



**ASSESSMENT OF WOMEN'S ACCESS TO JUSTICE FOR GENDER -
BASED VIOLENCE THROUGH ALTERNATIVE DISPUTE
RESOLUTION IN TANZANIA**

JESCA YUDA MBOGO

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REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LL.M)
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CERTIFICATION

The undersigned certifies that he has read and here by recommends for acceptance by the Open University of Tanzania a dissertation entitled “**Assessment of Women's Access to Justice for Gender-Based Violence through Alternative Dispute Resolution in Tanzania.**” In partial fulfillment of the Requirements for the award of Degree of Master of Laws (LL. M)

.....

DR. ABDALLAH MRINDOKO ALLY

(Supervisor)

.....

Date

DECLARATION

I, **Jesca Mbogo**, do declare that, the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirement for the Degree of Master of Laws (LL. M).

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DEDICATION

I dedicate this dissertation to my parents who sent me to school and get the enlightenment I have today!

ABBREVIATIONS

ADR	Alternative Dispute Resolution
AWAJ	Access to Women's Access to Justice
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
GBV	Gender-Based Violence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LCA	Law of the Child Act
MOCLA	Ministry of Constitutional and Legal Affairs
NPA-VAWC	National Plan of Action to End Violence Against Women and Children
NGO	Non-Governmental Organization
OWA-TZ	Open University of Tanzania Academic Staff
SDGs	Sustainable Development Goals
TAMWA	Tanzania Media Women's Association
TNGP	Tanzania National Gender Policy
UN	United Nations
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
VAW	Violence Against Women
VAWC	Violence Against Women and Children

LEGAL INSTRUMENTS

(a) International Legal Instruments

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

The Beijing Declaration and Platform for Action, 1995

The CEDAW Committee's General Recommendation No. 19 (1992)

The Convention on the Elimination of All Forms of Discrimination Against Women, UN, 1979. The General Recommendation No. 35 (2017)

The International Centre for Settlement of Investment Disputes (ICSID) Convention, 1965

The International Labour Organization (ILO) Convention No. 190 on Violence and Harassment in the World of Work, 2019

The UN Sustainable Development Goals (SDG 5 and SDG 16)

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (amended in 2006)

The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), 2019

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958

The United Nations Convention on the Rights of the Child (UNCRC), 1989

The United Nations Universal Declaration of Human Rights, 1948

(b) Domestic Legal Instruments

The Arbitration Act, 2020

The Civil Procedure Code, Cap. 33, R.E. 2019

The Constitution of the United Republic of Tanzania, Cap. 2, as amended from time to time
The Criminal Procedure Act, Cap. 20, R.E. 2019

The Judicature and Application of Laws Act, Cap. 358
The Law of the Child Act, 2009

The Legal Aid Act,
2017, Cap. 21.
The Penal Code, Cap. 16, R.E.
2019

The Sexual Offences Special Provisions Act
(SOSPA), 1998.
The Village Land Act, Cap. 114

ABSTRACT

This study examines the effectiveness and accessibility of Alternative Dispute Resolution (ADR) mechanisms for women facing gender-based violence (GBV) in Tanzania. Despite the existence of substantial legislative frameworks and policy measures designed to safeguard women's rights and combat gender-based violence, various obstacles continue to hinder the attainment of effective access to justice. This study analyzes the role of ADR as a supplementary or alternative option for survivors of GBV, evaluating its accessibility, effectiveness, and compatibility with formal legal frameworks in Tanzania. The research utilizes doctrinal and empirical methods, incorporating primary data obtained from interviews with legal practitioners, ADR mediators, government officials, and GBV survivors, alongside secondary data derived from legal texts, reports, and scholarly articles. Key findings indicate that although ADR presents a potentially less intimidating and more culturally sensitive alternative for women, notable limitations persist, such as power imbalances in mediation, insufficient training for facilitators, and a lack of awareness regarding ADR options among GBV survivors. The study examines the roles of customary and religious alternative dispute resolution practices and their effects on justice outcomes for women, emphasizing the complexities involved in integrating these practices with formal legal protections. This dissertation concludes by recommending the enhancement of the regulatory framework for alternative dispute resolution in gender-based violence cases, the improvement of mediator training, and the promotion of collaboration between government entities and non-governmental organizations to increase awareness and accessibility. Addressing these gaps will enhance women's access to justice in Tanzania, safeguard their rights, and establish safer, more effective avenues for survivors of gender-based violence seeking redress. This study enhances the understanding of alternative dispute resolution's role in justice for gender-based violence victims and establishes a foundation for future research and policy reforms in Tanzania.

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CHAPTER ONE

GENERAL INTRODUCTION AND BACKGROUND TO THE PROBLEM

1.1 Background to the Problem

Gender-based violence (GBV) persists in Tanzania, despite the creation of legal frameworks aimed at protecting women. Historically, the judicial system focused on typical dispute resolution methods, which frequently overlooked the unique requirements of GBV victims.¹ Alternative Dispute Resolution (ADR) has arisen as a potential alternative to increase women's access to justice, however not without problems.² The past dependence on informal community-based legal systems, which prioritized family unity over victim safety, frequently resulted in GBV cases being resolved through reconciliation rather than holding criminals responsible. This method, which was profoundly entrenched in patriarchal ideals, perpetuated cycles of violence while denying women justice.³

During the colonial and early post-independence periods, Tanzania's legal structure was heavily influenced by customary law, which weakened women's rights. The Marriage Act⁴ attempted to address family law but did not directly address gender-based violence, leaving women vulnerable in a legal system that valued social norms

¹ World Bank Group. Tanzania Gender Based Violence Assessment: Scope, Programming, Gaps and Entry Points, Report No. AUS0002786, 2017, pp. 17-33, <https://documents1.worldbank.org/curated/en/099155003312242676/pdf/P17605107388b40600a73a0ef1c83555589.pdf>

² Mbunda, J. The Role of Alternative Dispute Resolution in Enhancing Access to Justice in Tanzania, 2015 from <https://www.lawjournals.org/assets/archives/2020/vol6issue5/6-4-78-540.pdf>

³ Mukangara, et. al. Women in Tanzania: A Profile of Women in Tanzania, Beyond inequalities. Dar es Salaam, Tanzania, Harare, Zimbabwe: Tanzania Gender Networking Programme: SARDC Tanzania; Southern African Research and Documentation Centre Women in Development Southern Africa Awareness, WIDSAA, pp. 1-15, Harare, 1997, <https://search.worldcat.org/de/title/Beyond-inequalities--women-in-Tanzania--a-profile-of-women-in-Tanzania/oclc/1062058385> (Accessed 9/09/2024)

⁴ of 1971

above formal justice. Constitutional amendments in the 1990s, followed by the passage of the Sexual Offenses Special Provisions Act,⁵ signaled a substantial move toward criminalizing certain kinds of GBV, such as rape and female genital mutilation (FGM). However, cultural hostility, a lack of resources, and low understanding among law enforcement officers have hampered SOSPA enforcement.⁶

By the 2000s, it was clear that the formal justice system was unprepared to handle GBV cases efficiently, prompting increased promotion of ADR methods as part of judicial reform.⁷ The Criminal Procedure Act was revised to allow for mediation and arbitration,⁸ while the Legal Aid Act⁹ aims to assist underprivileged populations, particularly women victims of GBV. The National Plan of Action to End Violence against Women and Children¹⁰ aimed to strengthen the legal and policy frameworks governing GBV. Despite these efforts, enforcement remains low, and ADR is limited in dealing with GBV cases due to cultural and societal hurdles.¹¹

There are various hurdles to using ADR in GBV instances. First, cultural norms in Tanzania continue to support traditional reconciliation practices that prioritize family unity over justice. As a result, women are frequently urged to reconcile with their abusers, reducing the effectiveness of ADR as a means of pursuing justice.¹² Second,

⁵ (SOSPA) in 1998

⁶ Ng'ondi, N.B, Child protection in Tanzania: A dream or nightmare Children and Youth Services Review, *ELSEVIER*, Volume 55, August 2015, Pages 10-17, <https://www.sciencedirect.com/science/article/abs/pii/S0190740915001619> (Accessed 8/9/2024)

⁷ Mukangara, et. Al., *ibid*, n. 3

⁸ the Arbitration Act, 2020

⁹ Legal Aid Act, 2017, Cap. 21

¹⁰ 2017-2022

¹¹ Mukangara, *ibid*

¹² *ibid*

many ADR practitioners lack gender-sensitive training, which can result in outcomes that do not adequately address the suffering suffered by GBV victims. Third, there is a lack of understanding of ADR processes, particularly in rural regions, and impediments such as geographic distance and financial limits impede women's access to justice.¹³ Finally, the legislative framework governing ADR in GBV situations is still in development, raising questions about how ADR should be used to secure women's protection and rights.

Tanzania has made headway in integrating ADR into its legal system and resolving GBV through legislative reforms, although considerable problems still exist. Cultural norms, insufficient gender-sensitive training, and a lack of detailed legal standards for ADR in GBV cases keep the system from adequately satisfying victims' demands. To be an effective tool for gender justice, ADR must raise awareness, implement gender-sensitive frameworks, and seek to modify old norms that favor reconciliation above justice.

