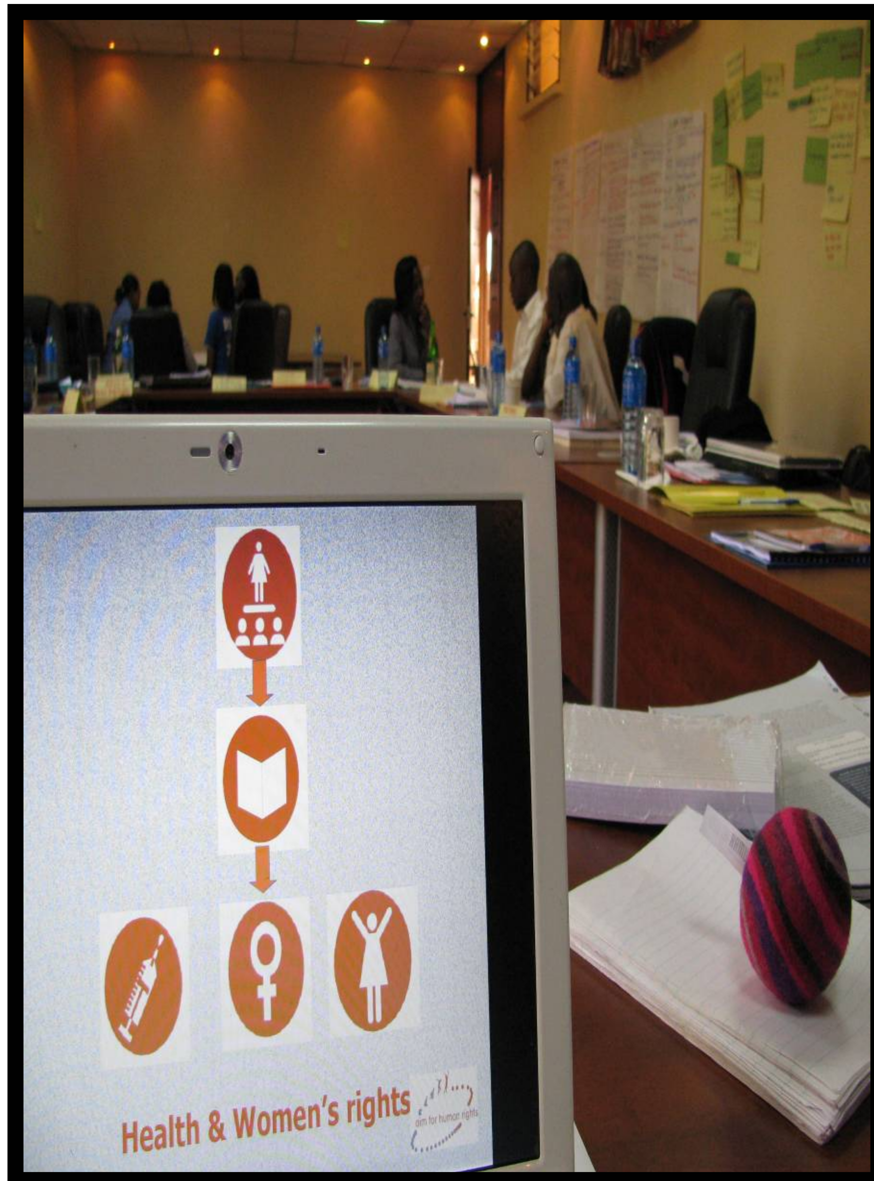
A HeRWAI Analysis of the Reproductive Health Rights Bill;

Addressing Female Genital Mutilation in Kenya



Based on the HeRWAI Short Version Workshop

held from 14-16 October 2009

Nairobi, Kenya

A HeRWAI Analysis of the Reproductive Health Rights Bill;

Addressing Female Genital Mutilation in Kenya

Introduction to this report

From 14-16 October 2009 *Aim for human rights and Fida Kenya, Federation of Women Lawyers* organized a *Short version workshop of the Health Rights of Women Assessment Instrument (HeRWAI)* including an introduction to the United Nations Human Rights Mechanisms. HeRWAI was developed in cooperation with several organisations, among them *FIDA Kenya,* and published by *Aim* in 2006. Since then it has been introduced worldwide to over 200 organizations, who can use HeRWAI to strengthen the advocacy capacity and work within their organizations. In order to increase the outreach of HeRWAI *Aim* developed a program to do HeRWAI in a shorter workshop process. One of the main challenges of HeRWAI is the amount of time necessary to do an analysis. By pooling resources in a short amount of time and bringing knowledge of the different organizations together, the aim of the workshop is to do a basic analysis that can be used for rights based advocacy. In this particular case also directed at the International Human Rights Mechanisms, such as input towards the Universal Periodic Review, Review of the CEDAW Committee of Kenya's national report in 2010 and if possible, regional mechanisms, such as the African Union.

This analysis report is the outcome of the HeRWAI short version workshop. The workshop process was facilitated by of Aim for human rights. The analysis was conducted by the following participating organizations:

- *Equality Now* — www.equalitynow.org
- *Coalition on Violence Against Women* — www.covaw.or.ke
- *Family Health Options Kenya* — www.fhok.org
- *Reproductive Health Rights Alliance* — www.rhra.co.ke
- *Centre for Rights Education and Awareness* — http://creawkenya.org/
- *Tomorrow's Child Initiative* — www.tcinitiative.org
- *Legal Resources Foundation* — www.lrf-kenya.org
- *Young Women's Leadership Institute* — www.ywli.org
- *Caucus for Women's Leadership* — www.kwpcaucus.org
- *United Disability Empowerment in Kenya* — www.disabilitykenya.org
- *FIDA Kenya* — www.fidakenya.org

Note to the reader of this report

The following analysis report follows the structure of HeRWAI where relevant questions have been answered. At the end of each step a conclusion has been written, which has made up into the executive summary of the analysis. In step 6 there is no reference to an action plan as this will be formulated at a later stage. In addition, there were a number of limitations in terms of resources that could be reviewed versus the time in the workshop. However, most relevant documents were used and are quoted with reference at the end of this report.

This report was edited by Marije Nederveen, Women's Human Rights, program officer *Aim for human rights*, and Sarah Jane Koulen, intern *Aim for human rights*

2 December 2009

For more information on the work of *Aim for human rights* and HeRWAI specifically, please visit: www.aimforhumanrights.com.

