

Female Genital Surgeries: Rethinking the Role of International Human Rights Law

Margaret Kwoka*

Abstract

International human rights frameworks strongly condemn female genital surgeries (FGS) and countless Western interventions to ‘eradicate’ the practice have been attempted. Despite these legal efforts, few success stories have emerged. A Senegal-based non-governmental organisation, Tostan, has modelled an innovative approach which employs a grassroots basic education programme that has led to hundreds of public declarations by communities choosing to abandon the practice. This article explores the history of the international response to FGS and the legal underpinnings of the success of the Tostan programme, and concludes that Tostan unconventionally employed international human rights law in three ways. First, Tostan incorporated human rights principles into its basic education programme. Second, Tostan invoked the power of the international community to publicly and legally support the communities’ grassroots efforts. Finally, Tostan eliminated the culturally offensive effects of legal interventions which employ top-down criminalisation of the practice and condemnation of practitioners.

1. Introduction

Ousmane Sembene, one of the most prominent film directors in Africa, launched a full feature film called *Moolaade* in 2004.¹ A native Senegalese, Sembene depicted the women in a small village in Burkina Faso rebelling against the practice of female genital surgery (FGS).² The film is not, however, an attack on traditions and lifestyles in Africa.³ Sembene’s message embraces the village life and celebrates its strength, portraying that same strength as crucial to fighting FGS.⁴ The film portrays one example of an ever-growing movement to find solutions to some of the most debilitating cultural practices from within the communities themselves.⁵

Sembene uses the image of one local woman who opposes the practice, saving her own daughter from it and providing sanctuary for four girls who flee the ceremony itself.⁶ However, the film invokes an ancient traditional form of asylum, using the traditional culture itself to combat the image of FGS as essential to African womanhood.⁷ Like an emerging movement in

*A.B. Brown University, 2002; J.D. Northeastern University School of Law, expected 2007. Special thanks to Professor Hope Lewis, who inspired this project and provided invaluable guidance.

¹ Scott, ‘Film Festival Review: Heroism and Defiance in an African Village’, *New York Times*, 13 October 2004.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Wood, ‘A cultural right of passage or a form of torture: female genital mutilation from an international law perspective’, (2001) 12 *Hastings Women’s Law Journal* 347 at 349-50 (citing numerous recent legal commentaries, books, newspapers, non-governmental organisation reports and UN reports produced on the topic of FGS).

⁶ Honeycutt, 2006 Cannes Film Festival: *Moolaade*, *The Hollywood Reporter*, 1 January 2006.

⁷ Ibid.

Senegal, started by an innovative organisation called Tostan, Moolaade exemplifies the power of using local forces to change harmful traditional practices.

Part 2 of this article will provide a brief background of the practice of FGS, its purposes and its effects. Part 3 will explain the moral dilemmas faced by activists both in the West and in Africa who see a need to curb the negative effects of FGS but also wish to respect the cultural practices of non-Western traditions. Part 4 will provide an overview of the international legal authority for the criminalisation and/or pro-active government and private actions to eliminate the practice. Part 5 will show how legal standards alone have proved insufficient to change the long-held customs in cultures that practice FGS. Finally, Part 6 will reveal an in-depth analysis of one successful campaign to eliminate the practice of FGS and the international legal community's role in that positive outcome.

2. Background on FGS

The practice of FGS, also referred to as female genital mutilation (FGM),⁸ female genital cutting (FGC),⁹ or female circumcision (FC),¹⁰ has received an ever-increasing amount of attention in the international community. FGS¹¹ is a generalised term that is used to describe several different types of alteration of female genitalia.¹² The least invasive type of alteration is the mere removal of the clitoral prepuce, or 'hood' of the clitoris without removal of any part of the clitoris itself.¹³ This is generally referred to as 'sunna', which means 'traditional', and is the least common form

⁸ FGM is a term largely used by human rights activists in the West as part of a rhetoric which invokes the image of a human rights abuse. See Lewis, 'Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide', (1995) 8 *Harvard Human Rights Journal* 1 at 5. See also Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (Philadelphia, Pa: University of Pennsylvania Press, 2001) at 3 (noting that individuals from communities that practice FGS are frequently offended by the term); and Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision', (1997) 47 *Case Western Reserve Law Review* 275 at 289 ('Describing a vital aspect of African cultural identity as 'mutilation' has proven offensive, if not psychically mutilating, to critical African constituencies....').

⁹ FGC is a term whose use is growing as a neutral alternative to FGM. Gruenbaum, *supra* n. 8 at 4.

¹⁰ FC was the name most commonly used in the West to describe FGS practices, but fails to recognise many of the inherent differences between male circumcision and female circumcision, including the invasiveness and variance of practices that are encompassed within FGS. See Lewis, *supra* n. 8 at 5; and Gruenbaum, *supra* n. 8 at 4.

¹¹ Among the many common names used to describe the process of ritualistically altering a girl or woman's genitalia, this article will refer to these practices as FGS. The author feels that this name retains some reflection for the seriousness of the effect of FGS on an individual's body, while refraining from the use of words that convey judgment, such as mutilation. Furthermore, scholars using FGS have noted that it allows a comparison between this type of surgery and surgeries undergone for cultural purposes in the West (such as cosmetic surgery). See for example Lewis, *supra* n. 8 at 7; and Gunning, 'Arrogant Perception, World-travelling, and Multicultural Feminism: The Case of Female Genital Surgeries', (1991) 23 *Columbia Human Rights Law Review* 189.

¹² Lewis, *supra* n. 8 at 7.

¹³ McGee, 'Female Circumcision in Africa: Procedures, Rationales, Solutions, and the Road to Recovery', (2005) 11 *Washington and Lee Race and Ethnic Ancestry Law Journal* 133 at 133. Some commentators have equated this form of FGS to male circumcision; others object on the basis that the purpose of male circumcision is starkly different from that of female circumcision. See Wood, *supra* n. 5 at 353. See also Lewis, *supra* n. 8 at 5 (noting that female circumcision may also simply reflect both African and Western unease with a discussion of genitalia and that activists find the term misleading insofar as most forms of male circumcision are less invasive).

of FGS.¹⁴ A more invasive form of FGS, and the most prevalently practiced, is referred to as 'excision', and involves the removal of the clitoris along with part of all of the labia minora.¹⁵ Finally, the most extreme practice of FGS, known as infibulation, involves the removal of virtually all external genitalia followed by sewing the vagina to leave only a small hole for urination and menstrual bleeding.¹⁶

There are numerous health consequences to FGS, including chronic infection, haemorrhaging, and severe pain during urination, menstruation, sexual intercourse and child birth.¹⁷ Deaths from infection or bleeding are not uncommon.¹⁸ In a recent World Health Organisation (WHO) study on the obstetrical effects of FGS, nearly 30,000 women's childbirth experiences revealed that women who have undergone FGS are significantly more likely to experience caesarean section, postpartum haemorrhage, episiotomy, extended maternal hospital stay, resuscitation of the infant and inpatient perinatal death.¹⁹ Worldwide, estimates are that 130 million girls and women have undergone FGS and approximately two million more may experience it each year.²⁰ Although the majority of cases occur in Africa, FGS is also practiced in the West, most commonly in immigrant communities.²¹ In fact, the West is confronted with two separate domestic legal debates: the criminalisation of the practice in Western countries and the asylum claims made by women based on FGS.²²

FGS is generally performed on pre-pubescent girls as part of a coming-of-age ceremony.²³ The origins and purpose of the practice are widely debated.²⁴ In fact, the reasons for performing FGS are different among different communities.²⁵ Some Islamic leaders have claimed FGS as a religious tradition and many communities see FGS as linked with their Islamic faith.²⁶ However,

¹⁴ Lewis, supra n. 8 at 5 (noting that the World Health Organisation has adopted specific clinical terms for the different types of FGS). See also Banks et al., 'Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries', (2006) 367 *Lancet* 1835.

¹⁵ Wood, supra n. 5 at 354; Lewis, supra n. 8 at 5; and Banks et al., supra n. 14 at 1835.

¹⁶ Center for Reproductive Law and Policy, 'Female Genital Mutilation: A Matter of Human Rights', (Center for Reproductive Law and Policy 2003) at 9; Banks et al., supra n. 14 at 1835; and Lewis, supra n. 8. A fourth category is frequently identified as 'Unclassified FGM' which can include various forms of pricking, piercing or cutting of female genitals that do not fall within the three above listed categories. See Wood, supra n. 5; and Skaine, *Female Genital Mutilation: Legal, Cultural and Medical Issues* (Jefferson, NC: McFarland Publishers, 2005) at 8.

¹⁷ 'Mali: Calling for a Law Against Female Genital Mutilation (FGM)', (July 2004) *Equality Now, Women's Action* 25.1.

¹⁸ Ibid.

¹⁹ Banks et al., supra n. 14 at 1839. Risks for experiencing one of these negative factors during childbirth increase with more extensive FGS.

²⁰ Center for Reproductive Law and Policy, supra n. 16 at 8. See also Banks et al., supra n. 14 at 1835 (stating that over 100 million women and girls have undergone an FGS procedure); and Gruenbaum, supra n. 8 at 7 (reporting an estimate of 114 million women having undergone FGS and 2 million women at risk each year).

²¹ Center for Reproductive Law and Policy, supra n. 16 at 8. See also Gruenbaum, supra n. 8 at 7 (noting that FGS is practiced in 28 countries in Africa).

²² Skaine, supra n. 16 at 54; and Liu, 'When Law and Culture Clash: Female Genital Mutilation, a Traditional Practice Gaining Recognition as a Global Concern', (1998) 11 *New York International Law Review* 71 at 71-72. See also *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (granting an asylum application to a 19 year old Togolese girl because of a well-founded fear of persecution based on a so l group, which consisted of women and girls of a particular ethnicity in Togo who had not undergone FGS and opposed the practice).

