

**THE IMPLICATIONS OF TANZANIA NOT DOMESTICATING
INTERNATIONAL HUMAN RIGHTS INSTRUMENTS
THE CASE STUDY OF CEDAW**

By

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**A Dissertation Submitted in Fulfilment of the Requirement for the Award of
Masters of Laws (International Law) of Mzumbe University**

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CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a dissertation paper entitled, **The Implications of Tanzania not Domesticating International Human Rights Instruments; the case study of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** in partial fulfilment of the requirements for award of the degree of Master of Laws (LL.M) of Mzumbe University.

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May God always bless you all.

DEDICATION

This work is dedicated to all women... for they are indeed flowers.

LIST OF ABBREVIATION

ACHPR's-	African Court on Human and People's Rights
CAT-	Committee Against Torture
CCPR-	Committee on Civil and Political Rights
CEDAW-	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW-	Committee on the Elimination of All Forms of Discrimination Against Women
CERD-	Committee on the Elimination of Racial Discrimination
CESCR-	Committee on Economic, Social and Cultural Rights
CHRAGG-	Commission on Human Rights and Good Governance
CMW-	Committee on Migrant Workers
CPA-	Criminal Procedure Act
CSW-	Commission on the Status of Women
DEDAW-	Declaration on the Elimination of Discrimination Against Women
DEVAW-	Declaration on the Elimination of Violence Against Women
DVA-	Domestic Violence Act
ECHR-	European Court of Human Rights
ECOSOC-	Economic and Social Council
FGM-	Female Genital Mutilation
GA-	General Assembly
GBV-	Gender Based Violence
HRCm-	Human Rights Committee
HRCo-	Human Rights Council
ICCPR-	International Covenant on the Civil and Political Rights
ICESCR-	International Covenant on the Economic Social and Cultural Rights
ICJ-	International Court of Justice
ICW-	International Council for Women
LMA-	Law of Marriage Act
LRC-	Law Reform Commission

NGLS-	Non-Governmental Liaison Services
NGO-	Non Governmental Organization
NHRI's-	National Human Rights Institutions
OHCHR-	Office of the High Commissioner of Human Rights
SC-	Security Council
SOSPA-	Sexual Offences Special Provisions Act
TPFNet-	Tanzanian Police Female Network
TEA-	The Evidence Act
UDHR-	Universal Declaration of Human Rights
UN-	United Nations
UNGA-	United Nations General Assembly
UPR-	Universal Periodic Review
URT-	United Republic of Tanzania
USA-	United States of America
WG-	Working Group

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ABSTRACT

For quite a long time women have been considered as that part of nature that does exist on some fault. As a result women have faced harassments within their individual lives such as at work and also at home. An era came when such ideologies were put aside and the woman had to be part of nature as she too is a human being. With that the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) came into force. For almost thirty years Tanzania has been silent on the issue of domesticating the CEDAW. This has been so even though the principles of international law depict, once a State ratifies an international instrument it is under an obligation to domesticate it for proper use within the legal institutions. This, however has remained to be in abyss.

Despite the fact that Tanzania has ratified this instrument indicators of discrimination against women is still visible through laws that have not been abolished and institutions that are not free and independent in dealing with issues that affect women in general.

This study aims at discussing in depth the CEDAW, what important features it portrays and how each country has to implement these principles embodied within the Convention. The study further discusses on the international, regional and domestic legal framework and what has been done so far. Moreover the obligation Tanzania has under international law and the effects of going against these obligations are also discussed in detail. In concluding possible solutions that can be used to solve this problem have been pointed out.

DEFINITION OF KEY TERMS

Gender Based Violence (GBV) – Gender-based violence is an umbrella term for any harm that is perpetrated against a person’s will; that has a negative impact on the physical or psychological health, development, and identity of the person; and that is the result of gendered power inequities that exploit distinctions between males and females, among males, and among females. Although not exclusive to women and girls, GBV principally affects them across all cultures. Violence may be physical, sexual, psychological, economic, or sociocultural. Categories of perpetrators may include family members, community members, and those acting on behalf of or in proportion to the disregard of cultural, religious, state, or intra-state institutions

Female Genital Mutilation (FGM) – refers to all procedures that involve cutting or removing part of or all of the clitoris, and sometimes also removing the labia minora and wounding the labia majora for non-medical reasons

LIST OF STATUTES

The Constitution of the United Republic of Tanzania Cap 2 [R.E 2002]
Act 20 of 1992 of the Constitution of the United Republic of Tanzania
The Domestic Violence Act of South Africa, no. 118 of 1998
The Domestic Violence Act of Ghana, no. 732 of 2007
The Constitution of the Republic of South Africa no. 108 of 1996
The Law of Marriage Act 1971, Cap 29 [R.E 2002]
The Police Force Act Cap 322 R.E 2002
The Police Force Supplement Act Cap 322 [R.E 2002]
The Basic Rights and Duties Enforcement Act Cap 4 [R.E 2002]
The Penal Code Cap 16 1945
The Criminal Procedure Act Cap 20 1985
The Evidence Act 1967 Cap 6
The Sexual Offences Special Provisions Act 1998
The Land Act 1999 Cap 113
The Village Land Act 1999 Cap 114
The Employment and Labor Relations Act 2004 Cap 366

LIST OF INTERNATIONAL CONVENTIONS

The Covenant of the League of Nations, 1919

The Convention Concerning the Employment of Women before and after Childbirth, no. 3, 1921

The Convention Concerning the Employment of Women during the night, no. 4, 1921

The United Nations Charter, 1945

United Nations, Statute of the International Court of Justice, 1946

The Universal Declaration of Human Rights, 1948

The United Nations Convention on the Elimination of All Forms of Racial Discrimination, 1965

The United Nations International Covenant on Civil and Political Rights, 1966

The United Nations International Covenant on Economic, Social and Cultural Rights, 1966

Declaration on the Elimination of Discrimination Against Women, 1967

The United Nations Vienna Convention on the Law of Treaties, 1969

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1979

The African Charter on Human and Peoples' Rights (The Banjul Charter) 1981

The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984

The United Nations Convention on the Law of Child, 1989

Declaration on the Elimination of Violence Against Women, 1993

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

LIST OF CASES

DOMESTIC CASES

- Ahmed Said Kidevu v. Sharifa Shamte (1989) TLR 148
- Chilla v. Chilla, (January 6, 2004) High Court of Tanzania at Dar Es Salaam
- Deocras Lutabana v. Deus Kashanga, [1981], TLR. 122
- Ephraim v. Pastory and Another [1990] High Court of Tanzania at Mwanza (PC) Civil Appeal no. 70 of 1989, [1990]LRC (Const) 757
- Ndewawiosia v. Immanuel Malasia, [1968], H.C.D 127
- Teresia Maginga v. Marwa Mwita, 2001

REGIONAL CASES

- Ahmed Raffik Omar v. the Government of the Republic of SA 2005 (CCT 47/04) [2005] ZACC 17
- Jawara v. The Gambia, (2000) AHRLR 107 (ACHPR 2000)
- Ligue Camerounaise des Droits de l'Homme v Cameroon (2000) AHRLR 61 (ACHPR 1997)
- Narodien v. Andrews 2002 [2007] ZAGPHC 306
- Minister of Safety and Security v. Venter (570/2009) [2011] SCA
- Peoples' Democratic Organization for Independence and Socialism v The Gambia (2000) AHRLR 104 (ACHPR 1996)
- Recontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia, (2000) AHRLR 321 (ACHPR 1996)
- S v. Baloyi (Minister of Justice & another intervening) 2000 ZACC 19
- Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60
- Van Eden v. Minister of Safety and Security (Women's Legal Center Trust as amicus curiae) (186/01) [2003] ZAECHC 21

INTERNATIONAL CASES

Broeks v. The Netherlands, Communication No. 172/1984

Fanali v. Italy, Communication No. 75/1980

Karen Tayag Vertido v. The Philippines, Communication No. 18/2008

Nicaragua v. United States of America, Jurisdiction and Admissibility, 1984 ICJ REP, 1986

Ms. A. T. v. Hungary Communication No. 2/2003

Rahime Kayan v. Turkey, 2005

Valesquez Rodriguez v. Honduras No. 4, Inter-American Court of Human Rights (IACrtHR), 29 July 1988

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

Since human rights violations occur within states it is the ultimate obligation of the State concerned to protect victims of human rights violations, prevent human rights violations and punish the perpetrators. It is inevitable that the protection and enjoyment of human rights has to come from within the State. As Mrs. Eleanor Roosevelt once said;

Human rights begin in small places close to home, so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in, the school or college he attends, the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.¹

At the national and international level the protection of human rights has been pertinent. At the national level, one of the major ways of protecting human rights is through the enactment of domestic or national laws through an Act of the parliament, which would enable courts in the country to litigate upon issues and cases pertaining to, among other things, human rights. At the international level States transact a vast amount of work by using the device of the treaty² among them.³ Thus according to the Vienna Convention on the Law of Treaties⁴ once a treaty has been concluded among the parties it becomes binding among them and must be performed in good faith. This

¹ Jayawickrama, N. (2002), *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence*, Cambridge University Press, pg. 95

² A treaty is basically an agreement between parties at the international scene. Under article 2 of the Vienna Convention it has been defined as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

³ Shaw, M. N., (2008), *International Law*, 6th edition, Cambridge University Press, pg. 902

⁴ Done at Vienna on 23rd May 1969, and entered into force on the 27 January 1980, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

is embodied under a rule known as *pacta sunt servanda*. The international human rights system cannot take over the administration of recalcitrant states in order to ensure the enjoyment of these human rights and thus it is through treaties that the international human rights system can put pressure on States to protect human rights.⁵ However this is no easy thing since ratifying the treaties is one thing and implementing it is another. For Civil Law Countries, which follow the monistic approach, treaties have a direct effect under national legal systems. Thus international law is directly applicable in the national legal order. There is no need for any incorporation.⁶ But for common law countries, which follow the dualistic approach, there is a need of incorporating the treaty into national laws since international law and domestic law are separate legal systems. If international law is not transformed into national law through legislation, national courts cannot apply it.⁷

Tanzania follows the dualist approach. It is the aim of this research to focus on the implications of Tanzania not domesticating international human rights treaties, in particular the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

1.2 Background of the Problem

CEDAW was adopted by the United Nations General Assembly (UNGA) in resolution 34/180 of 18th December 1979 and entered into force on 3rd September 1981. CEDAW is a document that consists of a preamble and 30 Articles divided into six parts where part one contains the first six Articles which include the definition of discrimination, the list of State obligations, a provision on temporary measures and a provision on the suppression of trafficking and the exploitation of prostitution of women. Part two has provisions on women's participation in public and international life as well as nationality rights. Part three contains a list of socio-economic rights including

⁵ Bangamwabo, F., *The implementation of international and regional human rights instruments in the Namibian legal framework: Human Rights and the Rule of Law in Namibia*, Macmillan Publishers, pg. 165

⁶ This approach is common in countries such as USA, Holland, Franca and Namibia.

⁷ Killander, M. (Ed). (2010). *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, pg. 11

education, employment, health and specific development-oriented provisions pertaining to rural women. Part four contains provisions on equality of men and women before the law. Part five covers the setting up and composition of the committee which oversees CEDAW and reporting obligations. Part six contains the housekeeping provisions including provisions for ratification reservations, obligations and so on.⁸ The genesis of CEDAW can be found in the Charter of the United Nations and has been built on the provisions of the United Nations Charter, which expressly affirms the equal rights of men and women, and the Universal Declaration of Human Rights, which proclaims that all human rights and freedoms are to be enjoyed equally by men and women without distinction of any kind.⁹

This treaty establishes a comprehensive rights framework on which States can progressively measure themselves and be measured by others on their success in advancing towards gender equality.¹⁰ Moreover it provides for a comprehensive guide to actions that can be taken to eliminate discrimination.¹¹ CEDAW provides a definition of discrimination which covers direct and indirect discrimination, equality of opportunity as well as formal equality and disadvantageous discrimination that nullifies or impairs enjoyment by women of their human rights. It states that;

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.

⁸ Oswald, B., Durham, H., Bates, A. (2010). *Documents on the Law of Peace Operations*, Oxford University Press. Pg. 103

⁹ The preamble to the Charter states that the peoples of the UN were determined to reaffirm faith in the equal rights of men and women. The Charter further states in Article 1(3) that one of the purposes of the UN is to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to sex.

¹⁰ Gopal, G., Salim, M. (Ed). (1998). '*Gender and Law: Eastern Africa Speaks*', The International Bank Reconstruction and Development pg. 56

¹¹ Rwebangira, K. M. (1996), '*The Legal Status of Women and Poverty in Tanzania*', Motala Grafiska, pg. 42

This provision does a number of things. It makes clear that all discrimination is prohibited and that it is irrelevant where that discrimination occurs, that is whether it is done by the State actor or a private individual or private organization.

1.2.1 The 2006 Optional Protocol to the CEDAW¹²

On October 6, 2000, an Optional Protocol to CEDAW was adopted. It includes the Communication procedure through which individuals and groups of women can have an avenue of bringing complaints to the CEDAW Committee, and the inquiry procedure which enables the Committee to conduct inquiries into grave or systematic abuse. By ratifying the Optional Protocol, a State Party recognizes the competence of the Committee on the Elimination of Discrimination Against Women to receive and consider complaints from individuals or groups within its jurisdiction alleging a breach of CEDAW provisions. The optional protocol is an addendum to CEDAW and requires signature and ratification just like the Convention. Tanzania acceded to the optional Protocol in 2006.¹³

1.2.2 The development of CEDAW in the United Republic of Tanzania (URT)

Tanganyika gained independence on 9th December 1961 and after the union with Zanzibar on the 26th April 1964 became the United Republic of Tanzania. It is significant to note that after independence the government of URT ratified several core international human rights instruments, dealing with, among others, human rights. These include such as the International Covenant on Economic, Social and Cultural Rights, (ICESCR,¹⁴ 1966 as well as the International Covenant on Civil and Political Rights (ICCPR)¹⁵ 1966, in 1976, and the Convention on the Rights of the Child

¹² Optional Protocol to CEDAW, adopted by General Assembly Resolution 54/4 on 22 December 2000. Available

in electronic form on: <http://www.un.org/womenwatch/daw/cedaw/protocol/index.html>

¹³ retrieved from treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

¹⁴ Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967)

¹⁵ Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M 368 (1967)

(CRC)¹⁶ in 1991. In 1985 Tanzania ratified CEDAW without any reservations.¹⁷ The reason for that as stipulated by Mrs. Mongella¹⁸ during the meeting of the CEDAW's Committee¹⁹, being that;

The Government of Tanzania did not believe that entering reservations to some articles of the Convention would help to solve the problem of discrimination which required practical solutions. Tanzania therefore intended to work systematically to eradicate the remaining practices which discriminated against women.

1.2.3 Tanzania's dualistic nature

Unlike Civil law countries where ratified international treaties directly forms a direct part of its municipal law countries in the common law tradition require further incorporation of these international documents into their domestic law through legislation.²⁰ Tanzania is a dualist country which entails that international law and municipal law are regarded as two separate systems of law, regulating different subject-matters. They are mutually exclusive, and the former has no effect on the latter unless and until incorporation takes place through domestic legislation.²¹ Indeed, it is only when a human rights instrument and its provisions have become part and parcel of domestic law that national courts and quasi-judicial bodies will be able to apply them to cases brought before them by private individuals or organizations.²² The explanation for this lies in the British constitutional tradition. It was partly feared that;

If...the provisions of a treaty made by the Crown were to become operative within Great Britain automatically and without any specified act of incorporation it might lead to the result

¹⁶ Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989).

¹⁷ A reservation is defined under Article 2 of the 1969 Vienna Convention on Treaties as a Unilateral Statement however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.

¹⁸ Member of the United Nations International Research and Training Institute for the Advancement of Women, board of trustees.

¹⁹ Committee on the Elimination of All Forms of Discrimination against Women, Summary Record of the 157th meeting, 146, New York: U.N. Doc. CEDAW/C/SR. 157 (1990)

²⁰ Magoke-Mhoja, M. E. (2008). 'Child Widows Silenced and Unheard: Human Rights Suffers in Tanzania'. Author House, pg.131

²¹ Ibid note. 1, pg. 96

²² Ibid note. 5, pg. 166

*that the Crown would alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliament's approval.*²³

Following this tradition international law may be incorporated into the legal system through two different ways: directly through incorporation or indirectly through a process of reception or transformation. Reception or transformation takes place if the provisions of an international agreement are reflected in parts of national legislation whereas incorporation entails the wholesale enactment as part of domestic legislation of an international agreement.²⁴

In Tanzania, the power to enter into treaties is entrusted completely to the executive branch of the government. The legislature plays no part in the treaty-making process. Consequently, if treaties were to become part of the law in Tanzania without legislative endorsement, wide law-making powers would be conferred on the executive²⁵, and that is why by Act 20 of 1992, the National Assembly²⁶ was vested with power to 'deliberate upon and ratify all treaties and agreements to which the URT is a party and the provisions of which require ratification'. Article 63 of the Constitution of the URT also gives the National Assembly the power to 'enact legislation where implementation of an international treaty requires legislation' Article 63 (3) (d & e) stipulate that;

For the purpose of discharging its functions the National Assembly may;

- (d) enact law where implementation requires legislation;
- (e) deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification.²⁷

Thus the power to ratify treaties is with the legislature, the executive just signs.

²³ Viljoen F, '*International Human Rights Law in Africa*', 2007, Oxford University Press, pg. 336

²⁴ *ibid*, pg. 536

²⁵ *Ibid* note. 7, pg. 60

²⁶ Act no. 20 of 1992, The Constitution of the United Republic of Tanzania

²⁷ Article 63 (3) (d & e) of the Constitution of the United Republic of Tanzania 1977, as amended from time to time

1.2.4 Obligations of URT under CEDAW and the Constitution

By ratifying CEDAW countries pledge to end discrimination against women in all forms, and to undertake a series of measures in order to achieve equality. Under Article 2 of CEDAW States must embody the principles of equality of men and women in the Constitution and in their legal systems abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women, establish tribunals and other public institutions to ensure the effective protection of women against discrimination and eliminate all acts of discrimination against women by persons, organizations or enterprises.²⁸ In addition they must ensure the practical realization of the principle of equality. CEDAW stresses the equality of all men and women in the legal system and establishes that women should have the same rights as men. It calls for changes in constitutions, legislations and policies to reflect gender equality. Therefore although ratification is an important step, it is not a sufficient measure for the government commitment to end gender discrimination.²⁹ In doing this State parties must act without delay since the norm of non-discrimination does not allow for progressive realization.³⁰ The elimination of discrimination has an immediate effect.

The Constitution of Tanzania is the mother law of the nation. The object of the Constitution is to facilitate the building of the United Republic as a nation of equal and free individuals. Therefore the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring³¹:

- a) That human dignity and other human rights are respected and cherished;

²⁸ www.ifuw.org/what/advocacy/cedaw

²⁹ Nkonya, L. K. (2008). *Rural Water Management in Africa: The Impact of Customary Institutions in Tanzania*, Cambria Press, pg. 229

³⁰ The concept of progressive realization constitutes recognition of the fact that full realization of all rights within a certain Convention will not generally be able to be achieved in a short period of time. This is applicable for some rights which require a State to put enough resources for the realization of such a right.

³¹ Jullu, S., Hassan, S., Njau, M., and Tesha, F., (2009), *Marriage Matters*, Women's Legal Aid Center, pg. 20, also under chapter one, part two of the Fundamental Objectives and Directive Principles of State Policy of the Constitution of the United Republic of Tanzania.

- b) That human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights (UDHR);
- c) That all forms of injustice, intimidation, discrimination, corruption, oppression or favoritism are eradicated.³²

This entails that all the rights within the Constitution must be respected by Tanzania but still under article 7(2) it is stipulated that;

The provisions of this part of the Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person, or any court or any law or judgment complies with the provision of this part of the Chapter.

This, in other words, entails that there is a soft obligation for the government to uphold human dignity and eradicate discrimination. This obligation is not enforceable in the court of law.³³

Apart from that Tanzania has not incorporated CEDAW into statutory laws through an Act of Parliament. This means that CEDAW cannot be treated as part of Statutory Laws for the purpose of making formal judgment or court decisions.

1.2.5 URT's Periodic Reviews to CEDAW

It is also important to have a look at the practice of Tanzania turning in her periodic reports to the CEDAW Committee. Article 18(1) of CEDAW states that;

States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

- (a) Within one year after the entry into force for the State concerned;*
- (b) Thereafter at least every four years and further whenever the Committee so requests.*

A report that is submitted one year after the country ratified the instrument is known as the initial report which contains a brief history of the state, its form of the government, the legal system, the relationship between the arms of government and the steps taken

³² Article 9 of the 1977 Constitution of the United Republic of Tanzania, as amended from time to time

³³ Benschop, M., (2002), 'Rights and Reality: Are Women's Equal Rights in Land Housing and Property implemented in East Africa?', United Nations Human Settlement Programme, pg. 103

to internalize the international instruments.³⁴ The report that is submitted every four years is known as the periodic report which is submitted to indicate the progress made within a specific time period since the initial report was submitted. Tanzania submitted its initial report³⁵ to the Committee in 1990 and its second and third periodic reports³⁶ in 1996. During the consideration of the second and third periodic report the Committee noted in paragraph 30 and 31 that Tanzanian women have been facing the problem of violence such as sexual assault, wife battering, sexual harassment and Female Genital Mutilation (FGM). Moreover the committee was concerned that the Constitution of Tanzania did not explicitly define discrimination. As a result in 2000 during the 13th constitutional amendment Tanzania expanded the meaning of discrimination to include gender as a ground. However during the fourth, fifth and sixth combined periodic report which was submitted in 2008, the committee noted that although Tanzania had amended the Constitution to include gender as a ground of discrimination there is still direct and indirect practice of discrimination. Moreover the committee noted that although Tanzania had ratified CEDAW in 1985 without any reservation, the Convention has still not been domesticated as part of the law of Tanzania. It noted that without such full domestication the Convention is not part of the national legal system and thus its provisions are not justiciable and enforceable in the court of law.

Even though in some instances the courts in Tanzania through bold judges have been able to grant justice to women despite the fact that Tanzania has not domesticated CEDAW such as in the case of *Ephraim v. Pastory and Another*³⁷, this does not solve the problem. It not only takes bold judges to decide to use international instruments to

³⁴ Nmehielle, O. O. V., (2001), ‘*The African Human Rights System: its laws, practice and institutions*’, Martinus Nijhoff Publishers, pg. 189

³⁵ Consideration of Reports Submitted by State Parties: United Republic of Tanzania, Committee on the Elimination of All Forms of Discrimination Against Women. U.N. GAOR, 53rd Sess., Supp. No.38, A/53/38/REV.1 (1996) Para. 3

³⁶ Consideration of Reports Submitted by State Parties: United Republic of Tanzania, Committee on the Elimination of All Forms of Discrimination Against Women. U.N. GAOR, 53rd Sess., Supp. No.38, A/53/38/REV.1 (1996)

³⁷ *Ephraim v. Pastory and Another*, High Court of Tanzania at Mwanza (PC) Civil Appeal no. 70 of 1989, Mwalusanya, J., [1990]LRC (Const) 757

protect women even if they are not yet part of domestic laws but also the willingness of the state in making sure it implements CEDAW, since the onus is upon a national legal system to determine the status and force of law which will be accorded to treaty provisions within such legal system.³⁸

To some writers³⁹ the failure to domesticate CEDAW is due to the noticeable lethargy on the part of the competent legislature. For example during the Universal Periodic Review⁴⁰ (UPR) of Tanzania which was reviewed in October 2011 one of the recommendations which were made was the incorporation of provisions from ratified instruments into domestic law. However in this report these recommendations of putting in place a comprehensive strategy including legislative measures to eliminate practices and stereotypes that discriminate women, was not supported by Tanzania,⁴¹ without any specific reasons as to why that recommendation did not enjoy support from Tanzania. This failure to domesticate CEDAW is a barrier to the effective application of women's rights.

1.3 Statement of the Problem

Tanzania has not adopted a Gender Based Violence Act after ratifying the International Convention on the Elimination of all Forms of Discrimination against Women that fight against this kind of violence. It should be noted that a legal system must include not only relevant instruments but also up-to-date laws. In Tanzania other pieces of legislations have been used that are more general clauses on the equality of men and women and not on the whole agenda of protecting, preventing and punishing perpetrators of GBV. This has led to the increase of Gender Based Violence against

³⁸ Ibid note. 5 pg. 167

³⁹ Shivdas, M. and Coleman, S. (Ed). (2010). 'Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context', Commonwealth Secretariat. pg. 73

⁴⁰ Universal Periodic Review (UPR) is a mechanism by which each member nation of the UN has its human rights record examined by other UN member states to assess compliance with human rights obligations and commitments. Each country is reviewed in four and a half years and it is compulsory for all UN member states.

⁴¹ Report of the Working Group on the Universal Periodic Review of the United Republic of Tanzania A/HRC 19/4, 19th session, paragraph 87.4

women such as, domestic violence, marital rape, forced marriages and female genital mutilation. The use of various laws in addressing GBV is not sufficient since the law is scattered on different statutes which complicates the whole scenario. There are gaps in law that contribute to the persistence of Gender Based Violence and there are discriminatory legislative provisions that are still in force.⁴² For example the Law of Marriage Act Revised edition of 2002 provides for corporal punishment as a crime but does not address domestic violence or the causes.⁴³ Even though corporal punishment is an aspect under elements domestic violence, it does not include everything. It does not stipulate for marital rape as a crime either.

In countries that have enacted a law that prohibits GBV, implementing the provisions of CEDAW has not been of difficulty. For example in South Africa men's violence and ill-treatment of their intimate female partners was widespread and thus led to the enactment of a Domestic Violence Act (DVA) which was passed by the South African government in 1998.⁴⁴ The DVA of South Africa provides for civil remedy for persons affected by domestic violence and allows for a protection order to be granted to the complainant. The DVA provides for a detailed definition of domestic violence which the courts have applied in cases that come before them.⁴⁵ The Act also contains panoply of rights and remedies available to victims of domestic violence that is derived from the constitutional duty imposed on the State by sec. 12 (1) (c) of the Constitution of South Africa⁴⁶ to protect the right of everyone to be free from private or domestic violence.⁴⁷ Victims of GBV have exhausted the DVA through courts in different instances and the courts have been able to come to decisions based on the

⁴²www.wikigender.org/index.php/Africa_for_Women's_Rights:_Tanzania#But_discrimination_and_violence_persist

⁴³ Section 66 of the Law of Marriage Act Cap 29 R.E 2002

⁴⁴ The Domestic Violence Act of South Africa, no. 118 of 1998

⁴⁵ In *Narodien v. Andrews* 2002 (3) SA 500 (c) the court expanded the meaning of domestic violence. The magistrate stated that the definition of domestic violence in the DVA included any controlling or abusive behavior towards the complainant where such conduct harmed or could cause imminent harm to the safety health and wellbeing of the complainant.