Glossary

ACHPR – African Commission on Human and Peoples' Rights
ACWRC – African Charter on the Rights and Welfare of the Child
APRM – African Peer Review Mechanism
AU – African Union
BMZ – Bundesministerium für Wirschaftliche Zusammenarbeit und Entwicklung (German Federal Ministry for Economic Cooperation and Development
CAT – Convention against Torture
CBOs – community-based organisations
CEDAW- Convention on the Elimination of All Forms of Discrimination against Women
COMESA – Common Market for Eastern and Southern Africa
WTO – World Trade Organisation
CRC – Convention on the Rights of the Child
CSOs – civil society organisations
FGM – Female Genital Mutilation
FGM/C - Female Genital Mutilation/Cutting
FIDA – The Federation of Women Lawyers
GTZ – Deutsche Gesellschaft für Technische Zusammenarbeit (German Development Organisation)
HeRWAI – Health Rights of Women Assessment Instrument
ICCPR – International Covenant for Civil and Political Rights
ICERD – International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR – International Covenant for Economic, Social and Cultural Rights
ICPD – International Conference on Population and Development
IDP – Internally Displaced Person
IEC – Information, Education and Communication
IMF – International Monetary Fund
Kshs. – Kenyan shillings
MDG's – Millennium Development Goals
NEPAD – The New Partnership for Africa's Development
NGOs – Non-governmental Organisations
RHRB – Reproductive Health Rights Bill
UN – United Nations
UNFPA – United Nations Population Fund
UNICEF – The United Nations Children's Fund
UNIFEM – United Nations Development Fund for Women
UPR – Universal Periodic Review
VAW- Violence Against Women
WHO – World Health Organisation

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Executive Summary of the analysis

1. Identifying the policy

The chosen focus in this analysis is the Kenyan Reproductive Health Rights Bill (RHRB), the need for the Bill to include provisions relating to Female Genital Mutilation (FGM), and the utility of the RHRB for protecting women from FGM. This analysis was triggered due to a recent case in Kenya where a women was subjected to FGM after having given birth in hospital. This was executed without her permission, though under the family's instruction. The case points out a need to protect women over 18 from FGM. Only girls under the age of 18 are already legally protected by the Children's Act, where FGM is defined as illegal. The key actors in a policy to outlaw FGM are the (local) government and administration, law enforcement, the judiciary, religious and cultural leaders, health professionals and teaching institutions as well as civil society and other non-state organisations. Kenya already has certain programmes in place to combat FGM:

- UNFPA/UNICEF Female Genital Mutilation/Cutting abandonment project
- National Plan of Action for the Elimination of FGM;
- and a Ministry of Health project to eliminate FGM.

The aforementioned programmes may also serve as guidelines for the implementation of the RHRB.

The RHRB was tabled before by NGOs in 2008, but taken off again as there was a risk that it would be refused, based on a number of provision on safe abortion services. These were taken out, but now the bill will be tabled again. FIDA Kenya is one of the lead organisations for bringing this Bill to parliament. They would like to do this in the slipstream of the discussions around the formulation of the new Harmonised Draft Constitution.

The previous section, which has outlined the focus of the analysis, has also pointed to the potential positive and negative impacts of the RHRB. It is pointed out that though the Bill is meant to protect all women, and allow women from communities that exercise FGM to exercise their rights, the Bill may impact impoverished and marginalized women, disabled women, women living with HIV/AIDS, rural women, refugee and Internally Displaced Women negatively. The RHRB Bill has the potential to affect several human rights, such as the Right to health, The Right to human dignity, the right to non-discrimination, right to bodily integrity, etc. It seems that several communities in Kenya have become open to discussing FGM and it's harmful consequences, as well as the concept of legal protection from FGM. However, there are also communities that remain strongly opposed to the criminalisation of FGM.

2. Exploring the government's commitments

With regards to the government of Kenya's commitments, it can be concluded that the state is party to the key international human rights instruments, and thus bound by the obligations that arise hereof. One exception should be noted with regard to provisions for mothers before and after childbirth contained in the ICESCR, to which the Kenyan government has made a reservation, stating that the imposition of such measures such as paid leave through legislation is not necessary or expedient in Kenya. In addition, the state is party to several regional human rights instruments and Consensus documents.

On a national level, the Constitution implicitly endorses the right to health in relation to the

right to life, and a possible amendment will make this commitment explicit. Though the Constitution prohibits discrimination against women, discriminatory practices in the area of customary and personal laws persist. With regard to FGM specifically, the government has banned the practice for all those under 18 in the Children's Act, while the Penal Code outlaws grievous bodily harm, a category in which FGM could arguably be included. In addition, the government has established both a Focal Point office for FGM at the Ministry of Health, and has implemented a national programme that aims to ban FGM within the next decade.
With regard to the participation of civil society, several possibilities for participation and exercising influence on government policy have been identified, as well as various complaint mechanisms.

3. Describing the capacity for implementing the policy[1]

This section reflects on the governmental capacity for implementing the policy. Regarding health care in general, the budget allocated to the Ministry of Health is below the mitigation level in comparison to the Ministry of Defence. No budget has been allocated to FGM specifically, and the budgetary allocation reflects a governmental priority towards such issues as safe drinking water and hygiene and sanitation services. FGM is not mentioned in the national health plan or the health budget.

In addition, only one hospital in Kenya offers the corrective surgery for FGM victims, and it seems across the board medical staff are de-motivated and do not deliver this service adequately. Furthermore, trained medical staff is not spread across the country evenly, for such staff tends to congregate in urban areas, thus leaving the rural areas where FGM is more widespread, understaffed. Though the government has expressed its commitment to combating FGM through the implementation of the FGM focal point and other information campaigns, no funds are allocated to FGM specifically.