²³ Rahman and Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (London: Zed Publishers, 2000) 5.

²⁴ Ibid. at 5.

²⁵ Ibid. at 5-6.

²⁶ Ibid. at 6.

neither the text of the Qur'an nor Saudi Arabia, the home of Islam, calls for the practice of FGS.²⁷ Other communities see FGS as simply a rite of passage into adulthood, with links to custom, tradition and cultural identity.²⁸ FGS may also be used as a means to control women's sexuality.²⁹ In some cultures, a woman's purity is of utmost importance to her reputation and that of her family, and FGS is performed to preserve her virginity for marriage.³⁰ Another form of sexual control exists in polygamy practicing cultures where FGS may be performed to reduce the sexual demands a woman makes on her husband.³¹ FGS can also be explained as a way of gender normalising individuals.³² In some cultures, the clitoris is considered a male characteristic on a female body, and the foreskin a female characteristic on a male body.³³ In such cultures, 'circumcision' of each sex is necessary to purify the individual's sexuality and promote maturity.³⁴ Finally, some individuals and communities simply cite social pressures including community judgment, men's refusal to marry uncircumcised women, and conformity as justifications for the practice of FGS.³⁵

The virtually uncontested negative medical effects of FGS are, in and of themselves, a powerful reason to support efforts to eliminate the practice.³⁶ Furthermore, the voices of women who have undergone FGS and oppose it combined with the anti-FGS work of activists from cultures which practice FGS give weight to the argument that FGS is not a neutral practice.³⁷ Sembene's film provides us with a powerful example of the reasons for supporting local efforts to change the practice of FGS.³⁸

3. Universal Human Rights: A Stand-In for Cultural Dominance?

Even for those who believe strongly that FGS is a violation of basic human rights and that intervention is not only permissible but in fact is imperative, it is hard not to be troubled by

²⁷ Ibid.; and Friedenthal, 'It's Not All Mutilation: Distinguishing Between Female Genital Mutilation and Female Circumcision', (2006) 19 *New York International Law Review* 111 at 113-14 (noting that less reliable portions of the Sunnah and words of the Prophet Mohammad do support the idea that Islam mandates FGS, but that some argue that FGS is actual a violation of the basic tenants of Islam).

²⁸ Rahman, supra n. 23 at 5-6; and Wood, supra n. 5 at 360.

²⁹ Rahman, *ibid.* FGS is reported to enhance male sexual gratification while eliminating female sexual enjoyment or even inflicting pain on the woman. See also Wood, *ibid.* at 359.

³⁰ Rahman, *ibid.*; and Wood, *ibid.* at 357.

³¹ Rahman, *ibid.*

³² McGee, supra n. 13 at 141.

³³ McGee, *ibid.* Compare Wood, supra n. 5 at 363 (only noting that the clitoris is seen as a male element on a female body which must be removed).

³⁴ McGee, *ibid.* (explaining that this belief is widely held amongst the Dogon and Bambara ethnic groups in Mali).

³⁵ Rahman, supra n. 23 at 5-6.

³⁶ See Gruenbaum, supra n. 8 at 7 (noting that reviewing the health effects of FGS practices lead many people to oppose the practice); and Lewis, supra n. 8 at 12 (explaining that health effects constitute the most broadly shared basis for supporting Western intervention).

³⁷ See Friedenthal, supra n. 27 at 147-9 (citing a grassroots women's organisation in Kenya which created an alternative rite of passage ceremony and declarations made by a community of women in Senegal to abandon the practice); and French, 'Human Rites; Africa's Culture War: Old Customs, New Values', *New York Times*, 2 February 1997 (quoting Zainab Bangura, a woman's rights advocate in Sierra Leone, who worked to change the practices of FGS).

³⁸ See Scott, supra n. 1.

potent arguments made by those who oppose Western activists taking a leading role in the 'eradication' of FGS.³⁹

The foundation of international law at the conception of the United Nations in 1945 focused largely on the relationships between states.⁴⁰ State autonomy and sovereignty are therefore fundamentally important, and indeed expressed as the idea that states are not answerable to a higher international law.⁴¹ However, international human rights principles, as reflected in legal codifications, are based on the idea of a universal set of rights that should apply equally to every individual, thereby affecting the relationship between an individual and the state.⁴² There is, therefore, a natural conflict between state sovereignty and an individual's higher moral claim on his or her government when a fundamental human right is violated by that state.⁴³

Human rights principles, as embraced by universalists, therefore support the argument that there are some rights that are so fundamental to human nature that the breach of those rights is a morally and criminally culpable act in any cultural context.⁴⁴ To universalists, FGS is an act of violence against women, often framed as torture and labelled 'mutilation'.⁴⁵ To support these views, universalists often point to some of the purported goals of FGM, including keeping women from being promiscuous and promoting chastity and virginity.⁴⁶ Universalists therefore see themselves as arguing for the equality of women, the dismantling of patriarchy and the feminist movement as understood in a Western context.⁴⁷

Several such troubling arguments arise, however, from contradictions even *within* a conventionally Western understanding of international law.⁴⁸ As aforementioned, one such contradiction in Western-held values exists between a belief in human rights and an equally potent belief in state sovereignty.⁴⁹ While a basic understanding of the practice of FGM and its often deeply disturbing consequences for the health of girls and women may seem to constitute a

³⁹ See Lewis, *supra* n. 8 at 8 (noting that while the author takes the position that FGS is a violation of human rights, she recognises deep conflicts about the role of international human rights systems).

⁴⁰ See generally Article 1(2), UN Charter. Article 1, UN Charter provides that the United Nations is principally designed to avoid the violent conflicts which characterised the early part of the century, that its purpose was to promote peace and security, and that the states would agree to utilise this mechanism for settling international disputes. Article 2(7), UN Charter explicitly provides that the United Nations is not authorised to 'intervene in matters which are essentially within the domestic jurisdiction of any state...'.⁴¹

⁴¹ Trueblood, 'Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory', (2003) 28 *Denver Journal of International Law and Policy* 437 at 439. See Article 2(1), UN Charter which reads 'The Organisation is based on the principle of the sovereign equality of all of its members'.

⁴² Trueblood, *ibid.* at 437-8 (noting that international law is premised, in fact, on the idea that there are universal human rights); and Rahman, *supra* n. 23 at 15 (stating that human rights are considered to be those moral or political claims an individual has on his or her government by a matter of right).

⁴³ Compare Liu, *supra* n. 22 at 80 (national sovereignty as a principle of international law is not absolute).

⁴⁴ Shell-Duncan and Hernlund, 'Female "Circumcision" in Africa: Dimensions of the Practices and Debates', in Shell-Duncan and Hernlund (eds), *Female 'Circumcision' in Africa: Culture, Controversy and Change* (Boulder, CO: Lynne Rienner, 2000) 27.

⁴⁵ *Ibid.* at 27-8.

⁴⁶ Bowman, 'Comment: Bridging the Gap in the Hopes of Ending Female Genital Cutting', (2005) 3 *Santa Clara Journal of International Law* 132.

⁴⁷ Compare Gruenbaum, *supra* n. 8 at 40-1 (rejecting feminists' assertion that patriarchy is the full explanation for the continuation of FGS in practicing communities).

⁴⁸ See *ibid.* at 8-9 (explaining the various intersections of different areas of international human rights law as understood by a 'universalist' perspective).

⁴⁹ Boyle, *Female Genital Cutting: Cultural Conflict in the Global Community* (Baltimore, MD: Johns Hopkins University Press, 2002) 43.

violation of human rights per se,⁵⁰ the original position adopted by most international institutions is that states, particularly democracies, represent the interests of their people, who have the right to self-determination.⁵¹ Such a belief, if applied strictly, would permit states with a majority of the population supporting the practice of FGS to allow it under a domestic law.⁵²

The apparent troubling nature of the practice of FGS to Westerners is further in conflict with a Western notion of the fundamental right to privacy, which generally shields individuals from state intrusion on decisions that affect the family, child rearing and sexuality.⁵³ Moreover, suppressing or criminalising the practice of FGS is in conflict with a Western-held notion of freedom to practice one's religion, in the instances where individuals feel that FGS is a religiously based custom.⁵⁴ Thus, even within a Western paradigm of international law as commonly understood in the international arena, a balancing of rights will necessarily occur in any determination about action against the practice of FGS.⁵⁵

In the context of FGS, the recognition of privacy in the family arena, the freedom to practice one's religion, and a nation state's right to self-determination does not generally control.⁵⁶ This potential undervaluation of cultural rights is evidenced in their stark opposition to cultural relativist theorists, who believe that human rights laws can only be defined in relation to the cultural context in which they are imposed.⁵⁷ The theory underpinning cultural relativity is that the 'universal' rights championed by many international institutions are created by Westerners based on their own ideas of morality, and then imposed on other cultures.⁵⁸ In support of this, many scholars point to various facts surrounding the practice. For instance, women perform FGM on other women — it is neither a state-imposed practice nor even a male-imposed practice.⁵⁹ Furthermore, girls often want the procedure and look forward to it as a right of passage.⁶⁰

⁵⁰ The specific human rights violation asserted varies frequently. Generally this practice is seen to violate a right to bodily integrity, to be free of torture, to health, to women's equality, or to dignity, which are embodied in various international human rights instruments discussed in detail in section 4 of this article. See for example Trueblood, *supra* n. 41 at 452-53 (asserting that FGS constitutes a violation of a wide variety of international law provisions).

⁵¹ Boyle, *supra* n. 49 at 43.

⁵² *Ibid.*

⁵³ Obiora, *supra* n. 8 at 347-8.