⁴⁶ The Constitution of the Republic of South Africa no. 108 of 1996

⁴⁷ *S v. Baloyi (Minister of Justice & another intervening)* 2000 (2) SA 425 (CC), 2000 (1) SACR 81; 2000 (1) BCLR 86. See also *Van Eden v. Minister of Safety and Security (Women's Legal Center Trust as amicus curiae)* 2003 (1)SA 389 (SCA); [2002] 4 All SA 346 para. 13

objectives of the Act. In the case of *Ahmed Raffik Omar v. The Government of the Republic of SA*⁴⁸ the applicant who was arrested due to his abusive acts towards his partner wanted the Constitutional Court of South Africa to declare section 8 of the DVA invalid. Section 8 in short provides for a court to authorize a warrant of arrest when it issues a protection order. However the court noted the essential importance of the South African Police Service in providing protection against domestic violence and thus considered section 8 as valid for the sake of the victim of domestic violence. In another case of *Minister of Safety and Security v. Venter*⁴⁹ the respondents sued the Minister of Safety and Security for damages based on the failure of the police to perform their legal duty to assist the respondent to take steps to protect themselves under the DVA and thus resulted in the rape of the second respondent and an injury by a bullet to the first respondent. The court found in favor of the respondents since it was the duty of the police under the DVA to assist the victims.

Even though the DVA of South Africa does not criminalize domestic violence but rather retains the speedy, inexpensive and unsophisticated civil procedure of obtaining a restraining order in a magistrate's court, this does not mean that Tanzania should not enact a law on GBV. Tanzania should build on the experience of South Africa and go on further in criminalizing GBV like the Domestic Violence Act of Ghana⁵⁰ which under section 3 criminalizes domestic violence.

The problem of not having one uniform law on GBV in Tanzania has shown that there is lenient punishment for perpetrators or none at all as the judiciary is left stranded between different laws that do not provide a comprehensive framework for this problem for example in the case of *Teresia Maginga v. Marwa Mwita*⁵¹ the wife petitioned for divorce because of routine domestic violence. However the defendant insisted that he still loved his wife and wanted to maintain the marriage. The court

⁴⁸ *Ahmed Raffik Omar v. the Government of the Republic of SA* 2005 CCT 47/04

⁴⁹ *Minister of Safety and Security v. Venter* (570/09) [2011] ZASCA 42 (29TH March 2011)

⁵⁰ Domestic Violence Act of Ghana, 2007, Act no. 732

⁵¹ *Teresia Maginga v. Marwa Mwita* (2001), cited from Magoke-Mhoja, M. E, (2008), 'Child Widows Silenced and Unheard: Human Rights Suffers in Tanzania'. Author House, pg. 90

ordered that the couple should stay together according to section 107 (1) (a) of the Law of Marriage Act (LMA) 1971⁵², which states that;

In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct that and circumstances of the parties and, in particular-

a) shall, unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing

In the above case one can conclude that the court came to that conclusion just because of the wording of the Act and not based on the evidence presented by the victim. This shows how victims are faced with the problems that could be solved with the enactment of a specific law that may cater for such problems.

The problem is seen within the legal system of Tanzania. There is no one uniform law that combines rights women are entitled to and punishments. Hence this makes it difficult for law enforcement agents to protect women in need of protection. All the laws that somehow cover women rights are scattered and even these scattered laws do not fully cover all rights women are entitled to.

1.4 Objectives of the study

1.4.1 General Objective

To examine the implications of Tanzania not domesticating international human rights instruments that it has ratified. The objective is to focus on CEDAW as a case study for Tanzania.

1.4.2 Specific Objectives

1. To discuss the international instruments that Tanzania has ratified that deal with the elimination of human rights violations against women and the obligations that result therefrom.
2. To examine the efficacy of CEDAW in combating violations against women in Tanzania, and International bodies that monitor human rights such as the Human Rights Council, the Office of the High

⁵² The Law of Marriage Act 1971, CAP 29,R.E, 2002,

Commissioner for Human Rights (OHCHR) and the Committee on the Elimination of all Forms of Discrimination Against Women.

3. To observe the legal framework of Tanzania in addressing human rights violation against women, that being, also the gaps or defects in the municipal laws that hinder the effective protection of women against human rights violations , and assess how the government is committed in addressing women human rights violations in Tanzania.
4. To study the reasons and effects that result from Tanzania not adapting a GBV Act that will protect women and provide for a punishment for the crimes committed by perpetrators.
5. To discuss the types of GBV prevalent in Tanzania and their implications and examine the factors that account for GBV in Tanzania.
6. To come out with recommendations and suggestions based on the findings on how this problem can be solved.

1.5 Research Hypothesis

This research will be guided by the following hypotheses;

1. The fact that Tanzania has not domesticated CEDAW, has led to the increase of human rights violations against women in different spheres of their lives.
2. There is no effective legal framework that can address these human rights violations in Tanzania and the laws that are in place are not enough to effectively deal with these violations.
3. The non-willingness or non-commitment on the government to take full measures in combating human rights violations is a challenge in implementing the provisions stipulated under CEDAW the reason mainly being that most violations are family matters that should be solved at the family level.

1.6 Significance of the study

The research will indicate the main reasons as to why States ratify the Conventions and indicate awareness on the part of the State over the obligations that a State incurs after ratifying the instruments

This research is important because it shall provide an awareness of the violence against women that is prevalent in Tanzania and the solutions that need to be taken to solve that problem. It is also important because it shall motivate the members of the Parliament to come up with a Law that will help women in Tanzania to overcome the problem of Gender Based Violence

It is important to all women who suffer under the whims of men and tradition because the enactment of the Law will help bring the perpetrators to justice. It is also important for judges because it shall provide a uniform framework for them to use and punishments they can give to the perpetrators.

It will give the security organs such as the Courts, more power to deal with the vice and be able to differentiate gender-based violence from other kinds of the vice prevailing in the society and thereby helping courts issue acceptable punishment.

The benefits that will occur after the study is done are that the principles of International law shall be recognized and respected in the sense that there will be an enactment of a national law. Women and Human Rights Activist will have better legal aid as they will access the courts with confidence that there is a Law that protects them.

1.7 Literature Review

In Africa 600,000 women die each year because of cruelty and domestic violence.⁵³ Moreover other women die because of traditional practices that are harmful like Female Genital Mutilation (FGM). In the Mwananchi Newspaper of June 24th 2012, it was reported that a pregnant woman was beaten cruelly and some of her body parts

⁵³ Mollel P, '*Wanawake 600,000 hupoteza maisha kila mwaka kwa ukatili*', Majira Newspaper, October 26, 2011

being cut with a machete by a stranger with the intention of seeing the unborn child. These acts and many other shows that a gap exists between the rights proclaimed in CEDAW and the reality in Tanzania in providing those rights. Implementation is the bridge that needs to connect these two aspects. Different literature has been written by various scholars on the subject. In the following part the researcher will deal with the literature on the subject and discuss whether the material presented shed enough light on the subject matter or not. Moreover the researcher will present an analysis of the materials discussed.

Peter, C. M⁵⁴, has provided a detailed and authoritative collection of Tanzanian case-law and materials on Human Rights. He has discussed the importance of human rights of women and why they need to be upheld. More weight has been given to the laws that Tanzania has enacted and how the laws can enable women to have access to courts. The book has also discussed how customs and traditions have impinged the rights of women in Tanzania. Moreover the enforcement of human rights at international level and national level has also been given greater importance because it is from these international instruments that we have international human rights today.

However this book has not discussed on the importance of domesticating the international instruments that Tanzania ratifies and in particular CEDAW. He has not discussed on the lack of a law that shall help Judges give out fair decisions and adequate punishment to perpetrators of Gender Based Violence. There is no mentioning of the importance of having a uniform law that can provide for consistency and reliability of the decisions that judges can make.

Kijo-Bisimba, H. and Peter, C. M⁵⁵, have given out a detailed discussion on various human rights in Tanzania and how the state has played its part in the promotion and protection of human rights. Within the book there is a special part that has identified

⁵⁴ Peter, C. M, (1997). '*Human Rights in Tanzania*', Rudiger Koppe Velang Koln.

⁵⁵ Kijo-Bisimba H. and Peter C. M, (2005), '*Justice and the Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries*', Legal and Human Rights Center.

the forms of gender discrimination against women, and how they are inflicted upon women. It has also discussed the reasons why discrimination against women occurs and the laws that protect women against discrimination. Emphasis has also been given to the aspect of the role of International law within municipal law and how international rules are supposed to be enforced in domestic laws. The book is important for the research as it provides an insight on the whole issue of what the GBV's are and what they entail.

Even though the book has given out a very detailed analysis of Gender Based Violence against women in Tanzania it has failed to note that there is a problem under the municipal system of not domesticating the International Instruments into national laws to give them stronger effect. It has also failed to note the gap in the laws of Tanzania. It has failed to address the need of a new law that will protect women against Gender Based Violence and punish the perpetrators of the violence.

Ross, S. D⁵⁶, in her book has provided for a comparative study of international human rights law between different African countries. She has discussed in detail on how and why the rights of women in Tanzania should be equal with men as far as inheritance of clan land and self-acquired land of their fathers is concerned. She has gone further to cite cases on such issues.⁵⁷ More emphasis has been given on how the Human Rights are realized and how they are enforced in practice. Apart from that she has also discussed the relevance of women under the International Instruments and how it protects them against discrimination. She has discussed in detail the tension between the rights and culture and how this discriminates against women. The author has noted that violence against women is still prevalent to the extent that they suffer at the hands of the perpetrators and that is due to the customs and traditions deeply rooted within the community.

⁵⁶ Ross, S. D, '*Women's Human Rights: The International and Comparative Law Casebook*', University of Pennsylvania Press, 2008

⁵⁷ Ibid note 37

She has noted that there is much more to be done for women in other spheres in Tanzania but failed to present the issue of GBV.⁵⁸ She has failed to note the gap or problem that Tanzania faces with regards to the lack of a basic law that may in one way help women who are helpless in defending their inherent rights. She has failed to note that there is such a need for reform and adaptation of a new Law that shall provide for a framework and guidelines to be followed in order to protect the women who suffer in Tanzania.

Ihana Landsberg-Lewis⁵⁹ in this book has shown the strength of the Convention and what it has achieved so far in the fight against discrimination. She has further noted at page 9 that the Convention is largely dependent on the political will of Governments. This political will can be created through the development of a highly conscious constituency, not only among women and women's groups, but within Government bureaucracies as well. She has further noted that the Constitution is the first way in which women human rights can be fully incorporated and bring with it greater meaning. She has discussed on this by giving examples of cases around the world on how the Constitutions have been able to help women in the fights against discrimination.⁶⁰

Moreover she has given an insight on the fact judges are not so willing to base their decisions on international treaties such as CEDAW because they do not consider it as part of national law but only as an aid to interpret national law. She has given an example of the Tanzanian case of Ephraim v. Pastory.⁶¹ This book is important for the research since it has provided a vast knowledge on the application of CEDAW in various legal systems that can help the researcher use in a comparative perspective with Tanzania.

⁵⁸ At page 176 she notes that "But there is no cause for euphoria as there is much more to do in other spheres"

⁵⁹ Landsberg-Lewis, I., (1998), 'Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women', The United Nations Development Fund for Women.

⁶⁰ Example Colombia, Brazil and South Africa

⁶¹ Ibid note 37

But despite discussing on various aspects of CEDAW she has left out an important part of implementing CEDAW through domesticating and the reasons as to why Tanzania has been reluctant for so long from domesticating CEDAW into its national laws.

Fareda Banda⁶² has noted that among the reasons that impede the full implementation of the provisions of CEDAW is the recognition of customary law as being part of the formal legal system in the territory. She has discussed that many African states recognize customary law as part of the legal regime. She further notes that some systems see customary law and culture as being subject to non-discrimination provisions contained within the bill of rights such as Ghana.⁶³ Yet others grant customary law immunity from non-discrimination provisions such as Zambia.⁶⁴

She further notes that Tanzania is a state that recognizes customary law and also provides for equality before the law without making explicit the hierarchy between the formal recognition of equality provisions and the continued existence of customary law. She has not failed to note the extent to which Tanzania has managed to uphold equality among men and women by citing cases that have dealt with issues involving human rights and customary law⁶⁵, and that women's rights had to be respected and that customary law had to evolve to reflect this new order.

She has strengthened her points around the issue of how customary laws are treated within Tanzania but has failed to cite the problem of Tanzania not domesticating CEDAW in order to make the law more accessible to women around the country and what implications result therefrom. Even though she has commended on Tanzania's act of not giving the customary laws priority in dealing with cases as it was in the case of *Chilla v. Chilla*.⁶⁶

⁶² Banda, F., (2005), 'Women Law and Human Rights: An African Perspective', Hart Publishing.

⁶³ Under article 27 (4) (d) of the 1992 Constitution of Ghana

⁶⁴ Under section 23 (4) (c) of the 1991 Constitution of Zambia

⁶⁵ Ibid note 37

⁶⁶ *Chilla v. Chilla* (2004), *High Court of Tanzania at Dar-es-Salaam*.

Jullu, S., Hassan, S., Njau, M., and Tesha, F.⁶⁷ have fully discussed on Tanzania's international obligation and responsibilities since after all Tanzania's obligation under CEDAW is self-imposed and not forced. It has noted on the binding nature of CEDAW and how the Parliament should enact domestic legislation to give full effect to the treaty obligations as individuals who may seek to have their rights recognized in courts under CEDAW may not be successful. This is so due to the fact that in the lower courts it is not easy for magistrates to be aware of the international conventions. Furthermore the book has discussed on the advantages that may come with the enactment of the law which includes the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms.

Furthermore the book has provided an insight on the different types of GBV that are common in Tanzania including polygamy, rape, domestic violence and FGM. However the book has failed to note on the implications that result from the failure of domesticating CEDAW in Tanzania and how it can affect women in the country.

Jullu, S., Hassan, S., Njau, M., and Tesha, F.⁶⁸ again discuss in detail the problem of domestic violence in Tanzania. They give out a detailed process of the legal procedure once a woman's right has been violated. They note that the procedure apart from being cumbersome is long and complicated and in comparison to that they cite the Domestic Violence Act of South Africa which has proven to provide a speedy procedure for victims of domestic violence in courts. This book has given a critical comparison at the international level for countries that have domesticated CEDAW either in their Constitution or by an enabling Act and the advantages that come with that.

⁶⁷ Jullu, S., Hassan, S., Njau, M., and Tesha, F., (2009), '*Marriage Matters*', Women's Legal Aid Center,

⁶⁸ Jullu, S., Hassan, S., Njau, M., and Tesha, F., (2009), '*Domestic Violence in Tanzania: Nimechoka Kupigwa*', Women's Legal Aid Center,

The book has discussed the reasons why implementing CEDAW has become such a problem in Tanzania. For example the Police Force Act⁶⁹ and the Police Force Supplement Act⁷⁰ establish the responsibilities of the Tanzanian police force but do not address domestic violence specifically even though their purpose is to preserve the peace and maintain the law and order. Still the authors have noted that the police are reluctant in considering domestic violence as a crime.

This book has given a very detailed discussion on the whole issue of GBV in Tanzania and how Tanzania has failed to implement her international obligations, but has failed to give out a way forward in order to end this problem in Tanzania.

Frans Viljoen⁷¹ has given an insight on the extent to which the provisions of international human rights treaties have become part of a particular country's domestic law. He has discussed in detail on the two doctrines of monism and dualism and the place of international human rights law in the hierarchy of municipal law. He states that there are three options;

1. International law may be accorded a status above all national law including the Constitution
2. Its status may be equal to that of the Constitution but superior to all other national laws, or
3. It may have a position in the legal hierarchy equal to that of the ordinary national laws.

He has attempted to gauge the extent to which domestic African courts have applied international human rights instruments and evaluate the significance. Once again Tanzania has not been an exception in this evaluation. Once again the case of *Ephraim v. Pastory*⁷² got the attention of the author. The author has applauded the efforts that

⁶⁹ The Police Force and Auxiliary Services Act, Cap. 322 R.E 2002 s. 8 (3)

⁷⁰ The Police Force and Auxiliary Services Act, Cap. 322 R.E 2002 s. 10

⁷¹ Viljoen, F., (2007), '*International Human Rights Law in Africa*', Oxford University Press.

⁷² Ibid, note 37

Tanzania had made with regard to protecting women's rights against customs that try to discriminate against them. However no mention has been made on the need to increase efforts in domesticating CEDAW into national laws in order to avoid waiting for that opportunity when a bold judge would take up the chance of using CEDAW's provisions even though it is not formally recognized as part of the national laws.

Magoke-Mhoja, M. E.⁷³ has explained how Tanzania being a common law country, needs to further incorporate international instruments into its legal system for the human rights treaties particular CEDAW to have any effect in courts. She has noted that Tanzania has not domesticated CEDAW and thus the implementation machinery lacks the teeth to enforce it. She has further noted that judicial intervention has played a vital role in promoting women's rights. By justifying this she has given out example of cases that have been dealt with in courts. For example in *Ndewawiosia v. Immanuel Malasia*⁷⁴ the customary law that barred daughters from inheriting land had no place in contemporary Tanzania was it was considered discriminatory. She has further given a discussion on the fact that not all judges in Tanzania can be as bold as others for in other cases rights of women could not be upheld due to the fact Tanzania has not domesticated CEDAW. She mentions *Deocras Lutabana v. Deus Kashanga*⁷⁵ as an example where the court while accepting that the customary laws of inheritance were discriminatory and caused hardships to women the court decided to do nothing and wait for the legislature to effect the relevant changes

She has failed to note that the legal system has only dealt so far with issues pertaining to inheritance of land and thus leaving the other sphere of GBV in the dark, which is a burning issue and needs to be given enough attention. Moreover the author has not given her recommendations on what should be done after realizing this problem.

⁷³ Magoke-Mhoja, M. E, (2008), '*Child Widows Silenced and Unheard: Human Rights Suffers in Tanzania*'. Author House

⁷⁴ *Ndewawiosia v. Immanuel Malasia*, [1968], H.C.D 127

⁷⁵ *Deocras Lutabana v. Deus Kashanga*, [1981] TLR. 122

Amnesty Human Rights Report⁷⁶ has indicated that sexual and other forms of gender-based violence remained widespread, particularly domestic violence and that few perpetrators were brought to justice, contrary to the number of incidents of sexual violence in Tanzania. The report has not addressed the problem of domestication of different Human Rights instruments after ratification.

Much has been said on the issue of Tanzania ratifying CEDAW as a huge step in the promotion and protection of human rights for women, as many authors have commended the act of ratification believing it to be the end of GBV against women, whereas it is just the end of a new beginning, a beginning of implementation. Little has been said on the issue of domestication of CEDAW into national laws which is the crux Tanzania showing its acceptance to be bound by international instruments.

The books and articles that have cited the case of *Ephraim v. Pastory*⁷⁷ have done so since, one may say, it is among the few reported cases where the judge has used CEDAW in its decision making. However they have failed to note that the case is from 1989 and since then not much has changed with regard to the protection of women from various human rights violations. Most books are recent ones but have failed to note this problem and instead keep on citing a case that even though has shown great emphasis in implementing CEDAW, is an old case.

This research intends to add to the vast literature on the reasons why Tanzania has not implemented that obligation and the implications that result therefrom. Moreover it is the intention of the researcher to provide a list of recommendations that are going to be useful in dealing with this problem.

⁷⁶ Amnesty International Report: The State of the World's Human Rights, (2012)

⁷⁷ Ibid note 37

1.8 Research Methodology

1.8.1 Research Design

This research is going to be an empirical research based on finding the implications of States not domesticating international instruments. This research involved the touch of the society in the sense that interviews and questionnaires were used in the process of the research. The problem is more practical and hence there is a need to involve the society in dealing with the problem. However this research is not going to be based exclusively on primary data but secondary data such as books and journals shall also be used in the research.

1.8.2 Population and Sampling

A sample is a small representation of a large whole. It is a short-cut alternative to studying all people, all groups, all community or all areas through choosing of a small size that will represent the larger group. In this research the subjects that the researcher intends to target are women who are suffering from Gender Based Violence, law enforcement agents who are responsible for the protection of GBV victims and also governmental officials responsible for the enactment of a GBV Act. They are the main group that are involved in this research. The other participants that are going to be used in this study are human rights activists from places like The Legal and Human Rights Center and Judges who in one way or the other have been judicial activists in the fight against Gender violence.

1.8.2.1 Sample Unit

The sample unit for this research shall be of a geographical type based on the region of Mbeya and its districts and towns.

1.8.2.2 Sample Size

The sample size in total shall be fifty (50) consisting of the following groups; five (5) parliamentarians, fifteen (15) members of the judiciary, twenty (20) women and ten (10) men.

1.8.2.3 Sampling Technique

The technique that the researcher shall use is the Random (Probability) technique. This is so since it will eliminate any kind of human biasness and give each person in the sample unit a chance of being selected.

1.8.3 Data Collection Methods

The data collection method is in most instances based on documentary review of secondary sources. It is also based on the interview of subjects and participants in order to get an insight on the whole issue of women human rights violations and Questionnaires. The data collection methods shall include the following;

1.8.3.1 Primary Data

1.8.3.1.1 Interview

The interview method of collection of data involves presentation of oral questions and reply in oral responses, where the researcher will meet with the respondent for a face-to-face conversation. In this research structured interviews will be used. This is so because the respondents will each get the chance to answer the same questions and it will enable the researcher to come to a conclusion that has high validity since the questions will be the same. Interviews will be used to examine the respondents views and feelings about the issues relating to GBV and their views about the non-domestication of CEDAW. This method is effective since it will enable the researcher to ask questions to the respondent and receive answers on the spot and thus save time. Moreover it is important since some of the respondents may not know how to write and thus make the method of questionnaire not useful, and thus the interview method shall be more effective. Interviews will be conducted with law enforcement agents such as magistrates, judges and the police. Moreover women, non-governmental and governmental officers will also be interviewed.

1.8.3.1.2 Questionnaire

A questionnaire is a set of questions based on a researcher's objectives in a sequential order in order to get solutions or opinions from people to solve a problem. It basically consists of a number of questions printed or typed in a definite order on a form. The

questions are based on the subject in question. It is also used about such things which cannot be known through direct observation or interviews such as the ideas, intentions and motives of the persons concerned. Questionnaires will be employed to collect information on reasons for the failure of domesticating CEDAW in Tanzania, and also on the prevalence, types and sources of GBV. The questionnaire method is useful to the researcher since in collection of data the researcher may likely meet with respondents who are not willing to have a face-to-face conversation but are more willing to write down the answers on a piece of paper. Both closed and open questions will be asked.

1.8.3.2 Secondary Data

1.8.3.2.1 Documentary Review

Secondary data means that data that is already available. Documentary sources include books, survey scripts, memories, letters and diaries along with historical inscriptions and material published in news-papers and magazines from time to time. This will help the researcher to understand the background of the study in depth and know what has so far been written in relation to the subject. This research shall need the following resources; reliable literature including books and journals, computer, stationary, and availability of internet. Thus the Libraries of the African Court on Human and People's Rights and the International Court Tribunal for Rwanda will be helpful in conducting the Research.

1.8.4 Type of study

This study is an analytical study based on the region of Mbeya where the researcher will analyse the implications of States not domesticating the international human rights instruments reasons and effects of Gender Based Violence resulting from the lack of that law.

1.8.5 Analysis of the findings

The collection of data will undergo serious analysis. Such preliminary scrutinization will help the researcher in the determination as to whether the data collected concur

with the objectives of the research study. The method that will be employed by the researcher is qualitative analysis involving the summary of key findings in both data collected from the libraries and the society in general. The method of data analysis used in this study is logic in terms of deduction of facts related to the research problem.

1.9 Scope of the study

The researcher will limit the study in the country of Tanzania within the region of Mbeya. The researcher is also going to limit the research to the following number of issues; the reasons why Tanzania has not enacted a national law that shall provide for the protection, prevention and punishment of women human rights violence, the effects that have arisen out of the non-adaptation of such an Act and to analyze the various international, and domestic laws that provide for the elimination of human rights violence against women.

1.10 Limitation of the study

While undergoing this research several limitations shall be encountered including financial implications, as money will be involved in transport and publications of questionnaires. Another limitation is the time frame of the research.

1.11 Synopsis of the study

The first chapter will introduce the topic of the research. It provides for background of the problem in detail and what has so far been done in combating the problem nationally and internationally. It also provides for the Statement of the problem, objectives and the hypothesis that will guide the researcher in completing the research. This chapter also provides for the methodology of the research that being the type of the study and the strategies that will be involved in the collection of data.

The second chapter will provide for the conceptual framework of the research. It deals with the definition of different principles and terminologies that will be used in the research. This will enable the researcher to know what exactly to focus on. This chapter will be helpful in connecting different aspects such as GBV and the law.

The third chapter will introduce the CEDAW. Here the researcher shall discuss on the Convention in detail. Its growth and aims. The treaty body known as the Committee of CEDAW and its functions. The researcher will also discuss on the individual communication system to the Committee under the Optional Protocol to CEDAW.

The fourth chapter shall focus on the legal framework in combating women human rights violations. Here the researcher will examine the international bodies that are created for the protection of human rights around the world and in particular Tanzania such as the UN and the Human Rights Council. Moreover this chapter will assess the regional and domestic legal framework in Tanzania and the different laws that though were intended to protect women from human rights violations hinder their effective protection.

The fifth chapter will deal with the discussion of the findings of the data that has been collected. It will analyze the findings based on the data that was analyzed in the previous chapter.

The sixth chapter will present the conclusion of the research as viewed by the researcher which will be the answer to the hypothesis stipulated above. This chapter will also include a part on the recommendations that the researcher finds appropriate for the improvement of the problem of GBV.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1 Introduction

Over decades countries around the world have been ratifying international human rights instruments for the purpose of protecting human rights abuses against human beings and promoting the status of the human being in their respective territories. Tanzania is no exception as it has been entering into treaty agreements since the 1960's,⁷⁸ but the question to ask here is, is this the best move towards the protection of women's rights, is Tanzania ratifying international human rights treaties, and in this case CEDAW, just because it is a practice that every state goes through sometimes to make a political statement or is it for a real intention to respect them and put in place the domestic mechanisms by which the rights could be properly protected.

The aim of this chapter is to explain the different concepts, debates, ideas, views and principles involved in the domestication of treaties. This chapter also provides a conceptual framework which is based on the different concepts on implementing CEDAW nationally and the possible consequences of not implementing CEDAW in Tanzania. Moreover it is to connect the lack of the domestication of CEDAW with the ongoing GBV incidences in Tanzania.

