination of Violence Against Women, 1993
FGM:	Female Genital Mutilation
ICCPR:	International Covenant on Civil and Political Rights, 1966
ICESCR:	International Covenant on Economic, Social and Cultural Rights, 1966
NORAD:	Norwegian Agency for Development
OAU:	Organization of African Unity
UN:	United Nations
UNICEF:	United Nations Children's Education Fund
UNFPA:	United Nations Population Fund
WHO:	World Health Organization
Women's Protocol:	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, 2003

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1 Introduction

1.1 Background

Despite a certain degree of protection found in the Convention on the Elimination of Discrimination against Women¹ (CEDAW) and the Convention on the Rights of the Child² (CRC), the girl child was for a long time a neglected and hidden participant in the international legal regime. Not until the mid-90's was the vulnerability and protection of the rights of the girl child specifically addressed at the international arena. During the Fourth World Conference on Women in Beijing in 1995, the girl child became an important part of the Platform for Action on the Women's Rights Agenda.³ It is, however, important to note that although the girl child first was brought to the women's rights agenda in 1995, both the CRC and CEDAW contain provisions that pertain to the protection of the girl child to a certain extent. Article 2 (1) of The Convention on the Rights of the Child states that:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or status”.

Equally Article 1 of CEDAW states that:

¹ Adopted by UN General Assembly resolution 34/180 on 18 December 1979. Entered into force on 3 September 1981

² Adopted by United Nations General Assembly Resolution 44/25 in 1989. In force 2. September . 1990

³ 9 strategic objectives were set out with the purpose of eliminating discrimination against the girl child, increase level of awareness and participation of the girl child, eliminate negative cultural attitudes, promote and protect her rights, eliminate economic exploitation, eliminate violence against the girl child and strengthen the role of the family in protecting the girl child.

“For the purposes of the present Convention, the term "discrimination against women" shall mean 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”

Despite these two provisions found in the CRC and CEDAW, the inequalities faced by girls around the world are still tremendous and far from acceptable.

The girl child has ‘multiple identities’, meaning that two or more categories of identity overlap to present a picture of who she is. These categories can be race, gender, age, social class and religion, and are categories the girl is not able to influence or change.⁴ As a child, and as a girl, the girl child is far more marginalized and discriminated against compared to her male counterparts. The vulnerable position of girls stems not only from a socially-constructed gender role, but also from discrimination they face because of their age. The dominant view in most societies is that the child occupies an inferior position both in the family and in society at large. With the multiple levels of discrimination that they experience, girls are relegated to the bottom of power structures and power relations in the family and in the community. Just like the girl-child is born to powerlessness, there are others who are born into power positions.⁵

Certain issues that affect the girl child in Africa particularly are not covered by articles in the CRC or CEDAW. Issues such as Female Genital Mutilation (FGM) and HIV/AIDS are not explicitly mentioned in any of the two UN conventions. In comparison, the 2005 Women’s Protocol to the African Charter on Human and Peoples’ Rights (ACHPR)⁶ mentions HIV/AIDS and FGM and the impact they have on the rights of women and girls.

⁴ Amoah (2007) p. 6

⁵ Amoah (2007) p.7

⁶ CAB/LEG/66.6 (2000), entered into force Nov. 25, 2005

The African Charter on the Rights and Welfare of the Child (ACRWC)⁷ devotes an entire article to harmful traditional practices and it expands the repercussions of such practice by emphasizing the impact this may have on a child's dignity, not just his or her physical integrity.⁸ Another important factor is that the ACRWC and the Women's Protocol were adopted in Africa with due weight being placed on the region's culture and heritage, possibly making it more attractive for states to implement than the universal treaties.⁹

When the UN Convention on the Rights of the Child was adopted, only a few African states participated in a meaningful way. The ACRWC came as a supplement to the CRC a year later, motivated by the under-representation of African states at the adaptation of the CRC and a wish to integrate an African value system in the view of the rights of the child. The ideology behind the drafting of a regional children's convention was that the CRC is founded on a western view of the child from an individualistic oriented society, whilst the ACRWC on the other hand takes the family as the point of departure, with both the child and the family bearing duties and responsibilities. The ACRWC further builds on an Africa cultural heritage where the protection of traditional African values is important.¹⁰

Despite the existence of a Declaration on women's rights¹¹, CEDAW was for a long time the only binding convention specifically aimed at protecting the rights of women. The need for a women's convention in Africa came after a long discussion where the fact that the ACHPR only has one article, cf. art 18(3), that specifically mentions discrimination against women. In 2005 a Women's Protocol was added to the ACHPR. This important instrument has reinforced the protection of the rights under CEDAW and other human rights conventions, as well as international and regional declarations and resolutions. It managed to achieve this in three aspects: It addresses issues that have emerged to the global arena after CEDAW entered into force and that are of importance to the girl child, such as HIV/AIDS, it addresses issues like sexual harassment and violence that is not mentioned in

⁷ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999

⁸ ACRWC art. 21

⁹ Snipstad (2006)

¹⁰ Supra note 9

¹¹ GA/RES/2263 (XXII) 7 November 1967

CEDAW, and it addresses specific issues related to women in Africa, such as Female Genital Mutilation (FGM) and other harmful traditional practices. Lastly, the Protocol reaffirmed and reinforced the obligation of the State, particularly in the area of facilitating women's access to justice as a right.¹²

1.2 Purpose of thesis

This thesis seeks to analyze the UN Conventions and how they, through specific articles in the Conventions, General Comments and Committee comments, address the vulnerability of the girl child compared to AU Conventions and Committee comments. Further this thesis will look at one area of particular importance to the girl child in Africa, namely the practice of FGM. As mentioned previously, FGM is not mentioned specifically in the CRC or in CEDAW, but is clearly mentioned in the Women's Protocol to the African Charter¹³ and harmful traditional practices in general have been given a broadened meaning in the ACRWC.¹⁴ So, my main research question is thus:

Does the international regime, namely the UN Conventions, protect the rights of the girl child in a sufficient way or is the African Union, with the African Charter on the Rights and Welfare of the Child and the Women's protocol, a much needed addition to the international regime in order to fully protect the girl child in Africa?

To narrow down a broad research question, it will be supported by two sub-questions:
First, how has female genital mutilation been dealt with by the UN Conventions, their general comments and concluding observations and in the AU Conventions?

Second, to what extent are the provisions pertaining to the girl child in the two sets of Conventions implemented in the African continent?

¹² National Machinery for the advancement of women in Africa (2006)

¹³ Women's Protocol art. 5

¹⁴ ACRWC art. 21

1.2.1 Case

As will be further explained in the limitations part of this introductory chapter, it is impossible to address all areas and rights that affect the girl child in a negative way. I have therefore chosen to limit this thesis to one area, namely Female Genital Mutilation (FGM). To limit my thesis even further I will focus primarily on Ethiopia, but other countries will be addressed as well. The reason for choosing Ethiopia is twofold. Firstly, I have some prior knowledge on the situation of girls in Ethiopia, and because I was there with Plan Norway in February 2008. In addition to Ethiopia, a couple other countries in the region will be addressed in the chapter on FGM.

1.3 Methodology

This thesis will mainly focus on a comparison of the laws that exist internationally and within the African Union to determine how the girl child is protected in the region. The main approach will be legal positivism, looking at the law as it is, not based on its merits or demerits.¹⁵ As a secondary theoretical source I will look at the feminist legal theory in order to go deeper into the respective conventions and their applicability to the protection of the girl child. The feminist school of thought has engaged itself in the discussion of the legal protection of the girl child, and thus it will be natural for me to use feminist legal theory in parts of my thesis. Quite a bit has been written about the CRC and whether it can be said to be a feminist landmark or not, equally so discussions have risen about whether CEDAW protects the girl child or not. These ideas can be transferred to the ACRWC and the Women's Protocol. There is also a debate among "northern feminists" and "southern feminists" with African feminists claiming that "northern feminism" reflects the world as viewed through the eyes of white middle class women, and that they neglect the impact of western imperialism on the status of women in Africa¹⁶. This debate is transferred down to more specific issues, like FGM, with African feminists objecting to the notion of African

¹⁵ Stanford Encyclopedia of Philosophy. <http://plato.stanford.edu/entries/legal-positivism/>. Accessed 15 January 2008

¹⁶ Banda (2005) p.7

women as an homogenous and oppressed group, and claiming the “northern feminist” notion of FGM as gender-based violence and a manifestation of patriarchy is a new form of cultural imperialism.¹⁷

A point of departure for feminist thinkers is that history as we know it was written from the white male point of view, and does not reflect the role of women in history or in society. The language and structure of the law is created by males and thus reinforces typical male values, and contributes tremendously in reinforcing patriarchal power within the law.¹⁸ To the legal positivist this is irrelevant to determine the status of the law. The law is as it is and stands on its own because it is the law.

The masculine language of many international and regional human rights mechanisms hinders the full enjoyment of all rights for the girl child. This is further emphasized in Philip Alston and others “Children, Rights and the Law” where four feminist approaches to the CRC are laid out.¹⁹ As will be addressed later, these four approaches address the CRC as a masculine document made for white, male children.

As to the sources, both ‘hard law’ such as the relevant treaties, but also ‘soft law’ such as relevant declarations, Committee Concluding Observations and General Comments will be considered. In addition, political and juridical will at the national level to implement the conventions, to prohibit harmful practices such as FGM, and actions taking to improve the situation of the girl child in Africa, will be touched upon.

1.4 Limitation of thesis

There are many important issues relating to the violation of the rights of the girl child and although it serves the girl child little justice to leave those rights out, the length and time afforded this thesis creates needed limitations. Issues like the general right to health and the right to education are areas where the girl child regularly is discriminated against.

¹⁷ Banda (2005) p.212

¹⁸ Cornell University Law School. http://topics.law.cornell.edu/wex/Feminist_jurisprudence. Accessed 2 November 2007

¹⁹ Olsen (1992) p.194

Combating discrimination in these fields is vital for the full development of the girl child and the full realization of her rights, but in this thesis I will focus primarily on FGM. FGM infringes on many rights of the girl child and are closely linked to the before mentioned rights such as health and education.

I will briefly touch upon all the UN conventions of relevance to the rights of the girl child, but again because of time and space limitations, my main focus will be on the CRC and CEDAW. Equally, within the African Union my main focus will be on the Women's protocol and the African Charter on the Rights and Welfare of the Child.

Lastly, it would be impossible to get a clear and comprehensive understanding of the situation for all girl children in all African Union countries. Therefore, I will focus primarily on a few countries, with Ethiopia being my main point of departure.

1.5 Structure of thesis

Chapter two of this thesis will address the practice of FGM in Africa, with both an overview of the practice and the legal aspects of FGM. Examples from African states will be used to narrow down the issue. Chapter three addresses the UN legal framework, primarily the CRC and CEDAW and its protection of the girl child, or lack thereof. In doing so relevant articles, General Comments, relevant Declarations and Concluding Observations from various countries will be addressed. Hereto the main focus will be on harmful traditional practices. The fourth chapter will take a similar point of departure, with the African Union, primarily the African Charter on the Rights and Welfare of the Child and the Women's Protocol being addressed. In this chapter, declarations and other mechanisms in the AU will be emphasized. The fifth chapter will be the analysis or comparison chapter of the thesis. Here legal positivism and legal feminist theory will be looked at, as well as domestic implementation and enforcement. The sixth chapter will be the concluding discussion.