4. The impact on human rights

FGM negatively impacts women's human rights. Women are the most vulnerable in the society and FGM further affects their health in a long term way. The Reproductive Health Rights Bill recognises the violations of women's rights to health and creates and avenue for the realisation of the following rights;

- Right to human dignity
- Right to non-discrimination
- Right to economic empowerment
- Right to Sexual Health
- Right to equality
- Right to bodily integrity

The positive effects of the RHRB will be the way it enhances women's rights. For communities that do not practice FGM, the impact of a FGM combating measures in a policy will be neutral. The negative effects of the policy are caused by the need for the policy to address the specific needs of certain groups, such as women with disabilities, women living with HIV/AIDS and women in marginalised communities (rural Kenya, North Eastern, slum

[1] This section of the analysis could be further explored by looking at the exact budget allocations, but due to time constraints and limited information available this has not been possible during the timeframe of this workshop.

areas).
Though the Kenyan government seems to acknowledge the negative consequences of Violence Against Women and has taken certain measures, there remains a gap between policy and implementation.

5. State obligations

This section identifies a wide range of actors as (partially) responsible for the failure to implement a strong policy combating FGM. However, the noncommittal attitude of the government and its failure to allocate funds to the curbing of FGM can be seen as the main problem.

The Kenyan government can be held accountable for failing to uphold its international commitments to maintain the Right to Health, as this right has not been included in the Constitution as stipulated in Articles 12 of CEDAW (General Recommendation 24) and the ICESCR (General Comment 14).

The key obstacles to implementing a strong policy against FGM have been identified as a lack of political will, the lack of budget (made) available to combat FGM, and the relatively low number of women in Parliament. The government points to the tension between customary law and statutory law as well as the manner in which funds which may have been used to battle FGM are often redirected in the case of a humanitarian or natural disaster, as a reason for the slow progress on the issue. Assistance from international donors is often directed at other perceived priority areas, such as safe water and sanitation. In addition, because in the past government action on FGM has been slow and ineffectual, donor fatigue regarding funding for FGM has become a problem.

6. Recommendations and action plan

The final section of this report offers recommendations and points of action to be taken in eradicating the practice of FGM. Some recommendations include; the need for the government to prioritize FGM and allocate a budget to fund programmes aimed at eradicating FGM, and to implement new legislation that criminalises FGM for those over 18 as well as revise the Constitution so that the Right to Health is included therein.

Step 1 – Identifying the Policy

1. (If the starting point is a problem) describe the problem in maximum 1 page.
N/A

2. Which 'main' policy will be the focus in the HeRWAI analysis?

In this HeRWAI analysis, it was decided to focus on the Reproductive Health Rights Bill (RHRB) as opposed to the Penal Code and the Sexual Offenses Act. Of these three policy documents, the RHRB was perceived as offering the greatest opportunities for input and influence from Kenyan civil society as the Bill had yet to be reviewed and passed by Parliament. The aim is to work towards a better impact of the RHRB by adding FGM-related provisions, and for the Bill to become an effective instrument for battling FGM. The RHRB was tabled before by NGOs in 2008, but taken off again as there was a risk that it would be refused, based on a number of provision on safe abortion services. These were taken out, but now the bill will be tabled again. FIDA Kenya is one of the lead organisations for bringing this Bill to parliament. They would like to do this in the slipstream of the discussions around the formulation of the new Harmonised Draft Constitution.

The working group sees FGM as a societal phenomenon emanating from a patriarchal society with out-dated cultural practices. Various root causes have been identified. FGM is considered to mark the transition from girlhood to womanhood in many communities, and is also used as a means to curb women's sexuality and to live up to societal expectations. The practice is further perpetuated by a lack of government action, law enforcement and budgetary allocation to the issue. In addition, a lack of knowledge on women's reproduction, health and sexuality further compounds the problem. The topic of FGM is taboo, hence there are few information campaigns and a clear, efficient governmental strategy to eradicate the practice is lacking.

3. Who is the main actor implementing the policy?
The implementing actors of the RHRB would be local administration, law enforcement agents, the judiciary, religious and cultural leaders, health professionals and teaching institutions, civil society organisations and other non-state actors.

4. What does the government aim to achieve with this policy?
N/A

5. What is the actual effect of the policy on women's health?
FGM has serious potential health consequences for women and girls; this includes the risk of physical complications as well as psychological effects such urine retention, anaemia, recurrent bladder and urinary tract infection, chronic pelvic infections, infertility, trauma, stones in the urethra or bladder, and even death (FIDA policy brief). Therefore protecting women from FGM would prevent them from undergoing the harmful effects on their health.

6. Are there special programmes to implement the policy? Who is responsible for these programmes?
In Kenya, there is a National FGM focal office based at the Ministry of Gender which is mandated to coordinate all matters related to FGM. Kenya is also one of eight countries

selected to implement an accelerated FGM/C program toward the abandonment of FGM in one generation supported by UNICEF and UNFPA.[2] In November 1999, the Ministry of Health launched the National Plan of Action for the Elimination of FGM in order to reduce the proportion of girls, women and families that will be affected over the next twenty years.[3] The National Plan of Action provides for the establishment of national and district mechanisms for the coordination of FGM programmes; multi-sectoral collaboration to ensure relevant intervention in key development programmes; mapping and coordinating new and ongoing FGM interventions; investing in human resources and organisational capacity building; and establishing pro-active mechanisms for resource mobilization for FGM elimination programmes.[4] In June 2000, the Kenyan Ministry of Health has been supported by GTZ acting on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ) in the form of a project to eliminate FGM.

7. Are there protocols and regulations to guide the implementation of the policy? Do they include a description of the exceptions?

Kenya has a National Plan of Action on FGM and a National Reproductive Health Policy (2007) which may act as guidelines for the implementation of the Reproductive Health Bill. Where there is a gap, guidelines will be developed to ensure the effective implementation of the Bill.

8.Which groups does the government (or other main actor) intend to reach with the policy?

N/A

9. Which groups does the policy actually affect (positively or negatively)?

It was noted that there may be groups of women, or women in certain life stages for which the policy has a different effect than on others.

Positive Impacts

- protects all women;
- women from communities in which FGM is practiced can exert their rights.

Negative Impacts

- Women with disabilities (blind, deaf, etc);
- Poor women;
- Women from marginalized communities;
- Women living with HIV/AIDS and other chronic illnesses;
- Rural women;
- Refugee and IDP women.

10. What are the perceptions of the affected groups regarding the problem and related policy?

Some communities due to awareness-raising by various organisations have become open to

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[2] UNFPA, *Global Consultation on Female Genital Mutilation/Cutting – Technical Report.* 2008. See: http://web.unfpa.org/upload/lib_pub_file/829_filename_unfpa_fgm_2008.pdf Last accessed: 30 November 2009.