2.2 The Constitution.

A constitution is the set of the most important rules that regulate the relations among the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country.⁷⁹ According to the Preamble of the Constitution of Tanzania, the foundations of the Constitution are: a democratic and socialist society founded on the principles of freedom, justice, fraternity and concord which will ensure that all human rights are preserved and protected and that the duties of every person are faithfully discharged.⁸⁰ The

⁷⁸ www1.umn.edu/humanrts/research/ratification-tanzania.html

⁷⁹ http://www.oup.com/uk/orc/bin/9780199574063/parpworth6e_ch01.pdf

⁸⁰ http://ww2.unhabitat.org/publication/hs66702e/rr_chp4.pdf

Constitution is at the apex and the hierarchy of international law is not above the Constitution or aside the Constitution but its position is under the Constitution with the other laws.⁸¹

2.3 Ratification of International Treaties

A treaty is a written agreement to which a party may consent to be bound.⁸² It is an agreement formerly signed ratified or adhered to between two nations or sovereigns and governed by international law.⁸³ According to article 11 of the Vienna Convention on the Law of treaties⁸⁴ the consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.⁸⁵

According to article 2(1) (b) of the Vienna Convention on the Law of Treaties, ratification is an international act whereby a state establishes on the international plane its consent to be bound by a treaty. Traditionally ratification is the most used form to show consent among states. It consists of the execution of an instrument of ratification by or on behalf of the state and either its exchange for the instrument of ratification of the other state if the treaty is a bilateral treaty or its lodging with the depositary if the treaty is a multilateral treaty.⁸⁶

2.4 The Concept of Domestication/Integration into domestic laws.

International law does not regulate the implementation of international treaties and as a result, states have had to rely on their domestic and constitutional law for this.⁸⁷ That is where domestication comes into the picture.

⁸¹ Ibid note 23, pg 538

⁸² Ibid note 23, pg. 25

⁸³ Garner A. B., (2009), '*Black's Law Dictionary*', 9th edition, West Thomson, pg. 1640

⁸⁴ Done at Vienna on 23rd May 1969, and entered into force on the 27 January 1980, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

⁸⁵ Malanczuk, P., (1997), '*Akehurst's Modern Introduction to International Law*', 7th edition, Routledge, pg. 131

⁸⁶ Aust, A., (2005), '*Handbook of International Law*', Cambridge University Press, pg. 63

⁸⁷ Mendes, P. E., Lalonde-Roussy, A., (Ed.), (2003), '*Bridging the Global Divide on Human Rights: A Canada-China Dialogue*', Ashgate Publishing Ltd., pg. 100

Domestication is described as a way of maximizing the effects of an international instrument at the national level which has to be made part of domestic law either by way of incorporation or transformation. Even if this is not formerly done the treaty's influence should still be brought to bear on domestic law, policy and judicial decisions. Sometimes there is an added requirement that treaties should be published before courts can place reliance on them to find violations.⁸⁸ Domestication of international and regional treaties principally requires that constitutional and other legal provisions be enacted at the national level to give effect to the ratified treaties.⁸⁹ Following the ratification of an international Convention, State parties are obliged to align national laws to reflect the commitment in the treaties. This is what is referred to as domestication or harmonization. It is done through the country's constitutional provision.⁹⁰

Under the Presidential Circular no. 1 of 1985 relating to agreements between Tanzania and other States, international organizations and conferences agreements are under the purview of the cabinet, and the duty to initiate legislative implementation vests in the responsible Ministry or governmental departments. In practice it is the ministry of Foreign Affairs and International Cooperation which deals with the ratification of international treaties and leaves it to the relevant ministry for implementation.⁹¹ For Tanzania whose legal system may be characterized as being based on the dualist doctrine, the process by which an international legal rule may become part and parcel of the law of the land and therefore capable of enforcement, involves the following institutions and procedures⁹²;

i) Initiative by the Ministry of Justice and Constitutional Affairs

⁸⁸ Ibid note 23, pg. 52

⁸⁹ Viljoen, F., and Precious, S.(Eds.), (2007), '*Human Rights Under Threat: Four Perspectives in HIV, AIDS and the Law in Southern Africa*', Pretoria University Law Press, pg. 137

⁹⁰ Achilihu, N. S., (2010), '*Do African Children Have Rights? A Comparative and Legal Analysis of the UN Convention on the Rights of the Child*', Universal Publishers, pg. 103

⁹¹ Organized by the Center for Human Rights, (2011), '*Giving Effect to the Law on War Crimes, Crimes Against Humanity and Genocide in Southern Africa*', University of Pretoria, pg. 39

⁹² Yusuf, A. A., (Ed.), (1998), '*African Yearbook of International Law: Annuaire Africain De Droit International*', Kluwer Law International, pg. 74-75

- ii) Consultation with the Ministry of Finance (on possible financial implications)
- iii) Deliberation by the inter-ministerial Technical Committee
- iv) Approval by Cabinet
- v) Preparation of a bill by the Chief Parliamentary Draftsmen
- vi) National Assembly to pass the bill
- vii) Presidential Assent
- viii) Publication in the Government Gazette⁹³

The greatest challenge is to bring about compliance with the treaty provisions by government officials and nationals alike. International legal norms only become truly effective if compliance is not motivated by coercion or self-interest but flows from personal motivations brought about by an internal process of norm-acceptance.⁹⁴ It is believed that implementation is slow because the drafting and subsequent passing of implementing legislation is inherently a time consuming process that may sometimes also depend on the prevailing political will. Moreover the complexities involved in drafting implementing legislation have also slowed down domestication, as resources and the involvement of expertise to engage in domestication process is scarce.⁹⁵ On one side of the coin it can be argued that reliance of domestication is also on the notion of state sovereignty.⁹⁶ Tanzania would ratify any treaty like it did with CEDAW but domesticating it can be problematic since it is an independent State and its own decisions (not that of the international community) have priority. If domestic incorporation has not occurred then the courts in Tanzania are not obliged and may in some instances not even be entitled to apply these international norms save where

⁹³ This Procedure has been compiled from Presidential Circular no. 6 of 1963 (Ref. No. SHC/C.180/1 of October 16, 1963) on Ministerial Responsibility and Administrative Procedure and Waraka wa Rais no. 1 wa 1985 (Kumb. Na. SHC/C 180/1/C/70)

⁹⁴ Ibid note 23, pg. 25

⁹⁵ Murungu, C., and Biegon, J., (Ed.), (2011), '*Prosecuting International Crimes in Africa*', Pretoria University Law Press, pg. 284-285

⁹⁶ The right of a State to self-government or the supreme authority exercised by each state

reference to them is permitted or required by a separate norm within that legal order notably the Constitution of Tanzania.⁹⁷

2.5 Non-Domestication: A Human Rights Violation

The non-domestication of human rights instruments has stultified the growth of women's human rights.⁹⁸ For example litigation has become difficult especially where there is no full domestication of human rights treaties. In these circumstances the capacity to litigate around human rights issues is a question. Moreover the attitude of the judiciary whether it is conservative or proactive may have to play a greater role, whether it can rely on cite to take judicial notice of human rights treaties even if they have not been domesticated.⁹⁹ Women face problems accessing the law and attaining their rights because of this problem.

2.6 The Concept of Human Rights

Defining Human Rights has and will not be an easy thing. From the origin of human rights to date the definition has varied from context to another depending on the current understanding of human rights. Different societies and organizations have had different concepts of what they understand human rights to be. For example the view adopted by the Western world with regard to international human rights law in general terms has tended to emphasize the basic civil and political rights of individuals, that is to say those rights that take the form of claims limiting the power of government over the governed.¹⁰⁰

Human rights are rights that every human being has by virtue of his or her human dignity and they are the sum of individual and collective rights laid down in state constitutions and international law¹⁰¹ By definition human rights encompass and touch

⁹⁷ Peter M. P., and Kijo-Bisimba, H., (Eds.), (2007), '*Law and Justice in Tanzania: A Quarter of a Century of the Court of Appeal*', Mkuki na Nyota, pg. 206

⁹⁸ Olowu, D., (2009), '*An Integrative rights-based approach to human development in Africa*', Pretoria University Law Press, pg.77

⁹⁹ http://www.kubatana.net/docs/gen/unifem_%20protocol_ratification_&_implem_080911.pdf

¹⁰⁰ Shaw, N. M. (2008). *International Law*, (6th ed.), Cambridge University Press, pg. 268

¹⁰¹ Nowak, M., (2005), '*Human Rights: A Handbook for Parliamentarians*', SADAG, Bellegarde-sur-Valserine, pg.1

on practically every aspect of our lives and must be guaranteed, guarded, defended and respected at all times. Respect for human rights provides the foundation upon which rests the political, economic, social and judicial structure of human freedoms. It is vital for the prevalence of peace, security, stability and development.¹⁰² Human rights are the most fundamental rights of human beings. They define relationships between individuals and power structures, especially the State. Human rights delimit State power and, at the same time, require States to take positive measures ensuring an environment that enables all people to enjoy their human rights.¹⁰³

Human rights are an important aspect of the human life and the Preamble to the Universal Declaration of Human Rights (UDHR) stipulates that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.¹⁰⁴ To this end human rights are man's birthright and cannot be alienated and that because man is a rational and moral being he is different from other creatures on earth and is therefore entitled to certain rights and freedoms which other creatures do not enjoy.¹⁰⁵

According to the UN the important characters of human rights are as follows; they are internationally recognized, they are legally protected, they focus on the dignity of the human being, they protect individuals and groups, they obligate State and State actors, they cannot be waived or taken away, they are equal and interdependent and they are universal.¹⁰⁶

¹⁰² Heyns, C., and Killander, M., (Eds.), (2006), *Compendium of Key Human Rights Documents of the African Union*, 2nd edition, Pretoria University Law Press (PULP),pg. VII

¹⁰³ Ibid note 101, pg.1

¹⁰⁴ <http://www.ohchr.org/en/udhr/pages/introduction.aspx>

¹⁰⁵ Ibid note 1, pg. 27

¹⁰⁶http://www.google.co.tz/#hl=en&tbo=d&sclient=psy-ab&q=know+your+rights-Aung&oq=know+your+rights-Aung&gs_l=hp.3...19954.21411.3.21757.6.4.2.0.0.1.774.1257.2-2j6-1.3.0.les%3B..0.0...1c.1.uq-lyhX-Pg0&psj=1&bav=on.2,or.r_gc.r_pw.r_qf.&bvm=bv.1357316858,d.d2k&fp=94f8957766156c53&biw=1600&bih=799

2.6.1 State Obligations in Protecting Human Rights

Regardless of the fact that every treaty sets forth general obligations for States to assume upon ratification¹⁰⁷, it is broadly acknowledged today in both doctrine and jurisprudence that human rights guarantees three broad obligations, negative (to refrain from interfering with the enjoyment of rights) and positive (to take actions) .¹⁰⁸ These are as follows;

2.6.1.1 Obligation to respect

All human rights can be effectively protected at a basic level through lack of state interference in their enjoyment. The obligation to respect flows automatically from human rights without further pre-requisite.¹⁰⁹ States need to abstain from performing or tolerating practices that violate human rights.

2.6.1.2 Obligation to protect

The obligation to protect requires States to protect individuals against abuses by non-State actors.¹¹⁰ In other words the interests and rights portrayed in human rights instruments need to be safeguarded through the establishment of effective measures such as legislations and policies that would aim at protecting the right holders. For instance, the right to personal integrity and security obliges States to combat the widespread phenomenon of domestic violence against women and children by taking positive measures in the form of family or administrative laws, police and judiciary training or general awareness raising to reduce the incidence of domestic violence.¹¹¹

2.6.1.3 Obligation to fulfill

With this obligation states are required to fulfill human rights by ensuring that they are realized in practice. States need to facilitate, provide and promote access to rights.

¹⁰⁷ For example for CEDAW the obligation is stipulated under article 2-4

¹⁰⁸ Kalin, W., and Kunzli, J., (2009), *The Law of International Human Rights Protection*, Oxford University Press, pg. 96

¹⁰⁹ Ibid note 108, pg. 96

¹¹⁰ Ibid note 101, pg. 11

¹¹¹ Ibid note 101, pg. 12-13

This is particularly the case when such access is limited or nonexistent.¹¹² When governmental measures to provide for human rights are insufficient then the obligation to fulfill is not achieved.

2.6.2 Universality¹¹³ of Women's Human Rights

According to the Vienna Declaration adopted by the World Conference on Human Rights in 1993 "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner on the same footing and on the same emphasis."¹¹⁴ Human rights are universal because they are based on every human being's dignity, irrespective of race, color, sex, ethnic or social origin, religion, language, nationality, age, sexual orientation, disability or any other distinguishing characteristic. Since they are accepted by all States and peoples, they apply equally and indiscriminately to every person and are the same for everyone everywhere.¹¹⁵

For some scholars¹¹⁶ the symbol of human rights is a symbol of universality as it is an expression of values common to humankind, that human rights as a symbol are universal. And this is so by the simple fact of being born which is the universal symbol on which human rights are based.¹¹⁷

However due to the different cultures, strong beliefs religion and traditions among States, human rights and especially the rights of women have not acquired the status of universality. These aspects mentioned above undermine the universality of women's rights.¹¹⁸ Moreover much of international human rights law have been considered to

¹¹² International Commission of Jurists, (2008), '*Courts and the Legal Enforcement of Economic, Social and Cultural Rights*' Human Rights and Rule of Law Series No. 2, International Commission of Jurists, pg. 48

¹¹³ According to Black's Law Dictionary it means "Equality of applicability"

¹¹⁴ The World Conference on Human Rights, Vienna Declaration (25 June 1993), article 5

¹¹⁵ Ibid note 101, pg. 4

¹¹⁶ Such as Raimundo Pannikar

¹¹⁷ Sahinkuye, G. M., (2011), '*From Utopia to Universal Protection of Human Rights*', Prompt Printers and Publishers, pg. 45

¹¹⁸ The respect for women's human rights fails to be universal. The reasons for this general failure to enforce women's human rights are complex and vary from country to country, such as lack of state practice to condemn discrimination against women.

be influenced by the western¹¹⁹ ideologies¹²⁰ and therefore gaining universality of women's rights is difficult due to the cultural context in which these rights are expressed. Every culture expresses its experience of reality by concepts and symbols that belong to that tradition.¹²¹ Cultural relativism has also been considered as a way of impeding women's human rights. The implied argument for cultural relativism in the first analysis entails that norms of morality differ from place to place. Secondly it asserts that the way to conceive this variety is to take it within its cultural context. And in the third place it asserts that moral claims derive from and are enmeshed in a cultural context which is itself the foundation of their validity. Within this line of arguing it follows that there is no universal morality because the history of the world is the story of the plurality of cultures.¹²²

The UN Special Rapporteur on Violence against Women has described cultural relativism as the greatest challenge to women's rights and the elimination of discriminatory laws and harmful practices.¹²³ Kofi Annan once stated human rights are foreign to no culture and native to all nations; they are universal.¹²⁴ However this theory is caught up in the link between the theory of human rights and the practice of international human rights law.

Even though the Declaration on the Elimination of Violence Against Women (DEVAW) under Article 4 has urged states not to invoke custom, tradition, or religious consideration to avoid their obligation to eliminate discriminatory treatment of women, there are still practices that deny women their basic human rights.

¹¹⁹ Rwiza, N. R., (2010), *'Ethics of Human Rights: The African Contribution'*, Franciscan Kolbe Press, pg. 74

¹²⁰ Ideologies means a shared system of values held collectively by a specific group, which itself is often defined and identified by reference to the ideology.

¹²¹ Ibid note 117, pg. 45

¹²² Ibid note 119, pg. 88

¹²³ Coomaraswamy, R., (2003), 'Intergration of the Human Rights of Women and the Gender Perspective: Violence Against Women; Developments in the Area of Violence Against Women', Commission on Human Rights, UN Economic and Social Council, E/CN.4/2003/75, 6 January 2003

¹²⁴ Kofi A. Annan, Secretary-General of the United Nations, Address at the University of Tehran on Human Rights Day, 10 December 1997.

2.7 The concept of Dualism and Monism in International Law

There are two basic theories with a number of variations in the literature in the relationship between international law and domestic law. Dualism assumes that international law and municipal law are two separate legal systems which exist independently of each other. Lauterpacht portrays the dualist approach as follows;

*Municipal law differ so radically in the matter of subject of the law, its sources and its subsistence that a rule of international law can never per se become part of the law of the land, it must be made so by the express or implied authority of the state. Thus conceived the dualistic view is merely a manifestation of the traditional positivist attitudes.*¹²⁵

In order for a human rights instrument to have effect in a dualist country, it has to be transformed or incorporated into national law by following the procedures of that specific state. Normally it is the Constitution that provides for the outcome of an international treaty once ratified. It also provides for the procedures to follow once a treaty needs to be incorporated. The legislature plays this role. It incorporates a treaty into domestic law, which shall reflect upon the treaty provisions. In some instances courts hardly apply international law and if they do they do so for the sake of interpretation. But a deeper analysis of the treaty, in this case, is impossible in a dualist state.

Whereas monism assumes that both international and legal systems form one legal order. This approach being formulated by Kelsen in whose view the ultimate source of the validity of all law is derived from a basic rule (Grundnorm) of international law.¹²⁶

However the practical disadvantages of dualism are manifold as well. There is always the danger that the national and the international legal situation drift apart due to national-centric interpretation, unincorporated treaties and the latitude of the national

¹²⁵ Dugard, J., (2008), 'International Law: A South African Perspective', 3rd edition, Juta & Co. Ltd, pg. 47

¹²⁶ Ibid note 85, pg. 63

legislator in the sense of their willingness to incorporate the treaties. Above all unincorporated treaties remain legally non-existent within the national legal order.¹²⁷

2.8 Defining GBV

Due to the non-coherent nature of international law, and given the fact that there is no international legal body that has the ultimate authority to interpret legal terms such as GBV, there is no one, exhaustive and exclusive, definition of violence against women. In different societies and in different contexts different definitions have been used. Moreover CEDAW has not defined GBV in the Convention.¹²⁸ Thus the definition of GBV the researcher will use is that proposed by the Council of Europe, to include as follows;

*Gender-based violence is an umbrella term for any harm that is perpetrated against a person's will; that has a negative impact on the physical or psychological health, development, and identity of the person; and that is the result of gendered power inequities that exploit distinctions between males and females, among males, and among females.*¹²⁹

Under General Recommendation no. 19 made by the Committee on the Elimination of Discrimination against Women, discrimination has included GBV. It has defined GBV as;

*That violence that is directed against a woman because she is a woman or that affects a woman disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.*¹³⁰

These definitions are not exclusive to women and girls, although GBV principally affects women and girls than men and boys. This violence may be physical, sexual or economical and may take place throughout society, in the home, community and state institution such as police stations and hospitals.¹³¹

¹²⁷ Dorr, O., & Schmalenbach, K., (2012), 'Vienna Convention on the Law of Treaties: A Commentary', Springer-Verlag, pg. 465

¹²⁸ General Recommendation no. 19 brings the issue of violence against women within CEDAW by stipulating that the definition of discrimination contained in Article 1 includes GBV

¹²⁹ Ohana, Y., (Ed), (2007). 'Gender Matters: A manual addressing gender-based violence affecting young people', Council of Europe, pg. 43

¹³⁰ <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

¹³¹ Commonwealth Secretariat, (2004), 'Gender and Human Rights in the Commonwealth: Some Critical issues for action in the decade 2005-2015', Commonwealth Secretariat, London, pg. 113-114

There are different forms of GBV that vary from culture and country. However some forms are common in almost all countries, where as some are not common such as sex-selective abortion in Northern India which does not happen in Tanzania.¹³² In Tanzania there are several forms of GBV but the most common forms of GBV are as follows;

2.8.1 Domestic Violence

There is no law in Tanzania on domestic violence therefore there is no definition that is particularly based on Tanzania. However domestic violence can be defined as includes violence against women and girls by an intimate partner, including a cohabiting partner.¹³³ It involves a range of physical, mental, emotional and sexual abuses and suffering perpetrated by one intimate partner against another. Domestic violence can occur in many types of relationships but generally occurs between a man and a woman who are in a relationship.¹³⁴ In most societies of Tanzania men are the perpetrators in most of the domestic violence incidences. In other circumstances domestic violence has been defined as violent acts perpetrated on females because they are females.¹³⁵ The Law of Marriage Act¹³⁶ (LMA) does not protect unmarried couples from domestic violence. One could say this is so as the title of the law portrays what exactly to find in it, issues pertaining to married couples and not unmarried couples. Domestic violence is prevalent and this has been contributed by the lack of a specific law that reflects CEDAW to cater for such problems.

2.8.2 Rape and Marital Rape

According to Black's Law Dictionary¹³⁷ rape means the unlawful sexual intercourse committed by a man with a woman and not his wife through force and against her will. The legal definition that was used by the International Tribunal for Rwanda in

¹³² Terry, G., Hoare, J., (Ed.), (2007), '*Gender-Based Violence*', Oxfam GB, pg. XV

¹³³ United Nations Children Fund, (2000), '*Domestic Violence Against Women and Girls*', pg. 2

¹³⁴ Jullu, S., Hassan, S., Njau, M., and Tesha, F., (2009), '*Domestic Violence in Tanzania: Nimechoka Kupigwa*', Women's Legal Aid Center, pg. 111

¹³⁵ Myamba, F. P., (2009), '*Domestic Violence: Rights Movement in Tanzania: An Exploration*', Unpublished Doctoral Dissertation, Western Michigan University

¹³⁶ The Law of Marriage Act Cap 29 R.E 2002

¹³⁷ Ibid note 83

Akayesu in 1998 is still considered to be a standing definition.¹³⁸ Rape is among those wrongs which are never excusable nor justifiable.¹³⁹ Tanzania has a law in place that criminalizes rape in direct wording under the penal Code¹⁴⁰ of Tanzania. While the act of rape has been criminalized by various legal systems for more than 2000 years its definition has continually changed at the national level in accordance with society's understanding of sexual morality. Religious and cultural values in a society regarding sexuality are closely related to the general status of women and are constantly re-evaluated.¹⁴¹ The early criminalization of rape in many states was directly tied to the social condemnation of non-marital sex.¹⁴²

The problem however rests on marital rape which has not been criminalized. Marital rape has been defined as a husband's sexual intercourse with his wife by force or without her consent.¹⁴³ It involves any unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, threat of force or when the wife is unable to consent.¹⁴⁴ During the 14th century marital rape was still excluded under common law and most scholars believe it to originate from Justice Hale's pronouncement which states that, "by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract from."¹⁴⁵ Marital rape is a recent

¹³⁸ The court defined rape as 'a physical invasion of a sexual nature committed on a person under circumstances which are coercive. The tribunal considers sexual violence which includes rape as an act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.'

¹³⁹ Gardner J., and Shute S., (2000), *The Wrongness of Rape*, *Oxford Essays on Jurisprudence*, 4th series, Oxford University Press, pg. 193

¹⁴⁰ Section 130 of the Penal Code Cap 16 R.E 2002

¹⁴¹ Errikson, M., (2011), *Defining Rape: Emerging Obligations for States Under International Law*, Martinus Nijhoff, pg. 38

¹⁴² Ibid note 141, pg. 38

¹⁴³ Ibid note 83, pg. 1374

¹⁴⁴ Flowers, B. R., (2006), *Sex Crimes, Perpetrators, Predators, Prostitutes and Victims*, Charles C. Thomson Ltd., 2nd edition, pg.38

¹⁴⁵ Hale, M., (1800), *Historia Placitorum Coronae: The History of the Pleas he Crown*, Rider, Vol. 1

phenomenon therefore the treatment of marital rape as a punishable offence reflects a fairly recent development in the protection of women's human rights.¹⁴⁶

Under the CEDAW marital rape has not been included and therefore through the General Recommendation no. 19 under the comment for article 16 it has been added that family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes.¹⁴⁷

2.8.3 Female Genital Mutilation (FGM)

FGM refers to all procedures that involve cutting or removing part of or all of the clitoris, and sometimes also removing the labia minora and wounding the labia majora for non-medical reasons. The perpetrators invoke tradition and culture to justify their acts.¹⁴⁸ FGM is generally performed on young girls but is sometimes performed on infants, adolescents and women. In many cultures the practice is done because it is claimed that FGM is part of their culture and a way of controlling women's sexuality.

FGM is a violation of human rights and has been opposed in the international arena through various instruments such as DEVAW.

2.8.4 Forced marriages

Forced marriage is a marriage conducted without the valid consent of both parties, where duress is a factor.¹⁴⁹ A person is forced into marriage if another person forces them to enter into marriage without that person's full consent or approval. The force does not need to be directly applied to the victim that means indirect pressure applied to friends or family members may also amount to force.

¹⁴⁶ Oette L., (Ed.), (2011), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, Ashgate Publishing Ltd, pg. 278

¹⁴⁷ <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

¹⁴⁸ In re Kasinga 21 I. & N. Dec. 357 (B. I. A. June 11, 1996)

¹⁴⁹ Maruf, S. A., (2012), *Forced Marriage: A Study on British Bangladeshi Community*, Author House, pg. 6

The LMA¹⁵⁰ defines marriage as a voluntary union of a man and a woman, intended to last for their joint lives.¹⁵¹ In the case of *Ahmmmed Said Kidevu v. Sharifa Shamte*¹⁵² Maina, J. Observed that marriage is the voluntary union of a man and a woman and it is contracted with the consent of the parties. However no where in the Act is there a provision that expressly prohibits forced marriages except for the wording ‘voluntary’ which may or may not be interpreted accordingly.

2.9 Conclusion

Violation of women’s rights is an aspect that needs to be considered and taken into account by the government of Tanzania. This conceptual framework has revealed that with the non-adoption of a domestic legislation that would cater for women’s rights everything said and done may be in vain, since Tanzania is no exception when it comes to the concept of cultural relativism. There is a need for a law that would consider all the concepts and principles discussed above, a law that would be a pillar for women’s rights.

¹⁵⁰ Ibid note 136

¹⁵¹ Ibid note 136

¹⁵² (1989 TLR 148)

CHAPTER THREE

INTRODUCING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

3.1 Introduction

This chapter highlights some of the important elements of the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The chapter will bring to light the development of CEDAW in general, its importance and drawbacks. Moreover it will identify the obligations of states parties after ratifying the CEDAW and how the implementation of CEDAW is carried out. Another part will be devoted to the discussion on the Optional Protocol to CEDAW especially with the individual communication process and the inquiry system.