1.2 Statement of the Problem

Despite Tanzania's commitment¹⁴ to gender equality and the protection of women's rights, gender-based violence (GBV) remains a critical issue. The formal judicial system, burdened by lengthy procedures, high costs, and insensitivity towards GBV cases, often fails to provide timely and effective justice for survivors.¹⁵ In this context, Alternative Dispute Resolution (ADR) mechanisms, such as mediation and arbitration,

¹³ Mukangara, et. al. *ibid*, n.3

¹⁴ Tanzania has signed several international legal instruments such as UDHR, CEDAW, among others, and domestic commitments from the constitution and legislations which compels Tanzania to promote gender equality and protection of women

¹⁵ Mbunda, *ibid*, n. 2

have emerged as potential solutions for delivering more accessible and culturally sensitive justice.¹⁶ However, several legal and practical problems hinder Alternative Dispute Resolution (ADR)'s efficacy in combating gender-based violence (GBV) in Tanzania. One significant issue is the constitutional definition of discrimination, as the United Republic of Tanzania's Constitution does not explicitly prohibit both direct and indirect discrimination against women in both public and private spheres, allowing for gender inequalities contrary to Article 13 of the constitution.¹⁷

Furthermore, the continuous presence of discriminatory regulations, such as the Customary Law (Declaration) Order of 1963, which handles inheritance issues, perpetuates gender-based inequality. For example, customary inheritance laws frequently favor male relatives over female relatives, compromising women's property rights and economic stability.¹⁸

The Tanzanian legal structure makes it much more difficult for women to obtain justice. Sections 10 and 13 of the Law of Marriage Act¹⁹ permits polygamy and child marriage under certain conditions in so doing, reinforcing patriarchal norms that increase women's vulnerability to GBV. Furthermore, while section 240 of the Penal Code²⁰ criminalizes assault and battery, these rules frequently fail to address the gravity and specific characteristics of GBV, resulting in moderate sanctions and insufficient protection for survivors. This legal gap aggravates the difficulties that women experience when attempting to seek protection from domestic violence.

¹⁶ Mbunda, *ibid*

¹⁷ Constitution of the United Republic of Tanzania, Cap.2, as amended from time to time

¹⁸ The Local Customary Law Order of 1963, GN No. 279

¹⁹ Cap. 29

²⁰ Cap. 16, R.E. 2019

ADR mechanisms in Tanzania are further hampered by a lack of universal regulation or regulated procedures. The lack of specialized training for ADR practitioners dealing with GBV cases, as well as the absence of clear legal norms guiding ADR in sensitive topics such as GBV, contribute to variable and sometimes inadequate outcomes for survivors. Furthermore, institutional and cultural pressures typically force women to prioritize family unity and community reputation over personal safety, hindering their pursuit of justice through alternative dispute resolution.

This study seeks to assess the effectiveness of ADR in providing justice for women experiencing GBV in Tanzania. It explored the barriers and facilitators to accessing ADR, examined the impact of existing legal provisions and cultural norms, and proposed recommendations for enhancing the role of ADR in protecting women's rights and ensuring justice for GBV survivors.

1.3 Literature Review

In Tanzania, the literature on gender-based violence (GBV) indicates a recurring gap between the existence of legal safeguards and the real experiences of women seeking justice. This gap is highlighted by the fact that there is a gap between the two. Even though numerous legislative measures have been enacted with the intention of protecting the rights of women, such as the Sexual Offenses Special Provisions Act and the Law of Marriage Act, a significant number of women continue to face difficulties in gaining access to the legal system. The difficulties that are already there are made even more difficult by elements such as lengthy legal procedures, exorbitant prices, and a dearth of legal aid services. Furthermore, culture and society sometimes discourage women from reporting abuse or taking legal action because they fear

stigma, reprisal, or pressure to maintain family unity. This is because women are more likely to feel pressured to maintain family unity. Due to the restricted availability of courts and legal services in rural areas, the situation is even more grave than it is in urban areas. Despite the formal legal frameworks that are in place, many survivors of gender-based violence are left without proper support. This highlights the severe disparity that exists between the provisions of the law and the realities that women really experience in their lives. The following literature has been reviewed in the view of the above.

The World Bank Group²¹ published a report on Tanzania Gender-Based Violence Assessment: Scope, Programming, Gaps, and Entry Points which provides a detailed analysis of the current gender-based violence (GBV) situation in Tanzania. This study explores the existing policy interventions and service availability for addressing gender-based violence (GBV), exposing substantial deficiencies in the legal frameworks and bigger institutions that have been established to protect their victims. The lack of specialized aid for victims, which makes it difficult for survivors to seek justice, is one of the important outcomes. Another key result is a weakness in the implementation of rules pertaining to gender-based violence (GBV). Despite the fact that the study identifies a number of shortcomings in the judicial system, it does not go fully into the role that Alternative Dispute Resolution (ADR) plays in instances involving Gender-Based Violence (GBV). As a result, there is a gap in our understanding of how ADR could help alleviate some of these problems. On the other

²¹ World Bank Group, Tanzania Gender-Based Violence Assessment: Scope, Programming, Gaps and Entry Points, 2017

hand, its analysis of the legislative structure offers a major backdrop for evaluating the efficacy of alternative dispute resolution approaches in cases involving gender-based violence.

Mbunda's²² article on the function of Alternative Dispute Resolution in Enhancing Access to Justice in Tanzania determines the role that ADR plays in expanding access to justice within Tanzania's judicial system. The advantages of alternative dispute resolution (ADR) are highlighted in the paper. These advantages include its cheap cost, accessibility, and the ability to alleviate case backlogs in the formal judicial system. The importance of alternative conflict resolution in community-based dispute resolution is also emphasized. However, the study does not go into detail on the specific use of alternative dispute resolution (ADR) in cases involving gender-based violence (GBV), nor does it discuss the unique challenges that ADR practitioners may encounter in these delicate situations. Mbunda's work, despite this, establishes the groundwork for future evaluations of the application and effectiveness of alternative dispute resolution (ADR) in the fight against gender-based violence (GBV). It provides an important foundation for understanding the potential of ADR in Tanzania.

Mukangara et al²³ provides a comprehensive analysis of the social and legal challenges that women in Tanzania face. The literature touches on a variety of aspects of women's lives, such as education, health, and economic participation, while simultaneously putting an emphasis on the more general subject of gender inequality. Despite the fact that this work focuses on broad gender disparities and does not address any factors

²² Mbunda, J. *ibid*, n.2

²³ Mukandara, *ibid*, n. 3

that are specific to ADR or GBV, it is crucial because it provides historical context for understanding the cultural and institutional obstacles that women face when trying to seek justice. However, because the publication is somewhat out of date, it does not take into account recent changes to the law or the increased utilization of alternative dispute resolution procedures. The fact that it sheds light on the long-standing socio-cultural constraints that continue to impede women's ability to seek justice through alternative dispute resolution in the present day is, nevertheless, a contribution to the study.

The research conducted by Ng'ondi²⁴ provides an examination of the legal frameworks that pertain to child protection in Tanzania as well as the evaluation of how well these frameworks are implemented. Although the study's primary focus is on the protection of children, it does illustrate, in a roundabout way, the inefficiencies that exist within the Tanzanian legal system regarding the management of vulnerable populations. When it comes to navigating the legal system, women, particularly survivors of gender-based violence (GBV), confront similar problems. These systemic challenges, which include limited enforcement of laws and inadequate protection, can also apply to women. Even though the study does not explicitly address gender-based violence or alternative dispute resolution (ADR), it does contribute to a more comprehensive knowledge of the flaws in the legal system that have an impact on disadvantaged populations. These are findings that can be expanded to the context of women's access to ADR for situations involving gender-based violence.

²⁴ Ng'ondi, N.B., *ibid*, n. 6

Mbilinyi' and Omary²⁵ examines the confluence of gender relations and women's rights. Specifically, it investigates the ways in which patriarchy and legal discrimination influence women. This piece of writing provides insightful knowledge about the deeply ingrained cultural norms that contribute to the perpetuation of gender inequality. It demonstrates how the structures of society restrict the rights of women and support uneven power dynamics. The analysis of gender relations provides a critical viewpoint on how societal expectations and cultural barriers hamper women's access to justice. Although the study does not focus on conflict resolution procedures such as alternative dispute resolution (ADR), it does provide an analysis of gender relations. As a result of shedding light on the societal pressures that women encounter when pursuing justice through other mechanisms, it is vital to understand these dynamics in order to evaluate the efficiency of alternative dispute resolution in combating gender-based violence.

Kijo-Bisimba and Maina²⁶ evaluate the provision of legal aid services and the role that these services play in ensuring that marginalized groups, especially women, are afforded justice. In spite of the fact that the study takes a more comprehensive approach by being concerned with human rights and legal aid in general, it provides valuable insights into the ways in which legal assistance can be an essential instrument in assisting vulnerable groups in gaining access to justice. Highlighting the necessity of integrated support systems, this emphasis on legal aid complements the investigation of alternative dispute resolution (ADR) as a potential solution for

²⁵ Mbilinyi, M. and Omary, C. *Gender Relations and Women's Rights in Tanzania*, Dar es Salaam University Press, 1996

²⁶ Kijo-Bisimba, H., & Maina, C. *Human Rights and Legal Aid Services: A Case Study of Tanzania*, 2017, <https://corteidh.or.cr/tablas/28034.pdf> (Accessed 2/9/2024)

survivors of gender-based violence (GBV). When paired with alternative dispute resolution (ADR), legal aid programs have the potential to assist in bridging gaps in access to justice for women, particularly in cases of gender-based violence (GBV) where conventional legal avenues may be inaccessible or insufficient.