⁵⁴ Coffey, 'From Comparison to Paradox to the Dichotomous Nature of International Human Rights and Feminist Perspectives of Female Circumcision as a Violation of the Human Rights of Women', (2000) 4 *DePaul International Law Journal* 1 at 4. In fact, religious freedom has been one of the most highly valued human rights recognised in Western cultures, where civil and political rights traditionally take precedent over economic, social and cultural rights. *Ibid.*; see also Obiora, *supra* n. 8 at 349 (noting religious freedom supports the principle of moral and cultural pluralism rather than majoritarian standards).

⁵⁵ Compare Lewis, *supra* n. 8 at 8.

⁵⁶ See Lewis, 'Female Genital Mutilation-Female Genital Cutting', in David Forsythe et al. (eds), *Encyclopaedia of Human Rights* (London: Taylor & Francis, 2006) (asserting that international leaders and activists now recognise that FGS constitutes a violation of the human rights of girls and women).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ See Note, 'What's Culture Got to do With It? Excising the Harmful Tradition of Female Circumcision', (1993) 106 *Harvard Law Review* 1944. See also French, 'Grafton Journal: The Ritual: Disfiguring, Hurtful, Wildly Festive', *New York Times*, 31 January 1997 (quoting Bateh Kindoh, a 16-year old girl from Sierra Leone: 'I decided to go to the bush and have this done now because I am a mature woman now...This is a very happy time for us.'). But see Wood, *supra* n. 5 at 347-8 (explaining that Hannah Koroma of Sierra Leone, who, at the age of ten, was held down by four women while her external genitals were cut off with no anaesthetic, lost a tremendous amount of blood and suffered from severe vaginal infections for years).

⁶⁰ Note, *supra* n. 59.

As one example of a relativist view, Professor Leslye Amede Obiora argues the Western imposed anti-FGS movement plays on denigrating images of cultural inferiority, imperialism and racism—advanced by feminists, a group whose values should shun such images.⁶¹ This view of western feminists as imperialistic makes clear that good intentions are not enough.⁶² Furthermore, Obiora finds western feminists hypocritical because categorically condemning FGS ignores the voices of African women who find positive aspects in the practice of FGS, which could be characterised as both racist and imperialist.⁶³ In fact, under Obiora's view, Western activists deny agency to African women by labelling them victims.⁶⁴ Feminists in societies where FGS is widely practiced face a dilemma: asserting agency to resist FGS, thereby submitting to the cultural oppression and surrendering their cultural identity, or electing to submit to FGS and being labelled victims of a patriarchal society who have either never had a choice or made this choice from a false consciousness of not understanding what is in their best interests.⁶⁵ A rising study of the intersection of race, gender and culture, labelled global critical race feminism, notes that women of colour in colonised or neo-colonised nations 'often [have] to choose between the nationalist struggle for independence or self-determination and the women's struggle against patriarchy'.⁶⁶

Finally, some critics suggest that the universalist approach and the cultural relativist approach are not inherently at odds.⁶⁷ If one takes into account the rights and norms of the culture in which a practice is pervasive in determining whether it constitutes a human rights violation, it is questionable whether one has not simply reproduced a universal rule on an intra-cultural level.⁶⁸ In fact, there will be only one definition of rights in that cultural context, and it will apply equally to every individual, whether or not the individual agrees.⁶⁹

Despite the strong beliefs of cultural autonomy held by many indigenous groups, it is telling that there are so many indigenous movements against FGS and that many women who have undergone the practice are speaking out against it.⁷⁰ Perhaps because of these local efforts, although no doubt fuelled by Western notions of human rights violations, the international community is actively exploring the ways in which the practice can be eliminated.⁷¹

⁶¹ Obiora, *supra* n. 8 at 325-8 (particularly criticising the work of Mary Daly and Alice Walker, in portraying Africa as a continent of savagery, and noting that these images provide moral justifications for Westerners with saviour complexes). See also Walker, *Possessing the Secret of Joy* (London: Vintage, 1991).

⁶² See Gunning, 'Uneasy Alliances and Solid Sisterhood: A Response to Professor Obiora's Bridges and Barricades', (1997) 47 *Case Western Law Review* 445 at 447 (critiquing Obiora's assessment that Western feminists have co-opted the imperialist discourse and instead suggests that the discourse may have infected the feminists).

⁶³ Obiora, *supra* n. 8 at 275.

⁶⁴ Obiora, *supra* n. 8 at 265.

⁶⁵ See McGee, *supra* n. 13 at 148; and Coffey, *supra* n. 40 at 10-1. Ironically, those who fight hard against a Western assertion that African women have not chosen FGS for themselves because they lack agency in a patriarchal society risk denying African women who speak out against FGS that same agency when arguing that they are simply mouthpieces for Western activist agendas. See Gunning, *supra* n. 62 at 452-3.

⁶⁶ Wing, 'Global Critical Race Feminism for the Twenty-First Century', in Wing (ed.), *Global Critical Race Feminism: An International Reader* (New York: New York University Press, 2000) 1 at 12. Compare French, *supra* n. 59 (quoting Haja Sasso, a leader of the National Council of Muslim Women in Sierra Leone: 'I am only doing this to protect our culture...I don't want to see this ceremony eradicated, because it binds us, we the women, together. We respect each other in this way and we feel free together because of it.').

⁶⁷ Coffey, *supra* n. 54 at 4.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See Friedenthal, *supra* n. 27 at 147-9; French, *supra* n. 37; and Gunning, *supra* n. 62.

⁷¹ See Rahman, *supra* n. 23 at 9-11.

4. International Instruments: Legal Authority for Intervention

International human rights law, as embodied in a series of international treaties and charters created through the United Nations⁷² (UN) and the African Union⁷³ (AU), should inform the role of Western activists in changing the practice of FGS. Although these codifications of human rights law are often broad in nature, leaving problems both of interpretation and of enforcement against any individual nation-state,⁷⁴ it is important to understand the framework of rights they create as a predicate to any assertion that FGS violates those rights.⁷⁵ These documents, specifically the International Covenants, are voluntarily ratified by individual nation-states, which are then bound by the obligations therein,⁷⁶ and provide some theoretical underpinnings for Western intervention in the practice of FGS.⁷⁷

The first international definition of human rights and attempt at standardising human rights guarantees, the Universal Declaration of Human Rights (UDHR), was established through UN efforts in 1948.⁷⁸ The UDHR is seen as the foundation for international consensus on the recognition of basic human rights.⁷⁹ This document proclaims in Article 3, '[e]veryone has the right to life, liberty and the security of person', and in Article 5, '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.⁸⁰ Amnesty International has stated the widely held belief that the 'traditional interpretation of these rights' has not recognised FGM as a violation thereof.⁸¹ Additionally, the UDHR is not a binding document,⁸² further weakening its potential as a justification for FGS intervention. However, it was the very first attempt to redefine international law as a higher authority that can potentially intervene in the relationship between an individual and the state rather than simply an agreement between states about their relationship with one another.⁸³

⁷² The United Nations has a plethora of subsidiary bodies in the area of human rights. These bodies are categorised as charter bodies (those bodies created by UN Charters) and treaty bodies (those bodies that are concerned with the implementation and oversight of a specific treaty). Traditionally, these instruments were administered by the Commission on Human Rights, a charter body that provides support to the treaty bodies through Secretariats of the treaties. In April 2006 the Commission on Human Rights was replaced by the Human Rights Council, which assumed the role of the previous Commission on Human Rights. See GA Res. 60/251, 3 April 2006, A/RES/60/251.

⁷³ The AU was established in 1999 by the member states of the Organisation of African Unity (OAU) with the stated goal of promoting accelerated socio-economic integration of the continent leading to greater solidarity.

⁷⁴ Compare Woods and Lewis, *Human Rights and the Global Marketplace: Economic, Social and Cultural Dimensions* (Ardsley, NY: Transnational Publishers, 2005) at 138 (noting that broadly stated human rights norms allow for varying interpretations).

⁷⁵ Rahman, *supra* n. 23 at 15.

⁷⁶ But see Gruenbaum, *supra* n. 8 at 210-2 (exemplifying in the case of the Convention on the Elimination of all forms of Discrimination Against Women how, despite the binding nature of these treaties, exceptions, optional protocols and weak enforcement mechanisms can erode the treaties' effectiveness).

⁷⁷ See Skaine, *supra* n. 16 at 59-61 (explaining the impact of international human rights instruments on state actions pertaining to FGS).

⁷⁸ Rahman, *supra* n. 23 at 18; and Gruenbaum, *supra* n. 8 at 210.

⁷⁹ Gruenbaum, *ibid.*

⁸⁰ Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948, A/810 at 71.

⁸¹ Gruenbaum, *supra* n. 8 at 210.

⁸² Woods, *supra* n. 74 at 83.

⁸³ See Rahman, *supra* n. 23 at 15-6 (explaining that the contemporary understanding of human rights, recognising fundamental rights of individuals, originated with post-World War II international instruments such as the UDHR).