3.2 The Historical Overview of CEDAW

3.2.1 Before the World Wars

The situation of women's rights around the globe has been that of inequality. With the vast women's human rights violations around the globe there was a need to produce a comprehensive and effective framework for the protection and improvement of women's rights in the world. The struggle for women's rights took place in different and various forms across the globe. For example after World War I the International Council for Women (ICW) argued unsuccessfully for the inclusion of women's rights in the League Covenant.¹⁵³ With the outbreak of World War II and the dissolution of the League of Nations the work of the ICW came to an end.¹⁵⁴ With time some covenant were adopted that protected women but did not let women enjoy their human rights. An example of this was the Convention Concerning the Employment of Women before and after Childbirth¹⁵⁵ and the Convention Concerning the

¹⁵³ League of Nations, Covenant of the League of Nations, 28 April 1919, available at: <http://www.unhcr.org/refworld/docid/3dd8b9854.html> [accessed 4 March 2013]

¹⁵⁴ Freeman, A. M., Chinkin C., and Rudolf, B., (Eds.), (2012), *The UN Convention on the Elimination of all forms of Discrimination against Women: A Commentary*, Oxford University Press, pg. 3

¹⁵⁵ International Labour Organization, ILO Convention no. 3

Employment of Women during the night¹⁵⁶ adopted by the International Labour Organization in 1919.¹⁵⁷ This kind of a delay in the promotion and full enjoyment of women's rights has been as a result of the fact that the concept of human rights is based on the dichotomy between the public and the private spheres. Human rights generally concern only the public realm. Violations of rights that legal norms try to prevent are those that take place in the public sphere, since it is controlled by the State. However, women are generally relegated to the private sphere due to their subordinate status in society.¹⁵⁸ Therefore, since the principal violations of women's rights take place mostly in the private sphere, fundamentally within the family it has been difficult to protect the women against discrimination in various spheres of their lives. Practice has shown that States have been very reluctant to intervene within the private spheres of life even if violence is evident stipulating that issues within the family should be solved within the family.¹⁵⁹ Feminist legal scholar Charlotte Bunch has stated that the dichotomy between the public and the private has been widely used to justify the subordination of women and to exclude human rights abuses committed in the private sphere from public view.¹⁶⁰ This practice of States not interfering within the private sphere in relation to women human rights issues has developed without considering its impact upon women. Thus a need to establish a system that would consider women's rights was essential.

3.2.2 The United Nations (UN)

The United Nations (UN) which was created after the Second World War has set forth within its Charter the principle of non-discrimination, thus making the Charter becoming the first international agreement to deal with the issue of discrimination on

¹⁵⁶ International Labour Organization, ILO Convention no. 4

¹⁵⁷ Ibid note 154, pg. 3

¹⁵⁸ Isa, G. F., (2003), 'The Optional Protocol for the Convention on the Elimination of all forms of Discrimination against Women: Strengthening the Protection Mechanism of Women's Human Rights. *Arizona Journal of International and Comparative Law*' Vol. 20, No. 2, pg. 292-3

¹⁵⁹ Jullu, S., Hassan, S., Njau, M., and Tesha, F., (2009), '*Marriage Matters*', Women's Legal Aid Center, pg. 107

¹⁶⁰ Ibid note 158, pg. 294

the basis of sex. Under the preamble¹⁶¹ of the Charter it refers to the dignity and worth of the human person, and specifically to the equal rights of men and women. Under Article 1(3)¹⁶² of the UN Charter it is stipulated that one of the purposes of UN is among others to encourage respect of human rights and fundamental freedoms for all without distinction based on, inter alia, sex.

3.2.3 The Commission on the Status of Women (CWS)

In 1946 the Commission on the Status of Women (CSW) was a separate functional Commission of the Economic and Social Council (ECOSOC) created under UN charter article 68.¹⁶³ The CSW's function was to make recommendations to ECOSOC on promoting women's rights and on urgent problems requiring immediate attention in the field of women's rights.¹⁶⁴ Still after all these efforts it was evident that more needed to be done in the field of women's rights as violation of their rights continued to prevail.

3.2.4 The Universal Declaration of Human Rights (UDHR)

In 1948 with the adoption of the Universal Declaration of Human Rights (UDHR) one of its principles articulated that all human rights are to be enjoyed without discrimination on the basis of sex.¹⁶⁵ Together with the UDHR, the International Covenant on Civil and Political Rights (ICCPR)¹⁶⁶ and the International Covenant on Economic Social and Cultural Rights (ICESCR)¹⁶⁷ also prohibit discrimination on the grounds of sex and obligate states parties to guarantee and fulfill equality between men and women with regard to the enjoyment of their human rights. Still, despite the

¹⁶¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 4 March 2013]

¹⁶² Ibid note 161

¹⁶³ The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights and such other commissions as may be required for the performance of its functions.

¹⁶⁴ Ibid note 154, pg. 4

¹⁶⁵ Article 2, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> [accessed 4 March 2013]

¹⁶⁶ Article 3, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

¹⁶⁷ Article 3, Adopted by General Assembly resolution 2200 (XXI) of 16 December 1966

enactment of the ICCPR and the ICESCR there were no effective measures taken to eliminate discrimination against women, mostly since the UDHR was not a binding instrument.¹⁶⁸ In 1967 the CWS adopted the Declaration on the Elimination of Discrimination against Women (DEDAW).¹⁶⁹ Although the DEDAW was not legally binding and thus enforcement could not be attained among states, still this agreement smoothed the progress of moving from a non-binding instrument to a binding instrument.

3.2.5 The adoption of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

The CEDAW¹⁷⁰ was adopted on the 18 December 1979 by the United Nations General Assembly and entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it.¹⁷¹ It has almost achieved universal recognition¹⁷² since it has the second highest number of ratifications among the six most important human rights instruments of the UN.¹⁷³ Many commentators have noted that an important aspect of CEDAW is that it not only addresses the States but also the private sphere.¹⁷⁴

The Convention comprises of a Preamble which in general notes the continued existence of discrimination against women despite the adoption of various instruments including the UN Charter and the UDHR. Moreover it notes its intention of eliminating discrimination on the basis of sex by encouraging states to implement the

¹⁶⁸ Forsythe, P. D.,(Ed.), (2009), '*Encyclopedia of Human Rights*', volume 1, Oxford University Press, pg. 331

¹⁶⁹ UN General Assembly, Declaration on the Elimination of Discrimination against Women, 7 November 1967, A/RES/2263, available at: <http://www.unhcr.org/refworld/docid/3b00f05938.html> [accessed 4 March 2013]

¹⁷⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38, available at: <http://www.unhcr.org/refworld/docid/453882a422.html> [accessed 5 March 2013]

¹⁷¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

¹⁷² Although a few countries such as the United States of America (USA) have not ratified the convention

¹⁷³ Schöpp-Schilling, B. H., (2003), '*The Optional Protocol to CEDAW: Mitigating Violations of Women's Human Rights*', Deutsche Institut für Menschenrechte, pg. 1

¹⁷⁴ Ibid note 158, pg. 300

Convention and take measures necessary to achieve that aim.¹⁷⁵ The CEDAW is divided into six parts, Part I which includes Article 1-6 deals with states obligations; Part II comprising of Articles 7 to 9 deals with the public life of women and their civil and political rights; Part III containing Articles 10 to 14 deals with economic and social rights of women; Part IV, including Articles 15 and 16 deals with women's legal status in relation to family and marriage; Part V containing Article 17 to 22 establishes the monitoring system under the Committee of CEDAW; Part VI comprising of Article 23 to 30 deals with the final provisions.¹⁷⁶

The CEDAW's focus is on two major principles or concepts; non-discrimination and equality. Under article 1 of the CEDAW discrimination against women means

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.

The principle of non-discrimination covers both private and public spheres to include non-discrimination in economic, social, cultural and political lives of women. CEDAW condemns discrimination against women in all its forms and calls on governments to take all appropriate measures to eliminate such discrimination.¹⁷⁷ Equality is considered to be at the center of international human rights law and is viewed as one of the most important principles.¹⁷⁸ The principles of non-discrimination and equality are entwined or indivisible terms since where there is no equality there is no right of non-discrimination. Since it is the vulnerable groups that are targeted most of the principles of equality and non-discrimination have attained international acclaim in order to ensure that there is no discrimination on the basis of sex.¹⁷⁹

¹⁷⁵ Preamble to the CEDAW

¹⁷⁶ Ibid note 154, pg. 8

¹⁷⁷ Edwards A., (2011), 'Violence Against Women under International Human Rights Law', Cambridge University Press, pg. 154

¹⁷⁸ Ibid note 141, pg. 297

¹⁷⁹ Ibid note 141, pg. 297-8

3.3 State Parties' Obligations

The CEDAW identifies States parties' obligations that eliminate discrimination against women. These obligations require States parties' to take all appropriate measures to eliminate discrimination on the basis of sex as stipulated under article 1 of the convention. The phrase "all appropriate measures" entails that states are required to identify the existing situation and on that basis determine appropriate measures to deal with the situation.¹⁸⁰ This means that states need to assess areas in which discrimination is persistent and draw ways on how to eliminate the discrimination.

Articles 2 through 5 and 24 of CEDAW provide for the general obligations that all State parties' need to implement in good faith. They are the essence of the convention

3.3.1 Obligations under Articles 2 to 5 of CEDAW

Article 2 has been considered by the committee to be the cornerstone of the convention.¹⁸¹ State parties which ratify the convention do so because they agree that discrimination against women in all its form should be condemned and that the strategies set out in article 2(a) to (g) should be implemented by State parties' to eliminate it.¹⁸² In order to achieve the obligation under article 2, States Parties agree to a series of measures that are specified in the various sections of the Convention which will be discussed in a while. Article 2 states that;

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;*
- b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;*
- c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;*

¹⁸⁰ Boerefijn, I., (2003), 'The Optional Protocol to CEDAW: Mitigating Violations of Women's Human Rights', Deutsche Institut für Menschenrechte', pg. 11

¹⁸¹ Ibid note 154, pg. 72

¹⁸² Ibid note 154, pg. 74

- d) *To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;*
- e) *To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;*
- f) *To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;*
- g) *To repeal all national penal provisions which constitute discrimination against women.*

General Recommendation no. 28¹⁸³ of the Committee of the CEDAW has clarified the scope and clear meaning of the obligation set under article 2. Therefore the phrase “State parties condemn discrimination against women in all its forms” has been described under paragraph 15 which states that;

States parties have an immediate and continuous obligation to condemn discrimination. They are obliged to proclaim to their population and the international community their total opposition to all forms of discrimination against women to all levels and branches of Government and their determination to bring about the elimination of discrimination against women.

It is important for states to be cautious and strong in addressing discrimination against women in general, and show utmost commitment and dedication in eliminating any kind of discrimination against women. This may include the adoption of laws and policies that would show the commitment of states to end discrimination through the legal system.

The phrase “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” entails the adoption of a framework for identifying all forms of discrimination against women by the state and develops a policy for eliminating them and a strategy for implementing the policy.¹⁸⁴ Paragraph 24 of the General Recommendation made by the Committee on the CEDAW states that, States must;

¹⁸³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2, available at: <http://www.unhcr.org/refworld/docid/4d467ea72.html> [accessed 7 March 2013]

¹⁸⁴ Ibid note 154, pg. 76

Immediately assess the de jure and de facto situation of women and take concrete steps to formulate and implement a policy that is targeted as clearly as possible towards the goal of fully eliminating all forms of discrimination against women and achieving women's substantive equality with men. The emphasis is on movement forward: from the evaluation of the situation to the formulation and initial adoption of a comprehensive range of measures, to building on those measures continuously in the light of their effectiveness and new or emerging issues, in order to achieve the Convention's goals.

This obligation is an immediate obligation which can not be undertaken through progressive realization and therefore needs to be embarked on without delay. The obligation is to undertake and not to pick and choose changes.¹⁸⁵ Therefore the requirement to take “all appropriate measures” should not be translated to as an authorization for state parties to exercise complete discretion as to what is appropriate and what is not appropriate. While lack of funds and resources may impede complete fulfillment of the obligation in all areas it goes to the question of priorities and speed.¹⁸⁶ As a result the issue of discrimination against women should be given priority by the State parties and ways to eliminate it should be undertaken immediately.

By concluding on this article it can be said that the article generally emphasizes on the need of states to ensure elimination of discrimination against women by states and also by private actors in the spheres of women lives. It requires state parties' to ensure compliance by state organs and also private actors and make sure they take appropriate measures to eliminate discrimination against women in all its forms. In pursuing this policy states need to address the specific nature of each instance of discrimination.¹⁸⁷

Article 2 focuses on law and the role of the legislation and legal institutions in ensuring that women are not subjected to discrimination whether formal (*de jure*) or in practice (*de facto*). Constitutions, laws and policies should be changed to fall within the ambit of article two. Moreover the organs of the government should deliver on

¹⁸⁵ Freeman, M., (2003), ‘*The Optional Protocol to CEDAW: Mitigating Violations of Women's Human Rights*’, Deutsche Institut für Menschenrechte, pg. 5

¹⁸⁶ Ibid note 185, pg. 5

¹⁸⁷ Wijkstrom, B., (Ed.), (2006), ‘*A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*’, World Organization Against Torture, pg. 249

these obligations so that at the end even the lowest levels of governmental staff understand the obligation to not discriminate against women.

Article 3 of the CEDAW states the obligation to ensure women's development and advancement and enjoyment of rights on an equal basis with men. It states that;

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

States must adopt measures to make sure there is both de facto and de jure equality on the same basis as men in the enjoyment of their rights. The good quality of Article 3 is that it has given a more descriptive and more comprehensive explanation on development and advancement of women.¹⁸⁸

Article 4 entails the adoption of special measures to accelerate equality. These kinds of measures shall not be considered as discriminatory since they aim at putting both men and women at the same level and once that level has been reached such measures shall be discarded. Article 4 stipulates that;

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

These measures are necessary since women have been neglected for a long time and thus putting them behind the benefits of the society.¹⁸⁹ Therefore if a woman is given special treatment so as to achieve equality in areas such as education, work and health matters that shall not be considered discrimination. However care should be taken by States that when the equality level has been reached the special treatment should come

¹⁸⁸ Ibid note 185, pg. 5

¹⁸⁹ Ibid note 185, pg. 6

to an end or otherwise the special treatment may be considered as discrimination against men.

Article 5 states;

States Parties shall take all appropriate measures:

- a) 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 or on stereotyped roles for men and women;*
- b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*

This article requires state parties to abandon customs, traditions and practices that exist within their countries that have for so long discriminated women for example in issues like inheritance of land and property, participation in politics and Gender Based Violence (GBV). Thus States need to take all appropriate measures to ensure that these customs and cultures that impede the enjoyment of women's human rights are abolished with immediate effect.

3.3.2 Obligations for women's civil and political rights

The convention provides for the obligation of states to ensure that women fully participate in their civil and political lives by eliminating discriminatory laws that do not allow women to fully participate in public and political life.¹⁹⁰ This includes being allowed to vote just like men and hold electoral offices. Moreover women should be provided with equal representation¹⁹¹ of their governments. States should ensure that laws that discriminate women in the spheres of acquiring or retaining their nationalities should be abolished.¹⁹² With the development of technology and transport and especially with the right of a woman of free will to chose and marry who she wants even beyond borders may lead to issues of dual nationalities. Therefore women

¹⁹⁰ Article 7 of CEDAW

¹⁹¹ Article 8 of CEDAW

¹⁹² Article 9 of CEADW

should not be restricted by law or practice to change or acquire new nationality. States should also eliminate discrimination in all matters pertaining to marriage.¹⁹³ They should also adopt laws that would give women the equal stand in their marriages with men. General Recommendation no 21¹⁹⁴ of the CEDAW Committee gives a detailed discussion on the aspect of marriage life. The aim is to eliminate discrimination within the family circle. Since in most instances issues pertaining to the family have been considered to be family matters and not issue that the States through its organs need to be concerned of. Through article 16 States are required to eliminate discrimination against women in matters relating to family and marriage.

3.3.3 Obligations for women's economic, social and cultural rights.

Under this part of obligations states are required to make sure they eliminate all forms of discrimination against women that may impede their right to education.¹⁹⁵ Therefore all girls and women should get the same conditions for things like career and vocational trainings, access to books and stationeries on the equal basis with men. There should be no indicator of discrimination from the state or private individuals such as restricting women from joining certain programmes or courses. Education is a very important right since that is a facilitator for the enjoyment of other rights.¹⁹⁶ Women should not be discriminated when it comes to the right to work.¹⁹⁷ That includes from the moment of recruitment, during employment and when the employment comes to an end. Discriminatory laws that prohibit women from attaining health care and health services¹⁹⁸ should be abolished by state parties'. States should eliminate discrimination in other economic and social areas of their lives.¹⁹⁹ Moreover under Article 14 of CEDAW states need to eliminate discrimination against rural

¹⁹³ Article 16 of CEADW

¹⁹⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, available at: <http://www.unhcr.org/refworld/docid/48abd52c0.html> [accessed 7 March 2013]

¹⁹⁵ Article 10 of CEDAW

¹⁹⁶ Ibid note 154, pg. 254

¹⁹⁷ Article 11 of CEDAW

¹⁹⁸ Article 12 of CEDAW

¹⁹⁹ Article 13 of CEDAW

women. Rural women make up two-thirds of the world's female population²⁰⁰, and as such require state parties to eliminate laws and practices that discriminate against these rural women.

3.3.4 The obligation to respect, protect and fulfill.

It should also be noted that due to the imprecise language of most human rights treaties and due to the uncertainty of what should be expected of States in accomplishing the obligations under the treaties, human right bodies have sought to rectify this problem through developing and applying a model or framework of obligations.²⁰¹ The obligation to respect, protect and fulfill rights. Initially this framework was in relation to the economic, social and cultural rights but now is applied even to other treaties such as CEDAW. The Committee of CEDAW has adopted this framework for particular situations such as violence against women. General Recommendation no. 25²⁰² states that;

States parties to the Convention are under a legal obligation to respect, protect, promote and fulfill this right to nondiscrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men.

Under General Recommendation number 28²⁰³ of CEDAW the obligation to respect, protect and fulfill has been discussed in details. In general it stipulates for the following: the obligation to respect which is known as the negative state obligation requires that States should refrain from adopting law and policies that interfere directly or indirectly with a woman's equal enjoyment of her rights; the obligation to protect or to ensure respect is the positive obligation of States to protect women from

²⁰⁰ Ibid note 180, pg. 16

²⁰¹ Ibid note 154, pg. 19

²⁰² UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), 2004, available at: <http://www.unhcr.org/refworld/docid/453882a7e0.html> [accessed 7 March 2013]

²⁰³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2, available at: <http://www.unhcr.org/refworld/docid/4d467ea72.html> [accessed 7 March 2013]

discrimination by non-state actors. This obligation also requires States to eliminate customary and all other practices that prejudice and perpetuate the notion of inferiority. The obligation to fulfill or promote is a forward-looking obligation requiring States to adopt short, medium and long term public policies and programmes to combat discrimination against women.²⁰⁴

3.4 The CEDAW's Treaty Body

The United Nations Committee on the Elimination of Discrimination against Women (hereinafter the Committee), was established in 1982 to monitor compliance with CEDAW.²⁰⁵ Implementation of CEDAW is monitored through the Committee. Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women establishes the Committee on the Elimination of Discrimination against Women. Its purpose is to consider the progress made in the implementation of the Convention's provisions. The Committee is composed of 23 experts who are elected by secret ballot from a list of persons of high moral standing and competence in the field covered by the Convention. Experts are nominated by States parties which may nominate one person from amongst their nationals. In the election of members, the Convention calls for consideration of equitable geographical distribution and the representation of different forms of civilization as well as the principal legal systems. Experts are elected for four-year terms.²⁰⁶

The Functions of the Committee are set out in the CEDAW under Part V. Essentially the functions are to monitor State parties implementation through receiving State report from state parties on the measures taken to give effect to the provisions of the

²⁰⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2, available at: <http://www.unhcr.org/refworld/docid/4d467ea72.html> [accessed 7 March 2013]

²⁰⁵ Persadie N., (2012), '*A Critical Analysis of the Efficacy of Law as a Tool to Achieve Gender Equality*', University Press of America, pg. 95

²⁰⁶ The United Nations, (2003), '*The Convention on the Elimination of all forms of Discrimination against Women: Handbook for Parliamentarians*', United Nations, pg. 22

Convention.²⁰⁷ The Committee is also empowered by article 21 of the Convention to make suggestions and recommendations based on the examination of reports and information received from States parties. The Committee is also given competence to receive complaints from individuals alleging that their rights under the convention have been violated.²⁰⁸

3.5 Implementations

Once CEDAW has been ratified implementation of the treaty is the next step. Implementation of CEDAW is monitored by the Committee. It is mostly done so through State reporting. Every state needs to submit a report to the Committee on the measures taken to implement the treaty and the obstacles faced during the implementation process if any. However the implementation of CEDAW has been hindered by several factors including the monism-dualism paradox, the problem of state reporting and reservations to the treaty as discussed below.

3.5.1 The monism-dualism paradox

The relationship between municipal/domestic law and international law has frequently been described under the monism and dualism paradox. It is the legal system of a state that would determine how a treaty shall be applied domestically. Usually after ratification of an international instrument at the international plane a state party needs to consider the application of the treaty domestically. At this point, how a treaty is applied at the municipal level is determined by the State's practice of either monism or dualism. It is a country's Constitution that would determine so. Under the monism theory, the law is indivisible and that all law whether domestic or international is one.²⁰⁹ Therefore under monism the municipal laws and international laws have the same standing in courts as they belong to one legal system. Once a treaty has been

²⁰⁷ Article 18 of CEDAW

²⁰⁸ Crawford J., Lowe A. V., (2009), *The British Yearbook of International Law 2008*, Oxford University Press, pg. 704

²⁰⁹ Moseneke, D., (2010), *The Role of Comparative and Public International Law in Domestic Legal Systems*, pg. 2-3 Retrieved March 13, 2013 from <http://www.middletemple.org.uk/Downloads/3A%20%20Dikgang%20Moseneke%20%20ROLE%20OF%20COMPARATIVE%20AND%20PUBLIC%20INTERNATIONAL%20LAW.pdf>

ratified the treaty automatically becomes applicable within the State and is directly applied in courts; they are self-executing. For example section 2 of article 2 and section 2 of article 6²¹⁰ of the Constitution of the United States of America²¹¹ clearly stipulates that the judicial power shall extend to, *inter alia*, treaties made or which shall be made by the executive arm of the government.

For states that follow the dualistic approach international law and municipal law are regarded as two separate systems. Here dualism is seen as an incident of national sovereignty.²¹² Therefore a State needs to do something more after ratification. Such a State will need to domesticate/incorporate/transform the provisions of the treaty in order to reflect the provisions of the treaty in a domestic law, by enacting a law through the Parliament. Absence of an explicit act of domestication will result into the non-application of the treaty in the municipal courts. This is also stipulated under the Constitutions of dualist countries.²¹³

This monist and dualist paradox has caused the slow implementation of CEDAW in respective States that have ratified the Convention, since most dualist States would slow the implementation on the basis that the Convention has not yet been incorporated into national laws.

²¹⁰ All treaties made or which shall be made with the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding.

²¹¹ The Constitution of the United States of America, 1978

²¹² Ibid note 209, pg. 3

²¹³ For example under Article 63 (3) (d & e) of the Constitution of the United Republic of Tanzania 1977, which states that The National Assembly may deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification, or under the Constitution of South Africa of no. 108 of 1996 under section 321(2) states that “An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3) which includes agreements of technical, administrative or executive nature. The legal position in Britain has been succinctly set out in the decision of the Privy Council. The House of Lords in *J. H. Rayner Limited v. Dept. of Trade and Industry* (1990 (2) A.C. 418) observed: “The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty”.

3.5.2 State reporting

Article 18 of the CEDAW provides for the obligation of state parties to report to the Secretary General of the UN for consideration by the Committee on the progress made in implementing CEDAW principles. It states that state parties need to submit an initial report to the Secretary General of the UN one year after ratification which usually contains the measures that the state party has adopted to give effect to the provisions of the treaty the progress made in giving effect to the provisions of the treaty, and the factors and difficulties the state party has encountered that have affected the degree of fulfillment of its obligations under the treaty and then periodic reports every four years after the initial report.²¹⁴

The purpose of reporting is to promote compliance by State parties with the obligations contained in the Convention and to allow for comprehensive review of national legislations. However most State parties have not submitted their reports or are late in submitting the reports. This being mostly contributed by the fact that international law does not force states to do their obligations since it is not based on coercion. Therefore the obligation to report to the Committee remains at the will of the State concerned.

3.5.3 Reservations

A reservation is a unilateral statement however phrased or named made by a state when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that state.²¹⁵ The ICJ once held²¹⁶ that a reservation must be compatible with the object and purpose of the treaty; otherwise the reserving state may not be

²¹⁴ http://www.bayefsky.com/complain/47_state_reporting.php

²¹⁵ Article 2(1)(d) of the Vienna Convention on the Law of Treaties United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a10.html> [accessed 13 March 2013]

²¹⁶ Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide; 1951 I.C.J. 15

considered a party.²¹⁷ Moreover article 28 (2) of CEDAW also states that “A Reservation incompatible with the object and purpose of the present convention shall not be permitted”. Under General Recommendation no. 4²¹⁸ the Committee has shown concern on the increasing number of reservations that appear to be incompatible with the purpose and objects of CEDAW and calls for State parties to withdraw the reservations, since reservations are to be entered as a matter of current inability to perform the obligation, with a view toward eventually withdrawing²¹⁹ the reservations.²²⁰ But the practice has shown otherwise, since up to now CEDAW is the Convention with the largest number of reservations, a number of these reservations being contrary to the object and purpose of the CEDAW Convention and should therefore be not be considered as legal.

One of the major obstacles in implementing CEDAW provisions is the large number of reservations which have been deemed to be impermissible since they go against the purpose and object of CEDAW. Many State parties that have ratified CEDAW have included reservations on some provisions of the Convention. For example that is the reason why during the drafting of the Optional Protocol (hereinafter the Protocol) to CEDAW²²¹ it was agreed that there should be given no room for reservations since it would weaken the protocol instead of strengthening and increasing the efficacy of the Convention. Thus under article 17 of the Protocol it is stated that there shall be no reservations to the Protocol

²¹⁷ Martin, F. F., Schnably, J. S., Wilson, J. R., Simon, S. J., and Tushnet, V. M., (2006), ‘*International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*’, Cambridge University Press, pg. 25

²¹⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 2, 3 and 4, adopted at the Sixth Session, 1987 (contained in Document A/42/38), 1987, A/42/38, available at: <http://www.unhcr.org/refworld/docid/453882a822.html> [accessed 13 March 2013]

²¹⁹ Egypt withdrew its reservation to article 9(2) after passing a new Decree in 2011, which affirm a woman’s rights to pass her nationality to her children.

²²⁰ Ibid note 185, pg. 7

²²¹ Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/op.pdf> [hereinafter Optional Protocol to CEDAW].

3.6 The Optional Protocol

Even though CEDAW is an important document and has its own significances it is not matched by its lack of a strong enforcement mechanism. The Committee cannot pronounce a State party in violation and cannot order a remedy for the victim or punishment for the state party.²²² There was a need to come up with an additional instrument that will supplement the CEDAW especially in implementation of CEDAW. Thus the Optional Protocol to CEDAW²²³ was adopted by the General Assembly on 6 October 1999 to supplement the reporting and interstate complaint procedures, and strengthen the mechanisms available to individual women to seek redress for violations of their rights in CEDAW. The Protocol entered into force on 22 December 2000, following the ratification of the tenth State party to the Convention.²²⁴ The Protocol introduced two new procedures known as the individual communication procedure through which the Committee can review complaints to decide if rights guaranteed by the CEDAW have been violated and identify remedies for victims and the inquiry procedure through which the Committee can launch an inquiry into grave and systematic violations of women's human rights.²²⁵ The Protocol gives individual women and groups of women the ability to make a direct complaint to the Committee. However Article 1 has stipulated that only States who become parties to the optional protocol can recognize the competence of the Committee to receive and consider communications under the protocol.²²⁶

²²² Cotter A. M., (2004), '*Gender Injustice: An International Comparative Analysis of Equality in Employment*', Ashgate Publishing House, pg. 61

²²³ Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/op.pdf> [hereinafter *Optional Protocol to CEDAW*].