[3] Deutsch Gesellschaft für Technische Zusammenarbeit (GTZ); Africa Department. *Female Genital Mutilation in Kenya*. November 2007. See: http://www.gtz.de/de/dokumente/en-fgm-countries-kenya.pdf Last accessed: 30 November 2009.

[4] *Ibid.*

discussing FGM and its harmful consequences and are more open to the idea of having a law against the practice. There is a trend of many young girls running away from their communities to escape FGM - this is an indicator that there is an urgent need for a law to protect the rights of women and girls. However in some areas such as Kuria, Meru etc. communities are resisting the enactment of law that would criminalize FGM. According to UNFPA, the communities in Turkana districts are reluctant to discuss FGM and would not even accept a law that criminalises FGM.

11.Which human rights may be affected?

- The Right to health
- Right to human dignity
- Right to non-discrimination
- Right to privacy
- Right to be free from violence
- Access to information
- Right to be free from torture
- Right to bodily integrity
- Right to work
- Right to education
- Sexual rights

Conclusion

The chosen focus in this analysis is the Kenyan Reproductive Health Rights Bill (RHRB), the need for the Bill to include provisions relating to Female Genital Mutilation (FGM), and the utility of the RHRB for protecting women from FGM. This analysis was triggered due to a recent case in Kenya where a women was subjected to FGM after having given birth in hospital. This was executed without her permission, though under the family's instruction. The case points out a need to protect women over 18 from FGM. Only girls under the age of 18 are already legally protected by the Children's Act, where FGM is defined as illegal. The key actors in a policy to outlaw FGM are the (local) government and administration, law enforcement, the judiciary, religious and cultural leaders, health professionals and teaching institutions as well as civil society and other non-state organisations. Kenya already has certain programmes in place to combat FGM:

- *UNFPA/UNICEF Female Genital Mutilation/Cutting abandonment project*
- *National Plan of Action for the Elimination of FGM;*
- *and a Ministry of Health project to eliminate FGM.*

The aforementioned programmes may also serve as guidelines for the implementation of the RHRB.

The RHRB was tabled before by NGOs in 2008, but taken off again as there was a risk that it would be refused, based on a number of provision on safe abortion services. These were taken out, but now the bill will be tabled again. FIDA Kenya is one of the lead organisations for bringing this Bill to parliament. They would like to do this in the slipstream of the discussions around the formulation of the new Harmonised Draft Constitution.

Step 2: Exploring the government's commitments

1. Which international treaties has your country ratified? Were any reservations or limitations made?

Kenya has ratified the following international treaties;

- **CAT** - Convention Against Torture And Other Forms Of Cruel, Inhuman Or Degrading Treatment Or Punishment. (ratified 21 February 1997)
- **CEDAW**- Convention On The Elimination Of All Forms Of Discrimination Against Women (ratified 19 March 1984)
- **ICESCR**- International Covenant on Economic, Social and Cultural Rights (ratified 1 May 1972)
- **ICCPR**- International Convention on Civil and Political Rights (ratified 1 May 1972)
- **ICERD**- International Convention On The Elimination Of All Forms Of Racial Discrimination (ratified 13 September 2001)
- **CRC**- Convention On The Rights Of The Child (ratified 30 July 1990)

The Kenyan government has expressed a reservation with regards to Article 10, §2 of the ICESCR, which states;

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

With regards to this paragraph the government of Kenya has stated "While the Kenya Government recognizes and endorses the principles laid down in paragraph 2 of article 10 of the Covenant, the present circumstances obtaining in Kenya do not render necessary or expedient the imposition of those principles by legislation."[5]

2. Which relevant regional treaties has your country ratified?

Kenya has ratified (or signed) the following regional treaties;

- **ACHPR**- The African Charter on Human and People's Rights (23rd Jan 1992)
- **ACWRC**- African Charter on the Welfare and the Rights of the Child (25th July 2000)
- Protocol to the African Charter of Human and People's Rights on the Rights Of Women In Africa (signed but not yet ratified).

3. Which consensus documents does your government support?

The Kenyan government has expressed its support of the following consensus documents;

- Declaration on the rights of disabled persons general assembly resolution 3447
- (xxx) (1975), Article 5 (e) (iv).
- Millennium development goals (MDG's)
- Beijing Platform for Action (1995)

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[5] United Nations Treaty Collection. *International Covenant on Economic, Social and Cultural Rights* (status as at 30 November 2009). See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en. Last accessed: 30 November 2009.

- ICPD (international conference on population and development) Programme of Action (1994)
- Declaration On The Elimination Of Violence Against Women (1993)
- Solemn Declaration on Gender Equality in Africa-African states are required o submit a report on the progress of implementing the declaration to the AU- the declaration will now form part of the APRM process as a way of evaluating/ benchmark….for implementing the rights of women- Kenya is coming up for review next year (2010).

4. Is the government bound to other bilateral or multilateral agreements which may influence the policy? Which ones?

Kenya is bound to the following bi- and multilateral agreements;

- **COMESA** - Common Market for Eastern and Southern African States
- **WTO** - World Trade Organisation
- **IMF** – International Monetary Fund
- **World Bank**

5. What does the Constitution and other national laws say about the right to health?

The Kenyan Constitution as it currently stands implicitly recognises the right to health as a constituent element of the right to life. (Bill of Rights, Chapter 5 – protection from inhuman treatment, for purposes of preventing the spread of disease etc.) The proposed constitutional amendment under Section 61 explicitly provides for the right to health;

> *(1) Every person has the right to health, which includes the right to healthcare services including reproductive health care.*
> *(2) No person may be refused emergency medical treatment.*

6. Does the country have a law prohibiting the discrimination of women?

The Kenyan Constitution in Section 82 (2) & (3) prohibits discrimination of women. However, the Constitution still allows for discriminatory practices in matters of personal and customary law.

7.What does the constitution or other national laws say about other rights which are relevant to the policy?

Under Kenyan national law, Section 14 of the Children's Act criminalises FGM for persons under age 18, and the Penal Code criminalises assault and grievous bodily harm respectively, to the body of any person.

8. Does the country have laws that criminalise medical procedures only needed by women and/or that punish women who undergo those procedures?

Yes. In Kenya, abortion is prohibited, except in cases where the mother's life is in danger.