Tripp²⁷ investigates the confluence of women's movements, customary legal frameworks, and land rights throughout Africa. Her research focuses on how customary rules, which are firmly embedded in traditional practices, impact women's access to justice, notably in terms of land ownership and inheritance. Although the study focuses primarily on property rights and does not explicitly address Alternative Dispute Resolution (ADR) or its function in gender-based violence (GBV) cases, it provides an important knowledge of how customary law can either empower or constrain women's rights. This viewpoint is especially important in rural Tanzania, where customary law plays a considerable role. Tripp's analysis of customary law provides useful insights into how these legal frameworks may influence the implementation of ADR techniques in GBV cases, thereby framing the issues that women experience in such settings.

Betron²⁸ evaluates the policies and services available to combat GBV in Tanzania. The report emphasizes both the progress gained in addressing GBV and the remaining inadequacies in policy enforcement and service delivery. While Betron's report does not particularly address ADR methods, it does provide a complete summary of

²⁷Tripp, A. M. Women's Movements, Customary Law, and Land Rights in Africa, *African Studies Quarterly*, vol. 36(4), 2014

²⁸ Betron, Gender-based violence in Tanzania: an assessment of policies, services, and promising interventions, Health Policy Initiative, Task Order 1, Futures Group International, November 2008, <https://www.loc.gov/item/2019352551/> (Accessed 4/9/2024)

Tanzania's current GBV strategy, including survivors' limited access to justice. This study is useful in identifying shortcomings in the GBV framework that ADR might potentially address, laying the groundwork for examining how ADR could fill these gaps and improve justice delivery for women.

Rutabanzibwa²⁹ 2020 examines the legal and practical challenges that women encounter while using ADR mechanisms, notably in GBV instances. The study emphasizes the potential of ADR to give women with a more accessible road to justice, particularly in settings where formal legal institutions may be unavailable. However, the study recognizes the considerable hurdles that restrict the effectiveness of ADR in GBV cases, such as a lack of legal clarity, societal pressures, and cultural norms, which frequently discourage women from seeking their rights through ADR. While the article thoroughly discusses the limitations within ADR procedures, it may benefit from a more in-depth investigation of the sociocultural dynamics those impact women's decisions to use ADR. Nonetheless, it provides essential insights into the possibilities and limitations of ADR in empowering women, which is extremely important for understanding how ADR may be enhanced to better serve GBV survivors.

The above reviewed literature reveals that legal, social, and cultural factors affect Tanzanian women's access to justice for gender-based violence (GBV), with Alternative Dispute Resolution (ADR) acting as both a solution and a hindrance. Studies on Tanzania's legal frameworks highlight GBV law enforcement shortcomings and formal justice system constraints, which many survivors, especially rural ones,

²⁹ Rutabanzibwa, A. Empowering Women Through Alternative Dispute Resolution Mechanisms in Tanzania: Legal and Practical Challenges, 2020

cannot access. Although ADR is more accessible and community-based, its usefulness in managing GBV situations is questionable. The impact of customary law and societal norms that favor family unity over justice for women on ADR raises concerns about fairness, enforcement, and women's rights. The literature shows that ADR can improve access to justice, but it also calls for clearer legislative regulations, practitioner training, and efforts to overcome cultural norms that restrict women from exercising their rights. The literature illuminates how ADR might help or hinder justice for Tanzanian GBV sufferers.

1.4 Significance of the Study

Because it fills in important holes in the current legal system, the study on the evaluation of women's access to justice for gender-based violence (GBV) through alternative dispute resolution (ADR) in Tanzania is extremely important. The project intends to give women, who are frequently hampered by financial limitations, social stigma, and complicated legal procedures in the traditional court system, more quick, affordable, and accessible justice alternatives by concentrating on alternative dispute resolution (ADR) techniques including mediation and arbitration.

It looks at how ADR may integrate more socially conscious and societally acceptable community-based support networks while also empowering women by providing them a bigger voice and agency in settling their situations. Policymakers will benefit from the research's insightful analysis, which will point out the advantages and disadvantages of the current ADR frameworks and recommend evidence-based institutional and legislative changes to increase their efficacy.

Additionally, it highlights the significance of providing survivors with full support, surrounding legal, psychological, and social help, so advocating for a more all-surrounding approach to justice. This study intends to support larger initiatives for gender equality and human rights, both inside Tanzania and as a model for other countries, by lessening the load on formal courts and promoting increased trust and transparency in the legal system. In the end, it aims to guarantee that victims of gender-based violence obtain equitable, reasonable, and respectable outcomes, so considerably enhancing women's rights and the welfare of society.

1.5 Research Objective

1.5.1 General Objective

To evaluate the effectiveness, accessibility, and overall impact of alternative dispute resolution (ADR) mechanisms in providing justice for women affected by gender-based violence (GBV) in Tanzania.

1.5.2 Specific Objectives

- i. To examine the legal framework and policies governing ADR for GBV cases in Tanzania.
- ii. To investigate the barriers that women face when accessing ADR mechanisms for GBV cases in Tanzania.
- iii. To learn the experience of International legal instruments and best practice on ADR for GBV cases
- iv. To explore the role of community-based support systems and cultural attitudes towards ADR in GBV cases

1.5.3 Research Questions

- i. What are Tanzania's legal frameworks and practices for using Alternative Dispute Resolution (ADR) in cases of gender-based violence (GBV)?
- ii. What difficulties do women face while trying to use ADR mechanisms for GBV cases in Tanzania?
- iii. How do international legal instruments and best practices affect the use of ADR in GBV cases?
- iv. How do community-based support networks and cultural attitudes influence the use of ADR in GBV cases?

1.6 Research Methodology

This study has employed a combination of doctrinal and empirical research methods to provide a comprehensive analysis of the effectiveness and accessibility of ADR mechanisms for GBV cases. The combination of doctrinal and empirical methods ensures a general approach, covering both theoretical legal aspects and practical real-world experiences.

1.6.1 Doctrinal Research Method

The doctrinal research method has involved a detailed analysis of existing legal frameworks, policies, and regulations governing ADR and GBV in Tanzania. This method is justified because it allows for a thorough understanding of the legal context within which ADR operates,³⁰ including statutory laws, case laws, and international conventions that Tanzania has ratified. This has helped in identifying any legal gaps

³⁰ Murray, R. A., & DeSanctis, C. A., Legal Research Methods. Foundation Press, 2016

or inconsistencies that may impact women's access to justice through ADR. The doctrinal study has utilized the vast resources available in the online library of the Open University of Tanzania. This includes accessing legal databases, journals, books, and other academic publications that provide insights into ADR and GBV laws in Tanzania. The library's digital resources enabled a comprehensive literature review and legal analysis. Data acquired using the doctrinal method were analyzed by studying legislative frameworks, regulations, and international instruments pertaining to ADR and GBV in Tanzania.

1.6.2 Empirical Research Method

The empirical research method involved collecting primary data from individuals and organizations directly involved in ADR and GBV cases. This method was justified as it provides real-world insights into how ADR mechanisms were perceived and experienced by women affected by GBV, and it helped to understand the practical challenges and successes of ADR in this context.³¹ Conducting interviews with members of the Women Lawyers Association in Dodoma, provided valuable qualitative data. These legal professionals offered expert opinions on the effectiveness of ADR in GBV cases, discussed the barriers women face, and suggested improvements based on their experiences. Interviews with representatives from civil societies dealing with GBV within Dodoma municipality further enriched the empirical data. These organizations often worked closely with GBV survivors and provided insights into the support systems available, cultural attitudes towards ADR,

³¹ Murray, R. A., Ibid, n. 30

and the overall accessibility of ADR mechanisms for women. Data from the empirical method was analyzed by collecting information from women, ADR practitioners, and legal experts in order to better understand experiences and barriers. It also identified repeating themes in qualitative data, such as obstacles, perspectives, and the effectiveness of ADR procedures.

1.6.3 Research Technique and Sample Size

For the research on "Assessment of Women's Access to Justice for Gender-Based Violence through Alternative Dispute Resolution in Tanzania," a stratified questionnaire was used to ensure a representative sample of the population and to capture diverse perspectives on ADR mechanisms. Stratified sampling involved dividing the population into distinct subgroups (strata) and then randomly selected respondents from each stratum.³² This approach helped in obtaining more accurate and generalizable results.

For a sample size, the study adopted Five Survivors of Gender-Based Violence mixed of different ages, socio-economic backgrounds, and locations within Dodoma municipality. These respondents provided firsthand insights into their experiences with ADR mechanisms, including accessibility, fairness, and satisfaction with outcomes. Five Legal Professionals offered expert opinions on the effectiveness of ADR processes and identified legal and procedural challenges. This included Members of the Women Lawyers Association in Dodoma and Legal aid providers and

³² Salter, M., & Mason, J. Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research. Pearson Longman, 2007.

paralegals working with GBV cases. Five ADR Practitioners involving mediators and arbitrators who handled GBV cases and ADR trainers and facilitators. ADR practitioners provided insights into the procedural aspects of ADR, challenges faced during the process, and suggestions for improvement. Five Representatives of Civil Society Organizations representatives from different civil societies within Dodoma municipality. Representatives from organizations dealing with GBV offered perspectives on the support systems available for survivors and the community's acceptance of ADR mechanisms.