The UDHR was elaborated on by two separate and more specific documents pertaining to individual human rights created in 1966, which are binding instruments: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸⁴ The ICCPR contains identical language to the provisions of the UDHR, guaranteeing the rights to the security of the person and freedom from torture.⁸⁵ The ICESCR affirms in its preamble that human rights ‘derive from the inherent dignity of the human person’.⁸⁶ It further provides in Article 12 that, ‘[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.⁸⁷

Significantly, both the ICESCR and the ICCPR provide some of the basis for cultural relativist arguments, as they proclaim in Article 1 of each: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ Other group rights are announced in the ICESCR, including the freedom to practice one’s religion and to take part in cultural life.⁸⁸ This language may be used to classify the practice of FGS as a cultural right, or even a religious right, such that whether or not outsiders approve of it, the society that practices FGS has the right to decide through its own political processes whether or not it chooses to end the practice.⁸⁹ However, the strong language of the ICCPR, taken directly from the UDHR, announces a right to bodily integrity and freedom from torture; indeed, many activists use these instruments as underpinnings of support for the proposition that FGS constitutes an act of violence or inhuman treatment.⁹⁰

The AU has also created its own charter on human rights, the African Charter on Human and People’s Rights.⁹¹ This Charter largely mimics the language of the three instruments named above, the UDHR, the ICCPR and the ICESCR. However, it notably contains provisions concerning the duties of each individual, including:

[T]o preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need ... to serve his national community ... to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit

⁸⁴ Ibid. at 18. Taken together, these three instruments are often referred to as the ‘International Bill of Rights’ and constitute the broad principles, stated in brief general terms, which human rights activists turn to and interpret. See Lewis, *supra* n. 56.

⁸⁵ International Covenant on Civil and Political Rights 1966, 999 UNTS 171. Article 8 provides, ‘Everyone has the right to liberty and security of person.’ Article 7 provides, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’

⁸⁶ International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

⁸⁷ Ibid.

⁸⁸ Article 2, ICESCR provides: ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without any discrimination of any kind as to race, colour, sex, language, religion, political or other opinion ...’, and Article 13 provides that State Parties ‘agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among nations and all racial, ethnic or religious groups ...’. Article 15 provides: ‘The States Parties to the present Covenant recognise the right of everyone: (a) To take part in cultural life ...’.

⁸⁹ Obiora, *supra* n. 8 at 277 (noting that the right to self determination of peoples is often juxtaposed against individual human rights principles, placing the individual’s interest at odds with the community’s interest).

⁹⁰ Rahman, *supra* n. 23 at 25-6.

⁹¹ Ibid. at 18; and African (Banjul) Charter on Human and Peoples’ Rights 1982, (1982) 21 ILM 58.

of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

This type of language shows a strong influence of a more communitarian and less individualistic view of rights, understood by cultures in Africa.

In addition to these generally applicable human rights instruments, both the UN and the AU have adopted conventions and declarations created surrounding the rights of certain specified groups of individuals, including women and children.⁹² Indeed, women's rights have been a recent focus in international human rights law.⁹³

In 1981 the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), created by the UN, came into force.⁹⁴ This was the first international assertion that women's rights were human rights in and of themselves.⁹⁵ CEDAW defines discrimination as, 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.⁹⁶ Activists frequently rely on classifying FGS as discrimination to assert that FGS violates the human rights announced in CEDAW.⁹⁷

Article 2 of CEDAW provides 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', including, 'to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'.⁹⁸ The classification of FGS as discrimination, as has been asserted, therefore requires action by governments.⁹⁹ CEDAW also affirmatively places a duty on each government to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs 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'.¹⁰⁰ This language provides some textual basis for the proposition that human rights can be violated not only by states but also by private actors, and that states are responsible for undertaking some

⁹² See for example Convention on the Elimination of all Forms of Discrimination against Women 1989, 1249 UNTS 513; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); Convention on the Rights of the Child 1989, 1577 UNTS 3; and African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

⁹³ Compare Lewis, *supra* n. 56 (noting major landmarks for women's rights, including the creation of CEDAW, CEDAW Committee Recommendations, and the Declaration on the Elimination of Violence Against Women).

⁹⁴ Rahman, *supra* n. 23 at 11.

⁹⁵ Preamble, CEDAW.

⁹⁶ Article 1, CEDAW.

⁹⁷ Rahman, *supra* n. 23 at 21. This requires that FGS be both a distinction based on sex and also have the purpose or effect of impairing women's equal enjoyment of rights. Each of these propositions is arguable, as men are also circumcised and many argue that women's rights are not impaired as the purposes of the procedure are debatable. However, because FGS is significantly more intrusive than male circumcision, and because it is generally believed to make women sexually subordinate to men, the case that FGS constitutes discrimination under CEDAW is strong.

⁹⁸ Article 2, CEDAW.

⁹⁹ *Ibid.*

¹⁰⁰ Rahman, *supra* n. 23 at 47.

affirmative actions to curtail what otherwise might be thought of as ‘private’ actions outside of the control of the state.¹⁰¹

Furthermore, the Convention was accompanied by the creation of a committee (CEDAW Committee) to whom each state party is obligated to report periodically on the status of women within their jurisdiction.¹⁰² The CEDAW Committee is empowered to hear inter-state complaints under Article 29.¹⁰³ However, because these enforcement mechanisms were believed to be inadequate, the UN drafted an optional protocol that states may ratify separately, which entered into force in 2000.¹⁰⁴ The optional protocol allows for individual complaints to the CEDAW Committee, which mirrors individual complaint procedures already in place to enforce the ICCPR and other International Covenants.¹⁰⁵

The CEDAW Committee is also charged with making recommendations to States Parties based on their research into forms of discrimination that affect women globally and expertise interpreting CEDAW.¹⁰⁶ During a period wherein feminist human rights activists shifted their focus towards violence against women,¹⁰⁷ the CEDAW Committee issued two general recommendations that spoke directly on the practice of FGS. In 1990, the Committee made a recommendation entirely focused on how national governments should take an integrated approach to ending FGS.¹⁰⁸ The actions recommended include education campaigns, funding local efforts to end the practice, and adopting health policies that require the cooperation of local health clinics.¹⁰⁹ Although the recommendation also urges governments to seek international assistance, notably absent from this recommendation is a central mandate for criminalisation of FGS on a national level.¹¹⁰

¹⁰¹ See Shell-Duncan and Hernlund, *supra* n. 44 at 28. This definition of human rights violations, even by seemingly private actors, has been used to justify granting political asylum to women escaping the threat of FGS.

¹⁰² Woods, *supra* n. 74 at 239.

¹⁰³ *Ibid.* at 239. See also Article 29, CEDAW(‘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....’).

¹⁰⁴ Woods, *supra* n. 74 at 239.

¹⁰⁵ *Ibid.* at 240

¹⁰⁶ Lewis, *supra* n. 56.

¹⁰⁷ See Rahman, *supra* n. 23 at 11.

¹⁰⁸ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 14: Female Circumcision, A/45/38 at 80 (1990).

¹⁰⁹ *Ibid.* The recommendation urges governments to: (a) Take appropriate and effective measures with a view to eradicating the practice of female circumcision. Such measures could include: (i) The collection and dissemination by universities, medical or nursing associations, national women's organisations or other bodies of basic data about such traditional practices; (ii) The support of women's organisations at the national and local levels working for the elimination of female circumcision and other practices harmful to women; (iii) The encouragement of politicians, professionals, religious and community leaders at all levels, including the media and the arts, to co-operate in influencing attitudes towards the eradication of female circumcision; (iv) The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision; (b) Include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of female circumcision; (c) Invite assistance, information and advice from the appropriate organisations of the United Nations system to support and assist efforts being deployed to eliminate harmful traditional practices; (d) Include in their reports to the Committee under Articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women, information about measures taken to eliminate female circumcision.

¹¹⁰ See *ibid.*

Just two years later, the CEDAW Committee announced, for the first time, that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.¹¹¹ This recommendation explicitly rejects a strict public/private actor distinction holding States potentially 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'.¹¹² Furthermore, this recommendation lists female circumcision as violence against women,¹¹³ and recommends specifically that states 'identify the nature and extent of attitudes, customs and practices that perpetuate violence against women ... [e]ffective measures should be taken to overcome these attitudes and practices'.¹¹⁴ The measures that the CEDAW Committee recommends to combat violence against women includes a wide range of things, from criminalising certain practices to education, health care provision, rehabilitative programmes, and other preventative measures.¹¹⁵

Immediately following the CEDAW Committee's assertion that violence against women was a form of discrimination, the UN issued the Declaration on the Elimination of Violence Against Women, which is an aspirational, rather than legally binding, document.¹¹⁶ This declaration explicitly includes FGS as a form of violence when it proclaims that, 'violence against women shall be understood to encompass, but not be limited to ... female genital mutilation and other traditional practices harmful to women'.¹¹⁷ The Declaration also provides a wide range of mandates to governments, including enacting penal and civil sanctions, education, cooperating with international and non-profit organisations, providing adequate funding, promoting research and education, and maybe most strikingly, recognising the importance of women's movements and supporting their local efforts.¹¹⁸ Strikingly, this document explicitly rejects the cultural relativist argument, at least with respect to the enumerated actions which constitute violence against women, including FGS, stating that governments 'should not invoke any custom, tradition or religious consideration to avoid their obligations' to end violence against women.¹¹⁹

On a regional level the AU in 2003 created its own protocol concerning women pursuant to the Banjul Charter, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the Maputo Protocol.¹²⁰ The Maputo Protocol

¹¹¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, A/47/38 (1992).

¹¹² Ibid. at para 9.

¹¹³ Ibid. at para 11: 'Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.'

¹¹⁴ Ibid. at para 24(e).

¹¹⁵ Ibid. at para 24.

¹¹⁶ Declaration on the Elimination of Violence Against Women, GA Res. 48/104, 20 December 1993, A/RES/48/104.

¹¹⁷ Article 2(a), Violence Against Women Declaration.

¹¹⁸ Article 4, Violence Against Women Declaration.

¹¹⁹ Ibid.