9. Do local , customary, or religious laws influence the health rights of women in relation to the policy?

Certain religious groups in Kenya do not condone family planning or the use of contraception. In addition, certain groups within in the Muslim community actively advocate for the use of FGM. In customary law, FGM is accepted as a rite of passage to womanhood/adulthood.

Overview of women subjected to FGM per community	
Somali	96.8%
Kisii	96.2%
Maasai/Samburu	93.9%
Taita/ Taveta	62.1%
Kalenjin	48.6%
Meru/Embu	41.1%
Kikuyu	32.6%
Kamba	26.9%
Mijikenda/Swahili	5.1%
Luhya	0.9%
Luo	0.7%

10. Does the government have a national health strategy?

The Kenyan government has put in place the National Reproductive Health Policy: Enhancing Reproductive Health Status for all Kenyans (2007) as well as the National Plan of Action for the Elimination of Female Genital Mutilation/Cutting in Kenya, 1999-2019, which aims to eradicate FGM within 20 years.

11.Has the government developed indicators and benchmarks to measure its progress?

The Kenyan government has appointed a National FGM Focal Point office at the Ministry of Gender, and upholds its obligations to report periodically to international mechanisms such as CEDAW.

12. Which other national policies are relevant to the policy under analysis?

The following Kenyan national policies are relevant;

- The Employment Act
- Education Act/ policy
- Penal code
- Children's Act
- Adolescent's Reproductive Health Policy

How is the participation of civil society organised?

13. What are the official ways by which individuals, NGOs and other civil society groups can influence policy-making and legislation (mechanisms for civil society participation?)

In Kenya, individuals, NGOs and other civil society groups can influence policy-making and legislation through;

- Lobbying;
- Advocacy;
- Research;
- Monitoring & evaluation of services;
- National and International conferences;
- Shadow reporting;
- Consultations in the development and evaluation stages of policy making;

- Voting in elections and at referenda.

14. Where can people go to make a complaint (mechanisms for redress)?

The following national as well as international mechanisms offer Kenyans avenues for redress;

- The Ombudsman;
- The Kenyan Police;
- The Courts;
- Kenya National Commission on Human Rights;
- The East African Community Court;
- The African Commission;
- The International Criminal Court.

Conclusion

With regards to the government of Kenya's commitments, it can be concluded that the state is party to the key international human rights instruments, and thus bound by the obligations that arise hereof. One exception should be noted with regard to provisions for mothers before and after childbirth contained in the ICESCR, to which the Kenyan government has made a reservation, stating that the imposition of such measures such as paid leave through legislation is not necessary or expedient in Kenya. In addition, the state is party to several regional human rights instruments and Consensus documents.

On a national level, the Constitution implicitly endorses the right to health in relation to the right to life, and a possible amendment will make this commitment explicit. Though the Constitution prohibits discrimination against women, discriminatory practices in the area of customary and personal laws persist. With regard to FGM specifically, the government has banned the practice for all those under 18 in the Children's Act, while the Penal Code outlaws grievous bodily harm, a category in which FGM could arguably be included. In addition, the government has established both a Focal Point office for FGM at the Ministry of Health, and has implemented a national programme that aims to ban FGM within the next decade.
With regard to the participation of civil society, several possibilities for participation and exercising influence on government policy have been identified, as well as various complaint mechanisms.

Step 3: Describing the capacity for implementing the policy

Which financial resources are available for the implementation of the policy?

Kenya is in the process of implementing the Millennium development Goals (MDGs) with specific attention to reducing disease epidemics and child mortality rate.

According to sources available, the Government financial allocation to the Ministry of Health is below the mitigation level comparing with the citizen's population in comparison to the Ministry of Defense. According to the MDGs status report for Kenya 2005, the Government raised overall funding for health care by 30% during the 2005/06 financial year. This was below the national target in relation to what the Ministry of Defense was allocated. (Reference MDG status report 2005, page 5.)

1. What is the budget for the implementation of the policy?

In relation to FGM, the Ministry of Gender Affairs through National Commission Strategic Plan 2008-2012 does not allocate specific amount of funds to FGM. In the Strategic Issue 3; Gender Bias in access to social services as strategic objective 1 which is to improve hygiene and sanitation services through lobbying the Ministry of Public Health increase awareness of proper hygiene to women; the commission allocated a paltry Kshs. 2 million for these vital health rights. The funds are not sufficient to even conduct one week awareness on FGM presumably as a hygiene concern for women.

2. Is the budget for the implementation of the policy decreasing or increasing?

There is no specific budget allocated for FGM.

3. Do allocations to specific areas of health indicate where the government sets its priorities?

Yes it does, according to the Ministry of Gender Affairs through National Commission Strategic Plan 2008-2012 Strategic Issue 3 in Strategic Objective 1, preference is given to access to safe drinking water, hygiene and sanitation services where FGM is not mentioned with a budget of Kshs 5million. In Strategic Objective 2, reduction of infant mortality rates and under 5 mortality rate is allocated Kshs 10million as well. In Strategic Objective 3, the focus is on how to influence the levels of access to information and family planning methods from 39%-70% whose budget amounts to Kshs 15 million. Once again there is no concern for FGM or its survivor victims. In the 2009/2010 financial year the economic stimulus budget, FGM as a retrogressive practice was not catered for at all levels of health budget.

4. Are the public health and health-care facilities, goods, services and programmes functioning properly?

With a focus on FGM specifically, it can be concluded that public health facilities in Kenya or not functioning properly. For example, the Kenyatta National Hospital is the only hospital that is allocated funds for reconstruction surgery for FGM survivors. Apparently this particular facility is understaffed, congested, has a small budget, and the staff are not motivated thus do not provide this service adequately. However, the economic stimulus strategy budget 2009/2010 intends to improve levels of access in all health care activities.

Which human resources are available for the implementation of the policy?

5. Which staff is involved in implementing the policy or related programmes?
Health personnel who are trained doctors and nurses are assigned in all health facilities countrywide though they are not well motivated in terms of their competency incentives. (Reference Strategic Issue 3, Objective 4.)

6. How is the staff distributed in terms of location, level, background?
There is an imbalance in the distribution of staff where most of the medical staff prefer working in urban areas hence cause under staffing in the hardship areas where the FGM practice is prevalent. (Reference Strategic Issue 3, Strategic Objective 4/ FIDA policy brief on FGM page 3.)