1.6.4 Ethical Considerations

When conducting the study Assessment of Women's Access to Justice for Gender-Based Violence Through Alternative Dispute Resolution in Tanzania, ethical issues were crucial. The study prioritized participant confidentiality and privacy, particularly for survivors of GBV, to preserve their identities and personal information. All participants had provided informed permission after being clearly informed of the study's purpose, procedures, and their right to withdraw at any time. Furthermore, the study was conducted with sensitivity to the traumatic nature of GBV, avoiding any inquiries or conversations that could cause discomfort or harm. Ethical approval was obtained from appropriate authorities, and the study followed ethical norms that stressed the safety, dignity, and well-being of all participants.

1.7 Scope and Limitation of the Study

This study primarily focused on Dodoma municipality, examining the effectiveness, accessibility, and impact of ADR mechanisms in providing justice for women affected by GBV. The target population included survivors of GBV, legal professionals, ADR

practitioners, representatives of civil society organizations, and government officials. Investigating various ADR methods such as mediation and arbitration, the study aimed to identify barriers, evaluate outcomes, and explore the role of community support and cultural attitudes. However, the study's geographical limitation to Dodoma may affected the generalizability of findings to other regions of Tanzania, and challenges such as sample size representation, data collection difficulties, access to respondents, and resource constraints impacted the depth and breadth of the research. Additionally, cultural biases and recent changes in ADR and GBV laws influenced the study's relevance and accuracy. Despite these limitations, the research sought to provide meaningful insights and recommendations to enhance women's access to justice through ADR in Dodoma.

1.8 Conclusion

This Chapter has offered a broad introduction to the study on assessing women's access to justice for gender-based violence (GBV) in Tanzania using Alternative Dispute Resolution (ADR). The chapter provided background information on the subject, highlighting the significance of efficient ADR processes in dealing with GBV instances. It also underlined the research aims, importance, and critical questions that would lead this study. The study's scope and limits were also discussed, establishing its focus on the Tanzanian environment. This foundation lays the groundwork for the following chapters, which has focused deeper into the legal frameworks, problems, and role of ADR in improving women's access to justice.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK GOVERNING WOMEN'S ACCESS TO JUSTICE FOR GENDER-BASED VIOLENCE IN TANZANIA

2.1 Introduction

This chapter lays the groundwork for understanding the key concepts and theoretical underpinnings relevant to women's pursuit of justice in cases of gender-based violence. The chapter examines essential concepts such as justice, access to justice, and gender-based violence, situating them within Tanzania's legal and socio-cultural context. It also examines the theoretical frameworks, such as feminist legal theory and human rights theory that influence the legal, institutional, and social systems that determine women's access to justice in Tanzania. This chapter provides a strong framework for examining the Tanzanian legal system's effectiveness and limitations in addressing GBV by connecting these theories to the larger global discourse on gender equality and human rights. The focus is to highlight the relationship of law, policy, and social norms that either facilitate or impede women's access to justice.

2.1.1 Justification of Understanding the Conceptual and Theoretical Framework

Understanding the conceptual and theoretical framework-governing women's access to justice for gender-based violence (GBV) in Tanzania is critical for a study assessing women's access to justice through Alternative Dispute Resolution (ADR), as it provides a structured lens through which the complexities of justice, gender, and cultural practices can be examined. The following points describe the importance of these frameworks, with full citations:

2.1.2 Recognizing Systemic Barriers to Justice.

Understanding Feminist Legal Theory is crucial for recognizing the systemic and structural limitations that women confront in both formal and informal justice systems. Feminist legal experts say that the legal system frequently embodies patriarchal ideas that perpetuate gender inequities, making it difficult for women, particularly those experiencing gender-based violence, to obtain justice.³³ Using this approach, researchers might investigate whether ADR in Tanzania mitigates or exacerbates these hurdles. For example, feminist legal theory criticizes the neutrality of law and legal institutions, emphasizing how ADR might perpetuate societal power disparities.

2.1.3 Ensure compliance with Human Rights Standards

The Human Rights-Based Approach (HRBA) emphasizes the necessity for justice systems, particularly ADR processes, to be in line with international human rights norms. This is especially pertinent in Tanzania, since the country has signed international accords such as the Convention on the Elimination of All Forms of Discrimination Against Women. ADR methods must be created and executed in a way that protects women's rights to dignity, safety from abuse, and access to fair justice. HRBA provides a normative framework to guarantee that ADR conforms with these rights, including the right to a fair trial and protection against discrimination.³⁴

³³ K. T. Bartlett and R. Kennedy (Eds.), *Feminist Legal Theory: Readings in Law and Gender*, Westview Press, 1991

³⁴ UN Common Understanding on Human Rights-Based Development Cooperation, 2003

2.1.4 Emphasizing the Role of Power Dynamics

The Empowerment Theory is critical for evaluating ADR systems in Tanzania since it emphasizes women's empowerment inside judicial processes. Empowerment theory emphasizes the necessity for justice systems to give women the ability to decide the outcome of their GBV cases.³⁵ This is especially essential in patriarchal settings, where women may feel excluded by formal legal systems. Understanding this paradigm enables academics to determine whether ADR empowers women by giving them with an accessible, non-threatening platform on which their perspectives are heard and their autonomy is valued.

2.1.5 Addressing Multiple Forms of Discrimination.

Kimberlé Crenshaw's Intersectionality Theory is critical for understanding the multiple forms of discrimination that women suffer in Tanzania based on race, ethnicity, class, and geography.³⁶ GBV survivors in Tanzania may face injustice not just because of their gender, but also because of their socioeconomic class or ethnicity. For example, a rural Maasai woman may encounter different barriers to ADR than an urban woman from a more fortunate upbringing. Intersectionality theory is crucial in determining whether ADR processes are responsive to these intersecting forms of oppression, guaranteeing that all women, regardless of background, have equal access to justice.

³⁵ M. A. Zimmerman, Empowerment Theory: Analysis at the Psychological, Organizational, and Community Levels, In J. Rappaport and E. Seidman (eds.), *Handbook of Community Psychology*, Springer, 2000, pp. 43-63

³⁶ Crenshaw, K. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics." *University of Chicago Legal Forum*, vol. 1, 1989, pp. 139–167

2.1.6 Understanding the Coexistence of Legal Systems.

Legal Pluralism Theory is especially important in Tanzania, where official state laws interact with customary and religious legal systems.³⁷ Many women, particularly in rural areas, rely on traditional dispute resolution procedures that may conflict with official legal rights for GBV survivors. Understanding legal diversity enables scholars to investigate how ADR systems, which may be founded on customary norms, interact with formal laws and if they adequately safeguard women. It also helps to determine if ADR methods reinforce or resist patriarchal norms found in customary justice systems.

2.1.7 Promoting Equity in Justice Systems.

Social Justice Theory emphasizes the importance of equity in legal systems.³⁸ This idea is crucial for determining whether ADR methods promote fairness in GBV cases by guaranteeing that women, regardless of socioeconomic status, have equal access to justice. Many women in Tanzania are unable to pursue justice due to economic, educational, and societal constraints. ADR, when combined with social justice principles, can provide a more accessible and equitable path for these women. However, without knowing this theoretical context, ADR may perpetuate injustices, especially if vulnerable women are not provided with the essential support and protections.

³⁷ Griffith, J. What is Legal Pluralism? *Journal of Legal Pluralism and Unofficial Law*, 18(24), 1986, pp. 1–55.

³⁸ Sen A. *The Idea of Justice*, Harvard University Press, 2009

2.1.8 Addressing Systemic Inequalities

The Structural Inequality Theory emphasizes how legal institutions frequently reflect greater socioeconomic inequities, including gender discrimination. In Tanzania, structural disparities can take the shape of women's limited access to legal education, economic dependence on their abusers, or societal pressures to prioritize family unity above GBV justice. Using this theory, researchers can evaluate whether Tanzania's ADR procedures alleviate or maintain structural inequalities by encouraging resolutions that favor community or family interests over women's rights.

2.1.9 Enhancing Women's Capabilities

The Capability Approach, created by Amartya Sen³⁹ and Martha Nussbaum,⁴⁰ is critical for determining whether women in Tanzania have genuine freedom and capacity to access justice through ADR methods. The Capability Approach goes beyond formal legal access to determine if women have the means, expertise, and authority to participate meaningfully in ADR processes. Many Tanzanian women may lack the financial independence and education necessary to effectively pursue justice. Understanding the Capability Approach allows academics to assess whether ADR processes improve women's skills by giving them the tools and support they need to make educated decisions and seek justice.⁴¹ Understanding the conceptual and theoretical frameworks that control women's access to justice for gender-based violence in Tanzania is critical for assessing the success of ADR processes. These frameworks offer a holistic lens that emphasizes the interplay of gender, power,

³⁹ Sen, A. *Development as Freedom*, Oxford University Press, 1999

⁴⁰ M. C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge University Press, 2000

⁴¹ *Ibid*

culture, and legal systems, allowing academics to determine whether ADR is truly equitable and empowering for women. They also assist in identifying areas for improvement, ensuring that ADR systems are not only accessible but also consistent with human rights principles, gender equality, and social justice. By applying these theoretical approaches, the study will be able to give a more in-depth, comprehensive examination of women's access to justice for GBV in Tanzania, particularly in the context of ADR.

2.2 Conceptual Framework Governing Women's Access to Justice for GBV in Tanzania

Analyzing the conceptual framework that influences women's access to justice for gender-based violence (GBV) in Tanzania is essential, as it delineates the fundamental principles and notions that inform the perception and administration of justice in GBV cases. This framework identifies systemic challenges faced by women, including cultural barriers, legal gaps, and institutional weaknesses, which restrict their capacity to seek and obtain justice. This analysis elucidates the fundamental concepts of justice, access, and gender, establishing a framework for evaluating the efficacy of Tanzania's legal system in addressing gender-based violence (GBV). Understanding this framework enables the study to evaluate the effectiveness of current policies and laws, providing insights into the reforms needed to improve justice for women experiencing GBV.