2 Female Genital Mutilation and the law in Africa

2.1 The practice of Female Genital Mutilation

Female Genital Mutilation is defined by WHO as comprising *all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons*. The procedures are irreversible and their effects last a lifetime.²⁰ FGM is often referred to as a traditional practice rooted in culture or customs that is maintained from one generation to the next.²¹ UN Fact Sheet no.23 on harmful traditional practices points out that FGM is a traditional practice that has become synthesized over time from various values, and thus one can argue that FGM is a practice stemming initially from women and men strictly complying with the dictates of tradition within their community. In other words, tradition plays a powerful role in obstructing efforts to limit or eradicate FGM.²²

One often speak of four types FGM²³:

- **Type I**- Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).
- **Type II**- Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).
- **Type III**- Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation).
- All other forms of alteration or surgery done to the female genitalia without having a medical purpose

Proponents of FGM defend the practice for varied reasons depending on the culture and tribe, but largely, the following have been found to be the reasons:

²⁰ Legal and Human Rights Centre (2002) p.1

²¹Ewelukwa (2005) p.226

²² OHCHR <http://www.unhcr.ch/html/menu6/2/fs23.htm>. Accessed 4 April 2008

²³ World Health Organization <http://www.who.int/reproductive-health/fgm/terminology.htm>. Accessed 4 April 2008

“[I]t improves the appearance of the genital area as well as hygiene, and controls sexual deviance and promiscuity in women by reducing or eliminating their sexual desire. Some believe that it will increase male pleasures during intercourse, while some communities relate sterility or still births an infant morbidity to lack of performing FGM”.²⁴

Ethnicity, social eminence and impetus of tribal norms and practices seem to be the leading common denominators for the occurrence of FGM. Logically, it should follow that female children who have access to education will have more information on the link between FGM and human rights violations and thus reject the practice. However, in many areas where this practice persists, school girls favour the procedure. The deciding factor seems to be loyalty to the cultural norms and ethnic identity of their family rather than the external values they may learn in school.²⁵

The reasons behind the practice of female genital mutilation must be known if a human rights discourse is to be meaningful. Arguments that FGM violates girls’ rights to be free from discrimination and violence, their right to health etc might only be considered legitimate if the reasons behind the practice truly are rooted in discrimination.²⁶ The intent of the practitioner is seldom based on discrimination since it is mostly women who practice FGM on girls; the question should rather be if the community at large, with male elders having the power, are directly or indirectly behind the practice, thus making it rooted in discrimination.

2.1.1 The practice of FGM in a few African States

In order to understand the practice of FGM and how it affects girls in Africa, it will be useful to take a closer look at the practice from a country-specific point of view. To do so, this section will focus on the practice of FGM in Ethiopia, Sudan and Somalia.

²⁴ Nyirinkindi (2007) p.131

²⁵ Nyirinkindi (2007) p.131

²⁶ Packer (2002) p.24

The number of girls and women that have undergone FGM in Ethiopia varies from the high 90's to the mid 70's. According to UNICEF the number of women between the age of 15 and 49 that have undergone FGM is 74%.²⁷ More women in the rural areas than in urban areas have been mutilated. When women were asked if they would let their daughters undergo the practice, 38% say they would.²⁸ The age at which the practice takes place varies from region to region, with it happening as early as ten days after birth as an initiation into life in some regions, and in other regions it happens between the age of 15 and 17 or straight before marriage.²⁹

The reasons why the practice is still so widespread in Ethiopia are many and in line with arguments found in all communities that practice FGM. Communities believe that FGM is an important way to regulate a woman's sexual desire and the only way to ensure fidelity in marriage. Girls are told that they have to fulfil this rite of passage into adulthood or else they won't be accepted as a woman. Many communities believe that women who are not circumcised are prone to break things because of the superstition and taboos connected to FGM.³⁰

In Ethiopia public awareness on the dangers of FGM is inversely proportional to the attitude towards the eradication of the practice. Among the regions with the highest prevalence of FGM, resistance to the eradication of the practice is higher. For instance in the region of Afar, where the practice is widespread, the level of awareness is only 27%, while as in the capital of Addis Ababa the number is 61%. In general, there is a widespread support for FGM among Ethiopian women. Studies have shown that illiterate and rural women are twice as likely to support the practice, while as educated women are more likely to support eradication.³¹ This is an interesting finding in addressing the rights of the girl child in general. Girls are less likely to go to school compared to their male counterparts

²⁷ UNICEF http://www.unicef.org/ethiopia/ET_fgm.pdf. Accessed 15 March 2008

²⁸ UNICEF <http://www.unicef.org/sowc08/docs/sowc08.pdf> Accessed 18 May 2008

²⁹ Interview with Plan Ethiopia 26.02.2008

³⁰ UNICEF www.unicef.org/Ethiopia/ET_fgm.pdf. Accessed 20 March 2008

³¹ NTCPE (2005) p. 96

and thus more likely to be illiterate.³² In other words, the interconnectedness of the right to education and the right to be free from harmful traditional practices is quite tight. In order for the position of the girl child to be alleviated on the Africa continent all her rights need to be fulfilled.

Sudan is one of the countries where FGM is most widely practiced. According to UNICEF, an estimated 90% of married women between the age of 15 and 49 in Sudan have undergone FGM, and 58% of the women report having their daughters subjected to FGM³³. Contrary to popular belief, The State of The World's Children Report shows that the numbers of girls that have undergone FGM in rural areas are lower than those in urban areas. Unfortunately, there is no explanation offered these numbers. Cultural tradition is the most common reason behind FGM in Sudan, and is seen as an initiation into adulthood. FGM is seen as an important way to control women's sexuality and it guarantees the respect and value of the girl as a bride. Girls that have not undergone FGM are commonly forced to deal with stigmatization within their community.³⁴

As with Sudan, Somalia is also one of the countries in the world with the highest prevalence of FGM, with 98% of women between the age of 15 and 49 having been mutilated during their lifetime. In Somalia there is literally no difference in the percentage of women in rural and urban areas that have undergone FGM, but what is interesting is that contrary to the high number of women that have undergone FGM, only 46% say that they have had their daughters subjected to the practice. This can be seen as a positive trend, but on the other hand, the fact that mothers do not want their daughters to be circumcised does not necessarily mean that the numbers will go down. Pressure from the patriarchal community is often enough to win over one's own convictions. FGM is primarily performed on girls between the age of 4 and 11 and is a practice deeply imbedded in

³² According to UNICEF, 57% of the 72 million girls kept out of school in 2005 were girls. http://www.unicef.org/girlseducation/index_bigpicture.html. Accessed 6 May 2008

³³ UNICEF <http://www.unicef.org/sowc08/docs/sowc08.pdf> Accessed 18 May 2008

³⁴ UNICEF. http://www.childinfo.org/files/Sudan_FGC_profile_English.pdf Accessed 24 February 2008

Somali culture. It is believed that the practice is necessary to cleanse a girl. In some communities girls that have not undergone FGM cannot be married.³⁵

2.2 The legal aspect of Female Genital Mutilation

In the international community FGM is seen as a violation of the human rights of the girl child. Reaching this conclusion did not come easy, and one initial hesitation was that the practice of FGM is so deeply interlinked with cultural values. The international community struggled with the conflict between the protection of human rights and the right to one's own culture. This will be touched upon later in the thesis, but the conflict lies in that protection of one's culture found in human rights instruments may trump upon other human rights. The conflict has now been resolved in the favour of the supremacy of human rights.³⁶ In 1994 The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur to look into the issue of harmful traditional practices that affect the health of women and children, and in her 1997 report she stated that:

“...we can no longer swathe these traditional practices and female genital mutilations in a chaste cloak of social values and standards. It is no longer a case simply of health but of human rights and the violation of those rights”.³⁷

FGM was addressed as a practice harmful to the health of girls and women as early as in the 1950's. However, it took more than 40 years for the practice to be recognized as a violation of universally and regionally protected human rights, such as the right to health, life, dignity and personal integrity.³⁸

An important issue when protecting the rights of girls against harmful traditional practices such as FGM is the role of customary law within African societies. 'Law' in Africa is a concept of a wider meaning than most other regions of the world. In addition to the

³⁵ UNICEF. www.unicef.org/somalia/SOM_FGM_Advocacy_Paper-pdf Accessed on 24 February 2008

³⁶ Legal and Human Rights Centre (2002) p.2

³⁷ Warzazi (1997)

³⁸ Packer (2005) p.230

imposed general law, there exist laws based on various customs and practices of the many groups that live within the African continent.³⁹ Some regimes see customary law and ‘culture’ as being subject to the non-discrimination provisions contained within their respective bill of rights. In Ethiopia for instance, customary law that contradicts federal law is illegal in accordance with article 9 of the Constitution, equally so in article 27 of Ghana’s Constitution. In other states in Africa, customary law is granted immunity from their non-discrimination clauses, such as in Sierra Leone and Botswana.⁴⁰ According to Fareda Banda (2005), it seems that newer Constitutions are more progressive in that they embody human rights principles of equality and non-discrimination.⁴¹ With this said, although Ethiopia makes customary law secondary to the Constitution of the country, it is still one of the countries in Africa with the highest prevalence of FGM. Examples from Ethiopia show that although the law outlaws FGM, few cases are being brought to the courts. It is difficult to say why this is, but one factor is that the courts are very reluctant to address issues such as FGM, early marriage and other harmful traditional practices. The male judges seem reluctant to change and prefer the old civil code in the country over the new revised penal code.⁴²

In dealing with customary law, one can identify three constitutional models on the African continent; the first being a strong cultural relativism, which allows customary law to flourish without consideration of non-discrimination or equality before the law. The second model is a weak cultural relativism, which recognizes that customary law plays a role in the country, but also provides for equality before the law without ranking the two regimes up against each other. The last model is the universalist approach, which recognizes customary law and a right to culture, but makes both subject to the test of non-discrimination and equality before the law.⁴³

³⁹ Banda (2005) p.13

⁴⁰ Banda (2005) p. 34

⁴¹ Banda (2005) p.34

⁴² CEDAW 30th session. CEDAW/C/SR.645

⁴³ Banda (2005) p. 218

Gender is another element central to the practice of FGM. An examination of the practice from a human rights standpoint shows that the practice should be considered as belonging to four groups: health, violence, equality/discrimination and/or children's rights. Of the four, health has been seen as the most culturally sensitive and inoffensive group. However, the difficulty with using a health approach is that it neglects the fact that the practice also constitutes gender-based violence. Further, focusing only on the negative health consequences of FGM leaves open the door for safer types of practices, such as medicalization.⁴⁴

As will be elaborated on later, CEDAW does not offer a protection against violence, but the Committee and other special procedures have repaired this flaw. The appointment of the Special Rapporteur on violence against women⁴⁵ raised the profile of FGM to be considered an act of violence.⁴⁶ In 1993 the Declaration on the Elimination of Violence Against Women was adopted, and it was the first international instrument to directly incorporate the term FGM. A year later during the International Conference on Population and Development in Cairo, the expression FGM was used to illustrate harmful traditional practices against women. The term FGM was also used in the Beijing Declaration and Platform for Action at the Fourth World Conference on Women in 1995.⁴⁷ From the early 1990's the international community highlighted in a number of statements at various conferences the human rights implications of FGM. The Beijing Conference in 1995 highlighted acts of gender-based violence against women and girls, and FGM was mentioned as one of them. Regardless of the reasons given for the practice, a human rights standpoint views the practice as violence.⁴⁸

FGM is a practice mostly performed on children and in that sense it is an intrinsic part of the legal regime protecting the child. FGM has often been seen as an issue belonging to the

⁴⁴ Banda (2005) p.218

⁴⁵ UN Human Rights Commission resolution 1994/45, adopted on 4 March 1994

⁴⁶ Banda (2005) p.220

⁴⁷ Nyirinkindi (2007) p.129

⁴⁸ Nyirinkindi (2007) p.133

women's rights agenda, and it is in the sense that the women's rights agenda also protects female children, but one cannot forget the child aspect of the practice.