7. Which level of government is responsible for the implementation of the policy?
The Parliament is responsible for enacting a Legislative Act for the implementation of FGM and mainstream it in the Penal Code. (Reference Strategic Issue 3, Strategic Objective 3)

8. Which cultural, religious, social, environmental and other factors influence the implementation of the policy?
Cultural limitations influencing the implementation of policy to combat FGM include the manner in which certain communities such as the Somali, Masaai, Meru, Kisii and Kisigis value FGM as a rite of passage. In the Muslim community, FGM is seen as a cleansing ritual. In addition, FGM is considered a way to suppress women's sexuality and curb promiscuity. FGM has become the norm.
Social limitations include the risk of stigmatisation of girls and families of girls who do not undergo FGM. The practice brings prestige to the family of girls who have undergone FGM. In addition, it is feared that girls who have not undergone FGM will not get married, or will not receive bride price.
However, there are also factors which seem contribute to the expansion of policy to combat FGM. For instance, the government uses public administrators in condemning the FGM practice during public forums (Barazas). Community leaders are trained through civic education, certain religious leaders take part in advocacy and there is an intensive media campaign which highlights the dangers of FGM. In addition, in a bid to attain MDGs 2 and 3, there are campaigns to influence the reduction of gender disparity in student enrolment in primary, secondary and tertiary schools as well as universities.

9. Is the State in a process of reform, structural adjustment or crisis which influences the implementation of the policy?
The state is in a process of constitutional, judiciary and police reform.

10. Describe conflicting interests or lack of consistency related to the implementation of the policy.
Though the government mainstreams FGM concerns in the national plan, no financial allocations have been made to address the issue. In addition, there is a conflict between customary law and statutory law.

11. Does the government show political will to implement the policy?
Yes and no. Though there is a FGM focal point in the Ministry of Gender, no funds have been allocated to combat FGM specifically.

Conclusion

This section reflects on the governmental capacity for implementing the policy. Regarding health care in general, the budget allocated to the Ministry of Health is below the mitigation level in comparison to the Ministry of Defence. No budget has been allocated to FGM specifically, and the budgetary allocation reflects a governmental priority towards such issues as safe drinking water and hygiene and sanitation services. FGM is not mentioned in the national health plan or the health budget.

In addition, only one hospital in Kenya offers the corrective surgery for FGM victims, and it seems across the board medical staff are de-motivated and do not deliver this service adequately. Furthermore, trained medical staff is not spread across the country evenly, for such staff tends to congregate in urban areas, thus leaving the rural areas where FGM is more widespread, understaffed. Though the government has expressed its commitment to combating FGM through the implementation of the FGM focal point and other information campaigns, no funds are allocated to FGM specifically.

Step 4 - The Impact on Human Rights

Is timely and appropriate health care a relevant issue?

1.Is timely and appropriate health care a relevant issue for the policy?
N/A
2. Are underlying determinants of health a relevant issue for the policy? If yes, explain why and how.
N/A

Is participation a relevant issue?
3. Participation a relevant issue? If yes, explain why and how.
Participation is a relevant issue. There is lack of open dialogue among the women. There is a gap between knowledgeable community leaders and them taking a stand to educate the community. Religious leaders prefer to keep quiet about FGM even if it happens within their congregation. For example, the Seven Day's Adventist Church.

4. Who participates or participated in the development and implementation of the policy?
Women from the Kisii, Somali, Meru and Masaai communities participated in the development and implementation of the policy, as well as civil society organisations (CSOs). Still lacking is male involvement, the involvement of traditional practitioners, medical regulatory board, cultural gatekeepers, religious leaders and teachers.

Is violence against women a factor in the policy?
5. Is violence against women a relevant issue? If yes, explain why and how.

***VAW** is any violation of a woman's personhood, mental or physical integrity through individual actions or oppressions of society. The term **violence against women** refers to many types of harmful behaviour directed at women and girls because of their sex. It includes any act of gender-based violence that results in or is likely is likely to result in physical, sexual or psychological harm or suffering to women whether occurring in private or public life. (UNITED NATIONS)*

FGM a VAW issue as it has both a physical and a psychological impact on women and girls who undergo the practice. It is violence with a grievous health impact on women and girls that include shock, bleeding, bacterial infection, urine retention, anaemia, injury to genital tissue, urinary tract infections that affects the right to women's physical health[6]. The psychological violence includes insomnia, disturbance in eating, fear that leads to submission[7]. There are long term effects of FGM on women and girls that denies them their right to health and full enjoyment of their rights hence violating them. The long term effects include permanent health implications on women's mental and social health like infertility, trauma, obstructed and painful labour, pain during intercourse, big scars after the healing and increased pain during menstruation etc[8]. FGM is therefore a VAW issue since it in essence denies women and girls the right to experience life in its fullness.

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[6] FIDA Kenya, *FGM Policy Brief*. See: www.fidakenya.org Last accessed: 30 November 2009.
[7] *Ibid.*
[8] *Ibid.*

FGM denies women the right to make decisions over their lives as the practice is socially sanctioned on them and any woman and girl who refuses to go through the process in the communities that practice this face consequences in the community, hence leaving women with no choice. It is therefore directly or indirectly forced on the women and girls.

It further leads to violation of other rights as it is closely associated with early forced marriage where the girl drops out of school and is denied her right to education. The cultural origin and justifications for FGM is to reduce the sexual urges for women and girls in order to control their sexuality in polygamous marriages, as a consequence, FGM denies women and girls the right to enjoy sex.

6. Is the government taking adequate measures to prevent and/or ban violence against women?

The Kenyan government has put in place several legal measures to curb VAW but there is a gap between policies and implementation. The following are the policies and legal provisions that have been put in place to address VAW[9]:

- CEDAW- Kenya is a signatory to the CEDAW that bans all forms of discrimination against women. FGM hinders women's ability to enjoy her human rights equally to men.
- The Constitution provides protection of every individual from torture but FGM has not been recognised as such a violation.
- The Children's Act of 2001 protects girls under the age of 18 years from FGM but does not protect anyone over 18, hence women who escape FGM at an early age are often subjected to FGM in the process of giving birth with no legal protection.
- The Penal Code criminalises the assault and grievously bodily harm but it is too vague and does not refer to FGM explicitly.
- Presidential decrees have often worked where the local communities and implementers are keen to observe the decree. The former president Moi often issued decrees against FGM and the local provincial administration officers enforced these.
- Kenya is a member of the UN and hence has the duty to implement the MDGs where MDG 2 calls for universal primary education for boys and girls while MDG3 calls for Gender Equality. Kenya has committed to achieving universal primary education through providing free primary education. If implemented the free primary education for girls will also reduce FGM since a lack of education is highly connected to the prevalence of FGM.
- The government has committed to improving the education of the girl child.