2.2.1 Access to Justice

Access to justice constitutes a fundamental principle within human rights law, encompassing the capacity of individuals, especially vulnerable populations such as

women, to pursue and secure legal remedies for their grievances. Access to justice in the context of gender-based violence (GBV) pertains to women's capacity to engage with formal legal mechanisms, including courts and police, as well as informal systems such as community-based dispute resolution processes, to obtain redress for violence perpetrated against them due to their gender.⁴² Access to justice encompasses several essential components: the provision of legal services (including legal representation and legal aid), the impartiality of legal proceedings (which guarantees equitable treatment of women within the justice system, devoid of bias or prejudice), and the ability of the justice system to deliver adequate protection and redress (ensuring that legal frameworks are sufficiently robust to safeguard women and provide meaningful outcomes).⁴³

In Tanzania, various obstacles impede women's access to justice for gender-based violence (GBV). These include a lack of awareness regarding legal rights, economic dependence on male partners, societal norms that discourage reporting, and shortcomings within the justice system, such as corruption, limited resources, and inadequate legal frameworks. Article 13 of the Constitution of Tanzania ensures the right to equal protection under the law; however, access to justice is hindered by deeply rooted patriarchal.⁴⁴ Additionally, the Convention on the Elimination of All

⁴² ICJ, Women's Access to Justice for Gender-Based Violence: ICJ Practitioners' Guide n° 12, 2016, <https://www.icj.org/resource/womens-access-to-justice-for-gender-based-violence-icj-practitioners-guide-n-12-launched/#:~:text=Access%20to%20justice%20for%20gender%2Dbased%20violence%20means%20that%20States,to%20effective%20remedies%20and%20reparation>. (Accessed on 9/9/2024)

⁴³ ICJ, Ibid

⁴⁴ Legal and Human Rights Centre (LHRC), Tanzania Human Rights Report of 2022

Forms of Discrimination Against Women (CEDAW),⁴⁵ which Tanzania has ratified, mandates that state parties guarantee women equitable access to justice.

2.2.2 Gender-based Violence (GBV)

Gender-based violence (GBV) encompasses harmful actions directed at individuals due to their gender, with a notable disproportionate impact on women and girls.⁴⁶ It includes various abusive practices such as domestic violence, sexual harassment, rape, trafficking, female genital mutilation (FGM), and forced marriages. Gender-based violence (GBV) is rooted in power disparities between genders and is frequently reinforced by patriarchal norms and societal expectations that uphold male supremacy.

Tanzania's legal framework addresses gender-based violence (GBV) through legislation such as the Sexual Offences Special Provisions Act,⁴⁷ which criminalizes sexual offenses, and the Law of Marriage Act,⁴⁸ which offers limited protection against domestic violence. Although these laws are in place, enforcement is inadequate, influenced by cultural attitudes that minimize violence against women and prioritize familial reconciliation over legal action. Moreover, detrimental cultural practices such as female genital mutilation (FGM) persist in certain areas, despite their prohibition under Tanzanian legislation (SOSPA).

The World Health Organization (WHO) identifies gender-based violence (GBV) as a critical public health and human rights concern, resulting in serious implications

⁴⁵ UN, CEDAW, 1979

⁴⁶ What is gender-based violence (GBV)?, https://plan-international.org/learn/what-is-gender-based-violence-gbv/?gad_source=1&gclid=Cj0KCQjwveK4BhD4ARIsAKy6pMKKmUkvwBGkCVH-rDcRhOpSyX3f9TBNC7VlmYUZGaYTYva80Z1vcpUaApEMEALw_wcB (Accessed 9/9/2024)

⁴⁷ (SOSPA) of 1998

⁴⁸ Cap. 29, *ibid*, n. 19

for the physical and mental well-being of survivors.⁴⁹ International frameworks, including the Beijing Declaration and Platform for Action,⁵⁰ emphasize the necessity of eliminating gender-based violence (GBV) as a fundamental measure for attaining gender equality and empowering women. In Tanzania, addressing gender-based violence requires tackling both legal and institutional shortcomings as well as entrenched societal norms that sustain violence⁵¹

2.2.3 Equality and Non-Discrimination

Equality and non-discrimination serve as fundamental principles within justice systems and human rights frameworks globally. The principles advocate for the equal treatment of women under the law and ensure that they have equal access to legal protections, free from gender-based discrimination, particularly in the context of seeking justice for gender-based violence (GBV). In the context of gender-based violence, these principles guarantee that women are not exposed to biases, stereotypes, or discriminatory practices during their interactions with legal institutions or law enforcement agencies.

Equality and non-discrimination are enshrined in various international human rights instruments, notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁵² Article 2 of CEDAW mandates that states incorporate the principle of gender equality into their national constitutions or

⁴⁹ WHO, Violence against women, 25 March, 2024, <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (Accessed 12/9/2024)

⁵⁰ UN Beijing Declaration and Platform for Action, Fourth World Conference on Women, 1995

⁵¹ Amnesty International, The State of the World's Human Right -Tanzania. Amnesty International, 2020

⁵² UNCEDAW, 1979, ratified by Tanzania in 1985

relevant legislation, and it requires public authorities and institutions to abstain from any discriminatory actions. Article 15 asserts that women are entitled to equal rights under the law. Discrimination against women in legal processes, as well as the inadequacy of legal systems to address the specific needs of female survivors of gender-based violence, contravenes the principles established in CEDAW.

Tanzania's Constitution guarantees equality before the law, which asserts that all individuals are equal and entitled to protection without discrimination.⁵³ Despite existing protections, gender discrimination persists in legal and social frameworks, especially in rural regions where customary laws and patriarchal norms restrict women's access to justice. The Law Reform Commission of Tanzania indicates that women's experiences of gender-based violence (GBV) are frequently disregarded or downplayed, with legal proceedings often favoring male offenders rather than female victims.⁵⁴ Addressing these inequalities is essential for achieving substantive gender equality and ensuring that women have genuine access to justice for gender-based violence.

2.2.4 Human Rights

The notion of human rights is fundamentally connected to the safeguarding of women's rights, particularly the right to be free from violence. This concept, rooted in international human rights law, underscores that gender-based violence (GBV) constitutes not merely a criminal act but a significant infringement of human dignity

⁵³ Article 13 of the Constitution, 1977, Cap.2 as amended from time to time

⁵⁴ Law Reform Commission of Tanzania, Analysis of the Law of Marriage Act (1971), 2020

and essential rights. Women's rights, encompassing the right to life, liberty, security, and bodily integrity, are acknowledged as inalienable and indivisible in numerous international treaties and conventions. Gender-based violence (GBV) infringes upon women's human rights, including their right to be free from torture and cruel, inhuman, or degrading treatment.

Article 1 of the Universal Declaration of Human Rights (UDHR),⁵⁵ asserts that “all human beings are born free and equal in dignity and rights. The UDHR does not specifically address gender-based violence (GBV); however, its provisions have established a foundation for more targeted instruments, such as CEDAW and the Beijing Declaration and Platform for Action, which explicitly advocate for the elimination of violence against women within the framework of human rights. General Recommendation No. 19 of CEDAW explicitly identifies gender-based violence (GBV) as a form of discrimination against women and urges state parties to adopt measures aimed at eradicating this violence. The African Charter on Human and Peoples' Rights⁵⁶ and its Protocol on the Rights of Women in Africa⁵⁷ to which Tanzania is a signatory, underscore that violence against women constitutes a violation of human rights. Article 4 of the Maputo Protocol mandates state parties to implement and uphold legislation that prohibits all forms of violence against women, in both public and private spheres, emphasizing that gender-based violence constitutes a violation of women's fundamental rights.

⁵⁵ United Nations, UDHR, 1948,

⁵⁶ ACHPR, 1981

⁵⁷ AU Maputo Protocol, 2003

In Tanzania, although human rights frameworks are established to safeguard women against violence, cultural and legal obstacles frequently hinder the full realization of these rights. Amnesty International indicates that women in Tanzania, especially in rural regions, encounter obstacles including social stigma, insufficient legal awareness, and poor enforcement of gender- based violence laws, which collectively undermine their human rights. The human rights framework is essential for comprehending and promoting enhanced legal protections and effective remedies for women subjected to gender-based violence (GBV).

2.2.5 Legal Empowerment

Legal empowerment is the process by which individuals, especially marginalized groups such as women, acquire the capacity to comprehend, utilize, and influence the law to safeguard their rights. Legal empowerment is crucial in addressing gender-based violence (GBV), as it ensures that women possess both awareness of their rights and the necessary tools and support to effectively navigate the justice system and advocate for their protection. This concept encompasses the provision of legal education to women, access to legal aid, and the establishment of community support systems aimed at overcoming structural barriers to justice.