Under international law, the state is responsible for the acts of their organs and agents, even if these were not specifically instructed. The state may also be responsible for acts of private individuals who violate the rights and freedoms of others.⁴⁹ The positive and negative obligations of states to respect, protect and fulfil the human rights of individuals are important features of the responsibility of states under international law. The obligation to respect requires states to abstain or refrain from doing anything that violates the integrity of the individual or infringes on the girl's freedom. In cases of FGM, the state is very seldom, if ever, directly involved with the practice, so in this context, the state respects the rights of girls to not be subjected to the practice of FGM. In carrying out the obligation to protect the girl's right to be free from FGM, the state must act to prevent the violation at the hands of an individual, in other words by stopping the practitioner from mutilating girls. The responsibility for the violation of her human rights to health, life etc lies in this context with the state. In most cases, protection cannot be achieved without at the same time creating the conditions for fulfilment.

The problematic issue of whether a women's consent to a harmful traditional practice has been falsely or coercively obtained becomes less troublesome if the factors acting as restraints on consent are reduced or removed. For instance, a girl child in Africa cannot be fully protected from forcibly having to undergo FGM if her status in society is not improved. It is important to emphasize that although a girl might give consent to the practice, this does not remove the human rights violation. The point is that not until girls and women are fully empowered and fearless will their voices be heard. Consent does not change the human rights aspect of FGM and it does not eliminate state obligation to respect, protect or fulfil this right. The full protection, or fulfilment of the rights of the girl

⁴⁹ Packer (2002) p.50

child, can thus only be guaranteed if the improved and equal status of females and males is achieved.⁵⁰

2.2.1 FGM and the law in a few African States

To show examples of the correlations between the law and the practice of FGM in Africa, this section will contain summaries of the law and FGM in Ethiopia, Sudan and Somalia.

The Ethiopian legal system is a federal arrangement with a Federal Constitution and a number of state constitutions. Ethiopia is also a monistic system where international law, including human rights law, has supremacy. All laws, both customary and general laws, are subject to the Federal Constitution. The Federal Constitution fully recognizes human rights, and all human rights instruments ratified by Ethiopia are part of the Federal Constitution. Ethiopia has ratified the CRC, CEDAW and ACRWC, thus making these treaties part of the Federal Constitution. Article 9 (4) of the Ethiopian Constitution provides that all international agreements entered into are an integral part of the law of the land. However, reference in courts to international human rights standards is very minimal at best, nil at worst.⁵¹ Any customary law or regional law that contradicts the provisions of the Federal Constitution is considered invalid. The Revised Penal Law, adopted by the National Parliament in July 2004 and replaced the Penal Code of 1957, has increased the penalty for rape, criminalized FGM and raised the minimum age for marriage to 18.⁵²

Sudan was the first country to outlaw FGM in Africa. It was condemned by the Sudanese Medical Service as early as in the 1930's and legislation to prohibit FGM was enacted in the 1946 Penal Code.⁵³ Despite this achievement, the law was never enforced and there was never any conviction for the crime of conducting FGM. One of the problems concerning the punishment of FGM surrounded the permissible type of FGM, "Sunna". There was no

⁵⁰ Packer (2002) p.51

⁵¹ Zuberi (2005) p.17

⁵² Zuberi (2005) p.62

⁵³ Plan International (2007) p.22

agreement on what “Sunna” actually meant and what constituted “Sunna” or not. In 1991 the government affirmed its commitment to the eradication of the traditional form of FGM, but the revised 1993 Penal Code does no longer mention FGM as did the former code of 1946. This leaves the status of FGM unclear and currently, Sudan has no law that prohibits FGM.⁵⁴ Sudan has ratified the CRC and the African Charter on the Rights and Welfare of the Child, but has not ratified CEDAW or The Women’s Protocol.

There is currently no domestic law against FGM in Somalia, and Somalia has not ratified the ACRWC, the CRC, CEDAW or the Women’s Protocol.⁵⁵ There is in other words, little protection offered the girl child in Somalia and that could be one explanation for the high prevalence of FGM in the country.

Although it is too presumptuous to correlate the prevalence of FGM with the ratification of human rights instruments, it is, however, interesting that a country like Ethiopia that has ratified all the relevant human rights instruments for the girl child and has a legal prohibition against FGM, has a lower percentage of FGM than Somalia and Sudan, where the legal protection of the girl child is quite weak.

⁵⁴ Plan International (2007) p.22

⁵⁵ U.S Department of State’s report on FGM/C in Somalia
<http://www.state.gov/g/wi/rls/rep/crfgm/10109.htm> Accessed 5 May 2008

3 The United Nations instruments and mechanisms

3.1 The Convention on the Rights of the Child

The CRC is the most widely ratified UN human rights treaty. The CRC defines the child, for the purpose of the Convention as “every human being below the age of 18, unless the law applicable to the child, majority is attained earlier”, cf. art.1. If national legislation sets minimum age below 18 years, states must take the entire convention into account and particularly its general principles.⁵⁶ As general principles, discrimination on the grounds of sex or any other ground is not permitted, cf, art.2, the best interest of the child must be the primary consideration, cf. art.3, the child has a right to be heard, and the views of the child given due weight in accordance with the age and maturity of the child, cf. art. 12 and the child’s right to life, survival and development to the maximum extent possible must be ensured, cf. art. 6.

The general principles of the CRC have to be taken into consideration when interpreting the entire convention and are considered to be the core values of the CRC. In addressing the protection of the girl child, the general principles are vital as they touch on a number of issues pertaining to the girl child. Non-discrimination is self-explanatory since without this clause nothing stands in the way of discriminating girls based on their sex. The best interest of the child is much trickier as it is often difficult to decide what is in the best interest of the child. With the issue of FGM, parents might view it as being in the best interest of the child to undergo such a practice since it grants the girl a higher social status and acceptance compared to if done without. But on the contrary it is arguably against the best interest of the child to subject her to physical pain and danger during the mutilation, life long side-effects and psychological trauma. Article 12 is a general principle stating that the child has a right to be heard. All depending on the age and maturity of the child at mutilation, the child’s right to be heard and her view should be taken into consideration. For instance, if a girl is to undergo FGM and she is capable of forming her own views, it is important that the girl is given the opportunity to express her opinion on what is about to happen to her. The

⁵⁶ UNICEF (2007) p.5

last of the four general principles, article 6 the right to life, survival and development is of vital importance to the girl child. For instance, at its most severe form, FGM can lead to death and it infringes on a number of issues relating to survival and development. A girl that suffers severe physical side effects of FGM, such as haemorrhaging, infections, urinary tract infections etc⁵⁷, is prevented from enjoying importance rights such as the right to education because she is physically unable to go to school, which again infringes on her right to development. In other words, the consequences of FGM trump on more than just the physical integrity and well being of the girl, it can prevent her development, her survival and her right to life.

According to the CRC article 24(3) “States Parties shall take all effective and appropriate measures with a view to abolish traditional practices prejudicial to the health of children”. This provision is part of the health article of the CRC and thus traditional practices are only seen in the light of their consequences on the health of the child. Certain harmful traditional practices, such as FGM, should be seen as acts of violence and thus be included in the violence article of the CRC.

Article 19 of the CRC concerns the child’s right to protection from all forms of violence. This provision offers a very broad definition of violence, including “all forms of physical or mental violence, injury or abuse, neglect and negligent treatment, maltreatment or exploitation, including sexual abuse...” Harmful traditional practices could fall within this provision if it involves any of the above forms of violence. The problem is in defining what violence really is. What constitutes violence to one person might not be viewed as violence to another. A mother wanting her daughter to undergo FGM might not view the practice as violence, but rather as a necessity in giving her daughter the best starting point in life. While as to others, the practice of mutilating a girl is most definitely an act of violence. As mentioned earlier, in the CRC harmful traditional practices are viewed in light of their repercussions for the health of the girl, under article 24. However, during the 2001 General

⁵⁷ Toubia (1995) p.228

Day of Discussion on ‘Violence against Children within the family and in school’ the Committee stated that:

“... Other forms of violence and abuse could be addressed without the need to provide alternatives. Several participants pointed to the need to adopt broad and comprehensive approaches to violence against children within the family, including issues such as FGM, marital rape in connection with early marriages...”⁵⁸

3.1.1 Flaws of the Convention in protecting the rights of the girl child

The CRC allows reservations to be made against provisions within the Convention in line with the Vienna Convention on the Law of Treaties⁵⁹, and so has been done by a number of states. Reservations have been made on the Convention as a whole, for instance like Djibouti which states that any provision that contradicts the traditions of the country are not binding on the state, and similarly Iran does not see itself bound by any provision that contradicts Islamic Shari’a Law. When one knows that over 90% of the women in Djibouti undergo FGM⁶⁰ and FGM is most often done under the umbrella of tradition and culture, little protection is offered to the girl. As shown by the example from Djibouti, although the CRC is the most widely ratified Human Rights treaty, it is plagued by being one of the treaties with the highest reservations made against it.⁶¹ The reservation made by Djibouti says nothing explicitly about FGM, but the nature of the reservation implies that the government does not see itself bound by any provision in the CRC that protects the child against abuses veiled by culture or tradition.

⁵⁸ CRC/C/38, 8th session 21 January 1995

⁵⁹ Article 19 of the Vienna Convention on The Law of Treaties: 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 reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

⁶⁰ UN Office for the Coordination of Humanitarian Affairs

<http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62465> Accessed 20 March 2008

⁶¹ Backstrom (1996) p.573

As has been touched upon previously, and will be discussed later, one of the biggest flaws of the Convention itself is that harmful traditional practices has only been included in a sub-paragraph of the health article, cf. art. 24(3), and not the violence article, cf. art. 19. Article 24 (3) does not cover FGM well enough.