7. Does the policy affect the availability of the relevant services, goods and facilities for (certain groups of) women and how?

N/A

8. Does the policy affect the accessibility of the relevant services, goods and facilities for (certain groups of) women and how?

FGM Women

- Free or affordable services when necessary for safe pregnancies, child birth and post partum care to women that have undergone FGM e.g. obstetric fistula surgery at

[9] *Ibid*.

Kenyatta National Hospital, Caesarean section for breach births.

- The provision of basic reproductive health services at all levels of healthcare for persons living with FGM

Pre-FGM Women
- A safe and supportive environment for adolescents to create awareness and education on the cons of FGM
- Law enforcers that are approachable, knowledgeable, unbiased to handle threatened FGM cases.
- A judiciary system that positively and effectively passes judgement FGM cases

9.Does the policy affect the quality of services, goods and facilities and if so, how?

At the community level, there seems to be an attitude that resists outside services and facilities.
Women who have complications from FGM e.g. obstetric fistula are stigmatised and shunned and are hidden by their communities. Hence these women cannot seek assistance or access services.

The community seems to have its own local solutions to complications fromm FGM e.g. A seven year old from Kismayu had been circumcised. For 3 days she was unable to urinate and showed signs of infection. Her parents dug a hole in the yard and put fire in it wit the stool of a camel. They believed this would control the infection. The girl was seriously burnt and died 6months later.[10]

10. Does the policy affect the quality of services, goods and facilities, and if so, how?
N/A

11. Is the impact of the policy – as analysed in previous questions – equally felt by all groups, or are some groups affected more than others?
In Kenya some communities do not practice FGM while others practice different kinds of FGM that are not as dangerous to the women's health, hence some women may not feel the need for the policy in their lives. Statistics for Kenya show that in some communities the percentage of women who have undergone FGM is as low as 0.7% while the percentage in Maasai communities stands at 93.9%, Kisii 96.2% while Somali 96.8%, hence the women would feel the effect of the policy differently. Globally, the WHO estimates that 140,000,000 women and girls have experienced FGM and that at least 2,000,000 girls undergo this practice every year. Women and girls with disability suffer more from the effect of FGM while they are also more disempowered in terms of resisting FGM.

12. What is the impact of the policy on stereotypical gender roles?
The gender stereotype associated with FGM assumes that women should not enjoy sex and that sex is for the male while females are naïve recipients. According to Fatuma Mohammed Ali an activist against FGM from Ethiopia, while she talks to her neighbours about FGM and the negative effects "the neighbour recognizes that FGM will put her daughters at risk but

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[10] UNICEF. *Eradication of Female Genital Mutilation In Somalia.*
See: http://www.unicef.org/somalia/SOM_FGM_Advocacy_Paper.pdf Last accessed: 30 November 2009.

yet fears that without it, her daughters will have 'uncontrollable demands for sex'"[11]. This is closely associated with polygamy where a man would have many wives. FGM would ensure that the women were not demanding.

13.Considering the above, does the policy have discriminatory effects?
Yes, the policy does have discriminatory effects. It does not address specific groups of women e.g. disabled women, women living with HIV/AIDS, women from different cultures (e.g. Kisii, Kalenjin, Somali). The customary laws conflict with the constitution of the land and women rights which is not addressed by this bill.

Conclusion

FGM negatively impacts women's human rights. Women are the most vulnerable in the society and FGM further affects their health in a long term way. The Reproductive Health Rights Bill recognises the violations of women's rights to health and creates and avenue for the realisation of the following rights;

- *Right to human dignity*
- *Right to non-discrimination*
- *Right to economic empowerment*
- *Right to Sexual Health*
- *Right to equality*
- *Right to bodily integrity*

The positive effects of the RHRB will be the way it enhances women's rights. For communities that do not practice FGM, the impact of a FGM combating measures in a policy will be neutral. The negative effects of the policy are caused by the need for the policy to address the specific needs of certain groups, such as women with disabilities, women living with HIV/AIDS and women in marginalised communities (rural Kenya, North Eastern, slum areas).
Though the Kenyan government seems to acknowledge the negative consequences of Violence Against

[11] *Awaken: A Voice for the Eradication of Female Genital Mutilation.* Volume 12, Issue 2, December 2008. See: http://www.equalitynow.org/awaken/awaken_v12i02_200812.pdf Last accessed: 30 November 2009. p.2.

Step 5 – State Obligations

Who is responsible?

1. Who are the main actors involved in the violations which were noted in step 4?

- The police – FGM has not been criminalised and hence police do not take up FGM cases as grievous bodily harm and do not make the necessary efforts in prosecuting the case, such as gathering evidence, proper drafting of charge sheets etc.
- The communities - the traditional practitioners who perform FGM, the local governance structures like clans.
- The Ministry of Justice and the Judiciary – there are no efforts to specifically criminalise FGM, the courts don't compel police to bring sufficient evidence in FGM cases.
- The legislature - the parliament intentionally does not passing laws that are brought before the house to curb FGM and others related to women's health
- Medical practitioners – it is rare but FGM happens in hospitals. There are some cases where doctors have been known to protect their colleagues. On the other hand the medical attention needed for women who have undergone FGM during birth and other medical procedures are not taken seriously.
- Ministry of Health - does not consider this FGM a serious health issue
- Ministry of education- there are rarely efforts to curb FGM. The majority of the effort done in rescuing girls is done by CBOs and NGOs.
- Religious institutions – religious leaders remain silent on the issue or fail to give guidance on the same while others advocate it misleading communities to believe FGM is a religious requirement.
- The men - the patriarchal system of domination and the social sanctions that make men and boys believe girls have to be marriageable.

2. If actors other than the government are involved, what is the relation between the violators and the government? Has the government taken any measures to regulate the activities of the violators? Are these measures adequate?