Legal empowerment is based on the principle that access to justice and the capacity to assert one's rights are essential for human dignity and gender equality. Amartya Sen's Capabilities Approach highlights the necessity of empowering individuals, particularly those who are disadvantaged, to leverage existing legal frameworks for enhancing their social conditions and safeguarding their rights.⁵⁸ Legal empowerment initiatives,

⁵⁸ Sen, A. *ibid*, n. 39

including legal literacy programs, community paralegals, and support networks, enable women to interact effectively with the law and the justice system. In Tanzania, the Women's Legal Aid Centre (WLAC) offers legal assistance and education to women experiencing gender-based violence (GBV), facilitating their navigation of intricate legal processes and advocacy for their rights.⁵⁹ Sustainable Development Goal (SDG) 16 emphasizes the promotion of peaceful and inclusive societies, advocating for legal empowerment through equitable access to justice for all, particularly for vulnerable groups such as women.⁶⁰ In the absence of empowerment, women frequently find themselves ensnared in cycles of violence, hindered from pursuing justice due to insufficient knowledge or limited access to legal resources.

2.2.6 Cultural and Social Norms

Cultural and social norms significantly shape perceptions of gender-based violence (GBV) and influence women's access to justice. These norms represent the collective beliefs, values, and expectations within a society that delineate acceptable behavior for individuals, especially concerning gender roles and relations. In numerous societies, such as Tanzania, patriarchal cultural norms and traditional practices sustain power imbalances between men and women, frequently normalizing violence against women and obstructing their access to legal recourse. Societal beliefs that emphasize male authority and control over women's bodies and decision-making frequently deter women from reporting violence or pursuing justice. In rural Tanzania, customary laws prevail in numerous domains, with practices like child marriage and female genital

⁵⁹ Women's Legal Aid Centre (WLAC). Annual Report 2020

⁶⁰ United Nations, Sustainable Development Goals: SDG 16, United Nations General Assembly, 2016

mutilation (FGM) being culturally endorsed, despite their illegality under national legislation. Cultural norms serve as obstacles to justice by instilling fear in women regarding stigma, social ostracism, or potential retaliation from their communities or families when they seek to contest these practices.⁶¹

Social norms theory posits that individuals' behaviors are shaped by their perceptions of typical or acceptable conduct within their community. Communities that perceive gender-based violence (GBV) as a private issue or prioritize family cohesion may compel women to remain silent or reconcile with their abusers instead of seeking justice.⁶² Research indicates that these norms hinder women's access to legal protections provided by national and international human rights laws, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In Tanzania, initiatives to overcome these cultural yet they face significant challenges. The Tanzanian government has taken steps to criminalize practices such as FGM; however, enforcement remains inadequate due to the enduring influence of entrenched cultural values that safeguard these practices. Community sensitization programs and legal awareness campaigns are crucial for initiating a shift in harmful social norms that condone gender-based violence and obstruct justice for women.⁶³

⁶¹ United Nations Population Fund (UNFPA), Addressing Gender-Based Violence in Tanzania: Annual Report, 2018

⁶² Mackie, G., & Lejeune, J. Examining the Social Dynamics of Harmful Practices: A Theoretical Perspective. Innocenti Working Paper, UNICEF. Amnesty International, 2020

⁶³ UNFPA, Addressing Harmful Cultural Practices and Gender-Based Violence in Tanzania, Amnesty International, 2020

2.3 Theoretical Framework Governing Women's Access to Justice for GBV in Tanzania

The theoretical framework guiding women's access to justice for gender-based violence (GBV) in Tanzania is critical to the study because it provides a structured lens for evaluating the success of alternative dispute resolution (ADR) processes. It is beneficial to contextualize the research within the larger context of feminist legal theory, human rights frameworks, and socio-legal perspectives on access to justice. Establishing a strong theoretical framework, the study can critically evaluate whether ADR processes adequately address the systemic barriers that women face, such as power imbalances, cultural norms, and legal constraints, and determine how these frameworks affect women's ability to seek and achieve justice for GBV. This promotes a better understanding of the relationship between law, gender, and justice in Tanzania.

2.3.1 Feminist Legal Theory.

According to feminist legal theory, the law, which has historically been molded by patriarchal processes, is not neutral and frequently reinforces gender inequality. This theory looks at how the judicial system marginalizes women's experiences and reinforces gender biases, particularly in cases of gender-based violence (GBV).⁶⁴ It highlights that the law, rather than serving as an unbiased arbitrator, tends to reflect

⁶⁴ Bartlett, K. T. and Kennedy, R. *Feminist Legal Theory: Readings in Law and Gender*, Westview Press, 1991

societal power disparities. In patriarchal societies like Tanzania, these disparities are particularly prominent in informal and non-formal justice systems, such as Alternative Dispute Resolution (ADR) methods, which may unintentionally perpetuate traditional gender roles and power hierarchies.⁶⁵

ADR in GBV cases has the potential to provide a less adversarial environment for dispute resolution, but feminist legal experts are concerned that these methods may fail to address underlying systemic issues. For example, patriarchal norms inherent in both formal and informal legal systems may prohibit women from achieving true justice by coercing or pressuring them into settlements that value family peace or male power above their safety and well-being.⁶⁶ Feminist legal theory pushes for reforms that guarantee ADR processes are gender sensitive and do not just reproduce the power hierarchies present in traditional courts. This theory is crucial in determining whether ADR effectively tackles gender-based violence in Tanzania because it emphasizes the importance of hearing women's views, ensuring their agency, and avoiding reinforcing cultural biases that contribute to gender violence. Feminist legal scholars thus advocate for the incorporation of women's lived experiences and a rethinking of ADR processes to ensure they are truly liberating for women.

2.3.2 Human Rights Based Approach (HRBA)

The Human Rights-Based Approach (HRBA) is founded on international human rights

⁶⁵ Dillip, A.et. al. 'To be honest, women do everything': understanding roles of men and women in net care and repair in Southern Tanzania, 2018, vol.17(1):p. 459, <https://pmc.ncbi.nlm.nih.gov/articles/PMC6286524/#:~:text=Tanzanian%20society%20is%20largely%20patriarchal%20household%20%5B2%2C%203%5D>. (Accessed 09/10/2024)

⁶⁶ Phillip, A. Ibid

law and prioritizes the protection and promotion of fundamental rights such as access to justice, equality, and the right to be free from violence.⁶⁷ In the context of gender-based violence (GBV), the HRBA believes that women's rights to justice, protection, and dignity must be protected. This approach is especially important in evaluating ADR mechanisms in Tanzania because it requires that these processes adhere to international human rights obligations, such as those outlined in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Tanzania is a signatory.

According to HRBA, the legal system must protect women's autonomy and dignity by providing accessible and effective remedies for gender-based violence that are compatible with human rights norms. ADR systems, while providing faster and perhaps less expensive resolution procedures, must not jeopardize these norms. This approach ensures that ADR is not viewed as a lesser form of justice, but rather as a supplementary process based on the same core principles of fairness, non-discrimination, and human dignity.⁶⁸ The HRBA requires that ADR processes be designed in such a way that women are empowered, protected from coercion or further victimization, and have the right to seek justice on the same terms as men. For Tanzania, the HRBA recommends a careful examination of whether ADR processes respect women's rights or if they unintentionally perpetuate gender disparities, particularly in cases of GBV, where power relations between perpetrators and victims are frequently sharp. It also calls for conformity with international norms to ensure that

⁶⁷ Human Rights-Based Approach, <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach> (Accessed 28/9/2024)

⁶⁸ United Nations, Common Understanding on Human Rights-Based Development Cooperation, <https://www.un.org/ruleoflaw/files/HRBA%20Poster.pdf>, Accessed 28/9/2024)

all women, regardless of socioeconomic level, have equal access to fair, transparent, and human rights-based justice.

2.3.3 Empowerment Theory.

Empowerment theory in the context of access to justice stresses giving individuals, particularly marginalized groups such as women experiencing gender-based violence (GBV), the agency, resources, and capacity to make informed decisions about pursuing justice. This idea is crucial in determining whether Alternative Dispute Resolution (ADR) processes empower or disadvantage women in Tanzania. Empowerment means promoting women's autonomy by giving them authority over how their issues are handled, ensuring that they are active decision-makers rather than passive recipients of external solutions.

In patriarchal countries, women frequently lack the confidence and means to resist structural injustices, even legal ones.⁶⁹ ADR, if established with empowerment in mind, could provide a more accessible and less intimidating forum for women to express their issues. Unlike formal court settings, ADR can create an environment where women feel more at ease expressing their feelings and finding resolutions, especially in cases of GBV.⁷⁰ Empowerment in ADR entails ensuring that women's views are fundamental to the process and that they have the freedom to select the settlement option, whether mediation or arbitration. However, for ADR to be truly

⁶⁹ Zimmerman, M.A. *ibid*, n. 35

⁷⁰ UN Women, GENDER RESPONSIVE ALTERNATIVE DISPUTE RESOLUTION DILI, 4-5 DECEMBER 2017, https://asiapacific.unwomen.org/sites/default/files/Field%20Office%20ESEAsia/Docs/Publications/2019/03/tl-UNW_ADR-Seminar-Report.pdf (Accessed 14/9/2024)

empowering, it must be free of coercion, societal constraints, and cultural conventions that may force women to accept solutions that are not in their best interests. This is especially true in GBV instances, when power relations between victims and perpetrators can influence the result of conflict resolution. According to empowerment theory, alternative dispute resolution (ADR) should aggressively question and destroy the barriers that prevent women from receiving justice. In Tanzania, this entails establishing ADR processes that are gender sensitive, respect women's rights, and equip them with the resources they need to pursue justice on their own.