3.2 The Committee on the Rights of the Child

The Committee on the Rights of the Child is the body of independent experts that monitors the implementation of the CRC by the parties to the Convention, cf. art. 43. All state parties are obliged to submit reports to the Committee on how the rights within the Convention are being implemented, cf. art. 44. The Committee evaluates each report and addresses potential concerns and recommendations in the form of Concluding Observations. The Committee also publishes its interpretations of thematic provisions in the Convention in so called General Comments and also organizes Days of General Discussion on particular issues.⁶²

In its Concluding Observation to the report submitted by Ethiopia in 2006, the Committee expressed its concern that vulnerable groups of girls are victims of harmful traditional practices, deprived of education, victims of sexual and physical violence and commercial exploitation. The Committee recommends that the state party takes action to combat discrimination of vulnerable girls and makes this a national priority. Secondly, the Committee encourages the state to design programs to allow girls to access their right to education and increase the awareness of the value of the girl child amongst all stakeholders. Furthermore, the Committee recommends the retraining of practitioners of FGM in order for them to find alternative means of income. On a positive note, the Committee applauds the state party for criminalizing harmful traditional practices such as FGM.⁶³

In General Comment 3 from 2003 on HIV/AIDS, the Committee pointed out that discrimination in the context of HIV/AIDS often impacts girls more severely than boys⁶⁴,

⁶² OHCHR <http://www2.ohchr.org/english/bodies/crc/index.htm> Accessed 18 January 2008

⁶³ CRC 43rd session. CRC/C/ETH/CO/3 1 November 2006

⁶⁴ CRC/GC/2003/3 17 March 2003

and in General Comment 7 from 2006 on Implementing child rights in early childhood, the Committee stated that especially girls are vulnerable to early sexual abuse and exploitation within and outside the family.⁶⁵ Further, in General Comment 4 from 2003 on adolescent health, the Committee states in section V on the nature of states' obligation that all states have to fulfil the obligation to protect adolescents from all harmful traditional practices, such as early marriage, honour killings and FGM.⁶⁶

On 23 January 1995 the CRC Day of General Discussion dealt specifically with the girl child.⁶⁷ The decision to hold a Day of General Discussion on the girl child was intended to allow the Committee to contribute to The Fourth World Conference on Women to be held in Beijing in September the same year. During the discussion it was stressed that since the CRC is the most widely ratified human rights convention, it is also the most widely accepted framework for action for the protection of the girl child. The Committee has an important role to play in monitoring the implementation of the rights within the CRC including the right of non-discrimination based on gender, and the Committee should thus be seen as one of the fundamental institutions designed to implement the Platform for Action adopted at the Beijing Conference. During the Day of General Discussion, mention was made of the state party reports submitted to the Committee and the picture they gave of the situation of girls around the world. Many states have identified traditional practices still persistent within the state that infringe on the fundamental rights of girls and women.⁶⁸

Recommendations were adopted at the Day of Discussion, one being that the Convention on the Rights of the Child, along with the Convention on the Elimination of Discrimination Against Women should constitute an essential framework for a forward looking strategy to promote and protect the fundamental rights of girls and women and eradicate discrimination.⁶⁹

⁶⁵ CRC/GC/7/Rev.1 20 September 2006

⁶⁶ CRC/GC/2003/4 1 July 2003

⁶⁷ CRC/C/38, 8th session, 21 January 1995

⁶⁸ supra note 67

⁶⁹ OHCHR <http://www.unhchr.ch/html/menu2/6/crc/doc/days/girl.pdf> Accessed 9 January 2008

The CRC Committee has in a number of ways addressed issues of importance in the promotion and protection of the girl child. In doing so, the Committee recognizes that the girl child is in a vulnerable and skewed position compared to male children and that measures should be taken to improve her situation.

3.3 The Convention on the Elimination of Discrimination against Women

CEDAW is the second most widely ratified convention, after the CRC. The Convention does not offer a clear definition of what it means by women, but it has been accepted that the Convention protects all females, including girls. This is, however, not explicitly mentioned in the text, which leaves room for misinterpretation. CEDAW defines discrimination against women in article 1 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 freedom in the political, economic, social, cultural, civil or any other field”

Article 5 of the Convention urges States Parties to take measures to eliminate “prejudice and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women”. In this way the Convention acknowledges the role of customs and traditions in infringing on the rights of women and girls, and FGM is a practice based on customs and traditions that violate the rights of women and girls.

Few of the articles in CEDAW apply to the girl child explicitly, but article 10 relating to non-discrimination in the field of education, article 12 on non-discrimination and access to health care and article 16 (2) on illegality of child marriage are all provisions that relate to protecting the rights of the girl child.

CEDAW urges the modification of all social and cultural conduct that discriminates against women on the basis of their sex. By emphasizing the need to change existing laws and judicial systems, as well as the need to revise the education offered in order to change the stereotypical roles of the sexes seen in many communities, CEDAW seems to better understand the measures that need to be taken in order to fully combat cultural practices that infringe on the rights of women and girls than any other UN convention.⁷⁰

3.3.1 Flaws of the Convention in protecting the girl child

CEDAW is one of the most widely ratified human rights treaties in the world, but it is also the Convention with the most reservations made against it. The Vienna Convention on the Law of Treaties allows for reservations, but is also strict in that no reservations can be made that go against the core of the Convention.⁷¹ States vary in what provisions they reserve against, but the majority of reservations are made against articles 2 and 16. Article 2 relates to discrimination on the grounds of customs and traditions and article 16 relates to the elimination of discrimination against women in matters of marriage and family relations. When one looks at discrimination against the girl child, it is most often within the family and community such practice takes place. Harmful traditional practices such as FGM and forced and early marriage are most often matters within the family. When states refuse to offer protection against such practices by making reservations against articles 2 and 16, the girl child is left fending for herself. The Committee views articles 2 and 16 as core provisions in the Convention and reservations are as such contrary to the provisions of the Convention and against international law, but this hasn't stopped states from making reservations against these provisions. Other States parties may then challenge such reservations.⁷²

3.4 The Committee on the Elimination of Discrimination Against Women

The Committee on the Elimination of Discrimination Against Women is a body of independent experts that monitors the implementation of the Convention by its member

⁷⁰ Backstrom (1996) p.579

⁷¹ supra note 59

⁷² UN Division for the Advancement of Women

<http://www.un.org/womenwatch/daw/cedaw/reservations.htm> Accessed 10 January 2008

states, cf. art. 17. In accordance with the Optional Protocol to the Convention, the Committee is obliged to receive individual complaints as well as initiate inquiries into situations of grave and systematic violations of women's rights, cf. art. 2 of the optional protocol. In addition the Committee receives reports from state parties, concluding observations and formulate general recommendations and suggestions.⁷³

In its concluding observation to Ethiopia the Committee continuously brought up the issues of early marriage and FGM and expressed concern that harmful traditional practices is still a tremendous problem in the country.⁷⁴ The Committee is concerned about the continued persistence of entrenched traditional discriminatory practices, including that 80% of girls and women undergo FGM and although the minimum age of marriage has been raised to 18 in the law, the persistence of early marriage is still high.⁷⁵

Article 21 of CEDAW empowers the Committee to make suggestions and general recommendations based on examination of reports and state comments. In the Committee's General Recommendation on female genital circumcision (General Recommendation 14)⁷⁶ states are encouraged to take effective measures to eradicate female circumcision. Equally, in the General Recommendation on women and health (General Recommendation 24)⁷⁷ the Committee addresses the issue of FGM. This Recommendation emphasizes that certain cultural and traditional practices such as FGM carry a high risk of death and disability and recommends that states should ensure the enactment and effective enforcement of laws prohibiting the practice.⁷⁸

CEDAW does not explicitly mention violence against women and this often cited as a flaw of the Convention when addressing the needs of girls. However, the issue is addressed by the Committee in its General Recommendation on violence against women (General

⁷³ OHCHR <http://www2.ohchr.org/english/bodies/cedaw/index.htm> Accessed 12 January 2008

⁷⁴ CEDAW/C/2004/I/CRP.3/Add.7/Rev.1 30 January 2004

⁷⁵ Supra note 74

⁷⁶ OHCHR <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom14> Accessed on 20 May 2008

⁷⁷ OHCHR <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24> Accessed on 20 May 2008

⁷⁸ UNFPA <http://www.unfpa.org/gender/practices2.htm#22> Accessed 29 January 2008

Recommendation 19). The Recommendation states that gender-based violence may breach provisions of the Convention, regardless of whether violence is explicitly mentioned or not. Further the recommendation states that traditional attitudes where women are viewed as subordinate to men perpetuate widespread practices involving acts of violence such as FGM and early and forced marriage.⁷⁹

3.5 Other instrument

3.5.1 The Bill of Human Rights

The rest of the human rights family should not be left out in an analysis of the overall protection offered the girl child within the framework of the UN. The Universal Declaration of Human Rights from 1948 (UDHR)⁸⁰ was the first universal agreed human rights instrument. Although it is a declaration, and as such not legally binding, it is by many considered to encompass provisions that are a part of international customary law making some of the principles enshrined in the Declaration binding on all states.⁸¹ The preamble of the UDHR recognizes that inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 1 says that “all human beings are born free and equal in dignity and rights”, which means that men and women and boys and girls have equal rights and are equal in dignity. Article 2 is the non-discrimination clause of the declaration, stating that everyone is entitled to the rights in the declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The two International Covenants on Civil and Political Rights (ICCPR)⁸² and Economic, Social and Cultural Rights (ICESCR)⁸³ both contain important provisions protecting the

⁷⁹ CEDAW 11th session. General Recommendation 19

⁸⁰ General Assembly resolution 217 A (III) of 10 December 1948

⁸¹ Malanczuk (1997) p.213

⁸² General Assembly resolution 2200 A (XXI) of 16 December 1966

⁸³ supra note 82

girl child. The two Covenants along with the UDHR are considered to be the bill of human rights.

Article 2 is the non-discrimination provision of the ICCPR, explicitly granting all individuals, irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. Equally, article 3 emphasizes the equality of men and women in the enjoyment of the rights within the Covenant. The Human Rights Committee has emphasized the importance of this article in its General Comment 28 of 2000. GC 28 lays out the steps that need to be taken by the state in order for all individuals to fully enjoy the rights within the Covenant, and includes both positive and negative obligations. Further, the Committee points to the roles tradition, history and culture have played in deepening the inequalities faced by women throughout the world. Additionally, GC 28 states that in fulfilling the rights in article 24, on protection of children, such protection has to be carried out equally for boys and girls. States should take steps to make sure that girls and boys are treated equally when it comes to education, in feeding and health care, and eradicate all cultural or religious practices that jeopardize the freedom and well being of the girl child.⁸⁴

Articles 2(2) and 3 of the ICESCR are identical to articles 2 and 3 of the ICCPR, granting the economic, social and cultural rights enshrined in the Covenant equally to men and women. Article 13 of ICESCR grants everyone the right to education, boys and girls alike. The reason for the emphasis on the right to education should not be exaggerated, as it is only an example of an area found in the Bill of Rights that pertains specifically to children, and thus an area where one can again see the neglect of the girl child. The Committee on Economic, Social and Cultural Rights in its General Comment 13 emphasized an important point when it comes to the realization of the rights within the Covenant. Although they are subject to progressive realization and available resources, this does not apply to the non-discrimination provision found in article 2(2). This means that although the general right to education may be subject to such constraints as available resources and allows progressive

⁸⁴ CCPR/C/21/Rev.1/Add.10, General Comment No. 28

realization; no state can say that the exclusion of girls in education falls within these constraints.⁸⁵

3.5.2 Declarations, resolutions and other relevant documents of the UN

In addition to the before-mentioned bill of human rights and the work of its Committees, there are a number of declarations, resolutions and documents that are of relevance to the protection of the girl child within the UN system. The first document is the 1993 Declaration on the Elimination of Violence Against Women (DEVAW).⁸⁶ DEVAW expresses concern that some groups of women; such as female children, are especially vulnerable to violence. Article 1 of the Declaration defines violence against women as “any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. Further, Article 2 (a) of the Declaration defines violence against women as including FGM and other harmful traditional practices. Although the Declaration is a non-binding document, only expressing the political will of the General Assembly, the two mentioned definitions are of tremendous importance. The fact that FGM and other harmful traditional practices are included as acts of violence gives the human rights argument against the practice strength in that FGM is not just a health issue, it is an issue of physical or psychological harm and deprivation of liberty that deserves repercussions like all acts of violence.