¹²⁰ The Maputo Protocol is administered by the African Commission on Human and Peoples' Rights, a body created by the Banjul Charter.

includes, in Article 5, provision for the ‘elimination of harmful practices’, mandating that States Parties engage in ‘prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them ...’.¹²¹ FGS has thus been squarely placed into the category of a violation of international human rights.¹²²

Finally, human rights instruments concerning the rights of children are implicated in any discussion of FGS, because the international community has recognised children as needing a specialised set of protections.¹²³ The Convention on the Rights of the Child (CRC), provides in Article 19, that ‘States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s) [or] legal guardian(s) ...’.¹²⁴ It further mandates that governments ‘shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children’, and assures the child’s right to the highest attainable standard of health.¹²⁵

The African Charter on the Rights and Welfare of the Child has similar language, and goes further in Article 21, which addresses the ‘Protection against Harmful Social and Cultural Practices’, by declaring, ‘States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.’¹²⁶

There are, therefore, a plethora of bases upon which activists build a case for urgent action against the practice of FGS.¹²⁷ Those working to end FGS employ terminology to frame FGS as a violation of the right to be free from discrimination based on gender, the right to be free from violence, the right to health, and the right of a child to have its ‘best interests’ promoted.¹²⁸ In this fashion, FGS implicates many different aspects of human rights defined in the international context, and activists act legitimately under international legal authority.¹²⁹

¹²¹ Article 5(b), Maputo Protocol.

¹²² Compare Lewis, supra n. 56.

¹²³ See Preamble, Convention on the Rights of the Child.

¹²⁴ Article 19, Convention on the Rights of the Child.

¹²⁵ Articles 24(1) and (3), Convention on the Rights of the Child.

¹²⁶ Article 21, African Charter on the Rights and Welfare of the Child.

¹²⁷ See generally Rahman, supra n. 23 at 20-39. Many activists also utilise the principles of the international instruments discussed, but rely on national implementation through national constitutions, laws, and adoptions of international instruments’ language when campaigning on a national level.

¹²⁸ See, for example, Rahman *ibid.* at 20-39; Trueblood, supra n. 41 at 451-61 (listing each convention and how it can be applied to FGS); and Wellerstein, ‘In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation’, (1999) 22 *Loyola Los Angeles International and Comparative Law Review* 99 at 114-24 (advocating for FGS to be considered a violation of a wide range of international instruments). Many scholars also classify FGS as a type of torture prohibited by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See, for example, Trueblood, supra n. 41 at 458; see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987, 1465 UNTS 85. However, the application of the Torture Convention to FGS is controversial and often less useful because FGS is practiced without any intent to harm on the part of the practitioner; torture requires an intent to cause severe pain or suffering. See Rahman, supra n. 23 at 26.

¹²⁹ Compare Rahman, supra n. 23 at 39 (noting the struggle to place this issue within a broader social justice agenda and the variety of rights that are implicated by the practice).

5. A Failed Approach: Legal Standards Alone

Law alone seldom changes behaviour. Although it is certainly a key determinate of change, it is not a panacea nor is it a brooding omnipresence in the sky. It is instead a mechanism that is integral to, and contingent on, a broader societal scheme.¹³⁰

Despite the focus on international law and national compliance thereto that many scholars choose to discuss when addressing FGS, the criminalisation of FGS on a national level, as a stand-alone strategy, has proven largely ineffective in curbing the practice.¹³¹

There are many reasons why the various international legal standards discussed in Part 4 of this article, even when nominally adopted at the national level, have failed to effectuate the change that was envisioned.¹³² Many of the instruments have extremely weak enforcement mechanisms, such that countries may not be held accountable for failing to enforce national legislation that was enacted.¹³³ Furthermore, while many international legal standards try to reach the activities of private actors by holding governments accountable for failing to prevent human rights abuses where they are known, it is extremely difficult for struggling governments in less developed countries to prevent such widespread practices.¹³⁴ Finally, and perhaps most importantly, these laws have not, in most instances, reflected the majority will of the people, but rather '[flown] in the face of a very important, socially accepted practice'.¹³⁵ Frequently, these laws have been adopted at the insistence of the international community or during a period of colonisation.¹³⁶ In fact, the legitimacy of the laws in the eyes of the people affected is an exacerbated problem in an African context, where most countries are made up of multiple ethnic groups and no one group feels particularly connected with the overarching state government.¹³⁷ Because of this, legislative action on cultural practices has proven highly ineffective.¹³⁸

There are many countries whose experiences exemplify how legal institutions alone are not sufficient to combat the practice of FGS.¹³⁹ For instance, in 1998, the Parliament of Tanzania passed legislation criminalising the practice of FGS and imposing a penalty of five to fifteen

¹³⁰ Obiora, *supra* n. 8 at 275.

¹³¹ Gruenbaum, *supra* n. 8 at 206. In fact, a critical scholar commenting on Obiora's article noted that legal changes have seldom been sufficient to transform societies. He points to slavery in the American South and Apartheid in South Africa as illustrative of the idea that 'legal proscriptions standing alone failed to work transformational changes on an unwilling populace. Instead, grass-roots political agitation forced changes in the legal order; in turn, these changes helped to facilitate further social transformation.' See Krotoszynski, Jr., 'Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change', (1997) 47 *Case Western Reserve Law Review* 423.

¹³² See Rahman, *supra* n. 23 at 56-8.

¹³³ See Wood, *supra* n. 5 at 372.

¹³⁴ *Ibid.* at 274 (showing how states can be held accountable for 'private' human rights abuses).

¹³⁵ Gruenbaum, *supra* n. 8 at 206 (noting that laws often come from efforts of international activists, international institutions, missionaries, colonial governments or expatriated communities).

¹³⁶ *Ibid.* at 206-8 (recounting civil resistance to anti-FGS laws in various African countries).

¹³⁷ Ogbu, 'Comment on Obiora's Bridges and Barricades', (1997) 47 *Case Western Reserve Law Review* 411 See also Boyle and Preves, 'National Politics as International Process: The Case of Anti-Female-Genital-Cutting Laws', (2000) 34 *Law and Society Review* 703 (noting that Africa was not originally organised into nation-states, therefore making early anti-FGS campaigns centred around other organisational structures).

¹³⁸ *Ibid.* (noting the ineffectiveness of laws prohibiting 'bride price').

¹³⁹ Rahman, *supra* n. 23 at 58-59.

years of imprisonment and/or a substantial monetary penalty.¹⁴⁰ Tanzania has also ratified the ICCPR, the ICESCR, the CEDAW, the CRC and the Banjul Charter.¹⁴¹ Despite its strong legal affirmation of human rights, the practice of FGS goes on openly and often in mass ceremonies which may involve cutting 5000 girls or more at once.¹⁴² FGS practitioners openly defend the practice as well, as exemplified by one interview with a practitioner where she stated that FGS is 'a rite of passage for girls into womanhood, grooming and training of cultural values that maintain domestic stability within the community'.¹⁴³ These open practitioners continue to go unprosecuted under the criminal statutes Tanzania has enacted.¹⁴⁴

Mali also has also ratified the major international human rights instruments, and while not making a specific criminal provision covering FGS, has stated that an Article in its criminal code covering voluntary strikes or wounds does outlaw the practice.¹⁴⁵ Despite this, not one person has been prosecuted for practicing FGS.¹⁴⁶ Furthermore, Frontiers in Reproductive Health conducted a study in which it was shown that nearly all families in Mali practice FGS.¹⁴⁷ Community members and leaders continued to defend the practice, and practitioners of FGS were unconvinced that FGS has harmful impacts on the health of women.¹⁴⁸

In other countries, enforcement has been attempted but thwarted by popular resistance.¹⁴⁹ In Sudan, the British controlled government in 1946 enacted and began to enforce a statute criminalising FGS.¹⁵⁰ When the government arrested and jailed a midwife for circumcising a girl, the citizens responded by attacking the jail and freeing the midwife.¹⁵¹ A prominent Muslim reformer, who advocated for women's equality, supported the citizens because he believed that education should precede criminalisation.¹⁵² The practice of FGS continued as before without meaningful enforcement attempted thereafter by the government.¹⁵³ In Kenya, the British colonial

¹⁴⁰ The fine imposed can be up to 300,000 shillings, roughly equivalent to \$235. 'Tanzania: Failing to Enforce the Law Against Female Genital Mutilation', *Equality Now, Women's Act* 20.1, June 2001. The GDP per capita in Tanzania is only \$700, making this fine a substantial one in a Tanzanian context. See CIA, World Factbook Tanzania, available at: <https://www.cia.gov/cia/publications/factbook/geos/tz.html>.

¹⁴¹ Rahman, supra n. 23 at 222.

¹⁴² FGS is generally performed during the month of December in seasonal ceremonies in various parts of the country.

¹⁴³ Ibid. Other testimonial evidence supports the idea that men would never marry an uncircumcised woman because such women are 'not polite and are over-sexed'.

¹⁴⁴ Ibid.

¹⁴⁵ Rahman, supra n. 23 at 181. The 'National Plan for the Eradication of Excision by 2007' declared two penal code provisions applicable to FGS: Article 166 provides 'Any person who intentionally strikes or wounds or commits any other acts of violence or assault, resulting in an illness or an inability to work for more than 20 days, shall be punished by imprisonment from one to five years and by a fine of 20,000 to 500,000 francs...When the acts of violence, wounds or strikes result in mutilation, amputation, privation of the use of a member or of a sense, blindness, loss of any eye or other infirmities of illness, the punishment shall be five to ten years of hard labour ...'. Article 171 provides 'Any person who, without intending to cause death, intentionally ... subjects a person, even with his or her consent, to practices or manoeuvres that result or could result in an illness or an incapacity to work, shall be punished by imprisonment from six months to three years and, optionally, a fine of 20,000 to 200,000 francs.'

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ 'FGC Excisors Persist Despite Entreaties', *OR Summary* 2, Frontiers in Reproductive Health, Population Council, January 2000.

¹⁴⁹ Gruenbaum, supra n. 8 at 206.

¹⁵⁰ Ibid.

¹⁵¹ This event reportedly took place in the town of Rufa'a on the Blue Nile River in central Sudan.