There are no proper mechanisms to prosecute perpetrators hence they go scot-free. The government has come up with action plans to address FGM but has not allocated funds to run them. The government is just paying lip service to the issue and are non-committal in curbing FGM. The measures taken are inadequate.

3. What is the role of governments of other countries or international actors in relation to the violations?

There is been funding from external donors like GTZ, the UN through UNFPA and the Global Fund to address FGM. The special UN Rapporteurs have a role in questioning the government on their commitments emanating from the conventions that the government has signed / ratified.

For which of the effects can you hold your government accountable?

The government can be held accountable for failing to uphold the Right to Health, as this right has not been included in the Constitution as stipulated in Articles 12 of CEDAW (General Recommendation 24) and the ICESCR (General Comment 14). In addition, there is a lack of equitable distribution of health care facilities – for instance, Kenyatta National Hospital is meant to be a referral hospital but now acts as the primary health care provider for complications of FGM e.g. obstetric fistulas.

4. Which of the following core obligations is relevant for the policy and has not yet been achieved?
N/A

5. Does the obligation of progressive realisation apply?
The obligation of progressive realisation does not apply. Insufficient budgetary allocations are made by the government despite the policies such as the National Plan of Action against FGM. FGM is not deemed to be a health priority in comparison to malaria and HIV/AIDS. There is a lack of political will to implement the policy. In addition, there are few women representatives in Parliament to highlight women issues.

6. Does non-retrogression apply?
Yes, non-retrogression applies as the policy is meant to improve the health rights of women and their ability to access health facilities.

7. Which of the effects of the impact is a result of the government's failure to meet its obligations to respect, protect and fulfil health rights?
There is a failure to fulfil and protect health rights. The Children's Act protects girls below 18 years but fails to protect girls over 18 years. As a result, women above 18 years are vulnerable and susceptible to FGM. The FIDA case where a woman was mutilated during child delivery in a Nairobi hospital.

8. Has the government done enough to prevent discrimination in the implementation of the policy itself or in the impact of the policy?
No, the government has not done enough against abolishing discrimination of women in accordance with its international commitment e.g. Article 1 CEDAW.

9. Does the policy include effective measures to ensure influence and participation by women?
Yes, it does due to the fact that it is a civil society driven process in the formulation of the policy.

10. Which government commitments are linked to the effects of the policy?
The government commitments that are linked to the effects of the policy are, Article 12 of CEDAW, General Comment 24, Article 12 of ICESCR, General Comment 14 and Articles 16 and 18 of the African Charter.

Which are the main obstacles to the government meeting its obligations?

11. Its lack of resources (rather than, for example, lack of political will) a major cause of the weaknesses of the policy and its implementation?
Yes, a lack of resources is a major cause of the weaknesses of the policy. Finance is the nerve centre that drives other resources such as Human Resources who are qualified and properly trained but are not deployed to utilize their skills. Finances are also needed for the production of IEC (Information, Education and Communication) materials for awareness creation. There is simply no allocated budget for combating FGM.

12. Did the government attempt to obtain international technical and financial assistance?
The government has attempted to obtain international assistance, but there has not been a significant impact in curbing FGM, which has lead to donor fatigue. In addition, technical and financial assistance given by the International Community is directed to priority sectors such as family planning, water provision and sanitation.

13. Did other (donor) governments or international institutions extend the necessary assistance?
UNFPA,UNIFEM,UNICEF and the WORLD BANK have extended assistance to the government, but they are fatigued as the impact is not tangible and FGM continues to be prevalent as evidenced by the statistics shown previously.

14. Is the government likely to claim that other obstacles caused the weaknesses in the policy or its implementation?

- There is conflict between culture and statutory law, religion which have continuously undermined government efforts to curb this adverse practice.
- Natural disasters such as drought and floods tend to attract humanitarian redirection of funds meant for this purpose.

Conclusion

This section identifies a wide range of actors as (partially) responsible for the failure to implement a strong policy combating FGM. However, the noncommittal attitude of the government and its failure to allocate funds to the curbing of FGM can be seen as the main problem.

The Kenyan government can be held accountable for failing to uphold its international commitments to maintain the Right to Health, as this right has not been included in the Constitution as stipulated in Articles 12 of CEDAW (General Recommendation 24) and the ICESCR (General Comment 14).

The key obstacles to implementing a strong policy against FGM have been identified as a lack of political will, the lack of budget (made) available to combat FGM, and the relatively low number of women in Parliament. The government points to the tension between customary law and statutory law as well as the manner in which funds which may have been used to battle FGM are often redirected in the case of a humanitarian or natural disaster, as a reason for the slow progress on the issue. Assistance from international donors is often directed at other perceived priority areas, such as safe water and sanitation. In addition, because in the past government action on FGM has been slow and ineffectual, donor fatigue regarding funding for FGM has become a problem.

Step 6 – Recommendations and action plan

The following recommendations were formulated based on the analysis and discussions in the workshop.

On the national policy level:

- FGM should be prioritized by the government so as to regain the confidence of the International Community and counter donor fatigue on the issue;
- In relation to the re-allocation of funds by the government in meeting the needs of natural disasters, the government should have an elaborate, effective, early warning and sensing system for such disasters so as to avoid redirection of funds i.e. to FGM;
- The government should pass a new Constitution which will include to outlaw FGM for any women.

With regards to the budget:

- The government should increase their budgetary allocation for FGM and ensure equitable distribution of health facilities in fulfilment of policy obligations.
- The government needs to put funds into action plans and structures that is has put up in the annual budget already, such as:
  - National Plan of Action for the Elimination of FGM;
  - and a Ministry of Health project to eliminate FGM.
- There is a need for legislation that specifically criminalises FGM for all girls and women regardless of age and with stiff penalties. This can be included in the Reproductive Health Rights Bill.

On the international level:

- International treaties and instruments should be enforced by the relevant bodies in ensuring that women's health rights are fulfilled by governments and monitored by the various international mechanisms such as NEPAD, UPR, COMESA, WTO and the African Union in monitoring government compliance.
- The government is to apply the principles of CEDAW in their policies;
  - Article 12 of CEDAW, General Recommendation 24
  - Article 12 of ICESCR, General Comment 14
  - Articles 16 and 18 of the African Charter [12]
- The donors who are giving funds for the FGM to government bodies should hold the government accountable and monitor and evaluate all the activities to ensure that the funds are put into correct and timely use.

[12] See Annex 1.

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