Resolution 56/128 on Traditional or Customary Practices Affecting the Health of Women and Girls was adopted by the General Assembly on 30 January 2002.⁸⁷ The resolution reaffirms that harmful traditional or customary practices, including female genital mutilation, constitutes a serious threat to the health of women and girls, and can have fatal consequences. Further, the resolution reaffirms that such practices constitute a definite form of violence against women and girls and is a violation of their human rights. FGM

⁸⁵ E/C.12/1999/10 5 December 1999

⁸⁶ General Assembly resolution 48/104 of 20 December 1993

⁸⁷ General Assembly Resolution 56/128 30 January 2002

infringes on so many rights pertaining specifically to girls, and it is vital that all UN members take these political steps to eradicate the practice.

In her report to the Human Rights Commission in January 2002, the Special Rapporteur on Violence Against Women, its causes and consequences, Ms. Radika Coomaraswamy addressed the issue of cultural practices in the family that are violent towards women including FGM. In her report the Special Rapporteur describes the origin of the practice and background, while also emphasizing that FGM is indeed a practice that is violent against women and requires both international and national action for its eradication.⁸⁸

Lastly, under this section the work of the Commission on the Status of Women (CSW)⁸⁹ will be addressed. CSW is a functional commission under the Economic and Social Council (ECOSOC), dedicated to gender equality and advancement of women. The 51st session of CSW took place last year and in accordance with its multi-year programme of work for 2007-2009 it considered “the elimination of all forms of discrimination and violence against the girl child” as its priority theme.⁹⁰ In the report of the 51st session, the Commission recognizes that empowerment of girls is key to breaking the cycle of discrimination and violence and promoting and protecting the full and effective enjoyment of all human rights. In doing so, the Commission addressed various important issues such as poverty, education, gender stereotypes, health, HIV/AIDS, child labour, armed conflict, trafficking, migration, participation etc. The Commission calls upon the treaty bodies, particularly the CRC and CEDAW to ensure that the girl child is addressed in state reporting to the Committees. Further, the Commission calls upon all parties to strengthen its commitments already made to the Beijing Platform for Action, implement the Beijing Declaration⁹¹, the Cairo Plan of Action and Beijing +5⁹² outcome documents.⁹³

⁸⁸ E/CN.4/2002/83 31 January 2002

⁸⁹ ECOSOC resolution 11(II) of 21 June 1946

⁹⁰ UN Division for the Advancement of Women <http://www.un.org/womenwatch/daw/csw/51sess.htm>
Accessed 31 January 2008

⁹¹ Part of the Fourth UN World Conference on Women in Beijing in 1995.

⁹² General Assembly Special Session, five years after the Beijing Conference on further actions and initiatives to implement the Beijing Declaration and Platform for Action.

⁹³ Supra note 86

4 The African Union instruments and mechanisms

4.1 The African Charter on the Rights and Welfare of the Child

The ACRWC was adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity (OAU) on 11 July 1990 in Addis Ababa, Ethiopia.⁹⁴ It entered into force on 29 November 1999, after having received the needed 15 member states' ratification.⁹⁵

Like the CRC, the ACRWC defines a child as any human being under the age of 18, cf. art. 2. Equally, the Charter is predicated on four cardinal guiding principles.⁹⁶ The first principle being non-discrimination- "every child shall be entitled to rights and freedoms recognized in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national or social origin, fortune, birth or other status", cf. art. 3.

The second principle is the best interest of the child- "in all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration", cf. art. 4.

The third principle is the right to life, survival and development- "Every child has an inherent right to life. This right shall be protected by law. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child", cf. art. 5.

Last of the principles is that the views of the child shall be heard- "In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings. Those views

⁹⁴ Lloyd (2002) p.11

⁹⁵ As of April 2008, 41 out of the 53 AU member states have ratified the ACRWC

⁹⁶ Olowu (2002) p.129

shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law”, cf. art. 4(2).

As seen from the guiding principles, the ACRWC is quite similar to the CRC in provisions, with a couple of exceptions. The similarities in definition of a child, non-discrimination and best interest of the child are important particularly for the girl child, since it is discrimination based on sex that prevents the girl from enjoying as many rights as boys. Equally, when dealing with harmful traditional practices such as FGM, the best interest of the girl has to be considered and this is clearly stated in both the CRC and the ACRWC. As for the exceptions, article 21 of the ACRWC is a strong article fully devoted to the issue of harmful traditional practices and its impact on the well being of the child, girls in particular. Article 21 of the ACRWC states that:

“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 practices prejudicial to the health and life of the child, and (b) those customs and practices discriminatory to the child on the grounds of sex or other status”.

Article 1 (3) of ACRWC states that: “Any custom, tradition, cultural 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”. The inclusion of article 21 is important because it takes the protection of children and the obligations of the state one step further than the initial protection found in article 1 (3). It is equally important when taking into consideration the emphasis on cultural heritage and values of African civilization found in the preamble of the Charter. The Charter is thus saying that culture is important, but cannot justify practices in the name of culture or in the name of African civilization.⁹⁷

⁹⁷ Gose (2002) pp.50-52

4.2 The African Committee of Experts on the Rights and Welfare of the Child

Like the CRC, the ACRWC is a document for the explicit protection of children and their rights. And like the CRC, the monitoring and enforcement of the ACRWC lies in the hands of a Committee; the African Committee of Experts on the Rights and Welfare of the Child. The Committee consists of 11 members who serve in their individual capacity, with competence in matters of relevance to the rights and welfare of the child. The mandate of the Committee is as follows: promoting and protecting as well as monitoring the implementation of the rights enshrined in the ACRWC, interpret the provisions of the Charter and, lastly, the performance of any other task entrusted to it by the OAU Assembly, the Secretary-General of the OAU or the UN, cf. art. 42. Member states to the ACRWC are required to submit their first report on the measures they have adopted to implement the ACRWC to the Committee through the Secretary-General of the OAU by 2 years of the entry into force of the Charter, thereafter states have to submit a report every three years, cf. art. 43.⁹⁸

The African Committee has in light of article 44 of the ACRWC the jurisdiction to receive and hear communications from states parties, NGOs and from children and adults within the jurisdiction of the OAU member states regarding any matter found in the ACRWC, including violations of social, economic and cultural rights.⁹⁹ The fact that the Committee can receive individual and inter-state communications and conduct investigations gives it a wider power compared to its UN counterpart.¹⁰⁰

However, the Committee has weaknesses. The first deals with the confidentiality of the communications before the Committee. Article 44(2) states that every communication shall be treated in confidence and this is a weakness because often confidentiality has been used by African states to control human rights monitoring mechanisms. Publicity and the shame that often follows have a deterrent effect that shouldn't be undermined. The second

⁹⁸ Lloyd (2002) 12

⁹⁹ Lloyd (2002) p.23

¹⁰⁰ Chirwa (2002) p.169

weakness is that the ACRWC says nothing about the admissibility of communications, or in other words, it does not require the exhaustion of domestic remedies that one finds in most international instruments allowing individual communications. This doesn't necessarily need to be a weakness when one takes into consideration the weak legal systems in many African states, but none the less, the lack of exhaustion of domestic remedies removes a 'filter' that may prevent irrelevant and unnecessary cases from being brought before the Committee and thus cause a tremendous backlog and high expenditures.

The third weakness is that the effectiveness of the Committee is likely to be affected by the financial difficulties in having a separate monitoring body from the African Commission that monitors the African Charter on Human and Peoples' Rights.¹⁰¹

The confidentiality of the reporting mechanism in the Committee makes it difficult to see what impact the Committee has on encouraging change in domestic laws preventing the full realization of the rights of the girl child. In addition it makes it impossible for me to assess the full ramifications of the Charter, other than in the legally positivistic analysis further below.

4.3 The Women's Protocol to the African Charter on Human and Peoples' Rights

Despite the existence of the African Charter on Human and Peoples Rights and the extensive ratification of CEDAW by African states, it has been made clear that issues pertaining to women and girls have not been seriously considered at the institutional level. The African Commission, which is responsible for monitoring the African Charter on Human and Peoples' Rights had not addressed state obligation in gender-based discrimination, and no gender-related communications had ever been brought before the Commission. In regards to this, the introductory note on the Draft Protocol to the African Charter on the Rights of Women stated that: "to date, no African instrument relating to

¹⁰¹ Chirwa (2002) p.170

human rights proclaimed or stated in a precise way what are the fundamental rights of women in Africa”.¹⁰²

The Draft Protocol on the Rights of Women added provisions that could not be found in CEDAW and it acknowledged that much of the controversy around the human rights of women in Africa was the issue of African culture and the way it was interpreted. African cultural values was addressed in article 2 of the Draft Protocol which stated that “women shall enjoy on the basis of equality with men, the same rights and respect for their dignity and contribute to the preservation of those African cultural values that are positive and are based on the principles of equality, dignity, justice and democracy”.¹⁰³ The importance of this was that the Protocol recognized the importance of African culture, but emphasized that discrimination against women was not a part of African culture and could not be justified based on it. The African Commission adopted the Draft Protocol to the African Charter in November 1999 at its 26th ordinary session in Kigali, Rwanda. The version adopted by the Commission contained a few amendments to the original; one amendment was the introductory of the rights of the girl child. As a result the original text not only addressed the rights of women, but also included the rights of girls.¹⁰⁴ The Inter African Committee on Traditional Practices and the women’s unit of the former OAU drafted a convention on the elimination of harmful practices affecting the fundamental human rights of women and girls in 2000. The content of the draft convention was incorporated into the draft protocol on women’s rights at a later stage.¹⁰⁵

The Protocol to the African Charter on the Rights of Women was adopted in 2003 and entered into force in 2005 after having received the needed 15 ratifications.¹⁰⁶ The impact of the Protocol is still early to comprehend, but the symbolic effect is tremendous. Not only does the Protocol reinforce the rights of women already enshrined in CEDAW, but also it adds provisions not found in the Convention. As mentioned in the introductory chapter, the

¹⁰² Banda (2005) p.67

¹⁰³ Banda (2005) p.69

¹⁰⁴ Banda (2005) p.72

¹⁰⁵ Banda (2005) p.223

¹⁰⁶ As of 15 May 2008 21 out of the 53 AU member states have ratified the Protocol.

women's protocol is the first treaty to ban FGM, the protocol clearly mentions gender-based violence, the protocol sets a minimum age for marriage, sexual harassment at schools and HIV/AIDS is explicitly mentioned and addressed.¹⁰⁷

In regards to the Protocol's general protection of girls in Africa, it is mentioned in article 1 that the term 'women' means girls too, making it the most comprehensive document in the protection of the girl child. Article 5 is the prohibition of harmful traditional practices clause in the Protocol, which not only bans the traditional practice of FGM, but also the modern form of medicalization of FGM meaning that medical and trained personnel exercise the mutilation. Article 5 states:

“States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:...