²²⁴ Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/op.pdf> [hereinafter *Optional Protocol to CEDAW*].

²²⁵ Australian Human Rights Commission, (2011), '*Mechanisms for Advancing Women's Human Rights: A Guide to Using the Optional Protocol to CEDAW and other international Complaint mechanism*', Australian Human Rights Commission, pg. 5

²²⁶ Article 1 of the Optional Protocol to CEDAW

3.7 Individual Complaints and its procedure

Due to the problem of the lack of a complaint procedure under CEDAW, the Protocol included a procedure in which an individual who believes that her rights had been violated under CEDAW could bring the claim to the Committee if all procedures have been followed properly. Under article 2-7 of the Protocol and Part III of the Rules of Procedure of the Committee on the Elimination of Discrimination against Women (hereinafter the Rules of Procedure)²²⁷ the procedures for bringing an individual complaint before the Committee have been elaborated.

According to Rule 62 of the Rules of Procedure, the Committee may establish one or more working groups, each comprising no more than five of its members. In accordance with this Rule, the Committee has established a Working Group on Communications, comprised of five CEDAW Committee members. The Working group will determine whether a communication should be registered and declare whether a communication is admissible under the Optional Protocol in accordance with rule 64 (2) of the Rules of Procedure.²²⁸

3.8 Admissibility Requirements

Before going on to examine the merits of a communication, the Committee must, by a simple majority,²²⁹ determine whether the communication meets the admissibility criteria as set in articles 2 and 4 of the Protocol and Rule 68 and 58 (1) (e) of the Rules of Procedure.

Article 2 of the Protocol states that;

A Communications Procedure allows either individuals or groups of individuals to submit individual complaints to the Committee. Communications may also be submitted on behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received.

²²⁷ <http://www.un.org/womenwatch/daw/cedaw/index.html>.

²²⁸ This declaration can also be made by the Committee as rule 64 (1) states that “The Committee shall, by a simple majority and in accordance with the following rules, decide whether the communication is admissible or inadmissible under the Optional Protocol”

²²⁹ Rule 64(1) of the Rules of Procedure

Rule 68 of the Rules of Procedure states that;

Communications may be submitted by individuals or groups of individuals who claim to be victims of violations of the rights set forth in the Convention, or by their designated representatives, or by others on behalf of an alleged victim where the alleged victim consents.

Article 4 of the Protocol states that;

Before a complaint is considered, the Committee must determine that all available domestic remedies have been exhausted...

Rule 58(1) (e) of the Rules of Procedure states that;

The Secretary-General may request clarification from the author of a communication, including inter alia:

e) Steps taken by the author and/or victim to exhaust domestic remedies;

3.8.1 Who can file a complaint?

Any individual who has been affected by a law or policy that is against the CEDAW provisions and that has violated her rights can bring a complaint to the Committee. However the Complainant or complainants must demonstrate that they are directly affected by law policy or practice and that it has directly victimized them. It is not sufficient for a claimant to challenge a law or policy to be discriminatory, the complainant needs to show how the law of policy has victimized her as an individual. This being a safeguard against *actio popularis*, because it ensures that the communication is brought by those who have a sufficiently close connection to the original alleged violation.²³⁰ Article 2 of the Protocol also allows for communications to be submitted on behalf of individuals or groups of individuals, with their consent. In certain situations, a complaint may also be submitted where the consent of the individual or group of individuals has not been obtained, if the author can reasonably justify the lack of consent.²³¹

²³⁰ Ibid note 187, pg. 273-4

²³¹ Ibid note 187, pg. 274

3.8.2 Against who is a complaint made?

It is usually the State party that a complaint is filed against, because it is that State Party that had agreed on implementing the provisions of CEDAW in its territory. But since the state is not a being in itself the State is held responsible through its State official. Thus a State can be held responsible through its State official or State actor who commit acts that violate the convention. This can be a basis for a communication provided that the complainant can show how the facts of the violation disclose discrimination on the basis of sex.²³² Thus if for example a police officer rapes a woman who is held under custody for another wrong, the State will be held accountable if it has failed to remedy the situation.

Moreover a State can also be held responsible for acts of Private actors. This occurs when the State has failed to exercise due diligence in preventing, investigating, prosecuting, punishing or granting redress for human rights violations.²³³ It is important to note that the State needs to recognize that it has certain positive obligations towards ensuring the prevention of discrimination based on sex and if the State fails to take measures against such discrimination then it is held accountable in breach of its obligation even if the act was perpetrated by a private actor. This is supported by Article 2(e) of CEADW which states that;

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake, inter alia:

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

Also General Recommendation 19 of the Committee states that;

It is emphasized...Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation

²³² Ibid note 187, pg. 277

²³³ Ibid note 187, pg. 278

Case law has also proved the fact that States can be held liable by acts of private persons. In the case of *Velasquez Rodriguez v. Honduras*²³⁴ the Inter-American Court of Human Rights held that;

An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention

In a communication brought before the Committee by *Ms. A. T. from Hungary*²³⁵ the Committee in deciding the merits reminded itself of General Recommendation no. 19 which addresses the issue of State parties being held responsible for individual acts or non-state actors. The important thing is for the complainant to clearly demonstrate how the violation by a private person is linked with discrimination based on sex.

3.8.3 Communication Layout

Article 3 of the Protocol and Rule 56 of the Rules of Procedure provide as follows;

No communication shall be received by the Committee if it:

- (a) Concerns a State that is not a party to the Protocol;*
- (b) Is not in writing;*
- (c) Is anonymous.*

It is important for the communication to be in writing and not sent through emails since there is a need of the victim's signature.²³⁶ The identity of the victims and the State concerned should be made known to the Committee. Information of the claimant such as name, place of residence and age should be made available to the Committee. However such a requirement can be waived if it is believed that the victim may face maltreatment from the state concerned if the identity is revealed. Moreover the Committee will only receive communications that allege a violation of CEDAW by a State Party, meaning a country that has ratified or acceded to the Optional Protocol to

²³⁴ *Velásquez Rodríguez v. Honduras*, Series C, No. 4, judgment of the Inter-American Court of Human Rights of 29 July 1988

²³⁵ *Mrs. A. T. v. Hungary*, Communication No.: 2/2003

²³⁶ Connors J., (2003), 'The Optional Protocol to CEDAW: Mitigating Violations of Women's Human Rights', Deutsche Institut für Menschenrechte, pg. 17

CEDAW. This in general entails that victims of States that have not ratified the Protocol may not be able to make use of the Protocol's individual mechanism.

3.8.4 Violation should be of rights set under CEDAW

It is necessary that those who bring claims before the Committee must claim a violation by the State of one or more of any of the rights set out in the CEDAW. The Convention, however, does not set out rights but rather measures that States need to undertake to eliminate all forms of discrimination against women. Therefore women can submit claims if they are directly affected by the failure of the State party to give effect to its obligation under CEDAW.²³⁷ The complainant/complainants must identify and define the rights and state how the right/rights have been violated in relation to the obligations set under CEDAW. It is also important to note that the communication must relate to areas covered by the Convention. Therefore issues such as serious human rights violations like forced disappearances, torture and extra-judicial killings shall not be admissible before the Committee unless elements of discrimination on the basis of sex can be shown.²³⁸

With the practice of the Committee on General Recommendations, it has been easier for women to access the Committee when it comes to violations of their rights under CEDAW, since they have helped in the expansion of the meaning of the provisions of CEDAW. For example General Recommendation no. 19²³⁹ of the Committee has affirmed that the definition of discrimination includes gender-based violence (GBV) and therefore women who experience GBV may have an opportunity to bring claims before the Committee. An explicit example is in the Communication of *Mrs. A.T. v. Hungary*²⁴⁰ where the complainant complained about domestic violence despite her continuous efforts of seeking remedies from her government. The Committee concluded that Article 2, 5 and 16 of CEDAW were breached by Hungary.

²³⁷ Ibid note 236, pg. 18

²³⁸ Ibid note 187, pg. 276

²³⁹ <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

²⁴⁰ *Mrs. A.T. v. Hungary Supra*

3.8.5 Exhaustion of Domestic/Local Remedies

The rule requiring exhaustion of domestic remedies is a well-established rule in international customary and conventional law, including international and regional human rights treaties and it is perhaps the most important rule of all in accepting a communication as admissible. This has been affirmed by the decisions of international²⁴¹ and national courts, bilateral and multilateral treaties and through State practice.

Article 4(1) of the Protocol states that “for a communication to be admissible all domestic remedies must be exhausted”. The types of remedies include judicial remedies which include resort to the court of first instance and even up to the highest appellate body, administrative remedies including bodies such as the Human Rights Commissions or Employment Discrimination Tribunals within a state if they are independent and their decisions are enforceable, and extraordinary remedies.²⁴² The rationale behind this rule being that States need to correct any irregularity they may have committed before being made accountable at the International level and have the opportunity to redress it by its own means within the framework of its own domestic legal system.²⁴³

3.8.5.1 What is a domestic remedy?

In order for a domestic remedy to fall within the scope of exhaustion rule the following need to be done; the remedy must be available in practice and not only in theory, that means it must be sufficiently certain; the remedy must be adequate to provide relief for the harm suffered; a remedy must be effective for the object sought by the complainant and therefore a remedy that has no prospect of success does not constitute an effective remedy.²⁴⁴ This will be discussed further below.

²⁴¹ *Interhandel Case (Switzerland v. U.S.)* [1959] ICJ Reports 6

²⁴² *Ibid* note 225, pg. 15

²⁴³ Amerasinghe, F. C., (2004), ‘Local Remedies in International Law’, 2nd edition, Cambridge University Press, pg. 4

²⁴⁴ Sullivan J. D., (2008), ‘Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW’, International Women’s Rights Action Watch (IWRAP) Asia Pacific, pg. 3

Various Courts and Commissions have tried to give a description of what a domestic remedy constitutes. Here we shall discuss the Inter-American Court of Human Rights, the European Court of Human Rights, (ECHR) and the African Commission on Human and People's Rights, (ACHPR's). The Inter-American Court of Human Rights states that the internal legal remedies that need to be exhausted are those that are suitable to address an infringement of a legal right and capable of producing the result for which they were designed.²⁴⁵ The European Court of Human Rights (ECHR) has stated the following in view of the exhaustion of domestic remedies rule; "To meet the exhaustion requirement normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness".²⁴⁶ The ACHPR's stated that three major criteria could be deduced in determining the exhaustion rule, namely: the remedy must be available, effective and sufficient.²⁴⁷ The remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint.²⁴⁸ Since the Committee has had only a few communications to consider, it applies the same principles as applied by other international forums.

3.8.5.2 Available, adequate and effective remedies under CEDAW

For a remedy to be available it must first of all exist in law and be capable of being applied in practice by administrative and judicial authorities and also to the complainant's case. It is also important for a remedy to not only be available in law (in

²⁴⁵ Inter-American Court of Human Rights, Advisory Opinion OC11/90 on the Exceptions to the Exhaustion of Local Remedies

²⁴⁶ European Court of Human Rights, *Akdivar et al v. Turkey*, Judgment of 16 September 1996, Para. 66.

²⁴⁷ African Commission on Human and Peoples' Rights, Communication Nos. 147/95, 149/96, *Sir Dawda K. Jawara v. The Gambia*, para 31.

²⁴⁸ Communication No. 71/92 *Recontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia*

text) but also in practice. A victim should only exhaust those remedies that are available to her.²⁴⁹

Another important fact to consider is whether the remedy is adequate or sufficient to address the violation. The adequacy of a remedy depends on the type of relief that may be obtained in the event of a successful outcome and the nature of the alleged violation.²⁵⁰ Therefore for example in a case of domestic violence, a civil suit cannot be considered as an adequate remedy as it will not satisfy the victim for the type of violation that has occurred. For that kind of violation a criminal proceedings can be considered as an adequate remedy.

Lastly a remedy should be effective. Facts that indicate that a remedy is not effective in general include; malfunctioning of the judicial system for reasons related to incompetence, corruption or interference with the independence of the judiciary; executive or legislative action suspending judicial guarantees provided by the Constitution and other laws; and in other cases even the widespread of human rights violation can cause a remedy to be considered ineffective since the broad picture reflects the unwillingness of the government to remedy the situation of human rights violations.²⁵¹ It is difficult to provide justice through domestic remedies if for example the judiciary is under the control of the executive organ that is responsible for the illegal act or if the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts.²⁵²

Therefore for a communication to be considered it is necessary for it to show how these remedies have not been available, adequate and effective.

²⁴⁹ *Karen Tayag Vertido v The Philippines*, CEDAW/C/46/D/18/2008, para. 8.3

²⁵⁰ *Ibid* note 244, pg. 14

²⁵¹ In African Commission on Human and Peoples' Rights, Communication Nos. 25/89, 47/90, 56/91 & 100/93, World Organization Against Torture and Others v. Zaire, Ninth Annual Activity Report (1995-1996), para. 55; the African Commission on Human and Peoples' Rights has held that the existence of pervasive human rights violations obviates the exhaustion requirement. In these cases, it reasoned that the states concerned had notice of the abuses, bearing in mind the gravity of the violations, including the large numbers of victims involved, and the high levels of national and international attention directed to the situations

²⁵² *Article 19 v. The State of Eritrea*, African Commission on Human and Peoples' Rights, Communication No. 275/ 2003 (2007)

3.8.5.3 The exceptions to the rule of exhaustion of local remedies

The rule that domestic remedies need to be exhausted has exceptions. The first exception is when the domestic remedies are unduly prolonged or delayed, and the second exception is when the remedy is unlikely to bring effective relief.

There is no guideline of what entails unduly prolonged under the Human rights bodies and therefore the concept has been determined by a case-by-case evaluation. Factors that are considered include whether the delay is imputable to the State, due to active obstruction by the state, negligence or inactivity and severity of the violation, the complexity of the case, and its criminal or civil character.²⁵³ The CEDAW Committee found that domestic remedies were unduly prolonged in *Mrs. A.T. v. Hungary*.²⁵⁴ It concluded that a delay of over three years from the dates of the incidents that were the subject of criminal proceedings for assault and battery amounted to an unreasonably prolonged delay. It was noted that;

Such a delay of over three years from the dates of the incidents in question would amount to an unreasonably prolonged delay within the meaning of article 4 paragraph 1 of the Protocol particularly considering that the author has been at risk or irreparable harm and threats to her life during that period. Additionally the Committee takes account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.

The opposite of this decision can be found in the case of *Rahime Kayan v. Turkey*²⁵⁵ where the Committee noted that the communication was inadmissible since domestic remedies were not exhausted. This was so since the State party drew attention to other remedies that would have been available of which the author did not make use namely review or revision of judgment, under the complaints procedure of article 74 of the Turkish Constitution and a procedure under the Regulation on the Complaints and Applications by Civil Servants²⁵⁶

²⁵³ Ibid note 244, pg. 18

²⁵⁴ *Mrs. A.T. v. Hungary*, Supra

²⁵⁵ *Rahime Kayan v. Turkey*, (8/2005)

²⁵⁶ Paragraph 7.8 of Communication no. 8/2005

Thus despite the fact that the Committee determines whether domestic remedies have been exhausted it is necessary for the complainant to make sure that she exhausts the available remedies before approaching the Committee for further assistance.

The second exception to the exhaustion rule is when the remedy is unlikely to bring effective relief. It is important that victims make use of all remedies that are likely to offer success, and therefore mere doubts that the remedy would not bring success do not justify the exhaustion of domestic remedies. Moreover the assessment is also done by balancing the type of violation and the type of remedy sought which ought to provide a success.²⁵⁷ For example a remedy that is incapable of protecting a victim of GBV from the perpetrator while criminal proceedings are underway can be deemed to be ineffective and thus may not bring out good results. In the complaint of *Karen Tayag Vertido v. The Philippines*²⁵⁸ the Committee noted that the Philippine government had denied the complainant a remedy that would bring an effective relief for her alleged rape case when the case was allowed to remain in the trial court level from 1997-2005 before a decision was reached.²⁵⁹

Instead of having no other place for women to bring their complaints the Committee does not reject their claims altogether if it can be proved that remedies were either unduly prolonged or not likely to provide a positive result and thus these exceptions provide a type of relief for victims who face problems with accessing remedies at the domestic level and fail.

3.8.5.4 Burden of proof of exhaustion of local remedies

The time to prove whether domestic remedies have been exhausted is not when a communication is submitted but during the consideration of the communication by the Committee. When submitting a communication an author must provide information indicating that all available domestic remedies have been exhausted or supporting a

²⁵⁷ Ibid note 244, pg. 18-19

²⁵⁸ *Karen Tayag Vertido v. The Philippines* CEDAW/C/46/D/18/2008

²⁵⁹ The Committee noted further that cases of sexual offenses need to be dealt with in a timely and expeditious manner.

claim that an exception to the exhaustion requirement applies.²⁶⁰ If the State Party wishes to contest admissibility based on a failure to exhaust, it has the burden of showing that there are specific remedies that have not been exhausted which would be available to the alleged victim or victims in the particular circumstances of the case.²⁶¹ An example of this was observed in the case of *Rahime Kayan v. Turkey* when the State presented before the Committee a range of remedies that the complainant had not exhausted while she had the chance to do so.

Thus the burden of proof rests initially on the applicant but if the State contest to the exhaustion of domestic remedies, then it is the State party that needs to provide proof that those domestic remedies have not been exhausted fully since it is the State concerned that is in a better position to determine remedies that its judicial organs provide.

3.8.6 Inadmissibility for simultaneous examination of the Same Matter

Article 4 (2) (a) of the Protocol establishes a situation in which a communication may be considered inadmissible where the same matter has already been examined by the CEDAW Committee or has been or is being examined under another procedure of international investigation or settlement. In order to prove that the matter is concurrent with another one the Committee would need to see whether it is the same person who has submitted both communications, and if the fact of both communications are of the same subject matter and has already been examined by the Committee or is being examined under the procedure of another international investigation. If it is found that the authors, underlying facts and alleged violations of both communications are the same or substantially similar, the communication before the CEDAW Committee is likely to be characterized as the same matter as the other communication and declared inadmissible on this ground.²⁶²

²⁶⁰ Ibid note 244, pg. 24

²⁶¹ Rule 69(6) of the Rules of Procedure

²⁶² Ibid note 225, pg. 18

The phrase “same matter” has been described by the Human Rights Committee (HRCm) in *Fanali v. Italy*²⁶³ to include “the same claim concerning the same individual, submitted by him or someone else who has the standing act on his behalf before the other international body” the Committee followed the idea established by the HRC, in deciding upon the case of *Rahime Kayan v. Turkey*²⁶⁴ which involved a woman who was fired from her job as a school teacher for refusing to stop wearing a headscarf. Turkey objected that the communication should be dismissed on a number of grounds including the fact that the ECHR had already determined the same matter. The Committee determined that the communication was not inadmissible on that ground since the subject matter and author were not the same.

The aim of this admissibility criterion is two-fold, first to avoid duplication at the international level of matters that are the same and second, to underline the importance of steering the communication to the most appropriate treaty body, the one that can provide the most appropriate remedy for the victim.²⁶⁵

3.8.7 Communication must be compatible with CEDAW

Under article 4 (2) (b) of the Protocol a communication will be admissible if it is compatible with the provisions of CEDAW. Incompatibility here entails the following; that the substantive rights in the communication which a State is alleged to have violated are not guaranteed by the CEDAW, and the Communication seeks a remedy that would conflict with the purpose and object of the Convention.²⁶⁶ Therefore a communication to claim a title of nobility as observed in the claim of Cristina Munoz of Spain who claimed succession to her father’s nobility is not considered compatible with the provisions of CEDAW.²⁶⁷

²⁶³ *Human Rights Committee, Fanali v. Italy (75/80)*

²⁶⁴ *Rahime Kayan v. Turkey, Supra*

²⁶⁵ *Ibid* note 187, pg. 286

²⁶⁶ *Ibid* note 225, pg. 18

²⁶⁷ *Ibid* note 225, pg. 18

3.8.8 Communication must be substantiated

Under article 4 (2) (c) of the Protocol a communication will be inadmissible if it is proved that it is manifestly ill-founded or not sufficiently substantiated. This includes inviting the Committee to review decisions of domestic courts while in itself it is not an appellate body. In the Communication of *Karen Tayag Vertido v. The Philippines*²⁶⁸ the Committee stated that "... it is not its duty to replace domestic authorities in assessment of facts or in deciding on the alleged perpetrator's criminal responsibility. A communication that is ill-founded includes also a communication that is based on a plainly erroneous interpretation of the Convention. In the complaint of *Zhanna Mukhina v. Italy*²⁶⁹ the complainant complained to be a victim of a violation by the State under article 16(f)²⁷⁰ of CEDAW relating to family matters. Since the complainant failed to provide a basis on how her right had been violated the Committee had to declare the communication inadmissible.

3.8.9 Author must not abuse the rights to submit a communication

A communication will be inadmissible where the right to submit a communication is abused. This is stated under article 4 (2) (d) of the Protocol. Communications that are abusive include those that contain offensive languages, are intended to deceive the Committee, are frivolous, and are submitted with a malicious intent or in order to defame someone.²⁷¹

3.8.10 Period of the violation/violations

A communication will be dismissed as inadmissible if the alleged facts of violation occurred before the CEDAW and Protocol came into force that being three months after ratification or accession as per article 4 (2) (e) of the Protocol. However an

²⁶⁸ *Karen Tayag Vertido v. The Philippines* Supra

²⁶⁹ *Zhanna Mukhina v. Italy* CEDAW/C/50/D/27/2010

²⁷⁰ The provision provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(f) The same rights and responsibilities with regard to guardianship, ward ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount

²⁷¹ Ibid note 225, pg. 20

exception can be made for violations that commenced before the entry into force but have continued after the entry into force of the Protocol.²⁷² This occurred in the case of *Mrs. A. T. v. Hungary*²⁷³ where the incidence of GBV occurred prior to the date of the entry into force of the Protocol for the State party. The Committee was convinced that “it was important to consider the communication in its entirety since the violence has uninterruptedly characterized the period beginning from 1998 to the present (2003)”²⁷⁴.

3.8.11 The effects of Reservations on Admissibility

The Protocol does not allow reservations at all as stipulated by article 17 of the Protocol. However the Convention is subject to a large number of reservations by State parties’ while they go against the object and purpose of the Convention. The problem is with communications that target a provision that is under reservation by the State party concerned, since it is likely that the communication will concern articles of the Convention to which a state party has entered a reservation. Here the Committee is faced with a decision of either dismiss the communication on the ground that the right which the complainant has brought before the Committee is under the effect of reservation and therefore cannot be decided or decide to move on in determining the matter without considering the benefit of the reservation for the reserving State,²⁷⁵ and consider that the reservation is incompatible and severable.²⁷⁶ The second option will be useful for the victim since her communication will be determined but then on the other side it is detrimental for the State that entered the reservation since its right of consent would be infringed.

²⁷² Ibid note 187, pg. 288

²⁷³ *Mrs. A. T. v. Hungary, Supra*

²⁷⁴ In the case of *Rahime Kayan v. Turkey* (Comm. No. 87/2005) the Committee under paragraph 7.4 declared the communication inadmissible since the facts that are the subject matter of the communication occurred prior to the entry into force of the Protocol. The Committee noted that the crucial date was 9 June 2000 when the author was dismissed from her job and that the Protocol entered into force after that date.

²⁷⁵ This notion is followed by the HRC so that if a State has entered a reservation, such a reservation shall be without effect for the State party and the communication shall be determined still.

²⁷⁶ Ibid note 236, pg. 20

3.9 Inquiry Procedure

An inquiry procedure is a system that allows the Committee to initiate and conduct investigations on large-scale and also widespread violations of women's rights occurring within the jurisdiction of a States party. Article 8 and 9 of the Protocol and under Part XVII of the Rules of Procedure²⁷⁷, deal with the inquiry procedure.

Article 8 states that the Protocol;

Establishes an inquiry procedure that allows the Committee to initiate a confidential investigation by one or more of its members where it has received reliable information of grave or systematic violations by a State Party of rights established in the Convention. Where warranted and with the consent of the State Party, the Committee may visit the territory of the State Party. Any findings, comments or recommendations will be transmitted to the State Party concerned, to which it may respond within six months.

Article 9 states that the Protocol;

Establishes a follow-up procedure for the Committee. After the six-month period referred to in article 8, the State Party may be invited to provide the Committee with details of any remedial efforts taken following an inquiry. Details may also be provided in the State Party report to the Committee under article 18 of the Convention.