2.3.4 Intersectional Theory

Kimberlé Crenshaw's intersectionality theory investigates how many types of oppression and discrimination, such as gender, race, class, and ethnicity, overlap and compound one another, resulting in distinct disadvantages.⁷¹ In the context of GBV access to justice in Tanzania, intersectionality theory is critical for understanding that women's experiences of oppression are affected by various, overlapping social identities and kinds of marginalization. For example, in Tanzania, a woman from an ethnic minority group, such as the Maasai, who lives in a rural location may face distinct and more severe impediments to seeking justice than an urban woman from a wealthy background. Intersectionality theory requires that ADR mechanisms account for these intersecting types of discrimination, acknowledging that women's needs, challenges, and experiences differ depending on their social, economic, and cultural circumstances. For example, women from oppressed ethnic groups may have limited

⁷¹ Crenshaw, K. *ibid*, n. 36

access to legal services or encounter language problems, making it difficult to engage with formal justice systems.

If ADR procedures are constructed without taking these intersectional aspects into account, they risk further marginalizing already disadvantaged women. Intersectionality theory suggests that Tanzania's ADR systems be sensitive to these intersecting identities, ensuring that all women, regardless of ethnicity, socioeconomic background, or geographical location, have fair access to justice.⁷² This includes adapting ADR processes to address the specific problems that diverse groups of women confront, as well as providing appropriate resources such as translation assistance, legal education, or community outreach to ensure that marginalized women are not further excluded from justice. Applying intersectionality, ADR in Tanzania can be altered to better serve all women, particularly those who face many types of oppression. This guarantees that ADR does not just repeat the inequities that exist in formal legal systems, but rather provides an inclusive and equitable platform for justice.

2.3.5 Legal Pluralism Theory

Legal Pluralism Theory recognizes the coexistence of multiple legal systems within a single state, especially in countries like Tanzania, where formal state law operates alongside customary, religious, and informal systems of justice. This theory is crucial in analyzing women's access to justice for gender-based violence (GBV) through Alternative Dispute Resolution (ADR) in Tanzania because it acknowledges the role

⁷² Crenshaw's, Ibid

of non-state legal systems, such as customary or community-based ADR, in resolving disputes.⁷³ Legal pluralism is particularly relevant in Tanzania's rural and traditional communities, where customary law may dominate and ADR often serves as the primary means of resolving conflicts, including GBV cases. From the perspective of legal pluralism, ADR mechanisms can either provide an accessible and culturally appropriate platform for women to seek justice or perpetuate patriarchal norms that disadvantage them. In many instances, customary ADR practices may prioritize reconciliation or community harmony over individual justice, potentially reinforcing societal norms that downplay or excuse violence against women. Legal pluralism theory thus emphasizes the need for reforms that harmonize state law with customary and informal legal systems to ensure that all women, regardless of the legal framework they engage with, can access fair and equitable justice for GBV.⁷⁴

2.3.6 Social Justice Theory

Social Justice Theory is concerned with the fair distribution of resources, opportunities, and rights within a society.⁷⁵ In the context of women's access to justice for GBV through ADR in Tanzania, this theory focuses on ensuring that justice systems, including ADR mechanisms, are structured in a way that promotes equality and fairness. Social justice demands that all individuals, particularly vulnerable and marginalized groups like women, have equal access to legal remedies and are not disadvantaged by socio-economic, cultural, or legal barriers.⁷⁶

⁷³ Griffiths, J. *ibid*, n. 37

⁷⁴ Merry, S. E. Legal Pluralism. *Law & Society Review*, 22(5), 1988, pp. 869-896

⁷⁵ Rawls, J. *A Theory of Justice*. Harvard University Press, 1971

⁷⁶ *Ibis*

In Tanzania, many women face systemic barriers to justice due to poverty, illiteracy, and societal norms that discourage them from reporting GBV or seeking formal legal recourse. ADR, if designed in a way that aligns with social justice principles, can provide a more accessible and less intimidating avenue for these women to resolve their disputes. However, for ADR to be truly just, it must ensure that women are not pressured into accepting settlements that reinforce power imbalances or deprive them of their rights. Social justice theory advocates for ADR systems that are inclusive, equitable, and designed to dismantle the structural disadvantages that prevent women from accessing fair and just outcomes.⁷⁷

2.3.7 Capability Approach

The Capability Approach, developed by Amartya Sen and Martha Nussbaum, focuses on what individuals can do and to be their "capabilities" as the central metric of social justice.⁷⁸ In the context of women's access to justice for GBV in Tanzania, this approach stresses the importance of ensuring that women have the actual freedom and capability to pursue justice through ADR mechanisms. It is not enough for legal systems to formally provide avenues for dispute resolution; those avenues must be accessible, meaningful, and effective in enhancing women's real freedoms and capabilities. The Capability Approach is particularly useful in assessing whether ADR mechanisms enable women to exercise their rights and achieve justice in practice, not just in theory.⁷⁹ For women facing GBV, factors such as economic independence, education, and social support are crucial in determining whether they can effectively

⁷⁷Sen, A. *ibid*, n. 38

⁷⁸ Sen, A. *ibid*, n. 39

⁷⁹ Nussbaum, M. C. *ibid*, n. 40

engage with ADR systems. If ADR mechanisms are designed without considering these capabilities, women may be formally included in the justice system but still lack the real ability to pursue justice. Therefore, the Capability Approach advocates for ADR processes that are not only available but are also designed in a way that enhances women's capacity to make informed decisions, seek justice, and rebuild their lives free from violence.

2.3.8 Legal Pluralism Theory

Legal Pluralism Theory acknowledges the existence of numerous legal systems inside a single state, particularly in Tanzania, where formal state law coexists with customary, religious, and informal systems of justice.⁸⁰ This theory is important in examining women's access to justice for gender-based violence (GBV) in Tanzania because it recognizes the role of non-state legal systems in conflict resolution, such as customary or community-based ADR. Legal diversity is especially important in Tanzania's rural and traditional communities, where customary law may prevail and ADR is frequently used as the primary means of settling conflicts, including GBV cases. Legal pluralism views ADR processes as either providing an accessible and culturally relevant platform for women to seek justice or perpetuating patriarchal norms that disadvantage them.⁸¹ In many cases, traditional ADR techniques may promote reconciliation or communal harmony over individual justice, thus reinforcing societal norms that ignore or excuse violence against women. Legal pluralism theory highlights the importance of reforms that integrate state law with customary and informal legal systems, ensuring

⁸⁰ Griffiths, J. *ibid*, n. 37

⁸¹ Merry S. E. *ibid*, n. 74, pp. 869–896

that all women, regardless of the legal context in which they operate, have access to fair and equitable GBV justice.

2.4 Conclusion

The chapter on Conceptual and Theoretical Framework Governing Women's Access to Justice for Gender-Based Violence in Tanzania provided a thorough understanding of the various dimensions that influence women's pursuit of justice, particularly through Alternative Dispute Resolution (ADR) mechanisms. Exploring various theoretical frameworks such as Feminist Legal Theory, Human Rights-Based Approach, Empowerment Theory, Intersectionality Theory, Legal Pluralism, Social Justice Theory, Structural Inequality Theory, and the Capability Approach reveals that women's access to justice is a complex issue shaped by gender dynamics, socio-cultural norms, and legal structures. These theories emphasize that tackling GBV necessitates not only legal reforms, but also a greater understanding of the societal and structural hurdles that marginalize women. Furthermore, the frameworks emphasize the importance of ADR systems that are equal, inclusive, and empowering, preventing power imbalances and instead serving as genuine avenues for justice. In Tanzania, where formal and informal legal systems coexist, these findings are critical for developing ADR methods that are culturally relevant while adhering to international human rights standards. Finally, the conceptual and theoretical perspectives offered in this chapter serve as a solid platform for critically evaluating the efficacy of current ADR procedures in Tanzania and advocating for reforms that improve women's access to justice in cases of gender-based violence.

CHAPTER THREE

GLOBAL AND REGIONAL ADR LEGAL FRAMEWORKS FOR ADDRESSING GENDER-BASED VIOLENCE AGAINST WOMEN

3.1 Introduction

This chapter examines the different alternative dispute resolution (ADR) mechanisms that have been established on both international and regional levels to address gender-based violence (GBV) against women. This chapter evaluates women's access to justice in Tanzania by examining the effectiveness of ADR frameworks in relation to global human rights norms and regional legal instruments. This emphasizes the role of these frameworks in offering accessible and culturally sensitive pathways for women to pursue justice beyond conventional court systems, tackling obstacles like stigma, fear of retaliation, and the intricacies of legal processes. This chapter examines the principles, practices, and successes of ADR across different jurisdictions to highlight best practices and potential challenges in applying these frameworks in Tanzania. The goal is to enhance the broader discussion on improving women's access to justice in cases of GBV.

3.2 Importance of Understanding Global and Regional ADR Frameworks for Addressing Gender-Based Violence against Women

Understanding the importance of the global and regional ADR frameworks for addressing gender-based violence against women is essential for making an evaluation of women's access to justice for gender-based violence through Alternative Dispute Resolution (ADR) in Tanzania. This comprehension is crucial in clarifying the legal framework related to gender-based violence (GBV) and affects the practical

implementation of alternative dispute resolution (ADR) mechanisms that are essential for enhancing women's access to justice in Tanzania. The foundation of this comprehension lies in the global and regional frameworks that establish critical legal standards and obligations for addressing GBV. Examining these frameworks is essential for assessing Tanzania's legal system in relation to international standards and for identifying specific areas that require reform to improve women's access to justice.