(b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them...”

The article further states that harmful traditional practices not only harm the health of women and girls, but it constitutes violence. Article 6 states that marriage below the age of 18 is prohibited. Article 11 emphasizes the special vulnerability of girls during armed conflicts and article 12 prohibits sexual harassment of girls in educational facilities.

The Women's Protocol is a part of the ACHPR and is thus also monitored by the African Commission, in accordance with article 45 (2) of the African Charter on Human and Peoples' Rights.

¹⁰⁷ UNECA Rights of Women in Africa http://www.uneca.org/daweca/treaty_bodies.asp#AfricanProtocol
Accessed 4 January 2008

4.4 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights is the quasi-judicial body that has the task of promoting and protecting human and peoples' rights in Africa, as well as interpreting the African Charter on the Human and Peoples' Rights.¹⁰⁸ The Commission consists of 6 special mechanisms, one being the Special Rapporteur on the Rights of Women.¹⁰⁹ The mandate of the Special Rapporteur is, to mention a few of them, to assist governments in their implementation of the Women's protocol and to undertake fact-finding missions in member states of the AU.¹¹⁰ As spelled out in the intersession activity reports of the Special Rapporteur, she takes on many activities relating to the rights of women in Africa, the most important activity being the continuous encouragement of states to ratify the Protocol on Women's Rights. In addition she takes on other activities, such the drafting of a project on FGM. The Special Rapporteur plays a tremendously important role in lobbying states to ratify the protocol and to domesticate and implement the provisions in all instruments relating to the rights of women and girls.¹¹¹

In his report from a Promotion Mission to Burkina Faso on the 26th to the 30th of March 2007, Commissioner Rezag Bara brought up issues such as FGM, education for girls, forced and early marriage, and in general pointed out that Burkina Faso faced many challenges in implementing women's and girls' rights.¹¹²

4.5 Other instruments

The AU has formulated and adopted a number of declarations and conventions that touch upon the protection of the girl child in one way or another. Because of the allowed time of

¹⁰⁸ History of the Commission http://www.achpr.org/english/info/history_en.html Accessed 20 April 2008

¹⁰⁹ Adopted under resolution ACHPR/res.38 (XXV) 99

¹¹⁰ Mandate of the Special Rapporteur on the Rights of Women in Africa
http://www.achpr.org/english/info/women_mand.htm Accessed 20 April 2008

¹¹¹ Intersession reports http://www.achpr.org/english/info/women_Intersess..htm Accessed 22 April 2008

¹¹² Report of a Promotion Mission of Commissioner Rezag Bara to Burkina Faso (2007)
http://www.achpr.org/english/Mission_reports/Burkina%20Faso/Report%20of%20the%20Promotional_%20Burkina%20Faso.pdf Accessed 22 April 2008

the thesis, the focus will be on only a few of the instruments, the ones of most significance of the research question at hand.

4.5.1 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR)¹¹³ is the regional human rights convention for Africa, similar to the European Convention on Human Rights in Europe and the American Convention on Human Rights in the Americas. In the preamble of the ACHPR, the importance of the cultural heritage of Africa is emphasized and that the traditions of Africa have to be taken into consideration when dealing with human and peoples' rights. Article 2 is the non-discrimination clause of the Charter stressing that all rights in the Charter are to be enjoyed by everyone, regardless of amongst other, sex. Article 18 (3) states that the state shall ensure the elimination of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions. The girl is nowhere mentioned, and thus she was left unprotected by the most important treaty on the African continent until the adoption of the Women's Protocol to the Charter over 20 years later. The language of the Charter also contradicts the two articles emphasizing the equality of the gender. The use of the masculine pronoun, his or he, when addressing the rights works against the purpose of particularly article 2 and emphasizes the masculinity of the Charter.

4.5.2 Other relevant documents of the AU

In June 2003, an Afro-Arab consultative meeting on FGM and the law, sponsored by the UN, the EU and others, was held in Cairo. The result of the meeting was the adoption of the Cairo Declaration for the Elimination of FGM. The Declaration notes that FGM constitutes a violation of the rights of women and girls, and that the practice should be eradicated.¹¹⁴

¹¹³ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

¹¹⁴ Banda (2005) p.223

The Declaration points out that the prohibition of FGM should be integrated in the addressing of other issues such as gender equality, protection from all forms of violence against women and children, women's health and reproductive rights and children's rights, cf. art. 1.¹¹⁵ Another important recommendation coming from the Declaration is the full condemnation of the practice by medical personnel and that medical personnel to carry out the practice should be subject to the highest available criminal sanction, cf. art. 10. This is a clear stand against the medicalization of FGM, which again has been argued to be a reasonable answer to the health-related concern about the practice. Criminalizing FGM was an important point at the consultative meeting in Cairo, but it was also stressed that communities need to be sensitized, women and girls empowered and religious leaders educated and included in the process towards elimination in order to eradicate FGM from the African continent and the Diaspora.¹¹⁶

On July 6 2004 a summit debate on gender was held at the third ordinary session of the AU Assembly in Addis Ababa, Ethiopia. At the end of the summit, the AU Solemn Declaration on Gender Equality in Africa was adopted. The African Heads of State emphasized their commitment to the principle of gender equality as found in Article 4 (1) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human rights. Further, they affirmed their commitment to continue, to expand and to accelerate efforts to promote gender equality at all levels.¹¹⁷

The heads of state committed themselves to take a stand against gender-based discrimination, violence against women, to deal with the limited access of education to girls and to combat harmful traditional practices.¹¹⁸ The member states of the AU

¹¹⁵ The Cairo Declaration <http://www.childinfo.org/areas/fgmc/docs/Cairo%20declaration.pdf> Accessed on 20 March 2008

¹¹⁶ Supra note 115

¹¹⁷ Teribe (2007) http://www.africa-union.org/root/AU/Conferences/2007/october/wgd/speeches/Presentation_On_The_Au_Solemn_Declaration_on_Gender_Equality_in_Africa.doc Accessed on 15 February 2008

¹¹⁸ Supra note 117

undertake to annually report on the progress they have made in implementing the Declaration.

Last, although not a declaration formulated under the AU, the African Youth Declaration on Harmful Traditional Practices formulated by the first African Youth Forum organized by the Inter African Committee on Traditional Practices in Addis Ababa in 2000, emphasized the opinion of the youth on the issue of FGM and other traditional practices and is thus important to mention.¹¹⁹ The most important feature of this Declaration is the commitment of the Forum to eradicate harmful traditional practices such as FGM and be models in their respective countries in mobilizing youth against Harmful Traditional Practices, in particular FGM. In the midst of discouraging figures and lack of state willingness to take the necessary steps to eradicate FGM, the youth forum offers a glimpse of hope for the future of girls in Africa.

5 Analysis

5.1 Conceptual comparison

Although it has been mentioned previously I will in this section use legal positivist theory and legal feminist theory to compare the provisions in the two systems in their protection of the girl child. To do so I have chosen to look at a few general issues that pertain specifically to girls, but as with the previous chapters, the main focus will be on FGM.

¹¹⁹ Inter-African Committee (2000) <http://www.iac-ciaf.com/Documentation/Declarations/youth%20declaration%202000.pdf> Accessed on 15 February 2008

5.1.1 Legal Positivist Theory

Legal positivist theory looks at international law as it is, and views the meaning of the provisions in various conventions on the basis of the explicit wording. In this section, I will therefore take a closer look at the explicit provisions in the UN and AU conventions and see how they differ from or are to similar from each other.

5.1.1.1 Health issue

Harmful traditional practices touch upon areas such as discrimination, protection, health and violence, and the victims are predominately girls. In the CRC harmful traditional practices are only mentioned in one paragraph, which is article 24 (3); the health article. There is no denying that harmful traditional practices such as FGM are detrimental to the health of the girl, but it is much more than just a health issue. As I have argued previously, FGM constitutes violence and a violation of the right to health. It should thus be considered a violation of the right to be free from violence, as found in article 19, and the right to health (article 24). Since the Committee addresses FGM under article 24, it is clear that the CRC does not sufficiently deal with harmful traditional practices that are violent to the child. Here it is important to point out that during the Day of General Discussion in 2001 on violence in the family, the Committee did emphasize that FGM constituted violence.

An evaluation done by NORAD in 2007¹²⁰ on the efforts to eliminate the practice over the past 10 years, have shown that because FGM has been granted the status of merely being a health violation there has been a move towards alternative ways of conducting the practice to show that it is no longer a health risk. One alternative way is the increase in medicalization of FGM, which is when medical personnel trained in the procedure take over for traditional procedures. Another trend is the move from “severely harmful” to “less harmful” types of FGM. These alternatives cannot change the fact that FGM and other harmful traditional practices serve no purposes and only full eradication should be accepted.

¹²⁰ NORAD (2007)

5.1.1.2 Culture and customary law

Many argue that since FGM is done in the name of culture and tradition, and these are two areas of great importance to the African continent¹²¹, there is a valid reason for why FGM should not be considered a human rights violation. This would be a fitting time and place to go into a debate about the protection of culture found in a number of human rights instruments versus violations done in the name of culture, but due to the limited time and space allowed, I will only briefly address this contradiction. The right to practice one's culture, as for instance found under article 26 of the ICCPR, is not claimable if it is inconsistent with the other provisions found in the Covenant¹²². This is equally found in the ACRWC where article 1 (3) clearly states that any cultural practice that is inconsistent with the rights found in the Charter is to be discouraged.

As addressed in the section on FGM and the law in Africa, the issue of customary law came up, as it is seen as a hurdle in fully realizing the rights of women and girls on the continent. One famous case from the African continent that addresses the relationship between customs and law is the case of *Unity Dow v. Botswana* from 1991.¹²³ The actual content of the case is somewhat irrelevant to this thesis, but the decision of the Court has importance. To briefly summarize the case: Unity Dow was married to an American citizen and together they had two children. Because the father wasn't a Botswana citizen the government of Botswana said that the two children could not get Botswana citizenship, because this should follow the father. Unity Dow challenged this, stating that it was discriminatory and a violation of CEDAW. The government recognized that this was differential treatment, but that it was a part of customary law in Botswana. The Supreme Court declared that although international treaties were not binding within Botswana unless enacted by parliament, courts ought not to interpret legislation in a manner that conflicted

¹²¹ Respect for African tradition and values are explicitly mentioned in the preambles of the African Charter on Human and Peoples' Rights and the ACRCW

¹²² CCPR General Comment 23 CCPR/C/21/Rev.1/Add.5 8 April 1994

¹²³ *Unity Dow v Attorney General of Botswana* [1991] LRC 574

with Botswana's international obligations.¹²⁴ Subsequently Botswana amended its Citizenship Act and ratified CEDAW.¹²⁵ This case shows that customs and culture are not tolerated if they interfere with recognized international human rights treaties. In this sense, FGM is a violation of the rights of the girl child and cannot be seen as a way of preserving culture. As was addressed in the section on law and FGM in Africa, it varies from country to country how courts deal with customary law, but this case from Botswana sets precedence in that the provisions of CEDAW are to be protected.