¹⁵² Gruenbaum, supra n. 8 at 207.

¹⁵³ Ibid.

government criminalised FGS in 1954, but was forced to repeal the laws due to pressure from practicing communities.¹⁵⁴

Thus, although there exists an international legal framework through which outsiders can play a legitimate role in the anti-FGS movement, it seems clear that the concerned community needs alternatives to additional national laws criminalising the practice or new international documents condemning it.¹⁵⁵ In fact, while human rights principles calling for an end to FGS appear to have ‘won’ over the ideals of national sovereignty and self-determination, democratic representation continues to affect the process of ending FGS.¹⁵⁶ In fact, it is questionable whether international pressure, by international laws or by NGOs, to outlaw FGS at the national level is empowering to women who did not want to undergo the practice or whether it stripped women of power to make a choice to engage in their local cultural custom.¹⁵⁷ For Western activists concerned about the practice of FGS, a new framework is needed.

6. A Promising Alternative: The Case of Senegal

Today, I know my rights and I know that my body belongs to me. The mutilations that I have suffered since I was a baby I will never impose on my daughter. I would sooner die.¹⁵⁸

These words, spoken by Fatou Cissoko, a woman from the village of Malicounda Bambara, Senegal, represented the start of a truly grassroots movement against the practice of FGS.¹⁵⁹ The movement, which has now spread to more than 1000 villages in Senegal and to surrounding countries,¹⁶⁰ is a counterexample to the negative experiences of national law making as a primary strategy to end the practice of FGS seen in Mali and Tanzania.¹⁶¹ From a legal perspective, this raises many interesting and important questions. How did these women organise? What methods are they using to spread their message? What power do they hold to change these practices? And maybe most important for human rights activists and lawyers in the West, what role does the legal system play in this type of a movement? Although some scholars classify the programme in

¹⁵⁴ UN Office for the Coordination of Humanitarian Affairs, Integrated Regional Information Networks (IRIN), ‘Razor’s Edge: the Controversy of Female Genital Mutilation’, March 2005, available at: <http://www.irinnews.org/webspecials/FGM/46008.asp>.

¹⁵⁵ See Bowman, supra n. 46 at 146; but see ‘Mali: Calling for a Law Against Female Genital Mutilation (FGM)’, supra n. 17 ([Laws criminalising FGS] appear to be having an impact on reducing the prevalence of FGM, particularly in those countries such as Burkina Faso where the law is publicised and enforced.’).

¹⁵⁶ Boyle, supra n. 137 at 731 (‘Even though an issue may be resolved in favour of one universal ideal, other contradictory ideals do not disappear. Instead, they continue to operate as a constraint on both the means and the possible goals of reform.’).

¹⁵⁷ Ibid. (stating that the international system seems to have both stripped power and given power to women in countries where FGS is practiced); Obiora, supra n. 8 at 303 (explaining that women’s control over rituals is often a source of power for women in patriarchal societies).

¹⁵⁸ Paringaux, ‘Le Serment de Malicounda’, *Le Monde*, 14 October 1997.

¹⁵⁹ Ibid.

¹⁶⁰ Tostan: An Overview, available at: <http://www.tostan.org/about.htm>. See also Gagan, ‘Social Change in Senegal’, *Boston Globe*, 28 December 2001 (noting that as of 2001, over 400 villages in Senegal had made declarations abandoning FGS and Tostan was training women in Sudan, Burkina Faso, Mali, Guinea, and Nigeria); Crawley, ‘Africa Spurns Female Circumcision’, *Christian Science Monitor*, 5 April 2005.

¹⁶¹ Bowman, supra n. 46 at 158-9 (naming Tostan as a rare example of successful anti-FGS programs).

Senegal as 'non-legal',¹⁶² this article seeks to elucidate the way in which the law plays an integral role in the success observed.

Senegal has very strong formal laws against the practice of FGS both adopted from international protocols and through its domestic legal system.¹⁶³ Internationally, Senegal has ratified CEDAW, the CRC, the ICCPR, the ICESCR, the Banjul Charter, the Maputo Protocol, and the African Charter on the Rights and Welfare of the Child.¹⁶⁴ In its domestic law, the Senegalese Constitution includes a declaration on the equality of men and women and recognises rights of children and the right to practice one's religion.¹⁶⁵ Although a ban on FGS has not been incorporated into the Senegalese Constitution, in January 1999, Senegal amended its penal code to criminalise the practice of FGS, defined as a person who 'violates or attempts to violate the integrity of the genital organs of a female person by total or partial ablation of one or several of the organ's parts, by infibulation, by desensitisation or by any other means', and provides punishment including imprisonment up to five years or if the practice results in a death, punishment of hard labour for life.¹⁶⁶

In Senegal, FGS is only practiced amongst certain ethnic and religious groups, and unlike some other African countries where nearly all of the female population has undergone FGS,¹⁶⁷ the practice only affects 20% of women in Senegal.¹⁶⁸ Although some research suggests that it is easier to combat the practice of FGS in countries where it is practiced only in the minority of the population,¹⁶⁹ the movement in Senegal was not born out of a general public mandate imposed on a minority group, but rather from the practicing populations - communities where the rates of FGS were at 97% - abandoning the practice.¹⁷⁰ Thus, the model in Senegal is transferable, even to those countries where nearly all families practice FGS.¹⁷¹

Despite criticisms of Western activists' 'intervention' in developing countries condemning the practice of FGS against the apparent will of indigenous populations, outlined in Part 3 of this article, an outside organisation was clearly the catalyst for the positive change that has been observed in Senegal.¹⁷² Tostan, a US-incorporated/Senegal-based Non-Governmental Organisation (NGO), whose name in Wolof means 'breakthrough', is an organisation committed to broad-based informal adult education programmes.¹⁷³ Tostan was founded and run by Molly Melching who, although not African, had lived in her Senegalese community for over two decades.¹⁷⁴ The programmes focus on holistic education of women about democracy, human

¹⁶² Ibid.

¹⁶³ Compare Rahman, supra n. 23 at 206-8 (summarising the various legal prohibitions on FGS adopted by Senegal).

¹⁶⁴ Ibid. at 206; African Union Treaties, Conventions, and Protocols, www.africa-union.org/root/au/Documents/Treaties/treaties.htm (providing lists of signatories to various AU conventions).

¹⁶⁵ Rahman, supra n. 23 at 206-7.

¹⁶⁶ Ibid. at 207.

¹⁶⁷ Ibid. at 207. For example, the rate is 90% or higher in Egypt, Eritrea, Mali and Sudan.

¹⁶⁸ Ibid. at 206.

¹⁶⁹ Bowman, supra n. 46 at 152.

¹⁷⁰ Melching, 'November 27-28, 1999—105 Villages End FGC in Kolda: Largest Public Declaration to Date', Tostan, available at: <http://www.tostan.org/news-nov27.htm>.

¹⁷¹ This is consistent with Tostan's regional presence. Tostan runs programmes in Mali and Burkina Faso, where rates of FGS practice are 94% and 70% respectively. See Gagen, supra n. 160; and Rahman, supra n. 23 at 114 and 180.

¹⁷² Bowman, supra n. 46 at 159; and Gagen, supra n. 163.

¹⁷³ Tostan Mission Statement, available at: <http://www.tostan.org/about.htm>.

¹⁷⁴ Crawley, supra n. 160. In fact, Melching went to Senegal in 1974 as a Peace Corps Volunteer and has been there nearly continuously since then. Dugan, 'Senegalese Women Reclaim Their Rights', *Idaho Mountain Express*, 10-16 July 2002

rights, problem-solving, hygiene, health, basic mathematics and literacy.¹⁷⁵ Tostan then uses these tools to work on group goal setting and empowerment exercises.¹⁷⁶

In 1996, in the village of Malicounda Bambara, Tostan ran a series of sessions focused on FGS following the basic education programme.¹⁷⁷ In one of the sessions, theatre was used to show the tragedy of a girl who died from FGS.¹⁷⁸ Afterwards the women were prompted to discuss the play.¹⁷⁹ Although hesitant to speak at first,¹⁸⁰ the women started talking and it became clear that the basic education on human rights and democracy gave them confidence that they could change the practice if they wanted to.¹⁸¹ The women discussed this with the village elders and obtained the support of the village Chief, who, after talking with the women in his family, declared his opposition to the practice as well.¹⁸² That year, there were no circumcisions performed in the village during the rainy season, when the rituals usually take place.¹⁸³ In 1997 the village women organised to make a declaration abandoning FGS.¹⁸⁴ Approximately 40 villagers stood together and addressed reporters and guests invited for the declaration.¹⁸⁵

This event gained national attention through the announcement and President Abdou Diouf made an official endorsement of the movement.¹⁸⁶ President Diouf articulated both the need for local action and for his willingness to support that action through national legislation and laws concerning FGS.¹⁸⁷ One village leader spent three months visiting other villages to talk to them about abandoning the practice of FGS.¹⁸⁸ After this process of building community support, 13 Bambara villages issued what is known as the Diabougou Declaration.¹⁸⁹

The Diabougou Declaration starts by listing the reasons that these communities have felt the need to speak out.¹⁹⁰ The first reason noted is that the communities listened to the statements of the women and girls in their communities who attest to the suffering, illness, psychological trauma and loss of human life that can result from the practice.¹⁹¹ The declaration goes on to cite the reports of health workers, the support of religious values to ending the practice, and the international human rights law that supports its abandonment.¹⁹² Finally, it mentions that the state

¹⁷⁵ Tostan Mission Statement, *supra* n. 173.

¹⁷⁶ *Ibid.*

¹⁷⁷ The Malicounda Bambara Story, available at: <http://www.tostan.org/news-mal-bam.htm>.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.* In fact the play was conducted three times on separate occasions before the women were willing to discuss it.