The inquiry procedure contains five stages. The first stage is the request to conduct an inquiry in accordance with article 8 of the Protocol, or when the Committee decides on its own to initiate such an inquiry. The second stage involves the Committee determining whether or not the information satisfies the requirement set out under article 8 of the Protocol which is reliable information indicating grave or systematic violation of the rights set forth in the Convention. A grave violation refers to severe abuse such as relating to right to life, physical and mental integrity, and security of person whereas a systematic violation refers to the scale or prevalence of a violation such as resulting from customs or traditions or discriminatory laws or policies. The third stage involves inviting the State party to submit observations on the information and then the Committee may decide to establish an inquiry. Under stage four, once the Committee has completed its inquiry it publishes a report stating the findings and its recommendations if the Committee found that the State party has violated its

²⁷⁷ <http://www.un.org/womenwatch/daw/cedaw/index.html>.

obligations under CEDAW. The last stage involves the State party to implement the Committee's recommendations.²⁷⁸ At all stages except for the last two stages the procedure is confidential²⁷⁹, as provided for under rule 80 of the Rules of Procedure, since the CEDAW Committee may publicize the situation and the inquiry, including the CEDAW Committee's Report and Recommendations and the State Party's Response.²⁸⁰

An inquiry may be conducted without the consent of the state party. However at all stages of the inquiry procedure the cooperation of the state party should be sought. For an on-site visit to the state party its consent is required.²⁸¹ It should also be noted that an inquiry can only be conducted if the State is party to the CEDAW and the Optional Protocol and has recognized the competence of the Committee.²⁸² One inquiry has so far been undertaken with respect to Mexico after three Non-Governmental Organizations (NGO's) had submitted information that more than 230 young women and girls had been killed and after the report was made public the Mexican government promised to implement the recommendation made by the Committee.²⁸³

3.10 Inter-state complaints

An Inter-state complaint involves one state lodging a written communication regarding the non-compliance of another state with their treaty obligations.²⁸⁴ In principle the complaining state does so not on the basis of the nationality of the victim but simply because the complaining state wants to ensure that the other state obliges to the treaty obligations.²⁸⁵

²⁷⁸ Ibid note 225, pg. 26

²⁷⁹ Alfredsson G., Grimheden J., Ramcharan G. B., & Zayas A., (2009), 'International Human Rights Monitoring Mechanism', Martinus Nijhoff, pg. 96

²⁸⁰ Padilla, A. C.R., 'A Primer on the Inquiry Procedure Under the OP CEDAW' Retrieved March 8th 2013 from http://cedaw-seasia.org/docs/Primer_on_Inquiry_Procedure_EnGenderRights.pdf

²⁸¹ Ibid note 279, pg. 96

²⁸² Article 10 of the Optional Protocol to CEDAW

²⁸³ Viljoen F., (2012), 'International Human Rights Law in Africa', 2nd edition, Oxford University Press, pg. 123

²⁸⁴ Ibid note 177, pg. 117

²⁸⁵ Ibid note 279, pg. 96

Article 29 of the Convention provides as follows;

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Therefore two or more state parties can refer disputes about the interpretation and implementation of the Convention to arbitration and if the dispute is not settled it can be referred to the International Court of Justice (ICJ). State parties may exclude themselves from this procedure by making a declaration at the time of ratification or accession.²⁸⁶ The procedure of inter-State communications was introduced in the early drafts of the Protocol. Although some experts had emphasized on its positive aspects, this alternative was soon discarded since this procedure has hardly been used in the international sphere.²⁸⁷ This is also caused by the fear of a state for future diplomatic and political relations with other states. Up to date the procedure has not been used.²⁸⁸

3.11 Conclusion

The Protocol has proven to be an instrument of efficiency for women who cannot get domestic assistance from various human rights violations, since it acts like a backup for enforcing human rights which fail either willingly or unwillingly in addressing women human rights violations within their legal systems. Because of the load of communications and inquiries the Committee has been given an extra third session per year for examination of State reports inquiries and individual communications, giving women a better chance to bring their complaints before the Committee knowing that the Committee will have time to determine their claims. Since the procedures under the protocol are not widely known there is a need for governments and NGO's to widely circulate information in order to have transparency within a state, especially for

²⁸⁶ Samagadi A., (2008), '*Sourcebook of International Human Rights Materials*', British Institute of International and Comparative Law, pg. 38

²⁸⁷ Ibid note 158, pg. 309

²⁸⁸ The United Nations, (2003), '*The Convention on the Elimination of all forms of Discrimination against Women: Handbook for Parliamentarians*', United Nations, pg. 10

states that unwillingly do not have remedies that suffice women. Although the Protocol is a powerful tool a problem remains with implementing the decision of the Committee among State parties since international law is based on consent among States. It will remain within the hands of the State concerned to implement the recommendations made by the Committee.²⁸⁹

²⁸⁹ Sweetman, C., (Ed.), (2000), 'Women and Leadership', Oxfam GB, pg. 71

CHAPTER FOUR

THE LEGAL FRAMEWORK ON THE PROTECTION OF WOMEN'S RIGHTS

4.1 Introduction

Due to the complex nature of human rights and human rights violations, even to countries that have ratified various international instruments, a variety of means to solving these problems have been established at the national level which can be a country's own judicial system and special commissions set up to deal with human rights, the regional level in which judicial systems have been formalized and at the international level in which the bodies of the United Nations (UN) and other bodies have played their part in protecting and promoting human rights for all.

This chapter shall focus on the legal framework of protecting women human rights from the international level through the regional level and to the domestic or national level. The aim is to have an insight on the laws and policies that have been established by these systems.

4.2 The International framework of protection of women

Human rights violations persist even in countries that have ratified human rights instruments to the extent that if a comparison is made on the human rights situations between countries that have ratified international instruments and countries that have not yet ratified, no positive effects have been seen. Under these circumstances having a system that would provide protection for women around the globe against human rights violations has been viewed as a means of helping women all over the world. Therefore the UN has created a global structure for protecting human rights, based largely on its Charter, non-binding declarations, and legally binding treaties to the extent that at the international level the human rights monitoring arrangements consists of a two-track approach that includes mechanisms under the charter based bodies

including bodies that have been created under the UN system and treaty based bodies that have been created separately under international human rights treaties.

4.2.1 An Overview of the Charter Based Bodies

Charter based bodies are bodies created on the basis of the 1945 Charter of the UN. They derive their powers from the UN Charter.²⁹⁰ Under the UN policy of mainstreaming human rights all principal organs of the UN that is the General Assembly (GA), Security Council (SC), the International Court of Justice (ICJ), the Human Rights Council (HRC) and the Economic and Social Council (ECOSOC)²⁹¹ play their role. Although the last two have not been directly stated under the UN Charter they are charter based bodies.

4.2.1.1 The General Assembly (GA)

The competence of the GA's ability to address human rights issues is broad but yet limited.²⁹² Under Article 13(1) of the UN Charter the GA is provided with the mandate to promote human rights. It states as follows;

The General Assembly shall initiate studies and make recommendations for the purpose of:

- a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;*
- b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*²⁹³

However the main contribution of the United Nations General Assembly (UNGA) to human rights lies in the UN's recommendations and declarations which are not

²⁹⁰ The Advocates for Human Rights, (2010), 'UN Charter Based Mechanisms', Retrieved May, 2, 2013 from http://www.theadvocatesforhumanrights.org/un_charter-based_mechanisms_3.html

²⁹¹ These bodies have been established by the UN under Article 7(1) of the UN Charter, which states that There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat.

²⁹² Broad since Article 10 of the UN Charter allows the General Assembly to discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, but limited as the GA can only pass recommendations which are non-binding

²⁹³ Moreover Article 55 and 56 of the UN Charter impose upon the UN and its members a legal obligation to promote and respect for the observance of human rights.

binding to the members of the UN.²⁹⁴ The GA's recommendation can effectively draw attention to a human rights issue and may act as an influence for States to take action. Some human rights issues may begin its journey through a non-binding GA's recommendation.²⁹⁵

Each year through its Third Committee the GA holds a discussion on human rights issues. However despite all these efforts the GA does not have the power to enforce its decisions, except where the SC fails to or is unable to deal with crisis that may arise. This is provided for under the Uniting for Peace Resolution,²⁹⁶ in which the GA may consider a matter immediately if the SC has failed to deal with a matter concerning the breach of peace. Nevertheless this mechanism has not been used for the purposes of protecting women around the world. Since the promotion and protection of human rights is one of the UN's purposes, gross violation of women human rights should also be considered as a breach of peace.

4.2.1.2 Security Council (SC)

The SC's is another organ of the UN. It consists of fifteen members in which USA, Great Britain, China, France and Russia are permanent members, and ten other members who are not permanent.²⁹⁷ According to Article 24 of the UN Charter the SC's primary responsibility is the maintenance of international peace and security. Mandate in human rights matters was extended from the mandate of maintaining peace and security. Under the UN system the SC is the only body that is able to take executive decisions and call on member states to carry out decisions since its decisions are binding upon state parties. Where the SC determines the existence of any threat to the peace it may make recommendations or decide what measures to be taken in order to maintain the international peace. The SC may decide to take coercive measures as

²⁹⁴ The most significant resolution passed by the GA was the Universal Declaration of Human Rights (UDHR).

²⁹⁵ Mertus J., (2009), *The United Nations and Human Rights: A Guide for a New Era*, (2nd ed.), Routledge, pg. 39-40

²⁹⁶ UN General Assembly, *Uniting for peace*, 3 November 1950, A/RES/377, available at: <http://www.refworld.org/docid/3b00f08d78.html> [accessed 6 May 2013]

²⁹⁷ Article 23 of the UN Charter

per Chapter VII of the Charter to deal with worst cases, but in practice such action has been taken on a very selective basis and has been shadowed by as ad hoc geopolitical reasons unconnected with human rights²⁹⁸ and especially women human rights. In other situations where the Veto power could be used to bring about good results in the face of human rights violation, it has been misused by the five permanent members because of their differing interests and views.

The SC has played a vital role in the protection of women human rights during conflicts, and has passed on various resolutions to that effect. These resolutions have stressed on the importance of intergrating women in the role of peace keeping and protecting women during armed conflict situations against various violations. But still, the problem remains with the fact that the Security Council is the organ that determines a situation as giving rise to breaches of the peace. That determination is narrower. The Security Council determines a breach of the peace only in situations involving the use of armed force, thus not including women who face violence within their respective regions.

4.2.1.3 International Court of Justice (ICJ)

The International Court of Justice (ICJ) is the judicial branch of the UN, and is based in the Hague, the Netherlands. It was established in 1945 by the Charter of the United Nations. All states that have signed the UN Charter are members of the ICJ.²⁹⁹ The ICJ involves itself in human rights issues to a limited extent through advisory opinions and contentious mandates. Although the ICJ does not individualize findings of violations, the ICJ judgements may have a close bearing on human rights.³⁰⁰ The ICJ is not considered to be a good body for the protection and guarantee of women's human rights because it can only give advisory opinions³⁰¹ and receive complaints from

²⁹⁸ Brownlie, I., (2003), *'Principles of Public International Law'*, 6th edition, Oxford University Press, pg. 557

²⁹⁹ <http://www.icj-cij.org/court/index.php?p1=1>

³⁰⁰ For example in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986.

³⁰¹ Article 65 of the ICJ Statute declares that 'the Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the

member states but not individuals. It would be fanatical to see a country bring itself before the court for violation of women human rights. Moreover the issue of jurisdiction may also impede the enforcement of human rights. Under Article 36 of the ICJ Statute³⁰² the Court may have jurisdiction if the matter has been referred to it by the States concerned or if an optional clause providing for compulsory jurisdiction has been provided for or if a state is a party to a multilateral treaty. The Article states;

1. *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*
2. *The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*
 - a. *the interpretation of a treaty;*
 - b. *any question of international law;*
 - c. *the existence of any fact which, if established, would constitute a breach of an international obligation;*
 - d. *the nature or extent of the reparation to be made for the breach of an international obligation.*

Despite the fact that the Court may show boldness the reality is that human rights issues have not been given priority within the ICJ and especially women human rights.

4.2.1.4 The Human Rights Council (HRC)

The Human Rights Council (HRC) is the principal UN intergovernmental body established with a higher status in the UN hierarchy and is responsible for human rights issues. It was established by government resolution 60/251 of March 2006 to replace

United Nations to make such a request', while article 96 of the Charter notes that as well as the General Assembly and Security Council, other organs of the UN and specialized agencies where so authorised by the Assembly may request such opinions on legal questions arising within the scope of their activities

³⁰² United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: <http://www.refworld.org/docid/3deb4b9c0.html> [accessed 17 May 2013]

and assume most of the mandates, mechanisms, functions and responsibilities of the Commission on Human Rights (hereinafter the Commission).³⁰³

Before the HRC was established the Commission, which was a subsidiary organ of the ECOSOC, was established in 1946 to protect human rights in general. The Commission adopted several mechanisms that were aimed at protecting human rights. The Commission, however could not receive individual complaints on human rights violations and this was affirmed by ECOSOC Resolution 728.³⁰⁴ But this aspect did not deter the Commission from finding means of protecting human rights and in 1967 through 1235 Procedure³⁰⁵ the Commission obtained wider powers from ECOSOC and could examine information relevant to gross violations of human rights and fundamental freedoms contained in communications, appropriate cases, study them and make reports. In 1970 ECOSOC adopted resolution 1503 and authorized working groups (of not more than five members) to meet once a year to consider all communications and vote which one to be referred to the Commission.³⁰⁶ The 1503 procedure was a very confidential procedure unlike the 1235 procedure which was public.³⁰⁷ Even though the Commission was abolished it was considered to be the focal point of the work of the United Nations in the field of human rights.

The Human Rights Council is mandated to do the following;

- a) *Promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;*
- b) *Address situations of violations of human rights, including gross and systematic violations; and to make recommendations thereon; and*
- c) *Promote the effective coordination and the mainstreaming of human rights within the UN system.*

³⁰³Office of the High Commissioner for Human Rights, (2008), 'The United Nations Human Rights System: How to make it work for you', The United Nations Non-Governmental Liaison Services (NGLS), pg. 7

³⁰⁴ E/RES/728 F (XXVIII) 30th July 1959

³⁰⁵ ECOSOC Res. 1235 (XLII) of 6th June 1967

³⁰⁶ Ibid note 1, pg. 145-28

³⁰⁷ Dziurzynski, E. (Ed.), (2006), 'A New Chapter For Human Rights: A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council', International Service for Human Rights & Friedrich Ebert Stiftung, pg. 1

The HRC has several mechanisms that are used to monitor, promote and respect human rights and these are the Universal Periodic Review (UPR), the Special Procedure, the Complaint Procedure and the Human Rights Council Advisory Committee.

4.2.1.4.1 Universal Periodic Review (UPR)

The UPR mechanism is a mechanism by which the human rights records of all countries are to be examined. It was created through resolution 60/251.³⁰⁸ The review of each member state is facilitated by three rapporteurs known as the troika.³⁰⁹ It requires the state to report to the HRC in a four year interval and it is compulsory for all member states of the UN.³¹⁰ The review is based on three major documents which include a national report prepared by the state itself, a compilation prepared by the Office of the High Commissioner for Human Rights (OHCHR) which provides for the concluding observations of treaty bodies and the summary prepared by the office of the OHCHR and additional reports provided for by other stakeholders such as NGO's and other human rights institutions. After all documents have been submitted a working group on the UPR will meet and hold an interactive dialogue with the state under review. A referendum will be adopted containing the recommendations and conclusions. The HRC will consider the document afterwards and later adopt it, whereas it shall be the responsibility of the state to adopt the recommendations and implement them.³¹¹

This mechanism provides a state with the opportunity to describe actions it has taken to protect human rights in its region. Since it is compulsory it ensures that every state will be scrutinized in human rights issues and should there be concerns then it would be the responsibility of the State in question to implement the recommendations made.

³⁰⁸ A/RES/60/251

³⁰⁹ www.ohchr.org/EN/HRBodies/UPRMain.aspx

³¹⁰ Steiner J. H, Aston P., Goodman R., (2008), 'International Human Rights in Context: Law Politics and Morals', Oxford University Press, pg. 808

³¹¹ Office of the High Commissioner for Human Rights, (2008), 'Working with the United Nations Human Rights Programme', United Nations, pg. 146

4.2.1.4.2 Complaint Procedure

The complaint procedure³¹² of the HRC addresses consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms occurring in any part of the world. Any group or individual can bring gross violations of human rights to the HRC's attention. However these communications must not have a political motivation and all domestic remedies should be exhausted unless the remedies are ineffective or unnecessarily prolonged.³¹³ Complaints can be submitted by the individual himself/herself whose human rights have been allegedly violated or by a third party, such as an NGO, on behalf of that person and with the consent of that person.³¹⁴ The working group of the communications would screen the communications on the basis of admissibility to see if all conditions have been met such as exhaustion of local remedies. Afterwards the Working Group on Situations would go through the cases and make recommendations. The HRC would then review the report and give out its own opinions.

4.2.1.4.3 Special Procedure

When a situation is sufficiently serious the council may order an investigation of a group of experts known as the working group or an individual known as a Special Rapporteur to gather information, examine, monitor, advise and publicly report on human rights situations in specific countries or territories as to the status of human rights and fulfillment of states obligations. The mandate is divided into two, a country mandates which consists of independent experts assessing a country's overall human rights situation and the thematic mandate which is usually referred to a specific human

³¹² Resolution 60/251 of March 2006. On 18th June 2007 the HRC adopted the president text entitled UN Human Rights Council: Institution Building, Res.5/1 by which a new complaint procedure is being established.

³¹³ What constitutes "undue prolongation" cannot be determined generally and must be assessed on a case by case basis and also depending on the specific State in question.

³¹⁴ Consent can be waived if it is proved that consent may not be freely given due to fear of the repercussions.

rights issue and is done by Rapporteur, or on major phenomena of human rights violations worldwide.³¹⁵

One of the functions of the special procedure is fact finding, describing the functions of the international human rights monitors whose task is to ascertain what is going on in a given situation and to report thereon in relation to international human rights standards.

A major drawback on these procedures is that there are no hard and fast rules for the fear that the special procedures may not be applicable at all in different countries. Instead of rules there are basic pre-conditions³¹⁶ that need to be fulfilled by the government concerned before visits can be made.

4.2.1.4.4 Human Rights Council Advisory Committee

The Advisory Committee is a subsidiary body of the Human Rights Council and acts as a body that would think for the HRC at the HRC's direction.³¹⁷ The Advisory Committee focuses mainly on studies and research-based advice in a manner and form requested by the Council. While unable to adopt resolutions or decisions, or to establish subsidiary bodies without the Council's authorization, the Advisory Committee can make suggestions to the Council, to enhance its own procedural efficiency; and to further research proposals within the scope of its work.³¹⁸ The major aim of this Committee is to provide expertise and conduct research based on advice as requested by the HRC. The major weakness of this body is that it can not act on its own initiative.

³¹⁵ Office of the High Commissioner for Human Rights, (2008), 'Working with the United Nations Human Rights Programme', United Nations, pg. 107

³¹⁶ Terms of Reference for Fact-Finding Mission by Special Rapporteur/ Representative of the Commission on Human Rights. UN. Doc. E/CN.4/1998/45 Appendix V. such pre-conditions include freedom of inquiry in places of detention, unimpeded access with or without prior permission, freedom of movement in the whole country and assurance by the government that no person or official will suffer threats or harassments.

³¹⁷ <http://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/AboutAC.aspx>

³¹⁸ Office of the High Commissioner for Human Rights, (2008), 'Working with the United Nations Human Rights Programme', United Nations, pg. 81

4.2.2 Treaty Based Bodies

Treaty monitoring bodies perform a special role in the international human rights regime. They not only supervise the performance of obligations but also through their findings, comments and views, contribute to the interpretation of the human rights norms. Under each treaty there is a committee that oversees the performance of the obligations by the State parties. We will turn to some of the committees and see their efforts in the protection of women's human rights.

4.2.2.1 Human Rights Committee

The Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) by the state parties. However applications for remedies against violations of women's human rights have been meager within the Human Rights Committee.³¹⁹

4.2.2.2 The Committee on the Economic, Social and Cultural Rights (CESCR)

The CESCR³²⁰ has highlighted positive views on the protection of women through its general comments and through its monitoring mechanisms. The CESCR monitors the implementation of the International Covenant on Economic Social and Cultural Rights (ICESCR) by its State parties. Consistent with its position of receiving complaints in violation of the rights set forth in the ICESCR, the Committee's critical concern is on the protection of women from violation. The principal focus of the Committee's attention is the duty to protect the equal enjoyment of economic, social and cultural rights by women.³²¹ The Committee has noted that States have a duty to protect women workers from discrimination at work, for example arbitrary dismissal relating with pregnancy or pregnancy testing upon recruitment.³²²

³¹⁹ In *Broeks v. The Netherlands* Communication No. 172/1984 UN GAOR 42nd Sess. Supp. No. 40 at 139-UN Doc A/42/40 (1987), for an unemployed woman to receive benefits she had to prove that she was a breadwinner. But men had no such obligations. This case proved that through that legislation there was sexual discrimination.

³²⁰ The Committee of ICESCR was established under ECOSOC Resolution 1985/17 of 28 May 1985

³²¹ Sepulveda, M.M., (2003), *'The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights'*, INTERSENTIA, pg. 225

³²² Concluding Observations Mexico E/C. 12/1999/11/ PARAS 383 & 399

Under General Comment No. 14³²³ of the CESCR states have a duty to ensure that harmful social or traditional practices do not interfere with the enjoyment of economic social and cultural rights of women. Paragraph 21 insists on the elimination of discrimination against women so that women are enabled to realize their health rights.³²⁴

4.2.2.3 The Committee on the Elimination of Discrimination Against Women (CEDAW)

The Committee on the Elimination of discrimination against Women consists of experts who monitor the implementation of CEDAW by states. It has various means of doing so, among them being through individual complaints and initiating inquiries into grave women human rights violations. The committee has received various communications from victims around the world who claim certain rights that have been violated within the Convention. The Committee has been significant in helping states protect women's rights on a daily basis. This is so through communications that are received by the Committee, as for many states it is a shame once a woman has approached the Committee

4.2.2.4 The Committee on Migrant Workers (CMW)

The UN Convention on the Protection of the Rights of all Migrant Workers and Members of their families reaffirms basic human rights norms guaranteeing minimum protection for migrant workers and family members. According to Article 7 of the Convention State parties are required not to discriminate migrant workers on any grounds. Migrant women are especially vulnerable to deprivation, hardships, discrimination and abuse. Their status as migrants and women both put them at risk³²⁵

³²³ UN Committee on Economic Social and Cultural Rights (CESCR) General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) 11 August 2000, E/C.12/2000/4

³²⁴ Paragraph 35 of General Comment No. 14 of CESCR stresses that women should not undergo Female Genital Mutilation (FGM) and also paragraph 21 of the same stresses on criminalizing Marital Rape.

³²⁵ Gibney J. M. & Hansen A. R.(eds.), (2005), 'Immigration and Asylum: From 1900 to the Present', ABC-CLIO, pg. 257-58

4.2.2.5 The Committee Against Torture (CAT)

Convention Against Torture has provided for certain rules that States need to follow, among them being that no one shall be subjected to torture or to cruel inhuman and degrading treatment or punishment.

Women fall victims to torture in different ways. Certain forms of violence perpetrated by the State actors as well as private individuals or organizations amount to torture.³²⁶ CAT considers violence against women especially rape³²⁷ and other forms of sexual violence as gender based acts of torture. States should be held responsible if they fail to prevent and protect victims from gender-based violence such as rape, domestic violence and FGM

4.2.2.6 The Committee on the Elimination of Racial Discrimination (CERD)

The CERD was established to monitor the implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties. The Committee has established three mechanisms of performing the provisions of the Convention which include early warnings procedure³²⁸, inter-states complaints and examination of individual complaints.

The Committee has noted under General Comment No. 25 that racial discrimination may only or primarily affect women in a different degree than the men and that this discrimination may escape detection if there is no explicit recognition or acknowledgement. Paragraph 2 notes that certain forms of racial discrimination may be directed towards women because of their gender.³²⁹

4.3 The regional framework of protection of women

The African regional system has been developed under the auspices of the Organization of African Unity (OAU), established in 1963, but was later transformed

³²⁶ UN Committee against Torture, (2008), ‘Report of the Committee against Torture’, United Nations, pg. 201

³²⁷ In the case of C. T & K. M v. Sweden Comm. No. 279/2005/7 Nov. 2006, UN Doc. CAT/C/37/D/279/2005 (2007), the Committee regarded rape as a form of torture.

³²⁸ Early warning procedure aims at preventing existing situations escalating into conflicts.

³²⁹ UN Committee on the Elimination of Racial Discrimination, General Comment No. 25: Gender Related Dimensions of Racial Discrimination 03/20/2000

in 2001 into the African Union (AU).³³⁰ The African human rights system has several mechanisms that it uses to protect human rights and women human rights in general, through various instruments which include the African Charter on Human and Peoples' Rights³³¹ (hereinafter the Charter), which is supplemented³³² by other instruments like the African Charter on the Rights and Welfare of the Child³³³, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights³³⁴ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.³³⁵

4.3.1 The African Charter on Human and Peoples' Rights

The Charter³³⁶ was adopted unanimously in June, 1981 and entered into force in 1986.³³⁷ It has been ratified by all 53 member states of the AU. It is the base of the protection of human rights in Africa. The Charter has been divided into four sections including a preamble and three parts. Part I, which contains two chapters provides for the human and people's rights under chapter one³³⁸ and duties of the individuals under chapter two. Part II which contains four chapters, provide for the establishment and organization of the African Commission on Human and People's Rights (hereinafter the African Commission). This part also provides for the mandate of the

³³⁰ Akuffo, S. A. B., (2012), 'Report of the African Court on Human and People's Rights on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa', pg. 2

³³¹ African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 23 May 2013]

³³² Article 66 of the African Charter allows for the enactment of special provisions or protocols to supplement the provisions of the Charter. it states that 'Special protocols or agreements may, if necessary, supplement the provisions of the present Charter'

³³³ African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> [accessed 23 May 2013]

³³⁴ Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998, available at: <http://www.refworld.org/docid/3f4b19c14.html> [accessed 23 May 2013]

³³⁵ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, available at: <http://www.refworld.org/docid/3f4b139d4.html> [accessed 23 May 2013]

³³⁶ African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 23 May 2013]

³³⁷ D'Sa, R. M., (1985). 'Human and Peoples' Rights: Distinctive Features of the African Charter' *Journal of African Law*, 29, pp 72.

³³⁸ For example the rights to life and the right of equality before the law

African Commission and procedures of the African Commission in relation to communications brought to the African Commission and also applicable principles that the African Commission can apply such as international law principles. Part III deals with General Provisions. Clear features of the Charter include the following;

1. Apart from containing civil, political, economic, social and cultural rights the charter also has included “people’s rights” and “collective rights”³³⁹, such as the right of people to self-determination, the right to development, the right to a satisfactory environment, the right to peace, and the right of people to dispose of their wealth and natural resources.³⁴⁰ Although the text of the Charter leaves the term “peoples’ rights” open perhaps due to the diversity of the groups it could accommodate, the Commission has developed jurisprudence on a case-by-case basis. In the case of Social and Economic Rights Action Centre (SERAC) and Another v Nigeria³⁴¹ under paragraph 68, it states that “...clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa”.

2. Presence of claw back clauses is another vital feature to discuss. A claw back clause can be referred to the provisions in a convention or statute that tend to limit the rights which are guaranteed by the same convention or statute. The provisions of the law would give a right with one hand but with another take it away and thus making it hard to enjoy such rights. It is through the use of some terms that these rights have been qualified and thus permit a state to restrict’ those rights to the maximum extent permitted by domestic law.³⁴² For example under article 10 an individual has the right to free association

³³⁹ Article 19-26 of the Charter

³⁴⁰ Keetharuth, B. S., (2009), “Major African Legal Instruments”, Human Rights in Africa: Legal Perspectives on their Protection and Promotion, Macmillan Publishers, pg. 166

³⁴¹ 2001 AHRLR 60 (ACHPR 2001)

³⁴² Mutua, M., (2000), ‘The African Human Rights System: A Critical Evaluation’, pg. 6-7, <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf>

provided that he abides by the law.³⁴³ Claw back clauses limit the impact of the African Charter's provisions as it may give member states a lot of power and thus ending violation of human rights may become a problem.

3. The presence of political, civil, social, economic and cultural rights in the charter. The charter provides for civil and political rights with the exception of the right to privacy. Social, economic and cultural rights are also present and are not subject to claw back clauses.

The African Charter reflects, to a great extent, the discourse on human rights prevailing internationally at the time of its development. It is the foundational document of the African human rights system.