5.1.1.3 FGM as an act of violence

The eradication of harmful traditional practices is mentioned in the ACRWC as an element of state obligation under article 1 (3), as well as being addressed as a whole in article 21. Similar to the CRC, harmful traditional practices are not mentioned as acts of violence in the ACRWC. However, article 21 goes further than its counterpart in the CRC, article 24(3), in that it does not just address the health aspect of such practices, but also emphasizes the dignity of the child and her development. Article 21 reinforces the concept of an obligation on states to discourage any custom, tradition or religious practice, which is inconsistent with article 1(3) of the Charter, dealing with state obligation.

It can, however, be argued that the placement of harmful traditional practices under the article pertaining to state obligations grants the girl child a broader protection in the ACRWC compared to the CRC, but this is a miniscule difference in the grander scale of things. As I will demonstrate below, this difference plays a minor role when ACRWC, through the Committee of Experts, lacks the enforcement of the CRC Committee.

Both CEDAW and the Women's Protocol address issues that are of importance to females, and the Women's Protocol to the African Charter in particular has taken a big step to improve the protection of the girl child. Article 5 of CEDAW urges states to take action to eliminate cultural practices that are based on the inferiority of women, but CEDAW does

¹²⁴ Rwezaura (1998) p.30

¹²⁵ Banda (2005) p.144

not contain one single violence provision. Following the train of thought from earlier; that some harmful traditional practices such as FGM should be considered as acts of violence, this is clearly a downfall of the Convention. When speaking about violence in this setting, one often talks about gender-based violence, which again can be said to be violence rooted in discrimination of one sex, mainly the female sex. The disadvantage of the lack of such a provision in CEDAW is that not only is FGM excluded as an act of violence, it also downplays and ignores an area where women and girls are subordinated every day. Here the Women's Protocol is a great improvement. Article 5 of the Protocol prohibits harmful traditional practices, including FGM, and it points out that harmful traditional practices not only harm the health of girls and women, but they constitute an act of violence. That is tremendous progress, and shows that the vulnerability of the girl child is finally being taken seriously on the African continent. Article 5 of the Protocol is not only a great improvement on article 5 in CEDAW; it also addresses the above mentioned concern about the protection against harmful traditional practices found in the CRC and ACRWC, where harmful traditional practises are not viewed as acts of violence.

5.1.1.4 The best interest of the child

The CRC and the ACRWC are both guided by quite similar principles, as has been mentioned earlier in the thesis. Although they are quite similar in their wording, one principle in the ACRWC is a bit stronger in its content, and that is the principles of 'best interest of the child'. The CRC states that the principles of best interest should be 'a' primary concern, while as in the ACRWC the best interest principles should be 'the' primary concern. The placement of the 'the' is important in this context, because it goes further than the CRC in defining the best interest of the child. In the CRC, the best interest of the child is one primary consideration, while as in ACRWC it is the primary consideration. The best interest of the child is an important principle for all children, but especially for girls. The placement of 'the' in the ACRWC means that in every aspect of protecting children and their rights, the best interest of the child has to be the main concern. As guiding principles, every other provision in the conventions has to be read in context with the principles. When girls are denied their right to education, proper health care, to be free from harmful traditional practices etc, one has to always consider if such denial,

whether it is based on cultural or traditional views or not, truly is in the best interest of the child. Further, this then has to be the primary consideration. From a personal point of view, one can never justify hurting a child for no legitimate reason as being in the child's best interest. To pose a question: are practices such as FGM in the best interest of the girl-child? My answer would be a clear no, because there is no legitimate reason why this would be in the best interest of girls.

To further discuss the differences and similarities between UN and AU treaties in their protection of the girl child, a more in-depth look would be of added value, and to do so the following section will address the legal feminist theory.

5.1.2 Feminist Legal Theory

As mentioned in the first chapter, the feminist school of thought has engaged itself in the discussion of the legal protection of the girl child, and what approach is most suitable in addressing practices such as FGM. There is no agreed-upon opinion of whether the CRC is a feminist landmark or not. Equally, there are disagreements on whether CEDAW protects the girl child, or just adult females. In addition, African feminists have a somewhat different approach to the issue of FGM and women's rights in general than their western counterparts.

5.1.2.1 Feminist legal theory and the CRC

One point of departure for this school of thought relates to the use of possessive pronouns in human rights conventions. Previously when a singular possessive pronoun was used, it was masculine. With the CRC this has been replaced with both masculine and feminist pronouns being used where it was necessary to use a singular pronoun.¹²⁶ In other words, although other UN human rights conventions contain a non-discrimination clause, only in the CRC are both the genders given true equality in the exercise of their rights. A criticism

¹²⁶ Cohen (1997) p.47

to this argument is that the gender-neutral language in the CRC contradicts its purpose because the Convention should not only recognize boys and girls as equal, but should moreover recognize the specific nature and vulnerability of the girl child. This is seen in relations to the health provision of the CRC. There is for instance an entire health article targeted at disabled children, suggesting that they are the only group of children in need of special protection. This ignores the fact that the girl child faces health risks because of her sex through many practices such as infanticide, FGM, early and forced marriages etc.

Further, the CRC reinforces the importance of the family unit and this disregards the fact that most harmful traditional practices take place within the family unit. The education provision of the CRC calls for the promotion of a spirit of equality among the sexes, but this is undermined by the fact that the Convention also states that education should be directed at encouraging respect for parents and cultural values. The CRC thus fails to consider that the girl child's parents and her cultural values may be the reason why her right to education is being denied. Cultural attitudes towards the education of girls are often at the root of why she is unable to claim her right. Except for one provision relating to health¹²⁷, the CRC does very little to combat cultural discrimination against the girl child and the Convention does little to protect her from cultural abuses that take place within the family, which is the prime arena for such abuses.¹²⁸

Applying the same ideas to the ACRWC would probably lead to the same disagreements on whether it can be said to be a document encompassing the rights of the girl child or not. The ACRWC contains the same gender-neutral language as the CRC, and in that sense would be considered a feminist landmark by some. However, by others the fact that the girl child is nowhere explicitly mentioned in the text will be an examples that here too she is left unprotected. The ACRWC, more so than the CRC, emphasizes the importance of family and community, and thus would by some feminist be seen as doing more harm than good in its protection of the girl child. Unlike the section based on feminist analysis of the

¹²⁷ CRC art 24 (3)

¹²⁸ Backstrom (1996) p.578

CRC, this brief analysis of how the same feminists would view the ACRWC, is based solely on my own premonitions and not on scholarly work.

5.1.2.2 Feminist legal theory and CEDAW

As seen in the criticism of the CRC, feminist legal theory also offers a criticism of the protection offered the girl child in CEDAW. When one takes an in-depth look at the convention, it contains very few provisions pertaining to the girl child. Although the definition of discrimination against women could be interpreted to include discrimination against girls, the purpose of the article is to equalize the relationship between men and women. This is further shown in article 5 of CEDAW which encourages states parties to take all appropriate measures to: “modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes...”.¹²⁹ If one follows this train of thought; that article 5 meant to equalize adult men and women, the argument that CEDAW offers protection against FGM and other harmful traditional practices has no subsistence since it is the girl child who is the victim of such practice.

In the health provision of CEDAW equality in the access to health services for men and women is the paramount concern. By requiring equal access for both women and men, but not children, CEDAW reinforces the health-related discrimination one also finds in the CRC where children with disabilities are offered an entire health provision for their needs, while the girl-child is offered none. Although article 16 often is cited as proof that CEDAW had the girl child in mind because of the inclusion of child marriage, the argument of Cynthia Price Cohen (1997) is that paragraph 2 of article 16 dealing with the betrothal of child marriage is a very odd paragraph because it is simply tacked on at the end of an article that is concerned with equal rights between spouses and it does not note that

¹²⁹ Cohen (1997) p.37

the child in question is a girl. Equally, the convention requires states to set a minimum age for marriage, but does not indicate what this age should be.¹³⁰

Feminists all over the world would surely view the African Women's Protocol as document that protects the girl child as well as adult women, and is thus the most comprehensive document to date in protecting the girl child. The Women's Protocol reinforces the objective of CEDAW, whilst also mending the downfalls of CEDAW. This is done by for instance setting a minimum age for marriage at 18, cf. art. 6 (b), outlawing FGM, cf. art. 5, and by clearly stating that girls are included in the term women, cf. art. 1 (k). As stated above, this section is merely a proposal of how legal feminists would view the Women's Protocol, and is not based on scholarly work.

In analyzing the UN mechanisms, it is both relevant and interesting to look at the CRC and CEDAW together. Within the feminist school of thought there seems to be a difference in opinion in whether these two conventions protect the girl child or not. One train of thought within the feminist legal theory is that the gender neutral language of the CRC neglects to recognize the vulnerable position of the girl child and the fact that she is not mentioned specifically as a marginalized group, like disabled children, shows that the struggle of the girl child is very much forgotten.¹³¹ On the other hand, others claim the contrary. They claim that the CRC is most definitely a feminist landmark and that the CRC, and not CEDAW, protects the girl child to a great extent. The gender neutral language sends a clear message that the girl child was indeed in the back of the drafters' minds. This train of thought also argue that CEDAW is a women's convention only, and does not protect the girl child. The rights contained in the convention are rights belonging to adult females.¹³² The contradiction to this is article 16 (2) of CEDAW that prohibits child marriage.

¹³⁰ Cohen (1997) p.40

¹³¹ Backstrom (1996) p.575

¹³² Cohen (1997) p.49

5.1.2.3 African Feminism

There is a branch out of the more general feminist school; namely a group of African feminists. They have a somewhat different view of how women's and girls' rights should be addressed. The main argument of African feminists is that western feminism is the view of middle-aged white women who use the African context to highlight gender discrimination in general. In addition African feminists criticize western feminists for not recognizing the negative impact colonialism had on women in Africa, and how globalization today impacts the lives of women in Africa.¹³³ Debates grew in the 1980s on FGM and how the practice is viewed. "Northern feminists" viewed FGM as gender-based violence, while as African feminists, viewed the approach by the "northern feminists" as a new form of cultural imperialism. African feminists are for the abolition of the practice, but they argued that in working for the eradication of FGM, attention should not only be paid to the cultural underpinnings and justifications advanced for its continuation, but more so focus should be placed on issues of exploitation and poverty that contributed to the perpetuation of the practice.¹³⁴ In other words, a broader approach seeing the interdependence of factors supporting the continuation of FGM.

5.2 Implementation and Enforcement

In a comparison of two sets of human rights systems the positivistic comparison only provides a tiny bit of insight into their strengths and weaknesses. The true thrust of the comparison lies in the level of implementation and enforcement of the various treaties in African countries. When looking at the lists of ratification for the respective conventions one can see that only Somalia has not ratified the CRC, while as 12 AU member countries have not ratified ACRWC. Equally, more AU states have ratified CEDAW compared to the Women's Protocol.