¹⁸¹ *Ibid.* The facilitator cited the women's new understanding that they had the right to the highest possible standard of health and the right to be heard and to express their opinions.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*; See also Population Council, 'Reproductive Health: The Tostan Story', available at: <http://www.popcouncil.org/rh/tostan/tostan.html> (last visited 13 January 2007).

¹⁸⁶ Population Council, *ibid.*

¹⁸⁷ Rahman, *supra* n. 23 at 207 (quoting President Diouf to say, 'We must fight relentlessly against excision. The promulgation of a specific law might be necessary in order to show government commitment. But, and above all, governments and NGOs should join efforts to convince the population of the danger this practice represents to the health of women and induce attitudinal changes ... Every village should initiate debates on excision in order to make everybody realise that the time has come to ban such traditional practices forever.')

¹⁸⁸ Population Council, *supra* n. 185.

¹⁸⁹ *Ibid.*

¹⁹⁰ The Diabougou Declaration, [available at: http://www.tostan.org/news-diabougou.htm](http://www.tostan.org/news-diabougou.htm).

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

has taken a stance against the practice to protect the health of women and girls.¹⁹³ In the statement of what these communities have affirmed, leaders mention not only abandoning the practice and spreading their knowledge to other communities but also continuing the process of social transformation and education in a variety of areas.¹⁹⁴

The Diabougou Declaration is instructive because of the structure that the communities chose to organise their thoughts. They began at the local level, discussing their own experiences.¹⁹⁵ They recognised the role of education in broadening the knowledge base that they had in their own communities,¹⁹⁶ and most interestingly, they found support in legal institutions which gave validity, support and energy to their message.¹⁹⁷

The Tostan programme is operating in over 400 villages, not only in Senegal but also in Burkina Faso, Mali and Guinea.¹⁹⁸ In 2003 there was the first public declaration abandoning FGS outside of Senegal.¹⁹⁹ 23 villages in Burkina Faso declared their intent to stop the practice, bringing the total number of declared villages to an impressive 1,140 as of that time.²⁰⁰

Some scholars suggest that legal institutions should remove themselves entirely and let NGOs work on grassroots organising, at least until there is enough widespread support to enact a law that is democratic.²⁰¹ However, Tostan exemplifies how international law can have a very positive part to play even in grassroots education campaigns. Legal structures have played a role in the Tostan success in two principle ways. First, Tostan employed international human rights law in its basic education programme, which provided a foundation for women to assert their own rights in the context of the practice of FGS.²⁰² Second, the international legal community and the national legal structure supported the women's decision once it had been made, providing valuable affirmation and motivation to continue the programme.²⁰³

¹⁹³ Ibid.

¹⁹⁴ Ibid. ('Because education is at the heart of this historic encounter in Diabougou and recognising that basic education is a necessary element for the promotion of the individual and of society in general, we appeal to the Government to assist us in beginning a programme for basic education in national languages in the ten villages not previously having benefited from such a program.')

¹⁹⁵ Tostan encourages women to stand up at the declarations and give testimonials to the negative effects of FGS that they have observed in their own lives. In one such instance, a woman recounted how her daughter nearly died as a result of FGS, and how it took expensive medical care to save her. Melching, 'Fourth Public Declaration against FGC enacted June 19', available at: <http://www.tostan.org/news-june19.htm>.

¹⁹⁶ Population Council, *supra* n. 185: 'Although the people of Malicounda-Bambara committed on their own initiative to ending FGC, elements of the Tostan educational programme were pivotal in inspiring and empowering their decision.'

¹⁹⁷ The Director of Tostan relayed that the first declaration made following the passing of a national law banning FGS was 'the most joyous — perhaps because there was a new law and people felt more secure in standing up to make their decision.' Melching, *supra* n. 195.

¹⁹⁸ A Timeline of Events, available at: <http://tostan.org/about.htm>.

¹⁹⁹ Ibid.

²⁰⁰ Crawley, *supra* n. 160. Since then over 1,500 villages have declared an end to FGS practices in their communities.

²⁰¹ See for example, Bowman, *supra* n. 46 at 159-161.

²⁰² See Melching, *You Are An African Woman*, Speech at the John F. Kennedy School of Government, 16 November, 2000, available at: <http://www.tostan.org/news-mollym.htm> (explaining how women understood their rights under various international instruments).

²⁰³ See for example, Hillary Rodham Clinton and President William Jefferson Clinton Visit with the Senegalese People, available at: <http://www.tostan.org/news-clintonvisit.htm> (showing a positive reaction to foreign officials supporting women's efforts to abandon FGS); and Rahman, *supra* n. 23 at 207 (underscoring Senegalese President Diouf's support for the Tostan programme as a positive motivating factor).

The basic education programme, the foundation of Tostan's work in local communities, is heavily influenced by and relies on an international human rights law.²⁰⁴ Notably, Tostan was not originally created for the purpose of the eradication of FGS.²⁰⁵ Rather, it was created as a tool to educate women about their rights and democracy as well as basic skills in mathematics and literacy.²⁰⁶ These skills are seen as a prerequisite to making informed decisions, asserting one's rights and organising with one's community.²⁰⁷ In fact, anecdotal evidence supports the proposition that the women came to understand that they and their children had a right to the highest standard of health, and that it was sharing experiences where FGS had compromised the health of children that changed their attitudes.²⁰⁸ Molly Melching gave an example of a woman in the Tostan programme who not only came to embrace the right to health, but also the right to voice her own opinions, to own land and to vote.²⁰⁹ This woman was able to cite the international conventions in which these rights were guaranteed.²¹⁰

In many ways, starting with a short list of basic human rights which are easily recognisable in a cross-cultural context can lead to a convergence of ideas between the Western activists and the local communities on more complex issues, because, as one scholar notes, these principles are presented in a credible, non-directive manner.²¹¹ Because there was no order to change behaviour coming from these human rights principles, the basic education programme empowered women to choose for themselves to abandon the practice of FGS in Malicounda Bambara and other villages.²¹² As one account asserts, 'This may be the first time that entire communities acted with one voice on this issue. It was the voice of Senegalese women, not the UN, not the diplomats or politicians and, most importantly not westerners.'²¹³ The US Department of State explains that Tostan never proclaimed that FGS was right or wrong; rather they encouraged the women to use the skills learned in the programme to make a decision for themselves.²¹⁴ This empowerment allowed them to approach their husbands and village leaders and encourage abandonment of the practice.²¹⁵ In this way, human rights principles and the international law codifying those principles were instrumental in allowing women to abandon the practice.²¹⁶

²⁰⁴ Melching, supra n. 202.

²⁰⁵ Mackie, 'Female Genital Cutting: The Beginning of the End', in Shell-Duncan and Hernlund (eds.), *Female 'Circumcision' in Africa: Culture, Controversy and Change* (Boulder, CO: Lynne Rienner, 2000) at 256-57.

²⁰⁶ Population Council, supra n. 185.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Melching, supra n. 202. This speech also explains how traditional education, even for those who are able to benefit from it, does not teach women about human rights or about their bodies and their health in a way that is practical.

²¹⁰ Ibid.

²¹¹ Mackie, supra n. 208.

²¹² Ibid.

²¹³ Kowalsky, 'Between Law and Tradition: The Struggle Against FGM in Senegal', (March 2000) *The Human Rights Databank: Reports from the Field*, available at: <http://www.hri.ca/tribune/viewArticle.asp?ID=2544>.

²¹⁴ 'Senegal: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)', US Department of State, available at: <http://www.state.gov/g/wi/rls/rep/crfgm/10107.htm>.

²¹⁵ Ibid.; see also Courageous Decisions, Sustainable Changes, available at: <http://www.tostan.org/news-courageousdecisions.htm> (quoting one man in a village that participated in Tostan's basic education programme to say: 'No, I myself never participated in the Tostan classes. I just saw that they organise the women and adolescents and I come from a big family. These women are my relatives, so God pushed me to love this organisation with all my heart.')

²¹⁶ See Melching, supra n. 202.

International actors', institutions' and instruments' support for Tostan constitutes the other principle way in which the law has a role in the programme's continuing success. Tostan has received accolades and financial assistance from many international NGOs and governmental organisations, such as UNICEF, American Jewish World Service, USAID, and the Swedish International Development Agency.²¹⁷ This support comes despite the fact that NGOs are generally involved in advocating for top-down legal reforms, such as the criminalisation of FGS in national laws and/or the adoption and enforcement of international treaties.²¹⁸ The women making the original declarations in fact called on these international NGOs and on the government to support Tostan's efforts.²¹⁹

Support also came from leaders in the national and international realm. Senegalese President Diouf immediately endorsed the women's actions through public statements.²²⁰ Although national laws criminalising FGS 'are [generally] developed to change rather than reflect local attitudes',²²¹ President Diouf suggested and then implemented national law reform criminalising FGS *in response to* the women's actions.²²² Friends of Tostan still protested the passing of the law because they were concerned about using official abolition and sanction as a strategy.²²³ An original leader said '[t]ry to tell the Bambara people what they must do about their own customs and you have a fight on your hands.'²²⁴ Indeed, in one act of protest a traditional FGS practitioner performed a procedure 120 days after the passing of the law.²²⁵ Despite these setbacks, it is clear that the women welcomed widespread attention to their actions by inviting journalists and other media to the public declarations from the outset of their campaign.²²⁶ Indeed, public discussion, public declarations and media campaigns were central and successful strategies of the Tostan programme and Malicounda Bambara movement.²²⁷

In addition to attention from the President of Senegal, President Clinton and Hillary Rodham Clinton paid a visit to women who had participated in Tostan and had declared their intent to abandon the practice.²²⁸ While many individuals from the village, mostly men, were reportedly worried that the Clintons presence would not be positive, Ms Clinton congratulated the women's efforts to abandon the practice, rather than attacking the tradition itself.²²⁹ The validation of the women's decision by having such a visit also convinced many men that these women were 'at the origin of a historic movement'.²³⁰

²¹⁷ Tostan: An Overview, supra n. 160.