4.3.2 The African Court on Human and People's Rights

The African Court on Human and People's Rights (hereinafter the Court)³⁴⁴ was established during a time when Africa needed an institution that would protect human rights around the continent. The establishment of this Court is a significant advancement in the institutionalization of human rights in Africa. Through its advisory and contentious jurisdiction, the Court comes with the view of strengthening the African human rights system and ensuring the protection and fulfillment of fundamental rights and duties in the continent.³⁴⁵

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights³⁴⁶ which established the court, places two types of access to the court which include automatic access and optional access. Article 5 of this Protocol provides for automatic access of the court

³⁴³ Other examples could be Article 8, 6, 12 and 14

³⁴⁴ African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 Oct. 1986,

O.A.U. Doc. CAB/LEG/67/3 Rev. 5, hereinafter the African Charter or the Charter

³⁴⁵ Juma D., (2007), 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper', Essex Human Rights Review Vol. 4 No. 2 September 2007, pg. 2

³⁴⁶ Adopted in Addis Ababa in June 1998, CAB/LEG/66.5 (entered into force on 25 January 2004), [http://](http://www.african-union.org)

www.african-union.org

for the African Commission, the State party which has lodged a complaint to the African Commission, a State party against which the complaint has been lodged at the African Commission and African Intergovernmental Organizations.³⁴⁷ However individuals and NGO's do not have automatic access to the Court. Article 5(3) provides that NGO's with observer status³⁴⁸ and individuals can institute a case before the court if the State Party has made a declaration accepting the competence of the Court to receive cases. If a state does not make such a declaration then an individual may not be able to approach the court.³⁴⁹ Some States may use this opportunity as a scapegoat from scrutiny at the international plane on human rights issues.³⁵⁰

The admissibility criteria that the court uses are based on Article 56 of the Charter³⁵¹ which states that a communication can only be considered if;

They indicate their authors even if the latter requests anonymity; if they are compatible with the Charter; if they are not written in disparaging or insulting language directed against the State concerned; if they are not based exclusively on news disseminated through the mass media; if all domestic remedies have been exhausted unless the procedure is unduly prolonged; if they are submitted within reasonable time and if the cases have not been settled by the States.

Although the court as significant as it is, it has its flaws, mainly based on the restrictive access of individuals and NGO's to the Court compared to the unlimited rights of the African Commission and States to the Court. A scheme to access the court in which primacy is given to the States defies the conventional understanding of international human rights law.³⁵² Since human rights are intended to protect individuals from the disadvantageous acts of the government, it is unrealistic to give

³⁴⁷ Article 5 (1) (a-d) of the Protocol on the Establishment of the Court

³⁴⁸ "Observer status" means entitlement conferred upon a foreign country, intergovernmental organization or civil society organization to send observers on invitation to the meetings of the organs of the Community;

³⁴⁹ Article 34(6) of the Protocol establishing the Court.

³⁵⁰ In the case of *Michelot Yogogombaye v. the Republic of Senegal* (2009), Senegal did not make a declaration and therefore Michelot could not be able to access the court to bring his claims against Senegal.

³⁵¹ Article 6 of the Protocol on the establishment of the Court is read together with Article 56 of the Charter.

³⁵² *Ibid* note 345, pg. 3

the State primacy in accessing the court as it will unlikely rule in favor of the individuals or group of individuals.

4.3.3 The African Commission on Human and People's Rights

The African Commission, which was set up in 1987³⁵³ is a treaty body established under article 30 of the Charter³⁵⁴ and mandated under Article 45 of the Charter, with various functions that aim at promoting and protecting human rights around Africa.³⁵⁵ Among the important functions that the African Commission has been shouldered with, receiving communications is the most important one. It can receive communications from State party's that allege a violation by another State party.

Article 49 of the Charter provides that;

*Notwithstanding the provisions of 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.*³⁵⁶

³⁵³ Ibid note 340, pg.164

³⁵⁴ Article 30 states that ' An African Commission on Human and People's Rights hereinafter called "the Commission" shall be established within the organization of African Unity to promote human and people's rights and ensure their protection in Africa'

³⁵⁵ The functions of the Commission include the following:

1. To promote Human and Peoples' Rights; and in particular:

(a) to collect documents, undertake studies and research; on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments;

(b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;

(c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the AU or an African organization recognized by the AU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

³⁵⁶Rule 87-92 of the Rules of Procedure of the African Commission on Human and People's Rights 1988 (approved in 1995)

This provision has not precluded individuals and NGO's from using this avenue to address human rights issues that affect them. This is supported by Article 55 of the Charter which states that;

*Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.*³⁵⁷

Therefore anyone may bring a complaint to the attention of the African Commission alleging that a State party to the African Charter has violated one or more of the rights contained therein. In the communication between *Jawara v. The Gambia*³⁵⁸ the African Commission stated in paragraph 42 that communications other than those of State party's may also be considered by the African Commission. When a Communication is received the State party that is alleged to have violated the provisions of the Charter needs to be informed of the developments. Once the State party alleged has responded the Commission will then decide on the admissibility of the communication. Article 56 of the Charter provides for grounds of admissibility as follows;

Communications relating to human and people's rights referred to in 55 received by the Commission, shall be considered if they;

- 1. Indicate their authors even if the latter request anonymity*
- 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,*
- 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity*
- 4. Are not based exclusively on news discriminated through the mass media*
- 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged*
- 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and*
- 7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter*

³⁵⁷ Rule 93-102 of the Rules of Procedure of the African Commission on Human and People's Rights 1988 (approved in 1995)

³⁵⁸ (2000) AHRLR 107 (ACHPR 2000)

It is important that all these conditions are met by individuals who would like to address the African Commission before the African Commission can proceed.³⁵⁹ All conditions are important that they should be met³⁶⁰, but the most important condition is the exhaustion of local remedies. This rule is very important and has generated much argument within the Commission itself and by spectators. Even under paragraph 30 in the communication of *Jawara v. The Gambia*³⁶¹ the importance of this rule has been stated.³⁶² Rule 97 (c) of the Rules of the African Commission and Article 56 (5) of the Charter states that the African Commission shall determine a communication if all the available local remedies have been utilized and exhausted, in accordance with the generally recognized principles of international law, or that the application of these remedies is unreasonably prolonged or that there are no effective remedies.

It is expected of the State Party alleged to have violated the Charter's provision and not the individual himself to prove that the local remedies have been exhausted.³⁶³ If the State can prove that local remedies have not been exhausted it is the burden of the applicant to prove that he\she has exhausted all the available domestic legal remedies without any effective results.

³⁵⁹ The Information Sheet No. 3, www.achpr.org accessed on 3rd June 2013 on Admissibility of Communications state that "as a matter of principle, all the conditions must be met for a communication to be declared admissible. Otherwise, if one has not been met, the communication will be declared inadmissible and the case closed".

³⁶⁰ In the case of *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) the African Commission had to dismiss the communication which was brought before it since it contained a series of insulting language such as "Paul Biya must respond to crimes against humanity and 30 years of criminal neo-colonial regime". In another communication of *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000) the government claimed that the communication was based on news disseminated by the media. The Commission stated that "the media remains the most important, if not the only source of information. It is common knowledge that information on human rights violations is always obtained from the media", but the communication should not be exclusively based on those news.

³⁶¹ (2000) AHRLR 107 (ACHPR 2000)

³⁶² Paragraph 30 states that "This rule is one of the most important conditions for admissibility of communications, no doubt therefore, in almost all the cases, the first requirement looked at by both the Commission and the state concerned is the exhaustion of local remedies"

³⁶³ In Communication No. 71/92 *Recontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia*, 10th Annual Activity Report: 1996–1997, it was stated under paragraph 13 that "When the Zambian government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the burden of demonstrating the existence of such remedies".

In *Jawara v. The Gambia*³⁶⁴ it was stated that a local remedy should be *available*, in that the petitioner can pursue it without impediment, *effective*, if it offers a prospect of success and *sufficient* if it is capable of redressing the complaint.³⁶⁵ Of course situations may arise where domestic remedies are available but are not sufficient to provide a remedy for the victim. In this situations a remedy is considered insufficient.

Questions and arguments have been of concern on the aspect of “all available remedies” and when a remedy can be considered unduly prolonged or ineffective. The Commissions’ jurisprudence has helped clarify what entails all available local remedies. In *Recontre Africaine pour la Defense des Droits de l’Homme (RADDHO) v Zambia*³⁶⁶ it has been stated that complainants need not exhaust any local remedy that is ineffective on the face of it or insufficient. Therefore only those remedies that are available, effective and sufficient should be fully exhausted by the complainant. This includes the fact that the individual must take the case to the highest court of the land, or otherwise prove that the accessibility to the highest Court of the land was unduly prolonged or ineffective to carter for the specific violation.

A remedy should not be unduly prolonged within the African states. It is important that whenever a complainant wants to adress the domestic legal system, the procedures and outcomes should not be prolonged without reasonable grounds. In the communication of *Peoples’ Democratic Organisation for Independence and Socialism v The Gambia*³⁶⁷ the communication was declared admissible since no action was taken by the court after the case had been filed there for almost six years.

Although the African Commission is not impeccable in itself, it has endowed the continent with an immense jurisprudence and practical results in its efforts to promote and protect human rights. The African Commission has its flaws but it has reproached many States through its decisions. Even though not binding but most states have cleaned their closets through the works of the African Commission.

³⁶⁴ (2000) AHRLR 107 (ACHPR 2000)

³⁶⁵ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000)

³⁶⁶ (2000) AHRLR 321 (ACHPR 1996)

³⁶⁷ (2000) AHRLR 104 (ACHPR 1996)

4.3.4 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa³⁶⁸ (hereinafter the Maputo Protocol) was adopted in 2003 and entered into force in 2005 after being ratified by fifteen African States.³⁶⁹ The Charter seems to guarantee, unambiguously and without equivocation, the equal rights of women in its gender and equality provision by requiring states to eliminate every kind of discrimination against women and to protect women's rights in international human rights instruments.³⁷⁰ The African Charter under few provisions stipulates on women's rights. Under Article 18(3) it stipulates that;

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

Article 2 states that;

Every individual shall be entitled to the enjoyment to the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political, or any other opinion, national and social origin fortune, birth or any status.

And Article 3 states that;

- 1. Every individual shall be equal before the law*
- 2. Every individual shall be entitled to equal protection of the law.*

However, it has been regarded that the African Charter's provisions are not effective in promoting women's rights as it has not defined discrimination against women and some of the rights have not been guaranteed such as the right to consent before entering into marriage and equality in marriages. Moreover the African Charter has emphasized on the traditions and customs that have for a long time impeded the enjoyment of women's rights. For example under Article 4 the charter emphasizes on

³⁶⁸ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted July 11, 2003

³⁶⁹ Center for Reproductive Rights, (2006), 'The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights', www.reproductiverights.org, pg. 1

³⁷⁰ Ibid note 342, pg. 10

the physical integrity of a person³⁷¹ but article 17 and 18 (2) of the African Charter emphasizes on the promotion and protection of morals and traditions. The problem arises on the compatibility of some of the traditions such as FGM with the right to physical integrity. It was believed that a protocol was inevitable and hence the Maputo Protocol was enacted. Under the preamble to the Maputo Protocol the State party's have shown concern that *“despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices”*.

4.3.4.1 Selected Principles and Provisions of the Maputo Protocol

The Maputo Protocol is not different from other instruments on specifying certain international principles. The Maputo Protocol is based on the principles of Equality and elimination of discrimination. The Maputo Protocol defines discrimination as follows;

*...any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.*³⁷²

State parties need to eliminate through legislative actions all forms of discrimination against women. Moreover equality between men and women should be upheld as stipulated under article 2(1) (a) of the Maputo Protocol.³⁷³

Outstanding provisions in the Maputo Protocol include the following

1. Provisions relating to reproductive rights³⁷⁴ and health services for women.³⁷⁵ The protocol affirms women's reproductive rights, choice and

³⁷¹ Physical Integrity means the right to the protection of the body from any violation not freely consented to.

³⁷² Article 1(f) of the Maputo Protocol

³⁷³ ...include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.

³⁷⁴ Reproductive rights rest on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the rights to attain the highest standard of sexual and reproductive health. They also

autonomy. This includes the highest attainable standard of health and to equality in access to health care services. Various choices have been provided for women through the Maputo Protocol relating to their health status. For example women are allowed to have safe and legal abortion in some circumstances.³⁷⁶

2. Provisions relating to violence against women. The Protocol affords protection against GBV in Public and Private spheres of women's lives. It clearly stipulates for the State Party's to take all actions to eliminate violence against women. Violence against women has been defined under article 1 (j) of the Maputo Protocol to mean;

...all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

It also prohibits practices that are harmful³⁷⁷ to women such as FGM and forced marriages.³⁷⁸

3. Provisions relating to the rights within the marriage.³⁷⁹ Women have the right to enjoy equal rights to an equitable sharing of the joint property

include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.

³⁷⁵ States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- a) the right to control their fertility;
- b) the right to decide whether to have children, the number of children and the spacing of children;
- c) the right to choose any method of contraception;
- d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices;
- g) The right to have family planning education.

³⁷⁶ ...in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

³⁷⁷ Harmful Practices means all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.

³⁷⁸ Article 2(2) & 5 of the Maputo Protocol

³⁷⁹ Articles 6, 7 & 21 of the Maputo Protocol

deriving from the marriage in divorces or annulment of marriages. They are also allowed to consent before they enter into marriage.

The Maputo Protocol requires domestication by State parties that follow the dualist approach in order for it to be applied within the national courts of the respective States

4.4 The domestic framework of protection of women

It is the duty of each State to protect and promote human rights of its citizens. Since it is a State that has a relationship with its citizens it is in a better position to protect and promote those rights. This is so because it is also believed that in cases of violations it is a State that needs to be at the front line to investigate itself and observe where it went wrong and amend its mistakes through its own legislations.

4.4.1 The State of the Laws in Tanzania

Tanzanian laws have attempted to protect women in various spheres of their lives through different pieces of legislations. This part will take a glance at the laws, its flaws and how they have strived to protect women.

The Constitution³⁸⁰ of Tanzania is the primary source of law in Tanzania. The constitution recognizes that the protection and promotion of human rights is a condition *sine qua non* for the development of the Tanzanian society. Since 1977 several amendments have been incorporated into the 1977 Constitution, among which were the inclusion of the Bill of Rights in 1984. The Bill of Rights incorporates the fundamental freedoms and human rights. These are provided for in Chapter one part three of the Constitution and they range from Article 12 – 24³⁸¹, article 25 to 28 which imposes duties and obligations on every individual to respect the rights of others and society, and article 29 which establishes the obligation of society to every individual. The Basic Rights and Duties Enforcement Act³⁸² is an Act of Parliament which provides for the procedures of the enforcement of human rights contained in the

³⁸⁰ The Constitution of the United Republic of Tanzania, 1977, as amended from time to time

³⁸¹ The provisions include rights such as equality before the law, right to life, right to privacy and freedom of movement. Others are freedom of association and right to work.

³⁸² The Basic Rights and Duties Enforcement Act, CAP 4, Act no. 33 of 1994

Constitution. It contains requirements needed before a litigant can institute a case. However the Act makes it difficult to enforce these rights due to some of the conditions that need to be fulfilled. For example under section 8 (2)³⁸³ of the Act, the High Court may not exercise its powers if it is believed that there is redress for the contravention alleged.³⁸⁴ We can compare this with the rule of exhausting local remedies. Moreover for a matter to be heard, the High Court shall be composed of three Judges.³⁸⁵ This entails that a matter cannot be heard save for the presence of three Judges.

The Penal Code (PC) CAP 16, 1945 of Tanzania provides for heavy penalties for various offences that are committed such as rape, attempted rape and defilement. However there is no real connection between the PC and other laws such as the Law of Marriage Act (LMA) CAP 29, 1971 in relation to punishments of violators. For example the LMA prohibits inflicting corporal punishments on spouses, but does not provide for punishments for such an offence, nor does the PC. Moreover the PC does not stipulate for marital rape and its punishments. Moreover there are other provisions of the LMA that still pose a problem in the community. Girls of fifteen years are allowed to get married and sometimes even when they are fourteen,³⁸⁶ whereas at such age a girl is supposed to be in school.

Other laws that try to protect human rights include the Employment and Labour Relations Act 2004, however the law does not provide guidelines for providing equal

³⁸³ Section 8 (2) states that ‘The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.’

³⁸⁴ The term frivolous and vexatious have not been defined by the Act and thus remains to be defined at the discretion of the Judges.

³⁸⁵ Section 10 (1) of the Act states that ‘For the purpose of hearing and determining any petition made under this Act including references made to it under section 9 the High Court shall be composed of three Judges of the High Court...’

³⁸⁶ Section 13 (2) ‘...Notwithstanding the provisions of subsection (1), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) if-

(a) each party has attained the age of fourteen years; and

(b) the court is satisfied that there are special circumstances which make the proposed marriage desirable

opportunities in employment for men and women.³⁸⁷ Women are allowed to own Land under the Land Act and the Village Land Act of 1999. Even the Constitution under Article 24 (1) provides that every person is entitled to own property, however there are problems relating to inheritance of Land due to gender discrimination, stereo-types and negative attitude against women's capability of controlling the land. Despite efforts made by the government to enable women to own land there are still challenges including the customary tenures that are discriminatory something that can be removed by the the enactment of the Act.

The Sexual Offences Special Provisions Act (SOSPA) of 1998 amended the PC, to include sexual harassment which is defined as “un-welcomed sexual advances by words or action used by a person in authority, in a working place or any other place,” as a specific criminal offence. SOSPA addresses, among other things, sexual exploitation of women and children, procurement for prostitution, trafficking of persons and child prostitution. The laws of Tanzania continue to fail to recognize that rape within marriage is a criminal offence.³⁸⁸ The Law of Marriage Act³⁸⁹ of Tanzania does not prohibit marital rape nor does the Sexual Offences Special Provisions Act (SOSPA).³⁹⁰ Under section 130 (2) (a) of SOSPA it states that;

(2) A male person commits the offence of, rape if he has sexual intercourse with a girl or woman under circumstances falling, under any of the following descriptions:
(a) not, being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse

By this section marital rape is not recognized in Tanzania.³⁹¹

³⁸⁷ Human Rights Development Trust, (2002), ‘Gaps in Policies and Laws that Perpetuate Gender Based Violence in Tanzania: An Analysis and Synthesis’, United Nations Development Programme, pg. 12

³⁸⁸ The Center for Human Rights, (2009), ‘*The Impact of the Protocol on the Rights of Women in Africa on Violence Against Women in six Selected Southern Africa Countries: An Advocacy Tool*’, Cape Town, South Africa

³⁸⁹ The Law of Marriage Act 1971, CAP 29,R.E, 2002

³⁹⁰ The Sexual Offences Special Provisions Act Cap 110 R.E 2002

³⁹¹ Some writers believe that this law codifies the traditional belief that one of the wife's duties to their husbands is to fulfill his sexual appetite subjecting women to unwanted sexual acts.

Other African countries such as Zimbabwe have gone further to criminalize marital rape. For example the Sexual Offenses Act of 2001³⁹² of Zimbabwe considers non-consensual sex within the marriage as rape

In Tanzania FGM is prohibited under section 169 (1) A of SOSPA; which states that;

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

However the problem is that the section only prohibits FGM against children less than eighteen years of age. The Law has not considered that women could also fall victims of such practices.

4.4.2 Institutional Framework for the Protection of Human Rights

4.4.2.1 The Judiciary/Courts

The Constitution of Tanzania under Article 107 A provides for an independent judiciary.³⁹³ The Judiciary in Tanzania has four tiers which includes the Court of Appeal of Tanzania, the High Courts for Mainland Tanzania and Zanzibar, Magistrates Courts, which are at two levels, including the Resident Magistrate Courts and the District Court, which have concurrent jurisdiction and the Primary Courts which are the lowest in the judicial hierarchy. It is the duty of the Courts to enforce human rights within the country. Local laws are directly applicable in Courts but international instruments are applied depending on the Constitutional structure of the country. In Tanzania an international instruments need to pass in the hands of the Parliament before it can have any effect. In *Transport Equipment and Another v. D.P Valambhia*³⁹⁴, the Court of Appeal of Tanzania held that “*although Tanzania has ratified the International covenant on Civil and Political Rights ,admittedly, our*

³⁹² Sexual Offenses Act (Act 8/2001).
<http://www.kubatana.net/html/archive/legisl/010817sexoff.asp?sector=LEGISL>

³⁹³ The Judiciary is one of the branches of a government which includes a system that administers justice through the courts of law.

³⁹⁴ Civil Application no 19 of 1993 Court of Appeal of Tanzania, Dar es salaam

*legal position is that these instruments are not self executing .There has to be an act of parliament to make them operative”.*³⁹⁵

This may in one way or the other impede the enforcement of human rights in Tanzania if international laws are not transformed into domestic laws.

4.4.2.2 The Commission for Human Rights and Good Governance (CHRAGG)

The Commission for Human Rights and Good Governance (CHRAGG) was established in 2000³⁹⁶ as a national focal point institution for the promotion and protection of human rights and duties as well as good governance in Tanzania.³⁹⁷

CHRAAG, as a National Human Rights Institution (NHRI) in Tanzania, has several functions in promoting human rights, among them being; promoting the protection and the preservation of human rights; to receive allegations and complaints in the violation of human rights generally; to conduct enquiries into matters involving the violation of human rights; to conduct research into human rights issues; to institute proceedings in Court designed to terminate activities involving the violation of human rights; to investigate or inquire into complaints; to visit prisons and places of detention or related facilities; to promote ratification of or accession to treaties or conventions on human rights, harmonization of national legislation and monitor and assess compliance within Tanzania.³⁹⁸

For a NHRI to perform its functions ideally there are some conditions or principles that need to be fulfilled. The Paris Principles Relating to the Status of National Institutions of 1993 (hereinafter known as the Paris Principles) provide for these principles too. They include;

1. Independence of a Commission. (CHRAGG)

³⁹⁵ HRI/CORE/TZA/2012 pg. 7-8

³⁹⁶ CHRAGG was established under Article 129(1) of the Constitution of the United Republic of Tanzania of 1977 as amended by Act No. 3 of 2000.³⁹⁶ It became operational on the 1st July 2001 after the coming into force of the Commission the Human Rights and Good Governance Act No7 of 2001 as amended by Act No 16 of 2001 and Government Notice No. 311 of 8th June 2001.

³⁹⁷ Dr. Bisimba H. K., Sungusia, H., Mwalongo R., & Maro R., (Eds.), (2012), ‘Tanzanian Human Rights Report’, Legal and Human Rights Center, pg. 215

³⁹⁸ Section 6 of the Commission for Human Rights and Good Governance Act, 2001

A Commission needs to be free from any external forces that may interfere with its functions and result in the non-performance of the Commission.

Section 14 of the CHRAGG Act states that;

14. (1) Except as provided by the Constitution, the Commission shall be an independent department and the Commissioners shall not, in the performance of their functions, be subject to the direction or control of any person or authority.

(2) The Government, public authorities and other bodies shall provide such assistance and cooperation as may be required to ensure the effectiveness of the provisions of subsection (1).

The independence of the commission is limited by some statutory provisions such as Article 130(3)³⁹⁹ of the Constitution which gives the President significant power to do any act as against the commission. Moreover commissioners are appointed by the President, giving room for doubt as to the integrity of the commissioners.⁴⁰⁰

2. Capacity to investigate

The Commission needs to have the capacity to investigate into human rights violations and make recommendations out of its report or institute a case against the alleged person to have violated human rights. However this capacity is limited since the president is immune to this procedure. He/she is not to be investigated, and the law does not provide for any reasons as to why the president should not be investigated.⁴⁰¹

3. Accessibility to CHRAGG

³⁹⁹ The provisions of sub article (2) shall not be construed as restricting the President from giving directive or orders to the Commission, nor are they conferring a right to the Commission of not complying with directions or orders, if the President is satisfied that in respect of any matter or any state of affair, public interest so requires

⁴⁰⁰ Section 7(2) of the Commission of Human Rights and Good Governance Act, and Article 129(3) of the Constitution of Tanzania; provide that all the Commissioners and their Assistants shall be appointed by the President.

⁴⁰¹ Section 16(1) of the Commission on Human Rights and Good Governance Act 2001

The question of NHRI visibility and accessibility is always very important for effective functional implantations.⁴⁰² Offices in other regions, is an important issue for the effective protection of human rights. However CHRAGG does not have more than four offices in Tanzania. This impedes the accessibility of rural people when they need assistance in their human rights issues.

CHRAGG's recommendations and reports are not binding in nature on the government thus making this an incentive for the government not to abide by such recommendations.

4.4.2.3 The Law Reform Commission (LRC)

The Law Reform Commission of Tanzania is established under the Law Reform Commission Act of 1980. The Commission keeps all the laws of the United Republic of Tanzania under review since the society is changing so the need of new the laws is high. The Law Reform Commission can review any law or branch of law and recommend ways or measures which are necessary in which that law or branch of the law can be improved, or made simpler and be brought up date in line with human rights and the current circumstances of Tanzania.⁴⁰³

4.4.2.4 Tanzania Police Female Network

In 2007 the Tanzanian Police Female Network (TPF Net) was established.⁴⁰⁴ The mission of the network is to establish and strengthen cooperation among female police officers and the community at large. It also aims at creating awareness and confidence among its members and women at large. The objectives of the network is to, among others, strive to end gender related offences and abuse among women and children.⁴⁰⁵

4.5 Conclusion

The legal framework is in some ways adequate but it is not sufficient enough for States to take a siesta. The laws and policies have so far brought change but still, more efforts

⁴⁰²Ibid note 397, pg. 219

⁴⁰³ HRI/CORE/TZA/2012 pg. 8

⁴⁰⁴ It is governed by the Police Force Auxiliary Services Act

⁴⁰⁵ Maoulidi S., (2013), 'Who is who in the national BGV response?', Daily News pg. 4

need to be taken. A very good area of increasing efforts would include finding ways to improve enforcement within member states and limit the freedom that member states have up to this moment, especially in the area of making declarations by States before its citizens can access the regional human rights system. However it suffices to say that what has been done is praiseworthy but not passable.

CHAPTER FIVE

DATA ANALYSIS AND FINDINGS

5.1 Introduction

This chapter contains field findings and analysis which the researcher presents. These findings have enabled the researcher to analyze the data and determine whether the hypotheses that were raised earlier concur with the data collected and also the objectives intended by the researcher. The researcher obtained data from various groups and authorities. The questionnaires and interview questions were distributed among judges, advocates, police officers, parliamentarians, women and men. Forty (40) copies of structured questionnaires were distributed to police officers, women and men, while judges, advocates and parliamentarians were asked questions based on the interviews due to the time limit. The remaining ten (10) copies were not accepted by the targeted respondents. Out of the forty copies distributed to the respondents, only 30 respondents returned the questionnaires to the researcher. The collected data from the field analyzes the following sections; the implications of Tanzania not domesticating CEDAW in relation to the increase of human rights violations against women are negative; the efficacy of CEDAW in protecting womens' rights, whether the current legal framework is enough to carter for human rights violations against women and why CEDAW has not been domesticated from 1985 to present day.

The researcher has collected data from respondents through structured interviews that contained the same questions for each respondent. On the part of questionnaires there were open and closed question. Open questions gave the respondent a wider opportunity to answer the question without necessarily limiting the choices of their answers. This enabled the respondents to write down their views on the subject matter. Closed questions were set in a manner that gave them somehow a limited choice. The respondents were supposed to answer by only stating words such as yes or no. However this did not limit their answers completely since they were given the chance

to explain themselves more under the open questions as explained above. For other questions the respondent had another choice of writing words such as very strong, strong, weak, and very weak. This type of question was mainly based on the question of the efficacy of CEDAW in protecting women's rights, and whether the current legal framework is enough in the protection of women's rights. The following is the presentation of the data which has been collected by the researcher.