5.2.1 The monitoring bodies

The adherence, implementation and enforcement of CEDAW and CRC is monitored by their respective Committees. The ACRWC is also monitored by a Committee, while as the

¹³³ Banda (2005) p. 9

¹³⁴ Banda (2005) p.213

Protocol is monitored by the African Commission. As seen in the previous sections, the work of the two UN Committees is where they have a lead on their African counterparts. From a positivistic point of view there might not be a lot that differentiates the CRC from the ACRWC, but one cannot even compare the respective Committees in their work. The CRC Committee is both proactive and transparent in its work, as well as offering up-to-date interpretations of the Convention that fit the world of today. The Committee of Experts of the ACRWC is troubled with a difficult financial situation, and as mentioned earlier, it treats every communication in confidence. This can be a problem in the African context because it makes it easy for states to get away with violations since no one outside of the Committee, or the author of the communication or the state itself can see the reports or recommendations. One should not underestimate the effect that shaming and blaming has on repairing human rights violations. With this said, when looking at typical human rights violations experienced by the girl child, violations that touch upon sensitive issues such as culture, violence, discrimination etc, the confidentiality offered the author of a communication might just be the reason why the communication has been brought forth. In many circumstances, court cases are withdrawn because girls feel pressured by their communities.¹³⁵

The CEDAW Committee is as proactive, transparent and up-to-date as the CRC Committee. The work of the CEDAW Committee has been tremendous in repairing the downfalls of the Convention itself, in clearly stating that violence against women and girls is a violation of the Convention, and that some harmful traditional practices are acts of violence. It is fair to say that the Committee has strengthened the Convention in its protection of the girl child, from a point of almost offering no protection, to now being seen as a convention somewhat applicable to all females, including girls.

The Commission monitoring the African Women's Protocol has for obvious reasons not done nearly as much as its UN counterpart; as can only be expected considering that the Protocol is so new and due to the fact that prior to the adoption of the Protocol, issues

¹³⁵ Chirwa (2002) p. 170

relating to women and discrimination were hardly ever addressed. However, it seems from the Commissioner's report to Burkina Faso addressed earlier and the reports of the Special Rapporteur on the rights of women, that there is a move in the right direction. The Commissioner, the Special Rapporteur and states are addressing important issues such as FGM and early marriage. In order for the Women's Protocol to gain more respect, it is important that there is work being done to address the issues in the Protocol. Unfortunately, concluding observations are not available to the public from the webpage of the Commissioner, but as the state report from Sudan showed, girl's issues such as FGM are being addressed.¹³⁶ Equally, in Congo's report to the Commission, the state pointed to the issue of early marriage and lack of education for girls.¹³⁷

It is important to emphasize that although this thesis tries to compare and analyze two sets of human rights systems, the UN and the AU are not two competing systems. They are very much complementary, and most of the states that have ratified the AU treaties have also ratified the UN treaties. Thus, the monitoring of the Conventions provided for by the UN Committees is ultimately also a monitoring of the adherence to the AU treaties.

5.2.2 Domestic implementation

The general principle of law in most common law jurisdiction is that ratification of an international treaty by a state does not, ipso facto, transform that instrument into a piece of domestic law. Hence, courts cannot enforce treaties unless their provisions are locally enacted or otherwise domesticated into the national laws of the state.¹³⁸ Examples previously in this thesis show that it is one thing to ratify a human rights treaty, and quite another to domesticate and implement such a treaty.

¹³⁶ Sudan's periodic report http://www.achpr.org/english/state_reports/Sudan/Sudan%20_3_Report.pdf
Accessed 15 May 2008

¹³⁷ Congo's periodic report http://www.achpr.org/english/state_reports/DRC/DRC_State%20Report.pdf
Accessed 15 May 2008

¹³⁸ Rwezaura (1998) p.29

One ultimate premonition when comparing UN and AU treaties is that African states prefer to implement AU treaties because they are African and thus take the African context into consideration, while as the UN is universal and somewhat of a western system.¹³⁹ The truth however, is not so. There are examples that contradict each other all over the continent. For instance, Ethiopia has ratified CEDAW, but not the Women's Protocol. Lesotho has made reservations against large parts of CEDAW, but was one of the first countries to ratify the Women's Protocol.¹⁴⁰

Although ratification is the first step, it cannot be the last step. States have an obligation to work towards implementation of treaties they have ratified. States that have implemented human rights treaties into their domestic legal system should work towards enactment of these treaties in courts, but unfortunately this rarely takes place in Africa. The reasons why enactment doesn't take place can be many. As Ethiopia's report to the CEDAW Committee showed, judges in the courts are reluctant to use the new penal code where harmful traditional practices such as FGM and forced/early marriages are criminalized. They prefer the old penal code.¹⁴¹ Another important issue is that very few cases make it to the courts and this results in little or no precedence being set for future hearings. When dealing with violations of the human rights of girls, especially harmful traditional practices, one very often runs into social taboos and respect for culture and tradition. An example of this was a father in Senegal who filed a complaint against his wife and mother-in-law because they were going to perform FGM on his daughter. The case made it to court, but because of emotional public outcries in the region, the case was not pursued.¹⁴²

In dealing with harmful traditional practices, the courts are reluctant to take a strong stance, especially in rural areas, and people are reluctant to take cases to courts because of the tremendous social repercussions.

¹³⁹ Although this was somewhat confirmed during various conversations during my trip to Ethiopia in February 2008, it however seemed that the UN conventions are more frequently used in advocacy work

¹⁴⁰ Banda (2005) p.63

¹⁴¹ CEDAW 30th session CEDAW/C/SR.645

¹⁴² U.S Department of State. Report on FGM in Senegal

http://www.asylumlaw.org/docs/senegal/usdos01_fgm_Senegal.pdf Accessed 11 May 2008

On a positive note, in November 2007 the Cassation Bench of the Federal Supreme Court in Ethiopia chose to invoke article 3 of the CRC, best interest of the child, in a custody case.¹⁴³ This was very important because although Ethiopia has a monistic system where international law, including human rights law, is superior to Federal law, there is very little mention of human rights in court cases. The decision sets precedence for future cases in that the article 3 was explicitly mentioned and thus should be invoked by lower courts as well. As shown in the descriptive part of this thesis the guiding principle of article 3, best interest of the child, has tremendous importance to the girl child. The debate over what is in the best interest of the child has often been overshadowed by what is in the best interest of the parents or the community or the perseverance of culture, and like this case shows, it is the child that is in focus and his/her best interest should always be a primary concern.

The above mentioned cases show that enactment of international human rights laws rely heavily on awareness-raising, which again relies on resources and programs to inform the community about the rights enshrined. Here the role of NGOs is important. To use an example from Ethiopia; Plan Ethiopia supports children's clubs in various project areas, where children and community members are educated on children's human rights. A best practice from one area was a boy who got information that his sister was to undergo FGM. He had been taught at the children's club that FGM was illegal and he went to his teacher. The teacher talked to the parents and to the police, and together they were able to convince the parents not to mutilate the daughter. Without information and education on the rights of the girl child, cases will not be reported and change will not happen at the needed speed.¹⁴⁴

¹⁴³ Press Release African Child Policy Forum 15 February 2008

¹⁴⁴ From interview at Plan Ethiopia 26.02.2008

6 Conclusion

6.1 Does the UN and the AU protect the girl child?

There is a well-known Asian proverb saying that, “raising a girl is like watering the neighbour’s garden”. In many corners of the world girls are seen as burdens and not having the same worth or value as their brothers, and that taking the effort to raise a girl and grant her the same privileges as her brothers is a waste of time and effort. From cradle to grave girls and women are discriminated against, violated and neglected by their families, by the community, by the state and by the international community. It was with this in the back of my mind that I embarked on this thesis, and now have come to the point where it is time to sum up and answer the question; does the UN and the AU protect the girl child?

In short, the answer is: somewhat, but not quite. The only Convention that addresses the specific areas where girls are more vulnerable than boys is the Women's Protocol, but this document is so new that it is still too early to fully understand its ramifications for the girls of Africa. The three other main Conventions discussed in this thesis offer some protection, but far from enough. The area where one truly sees where the international community is addressing the girl child is in the work of the UN and its Committees. The CEDAW Committee in its General Recommendations, as well as the CRC Committee generating an entire Day of General Discussion to the issue of the girl child have tackled the issue of FGM and violence and how it relates to the girl child to a great extent.

The African Committee of Experts on the other hand has done little to address the position of the girl child in Africa. However, the number of declarations and resolutions show that there is will on the African continent to address the issue of violence against girls and harmful traditional practices. The African Commission has appointed a Special Rapporteur dealing with the rights of women, and the Commissioner has addressed specific issues pertaining to the girl child in his visits to a number of states. The contradiction is that the AU contains the one treaty with the strongest language and most explicit protection of the girl child, but the AU is lagging behind in implementing the provisions pertaining specifically to the girl child and in addressing states' obligations. Another contradiction is that as many as 12 African states have not ratified the ACRWC, while as only one has abstained to ratify the CRC. It seems that even from an African point of view, the UN is the preferred system to trust.

In so far as the factors that give rise to the violations against the girl child are rooted in the social and material conditions of the community, the role of law in righting these wrongs must not be viewed in isolation but should be seen as part of a broader campaign for social

change and social justice. The incorporation of international human rights norms into domestic law, therefore, should be strongly encouraged and supported.¹⁴⁵

6.2 Recommendations

It is important to recognize the importance of a strong human rights system on the continent of Africa. Human rights violations take place on a continuous scale, and the girl child is right in the midst of it. Girls are kept out of schools, they are forced to marry elder men too early and they are subjected to FGM. The international community needs to address these violations by strengthening the special procedures within the AU and strengthening the implementation and enforcement of the Conventions in the domestic systems of AU member states. Awareness-raising on the rights of the girl child needs to be improved in order for all members of the community to understand that harmful traditional practices are violations of the rights of the girl child and that some constitute severe acts of violence.

In addressing issues concerning children, it is important that governments promote an active policy of mainstreaming a gender perspective into all policies and programs so that the true effects decisions have on boys and girls are seen.¹⁴⁶ In mainstreaming gender into policy-making one enables policy-making bodies to become aware of the effects on the girl-child various seemingly gender-neutral policies and laws have.

In addition to awareness-raising it is important to contribute to alternatives to harmful traditional practices. By alternatives, medicalization or switching to less harmful ways of performing FGM does not suffice as legitimate alternatives. One example of alternative rituals to FGM is found in one Kenyan village where they've started a practice of 'circumcision with words'. The girls are secluded for a week and here they are educated on reproductive health, HIV/AIDS and other important issues for girls. The point is to keep

¹⁴⁵ Rwezaura (1998) p.43

¹⁴⁶ Rwezaura (1998) p.28

the initiation ceremony, but without the actual circumcision.¹⁴⁷ It is tremendously important for many communities to keep their traditions, it is thus important that alternatives are presented that show that the ceremonies continue as before, only without girls having to undergo circumcision.

In dealing with abuses or violations the law is a necessary tool. Without a well established set of laws, political will to enact these laws and a public understanding of what these laws entail, very little will be done to mend the wrongs that occur. This thesis has shown that at the international UN level and at the regional AU level, the laws are in place. One will always find flaws and gaps, but all in all it is fair to say that the girl child is offered protection in the law. However, the law can only do so much. Without political will to ratify, implement and enact the rights of the girl child, very little can be done to protect her. Without public awareness about what the law says, little can be done to pressure governments to take a stronger stance in protecting the girl child, and thus the girl child is left fendng for herself.

¹⁴⁷ UN Office for the Coordination of Humanitarian Affairs
<http://www.irinnews.org/report.aspx?reportid=53520> Accessed May 13 2008

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