²¹⁸ Boyle, supra n. 137 at 713.

²¹⁹ The Diabougou Declaration.

²²⁰ Rahman, supra n. 23.

²²¹ Boyle, supra n. 137 at 730.

²²² Kowalsky, supra n. 216 ('An inauspicious beginning perhaps – an awareness campaign and a public ban in one small village – nonetheless paved the way for a national law against FGM.');

but see 'Senegal: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)', supra n. 217 (noting that 'Representatives of Tostan . . . maintain that the law has made their work that much more difficult since it has increased defensiveness among the populations practicing it.').

²²³ Malicounda-Bambara: the Sequel, IKNotes on Indigenous Knowledge and Practices, The World Bank, April, 2001, available at: <http://www.tostan.com/news-april2001.htm>.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ The Malicounda Bambara Story, supra n. 177.

²²⁷ Population Council, supra n. 185.

²²⁸ Hillary Rodham Clinton and President William Jefferson Clinton Visit with the Senegalese People, supra n. 203.

²²⁹ Ibid.

²³⁰ Ibid.

Finally, international human rights law itself is evolving in a direction which is more supportive of the types of strategies employed by Tostan. For example, in CEDAW, the human rights announced are moving away from a state-oriented approach and start to bring together public and private acts.²³¹ As discussed in Part 4, the newer focus of the CEDAW Committee's recommendations on complying with CEDAW through a more integrated approach includes ideas about education and health care as well as government support of community initiatives.²³² Complying with the CEDAW Committee's recommendations could certainly include government support for programmes like Tostan.²³³ Furthermore, the Banjul Charter's provisions in conjunction with the African Charter on the Rights and Welfare of the Child, provide a basis for African international support and validity to indigenous anti-FGS campaigns.²³⁴ Support from within the continent for movements like Tostan's is even stronger in light of the recently adopted Maputo Protocol, calling on governments specifically to take an integrated approach to ending the practice of FGS.²³⁵

By using the law at the local level for basic education programmes, and at the national and international level to gain support for the women's autonomous decisions, Tostan has successfully employed the power of the law in a manner that is more consistent with local culture and context in several ways. First, while most legal approaches criminalise individual acts of FGS, the Tostan programme relied on the model of community decision-making and change.²³⁶ At each stage of the process, village elders and religious leaders were consulted and engaged in conversation.²³⁷ Support for the movement came not only from the women themselves, but also the men in their community, who were not excluded from the dialogue.²³⁸ Furthermore, the leaders had the power to carry the message to other villages.²³⁹

By enacting this type of community discussion, the implementation of the abandonment of the practice of FGS was wildly successful.²⁴⁰ Prior to the community abandonment, a woman who had not been circumcised was considered impure and not fit for marriage.²⁴¹ Under such a cultural system of belief, it was nearly impossible for an individual to make the choice not to excise her child.²⁴² In fact, children begged to be excised in order to conforming with their peers.²⁴³ However, if a whole community abandons the practice together the stigma attached to not undergoing this cultural rite of passage is not borne.²⁴⁴ Furthermore, the recognition of the leaders of the movement in Malicounda, that they must spread their ideas to other villages

²³¹ See, for example, the Optional Protocol to CEDAW.

²³² CEDAW Recommendation No. 19, *supra* n. 114.

²³³ Compare CEDAW.

²³⁴ Compare Banjul Charter, *supra* n. 92; and the African Charter on the Rights and Welfare of the Child, *supra* n. 95.

²³⁵ Maputo Protocol, *supra* n. 95.

²³⁶ Mackie, *supra* n. 205 at 256-7.

²³⁷ 'Senegalese Women Remake Their Culture', (December 1998) Africa Policy Information Center, *Indigenous Knowledge* No. 3 (in particular, noting that three representatives of a village chief met with the women to create the Diabougou Declaration).

²³⁸ *Ibid.* (reporting that two men who had taken part in the Tostan programme travelled to villages surrounding Diabougou to discuss FGS in those communities).

²³⁹ *Ibid.*

²⁴⁰ Mackie, *supra* n. 205 at 257 (stating that Malicounda Bambara represents 'the first unequivocal and collective abandonment of FGC on record' and that 'public opinion continues to oppose FGC and deviators would be identified and punished').

²⁴¹ Paringaux, *supra* n. 158.

²⁴² Compare Mackie, *supra* n. 205 at 257.

²⁴³ Paringaux, *supra* n. 158.

²⁴⁴ Mackie, *supra* n. 205 at 257.

guarantees that their new decision will not be shunned by those living in neighbouring communities.²⁴⁵ It seems as though it is only through community decision that the practice can truly be abandoned.²⁴⁶ One woman said that after the declaration, 'If any woman did cut her daughter, she did it in secret for the first time, knowing she would be subject to public disapproval.'²⁴⁷ The entire movement was collective in nature, which was an approach recognised by the traditional institutions.²⁴⁸ Because of this collectivity, people were able to comply without community persecution.²⁴⁹

In addition to the community oriented approach, Tostan allowed the law to be invoked in such a way that programmes were still accessible and acceptable to local communities.²⁵⁰ For instance, FGS was referred to as 'the custom' as opposed to framing it in offensive or explicit language.²⁵¹ Neither practitioners nor the practice of FGS were condemned.²⁵² Education about what other villages have done was the sole strategy.²⁵³ The message was communicated with a focus on local culture - reaffirming relationships, religious beliefs, and community decision making.²⁵⁴ Furthermore, the term 'eradication' was not used in conjunction with FGS, as this was not a movement to combat a practice, but rather an internal decision to abandon it.²⁵⁵ All of these subtle aspects of the programme came together to allow communities to make a decision that they could adhere to and prevent communities from feeling coerced into a decision by outsiders or foreigners who were judging them.²⁵⁶

7. Conclusion

This article has explored the nature of FGS, the ways in which international law supports intervention to end the practice, reasons why legal approaches have failed to achieve those goals, and a new model for successful abandonment of FGS which has taken root in Senegal. FGS has received growing attention in mainstream discourse on human rights²⁵⁷ and it is clear that it has negative and sometimes drastic consequences for the health of women and girls.²⁵⁸ International law has reflected the growing concern about the practice by including FGS as a named violation of human rights principles, in particular the right of women to be free from discrimination and to

²⁴⁵ Ibid.

²⁴⁶ Ibid. at 254-6. Political scientist Gerry Mackie applies 'convention' theory to the practice of FGS. Previously developed in conjunction with the practice of foot-binding in China, the convention theory predicts that the only practical way to end culturally embedded practices is collective abandonment of those practices. He suggests that because FGC is related to marriage, any inter-marrying group will universally conform to the decision to practice it. It therefore cannot be opposed to on an individual level without resulting in severe social consequences.

²⁴⁷ The Malicounda Bambara Story, supra n. 177.

²⁴⁸ Malicounda-Bambara: the Sequel, supra n. 223.

²⁴⁹ Mackie, supra n. 205 at 257.

²⁵⁰ IKNotes on Indigenous Knowledge and Practices, supra n. 223.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Wood, supra n. 5 at 349-50.

²⁵⁸ See generally Banks et al., supra n. 14.

be free from gender based violence.²⁵⁹ While international legal authority for intervention seems clear, the real impact of changing national laws to criminalise FGS is next to nothing.²⁶⁰

As such, human rights activists need to seek alternatives to campaigning for more bans on the practice, enforcement of criminal laws against majority practicing populations, and international condemnation of FGS.²⁶¹ Tostan, an NGO in Senegal, has provided such an example.²⁶² While one might be tempted to characterise Tostan as a non-legal approach to ending the practice, a close examination of the programme and its effects proves otherwise.²⁶³ Tostan has employed the force of international law in two striking ways.²⁶⁴ First, it has incorporated human rights concepts into its basic education programme for adults.²⁶⁵ These concepts have allowed participants to discuss FGS in a way that was previously unthinkable.²⁶⁶ Second, Tostan rallied the support of international legal actors to endorse, legitimise and support the ground-up grassroots effort initiated by the women in Malicounda-Bambara, Senegal.²⁶⁷ This international support gave validity to the women's efforts, especially in the eyes of the male leaders of their communities.²⁶⁸ The use of international law in this fashion allowed the programme to avoid some pitfalls of previous legal efforts, including casting judgment on important cultural practices, offending the population with whom activists are working, and alienating the most important actors who hold the power to change the practice of FGS.²⁶⁹ As Tostan's success in helping communities to abandon FGS spreads in the region of West Africa, understanding the programme's innovative use of international law in this context is crucial.²⁷⁰

²⁵⁹ See CEDAW Recommendation No. 14, *supra* n. 108; and CEDAW Recommendation 19, *supra* n. 111.

²⁶⁰ See *supra* Section 5.

²⁶¹ *Ibid.*

²⁶² See generally Tostan, Inc., information available at: www.tostan.org.

²⁶³ See *supra* Part 6.

²⁶⁴ *Ibid.*

²⁶⁵ Melching, *supra* n. 202.

²⁶⁶ The Malicounda Bambara Story, *supra* n. 177.

²⁶⁷ Malicounda-Bambara: the Sequel, *supra* n. 223.

²⁶⁸ Hillary Rodham Clinton and President William Jefferson Clinton Visit with the Senegalese People, *supra* n. 203.

²⁶⁹ See *supra* Part 6.

²⁷⁰ *Ibid.*