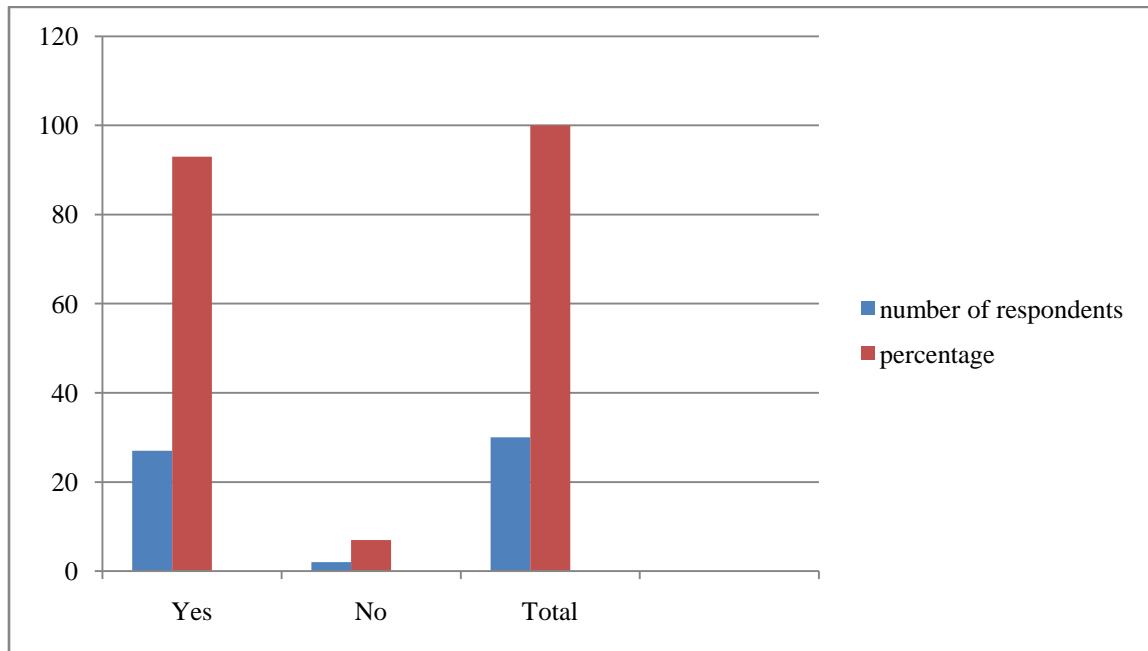
5.2. Implications of Tanzania not domesticating CEDAW are negative

Table 1.1 Implications of Tanzania not domesticating CEDAW are negative

Type of responses	Number of respondents	Percentage (%)
Yes	28	93%
No	2	7%
Total	30	100%

Source: Data collected from the Field

Graph 1.1 Implications of Tanzania not domesticating CEDAW are negative



Source: Table 1.1

Majority of the respondents are of the view that the non-domestication of CEDAW has brought about negative implications in Tanzania. Out of the 30 respondents 28 (93%) are agreeing that implications are negative since the Convention has not been adopted into domestic law, whereas only 2 (7%) believe that the non-domestication of CEDAW is not the reason for the negative impacts on women in the society. Those who were of the opinion that the non-domestication of CEDAW has brought negative results had the following reasons to support their answers;

First, there is an increase in GBV against women compared to previous years. One respondent noted that issues such as FGM, which has been considered by most respondents as a practice which is terrible in itself, domestic violence which is mostly in the form of beating and rape are on the increase. This has been noted through cases that are brought to courts and most respondents have noted that this trend is due to the lack of a single law that can easily place an offender on the spotlight regarding the crime committed.

Second, the respondents were also of the opinion that the non-domestication of CEDAW has resulted in traditions and customs being upheld instead of the law. This is the case in most patrilinear societies. Men are afraid to lose their prestige that is why CEDAW has not been domesticated, since women would be claiming for their rights more often. One of the respondents mentioned inheritance of property as an example by citing that if the Act were to come in place women would be able to claim for their rights in relation to inheriting property.

Third, some respondents stated that among the negative implications that result from the non-adoption of CEDAW in Tanzania include women being favoured, among others, in political issues as a vulnerable group instead of as a human being just like men. For example under special seats in the parliament. This has been considered as a form of making women feel good as members of the society instead of making them feel that they deserve positions and opportunities the same way as men.

Four, most respondents stated that it is difficult to sue because there is no ground to stand on when a woman is faced with issues that affect her as a woman. It has been stated by respondents that in the absence of a law one cannot meet the punishments deserved because of this lacuna. One of the respondent commented that a human being is created *imago dei* (in the likeness of God) which means that all persons should be treated alike, even the most vulnerable persons.

However there were two respondents who believed that there is no negative impact brought about by the non-adoption of CEDAW into domestic law in Tanzania. Although they stated that they do not believe that to be fatal in the protection of women since there was the Penal Code to protect them in various matters. The second one stated that although there is no GBV Act in Tanzania there is the Penal Code and the Law of Marriage Act which prohibits acts like cruelty.

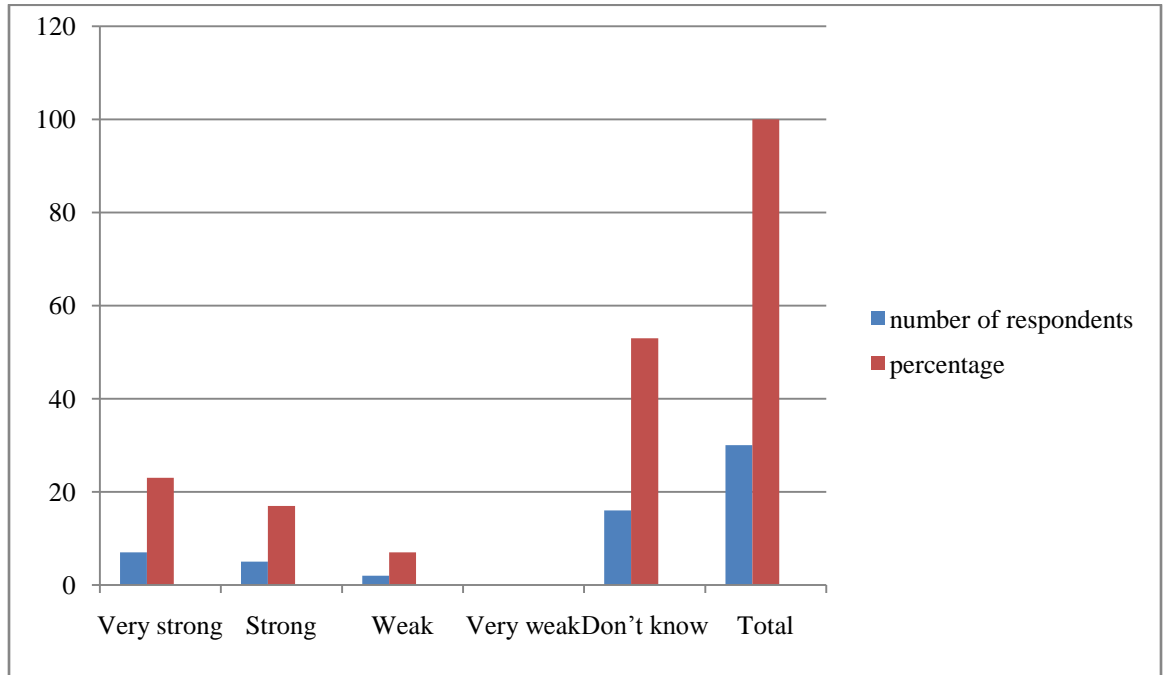
5.3 The efficacy of CEDAW in protecting womens' rights

Table 1.2 The efficacy of CEDAW in protecting womens' rights

Type of responses	Number of respondents	Percentage (%)
Very strong	7	23%
Strong	5	17%
Weak	2	7%
Very weak	0	0%
Don't know	16	53%
Total	30	100%

Source: Data collected from the Field

Graph 1.2 The efficacy of CEDAW in protecting womens' rights



Source: Table 1.2

Under this category it is evident that few respondents had any knowledge about the CEDAW and its purpose for women. Out of the thirty respondents only seven (23%) respondents believed it to be very strong while five (17%) respondents believed it to be strong. Two (7%) respondents believed it to be weak while sixteen (53%) respondents had no knowledge of the Convention. The respondents who had a little knowledge about CEDAW stipulated that it is a comprehensive document that covers aspects of women protection against discrimination in their different spheres of lives such as education, employment and domestically within their homes.

What intrigued them the most was the principles of equality and non-discrimination that have been embodied within the Act itself and thus they were mostly of the view

that without adopting this new law, the principles stated above will not be fully employed within real life.

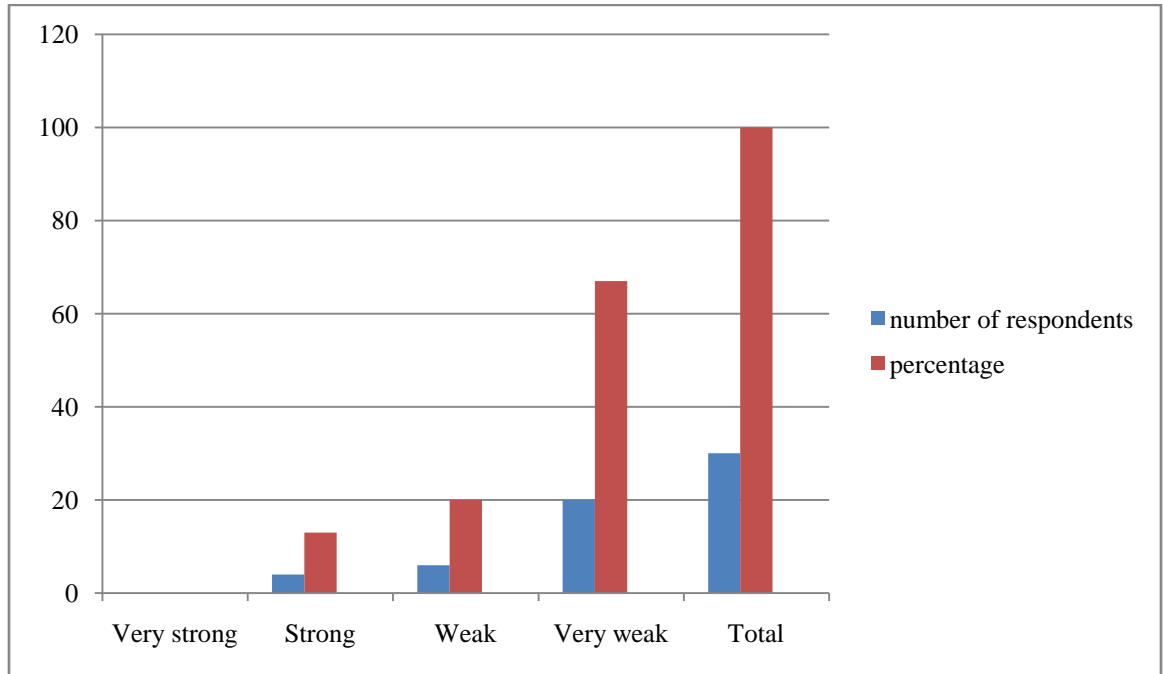
5.4 The efficacy of the current legal framework

Table 1.3 The efficacy of the current legal framework

Type of response	Number of respondents	Percentage (%)
Very strong	0	0%
Strong	4	13%
Weak	6	20%
Very weak	20	67%
Total	30	100%

Source: Data collected from the Field

Graph 1.3 The efficacy of the current legal framework



Source: Table 1.3

Under this aspect the majority of the respondents have agreed that the current legal system which includes laws and institution, is not sufficient. 67% of the respondents believe that the system is very weak in itself, where as 20% believe that it is weak. On the other side 13% state that it is strong while no one believed that the system was very strong. The reasons for this trend are as follows;

First, some respondents have noted the aspect of Equality before the law.⁴⁰⁶ This principle entails; an independent, impartial and incorruptible judiciary, one that is competent, efficient, fair and transparent, that enjoys the full confidence of the public and which is reasonable accessible and affordable to those who seek the protection and remedy of the Constitution and law.⁴⁰⁷ The respondents believe there is no equality before the law since access to justice and fair trials for women has become a problem

⁴⁰⁶ Article 7 of the UDHR, Article 13 of the Constitution of the United Republic of Tanzania, 1977

⁴⁰⁷ Speech addressed by Mohamed Chande Othman, Chief Justice, at the Tanganyila Law Society Conference, 2012

especially for rural women. Moreover legal representation has become a major problem as lawyers are reluctant to take up these cases.

Second, the available laws do not guarantee rights and liberties of women in general. One of the respondent mentioned that the current laws that relate to the protection of women are not enough and are discriminatory, for example the Law of Marriage Act which allows for marriage to persons below the age of eighteen years.

Other respondents stated that although some of the cases can be solved by the current legal framework like battery, but still there is a need of a law that would specifically cover for each issue that affects a woman as acts of domestic violence are broad and cannot be covered within the framework of battery.

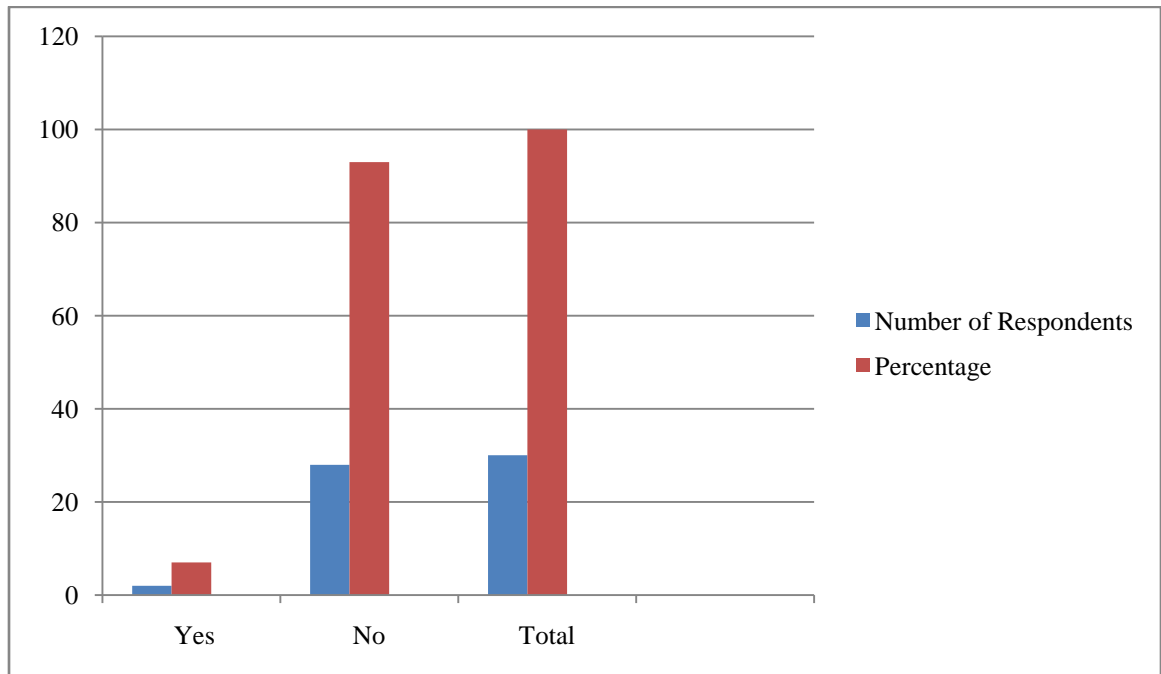
5.5 Is the non-domestication of CEDAW rational?

Table 1.4 Is the non-domestication of CEDAW rational?

Type of Response	Number of respondents	Percentage (%)
Yes	2	7%
No	28	93%
Total	30	100%

Source: Data collected from the Field

Graph 1.4 Is the non-domestication of CEDAW rational?



Source: Table 1.4

The majority of the respondents were of the view that the reasons for the non-domestication of CEDAW were irrational and not sensible at all. 93% of them believe that the non-domestication is attributed by factors that are unreasonable, whereas 7% of the respondents believed that the reasons were rational. The respondents who believed that the non-domestication was rational did however not provide grounds for their belief whereas the group that believed the reasons for non-domestication were irrational had the following ideas they believed to be the irrational reasons for the non-domestication of CEDAW;

First, they believed that the priorities of the government have already been set and domesticating one document for women is not among the priorities of the government. They stated that the government has not been motivated to push forward for the enactment of such an Act. In most circumstances States ratify instrument as a political

move but not as a way of helping women achieve their rights without any kind of discrimination.

One of the respondent stated that if Tanzania is willing from within to bring changes for women around the country then domesticating a Convention would not be an issue at all.

Second, slow procedures within the system itself has brought about this problem. One respondent noted that it has been almost thirty years now since Tanzania has ratified CEDAW, but no implementation Act has been enacted. This shows how beurocracy has affected many women around Tanzania. This clearly depicts that the government has set up other priorities. Once a country adopts a convention it is a must for it to adopt a domestic law or otherwise there would be a gap between the law on paper and the reality of implementing it.

The third reasons pointed out was the issue of existing laws. It was stated that maybe the government is not making any efforts to domesticate CEDAW because there are already existing laws. But one respondent noted that the existing laws are scattered within the legal framework and not on one piece of legislation thus making it hard for the judge or magistrate to deal with women issues in a more realistic and systematic manner.

The last reason pointed out was conservatism. Most respondents believed that conservatism by the law enforcement agents may have contributed to the non-domestication of CEDAW. The idea of not being dynamic has affected the majority of leaders and agents within the country, something that has to give way.

5.6 Conclusion

From the above summary of the findings and analysis it is revealed that not domesticating CEDAW is a problem that the government has been closing its eyes at. Women continue to be discriminated in their lives due to the lack of a proper footing. It is seen that the Convention is in itself a document that has touched on the various

important aspects of a woman but without proper enforcement of the same it will be like holding a candle in the wind.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 Introduction

This chapter of the research provides for the conclusion of the research and the recommendations that the researcher found to be important. These recommendations if adopted would be a solution to the problem of women human rights violations which is highly attributed by the non-domestication of CEDAW.

6.2 Conclusions

The aim of this research was to have an insight on the implications of not having an Act after Tanzania had ratified CEDAW. This has been facilitated by the reasearch questions pointed out earlier by the reaeacher. After thorough research the researcher has come up with the following conclusions;

First the government of Tanzania has not played a proactive role in making sure it implements the provisions of CEDAW in its entirety. Since 1985 Tanzania has been delaying in implementing this important act. This has resulted in many abuses that women face in various spheres of their lives.

From the findings above the researcher can insinuate that the non-adoption of CEDAW into domestic law has resulted in pain in the lives of women since there is no hope for them legally. Women continue to be abused by perpetrators and since there is no one single act to carter for their problems. Violence against women continues to be a problem and as stated above even the judges and magistrates believe that the non-adoption of a GBV Act has led to the increase of violence among women in the community.

Second the legal framework that exists at the moment is not sufficient and is discriminatory in itself. The researcher has realised that the laws that are used at the moment are very old laws that were adopted from the colonial rule and have not been

changed since then. Laws need to be dynamic and not static. They should change according to the needs of the society at that moment. Due to these discriminatory laws, it is difficult to reach that peak of a harmonious life between men and women.

Third the reasons of the government's reluctance in adopting the CEDAW are extraneous. The researcher has realised that the priorities of the government are irrelevant and hence not acceptable as a ground for the non-adoption of CEDAW for all these years. It is irrational to ratify a Convention and stay for almost thirty years without taking any effective measures to enact an Act for women just like other Acts. This shows that the government is not interested at all in the plight of women but ratified the Act as a political act and not as a responsibility.

6.3 Recommendations

6.3.1 Enactment of a new Legislation

It is pertinent that a new law be enacted that would cover important rights that are not found in other laws. This is important not only because Tanzania has ratified CEDAW and needs to domesticate it but also because of the integrity and dignity of a woman. Without the domestication of CEDAW the Convention is as good as word on paper. It cannot be effected within the courts. It is important to enact a new legislation that should also include punishments for perpetrators that are not lenient in itself.

Moreover the fact that the provisions used by the judiciary in trying to protect women are found in various different laws makes it difficult as it is scattered, hence proving the need to have a new law that would contain all the important provisions from the CEDAW and punishments relevant to the offence committed.

6.3.2 To the Government

The Government of Tanzania should through its departments implement the provisions of the CEDAW by domesticating CEDAW. Moreover it should bolster the Ministry of Community Development, Gender and Children (MCDGC), so that the policies initiated by the government are upheld. Since the government has been anticipating for

a new Constitution and a draft has already been announced it is important that article 46 of the draft be included in the new Constitution. The draft in swahili provides that;

46.-(1) Kila mwanamke ana haki ya:

(a) Kuheshimiwa utu wake;

(b) Kuwa salama dhidi ya unyonyaji na ukatili;

(c) Kushiriki bila ya ubaguzi katika chaguzi na ngazi zote za maamuzi;

(d) Kupata ujira sawa na mwanaume katika kazi;

(e) Kulindwa dhidi ya ubaguzi, uonevu na mila zenye madhara;

(f) Kulindwa kwa ajira yake wakati wa ujauzito na pale anapojifungua; na

(g) Kupata huduma ya juu ya afya inayopatikana.

(2) Mamlaka husika za nchi zitaweka utaratibu wa kisheria utakaosimamia masuala yanayohusu utekelezaji wa masharti ya Ibara hii ikiwa ni pamoja na kukuza utu, usalama na fursa za wanawake wakiwemowajane.⁴⁰⁸

However this Article alone does not address fully the important rights that women are entitled to such as inheritance rights. One Article on gender can not cover the whole aspect of a woman in their daily lives, the challenges they face and the human rights violations they face.

6.3.3 To the Legislature

The legislature as a body that oversees, *inter alia*, the enactment of various legislatures, needs to enact an Act that would criminalize acts that violate women's human rights such as domestic violence, rape and FGM. It is the obligation of the government and legislature to uphold the principles of International law and that includes enacting a specific Act that would protect women from acts of violence and punish the perpetrators after ratifying CEDAW.

6.3.4 To the Judiciary

It is the primary function of the judiciary to dispense justice without the fear or favor or ill will or affection of any kind to any one. They need to provide justice to all and that includes even the most underprivileged men, women and children. Despite the fact that Tanzania has not enacted a specific Act on GBV, the courts can still use international norms that have achieved the status of customary law to help women in distress. Even though Tanzania as a dualist state cannot apply international law in its courts judicial activism among judges can help solve the problem. Few bold judges

⁴⁰⁸ Ibara ya 46 ya Rasimu mpya ya Katiba ya Tanzania, 2013

have used international law in their courts even though they have not been domesticated such as the late Judge Mwalusanya. There is a need to have more bold judges who would use CEDAW in their courts to help women around the country.

6.3.5 General Recommendations

The government should take measures to fully and completely eliminate all traditional practices and customs that are harmful to the health and well being of a woman. Such practices like, FGM, early marriages and forced marriages are harmful to a woman and increase incidence of violence within the community leading to discrimination against women in various spheres of their lives.

Institutions that promote women's rights are few in Tanzania. The government should take initiative to establish more institutions around the country that would help women in rural areas receive help and advice. Most of the institutions are city centered and thus making it difficult for women living in rural areas to access them. Therefore it is relevant to establish these institutions in those areas.

The existing laws that discriminate against women should be abolished. Many laws that are still in use in Tanzania are discriminatory to women. The Law of Marriage Act, is an example of a law that discriminates women.⁴⁰⁹

Tanzania should hand in its periodic reports of its implementation of CEDAW within time in order to enable effective scrutinization of its efforts to protect women from discrimination. Tanzania has been handing in its reports at a very late stage and at most times without relevant excuses.

The government and the relevant Ministry should provide awareness among women and men on the effects of discriminating women around Tanzania. Campaigns of awareness shall instill in the minds of women and men the importance of regarding each other as human beings and not as a weaker being of the other.

⁴⁰⁹ The law allows for persons of 15 years to get married.

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www.reproductiverights.org

APPENDIX A

SAMPLE OF INTERVIEW QUESTIONS

PART A: RESPONDENTS PARTICULARS

1. Name:.....(Not compulsory)
2. Gender: Male [], Female []
3. Age:.....(Not compulsory)
4. Occupation.....

PART B: THE QUESTIONS

1. Do you know what the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) is?
2. What are your views on the Importance of CEDAW in Tanzania
3. Do you think there is a need of domesticating CEDAW in Tanzania? Why?
4. What do you think are the reasons for non-domestication of CEDAW in Tanzania?
5. What do you think are the implications of not domesticating CEDAW in Tanzania?
6. Do you think incidences of women human rights violation occur because of the non-domestication of CEDAW
7. Do you think the current Legal Framework is enough in itself to cater for women human rights violation?
8. Do you think you can approach the court of law knowing that there is no one law that can provide relief to your human rights violation incidence?

Thank you for your Cooperation.

APPENDIX B

SAMPLE OF QUESTIONNAIRE

(JUDGES, MAGISTRATES, PARLIAMENTARIANS, MEN AND WOMEN)

Dear respondent my name is Lusajo Peter and I am currently undergoing a research paper as a requirement for the completion of my Masters program in International Law at the University of Mzumbe. My research is titled “The Implications of Tanzania not domesticating Human rights Treaties: The case study of CEDAW” In order to finalize my studies your help is greatly needed and I hope you will greatly assist me.

PART A: RESPONDENTS PARTICULARS

5. Name:.....(Not compulsory)
6. Gender: Male [], Female []
7. Age:.....(Not compulsory)
8. Occupation.....
.....

PART B: THE QUESTIONS

9. Do you know what the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) is?
[] Yes
[] No

10. What are your views on the Importance of CEDAW in Tanzania

.....
.....
.....

11. Do you think there is a need of domesticating CEDAW in Tanzania?
[] Yes
[] No

12. If the answer above is either yes or no, please state the reasons
- a)
 - b)
 - c)
 - d)

13. Do you think the reasons for the non-domestication of CEDAW are rational (sensible)?
- a) [] Yes
 - b) [] No

14. Can you state four reasons for such non domestication
- a)

- b)
-
-
- c)
-
-
- d)
-
-

15. What do you think are the implications of not domesticating CEDAW in Tanzania?

- a)
-
-
- b)
-
-
- c)
-
-
- d)
-
-

16. Do you think incidences of human rights violation against women occur because of the non-domestication of CEDAW?

[] Yes

[] No

17. Do you think the current Legal Framework is enough in itself to carter for women human rights violation?

[] Yes

[] No

18. If the answer above is either yes or no please state how the legal system is enough to combat women human rights violation

a)

.....

.....

b)

.....

c)

.....

d)

.....

.....

Thank you for your Cooperation.