Furthermore, understanding these frameworks allows for a more thorough examination of the effectiveness of the existing ADR mechanisms in Tanzania. ADR serves as a viable alternative to traditional court systems, frequently presenting a more accessible and culturally attuned approach for women pursuing justice in instances of GBV. The United Nations Development Programme (UNDP) highlights that alternative dispute resolution (ADR) has the potential to reduce the burden on formal judicial systems and offer prompt resolutions for victims.⁸² Through a thorough examination of the impact of global and regional frameworks on the development and implementation of ADR practices in Tanzania, researchers can evaluate the adequacy of these mechanisms in meeting the needs of women experiencing GBV. Insights derived from the restorative justice principles articulated in the African Charter can inform the development of ADR processes that emphasize victim healing and reconciliation.⁸³

⁸² UNDP, *Alternative Dispute Resolution: A Guide for Practitioners*, 2012

⁸³ African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2003

The frameworks contribute significantly to the ongoing discourse surrounding women's empowerment and the role of non-state actors in the provision of justice. The incorporation of ADR into the justice system recognizes the limitations of traditional legal processes, especially in contexts where cultural stigmas and social norms can discourage women from seeking legal recourse.⁸⁴ A comprehensive grasp of global and regional frameworks enables a critical assessment of the effective integration of ADR into Tanzania's legal system, ultimately empowering women and enhancing their agency in pursuing justice. The UN Women's Global Framework for Action highlights the critical need for community-based mechanisms to assist survivors of violence, stressing the significance of local contexts in developing effective interventions.⁸⁵

Ultimately, the examination of these frameworks fosters global accountability and cooperation. Examining the methods used to address GBV through ADR across different jurisdictions allows Tanzanian policymakers and practitioners to identify and implement effective strategies and innovative approaches. Comparative analyses play a crucial role in identifying effective practices that have demonstrated success in analogous cultural and legal contexts. Community-based ADR methods in Rwanda have significantly enhanced women's access to justice.⁸⁶ The insights derived from these practices can inform policy reforms in Tanzania, resulting in a more effective and robust legal framework for addressing GBV. This chapter therefore is crucial for

⁸⁴ Bennett, R. The Role of Community-Based Approaches in Access to Justice for Women. *Journal of Gender Studies*, 19(3), 2010, pp. 243-256.

⁸⁵ UN Women, *Global Framework for Action: Addressing Violence Against Women*, 2015

⁸⁶ Peters, A. Restorative Justice in Rwanda: A Model for Gender-Based Violence Cases? *International Journal of Transitional Justice*, 8(3), 2014, pp. 460-477.

assessing women's access to justice in Tanzania. The frameworks set forth essential legal standards and influence the efficient application of ADR mechanisms. This study provides a detailed examination of interactions, which can enhance the understanding of improving justice for women experiencing GBV in Tanzania. It emphasizes the importance of protecting their rights and amplifying their voices in the quest for justice.

3.3 Key Global Legal Standards and Guidelines for ADR in GBV Cases

Global legislative norms for ADR in GBV cases are intended to give victims safer, more accessible routes to justice while prioritizing their rights and well-being. These guidelines promote consensual, victim-centered ADR processes that avoid the hazards of compulsion, power imbalances, and re-traumatization.

3.3.1 CEDAW's Role in ADR for Gender-Based Violence (GBV) Cases

The Convention on the Elimination of All manifestations of Discrimination against Women (CEDAW)⁸⁷ is a watershed moment in international law that aims to eradicate gender-based discrimination in all its manifestations, with a focus on preventing gender-based violence (GBV). The United Nations General Assembly adopted CEDAW, committing state parties to implementing comprehensive measures to protect women's rights and ensure access to justice. This contains provisions for incorporating alternative dispute resolution (ADR) methods as a means of addressing GBV, if these mechanisms meet international standards for justice, voluntariness, and women's rights protection.

⁸⁷ CEDAW, *ibid*, n. 45

The CEDAW framework provides legal grounds for states to implement ADR in a way that protects women's rights. Notably, Article 2 and Article 15 emphasize the responsibility of governments in this regard. Article 2 is crucial to CEDAW's goal, requiring state parties to implement policy measures to eliminate discrimination against women, such as legislative reforms and safeguards for equal access to justice. It explicitly requires states to "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all forms of discrimination against women" and "to establish legal protection of women's rights on an equal basis with men."⁸⁸ For GBV cases, this provision includes guaranteeing justice choices that meet survivors' specific needs, such as ADR paths that may provide a less combative and more supportive environment than standard court settings. Article 15 of the CEDAW mandates "equality of men and women before the law" and asserts that nations shall ensure women's access to legal processes that do not discriminate or victimize them. This includes making ADR methods accessible and fair, allowing women, particularly those who face difficulties in formal court systems, to seek justice without experiencing discrimination or procedural bias.

3.3.1.1 General Recommendations of the CEDAW Committee

The CEDAW Committee's General Recommendations No. 33 and No. 35 are authoritative interpretations of how state obligations under CEDAW relate to ADR in GBV cases. General Recommendation No. 33 emphasizes the necessity of providing

⁸⁸ CEDAW, 1979, (<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>). (Accessed 20/9/2024)

different paths to justice for women, including ADR processes, but with strict norms that preserve the rights of the women involved. The document notes that "alternative dispute resolution mechanisms, such as mediation, conciliation, and arbitration, must be voluntary, safe, and respectful of due process guarantees." The recommendation also specifies that ADR can benefit women in underserved or remote areas, if these mechanisms adhere to strict safeguards to prevent coercion and uphold equality⁸⁹

3.3.1.2 General Recommendation No. 35: Gender-Based Violence

Expanding on CEDAW's framework against GBV, General Recommendation No. 35 states that ADR in GBV cases should be used with caution and only when "adequate safeguards are in place to guarantee the survivor's rights and autonomy." This recommendation specifically states that ADR should only be used in cases of intimate partner violence if it can ensure a safe and non-coercive environment for the survivor.⁹⁰ This advice emphasizes the unique risks in GBV cases, where power inequalities are typically severe, and cautions against any compelled use of ADR that may prejudice survivors. The CEDAW Committee's recommendations highlight the need of state parties ensuring that ADR mechanisms, particularly in GBV cases, are conducted with the survivor's safety, autonomy, and rights in mind.

⁸⁹ ([CEDAW Committee, 2015])(<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no33-womens-access-justice>). (Accessed 20/9/2024)

⁹⁰ CEDAW Committee, 2017, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no35-gender-based-violence-against>(Accessed on 12/07/2024)

3.3.1.3 CEDAW's Role in Developing Safe ADR Mechanisms

CEDAW's comprehensive framework sees ADR as a potentially beneficial method to justice for GBV survivors, as long as it is regulated to protect them from future harm. CEDAW believes that ADR should be voluntary, which is critical for preserving the survivor's autonomy. ADR processes that respect voluntariness prevent situations in which survivors feel pressured into reaching agreements with perpetrators. Power disparities are common in GBV cases, especially in intimate partner violence. Requiring that ADR be entered into willingly, CEDAW gives survivors authority over the procedure, allowing them to opt out if they feel threatened or uncomfortable. CEDAW holds nations accountable for managing ADR systems, guaranteeing transparency and effective regulation. This is critical in preventing criminals from using ADR to avoid accountability. For example, without open oversight, ADR proceedings may be used to compel survivors into dismissing or diminishing claims. As a result, by emphasizing openness, CEDAW ensures that ADR can be a genuine, protective alternative to traditional legal procedures.

3.3.1.4 Gender Sensitive Training for ADR Practitioners

To guarantee that ADR is tailored to the specific requirements of GBV survivors, CEDAW recommends gender-sensitive training for ADR facilitators such as mediators and conciliators. ADR practitioners working in GBV cases must have expertise of trauma, power imbalances, and the effects of GBV. Training ADR facilitators to understand and recognize these interactions is critical for preventing additional victimization and re-traumatization of survivors. The CEDAW standards emphasize that only trained specialists who understand the complexity of GBV should

be allowed to manage these instances.

3.3.1.5 Procedural Safeguards to Protect Survivor Rights

CEDAW demands that ADR processes include procedural safeguards such as confidentiality, impartiality, and the option for survivors to bring in support people or advocates. These protections are critical for preventing any violation of the survivor's rights during ADR. For example, confidentiality requirements prohibit sensitive material from being exposed without agreement, and the right to an advocate ensures that survivors are supported rather than isolated during proceedings. Countries implementing CEDAW norms frequently incorporate its concepts into their national ADR frameworks. For example, in South Africa, the Domestic Violence Act⁹¹ includes CEDAW's principles by mandating mediation in domestic violence cases to be voluntary, confidential, and with the survivor's explicit approval. This congruence with CEDAW rules guarantees that ADR in GBV cases is not coerced and that survivors have a fair and respectful forum to seek redress.

3.3.2 UN Model Strategies and Practical Measures to Eliminate Violence Against Women: A Framework for Integrating ADR in GBV Cases

The United Nations Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Fields of Crime Prevention and Criminal Justice provide a comprehensive framework to help national governments, law enforcement agencies, and justice systems prevent and respond to gender-based violence (GBV). These strategies, endorsed by the United Nations Economic and Social Council

⁹¹ Act 116 of 1998

(ECOSOC) in 1997 and revised on a regular basis, provide detailed guidelines on the use of alternative dispute resolution (ADR) processes within criminal justice systems, particularly in cases involving gender-based violence. The Model Strategies promote victim safety, voluntariness, and trauma-informed approaches, ensuring that ADR procedures meet survivors' needs without jeopardizing their rights.⁹² The UN Model Strategies provide critical principles for incorporating ADR in a safe, ethical, and effective way for survivors of GBV. While ADR can be an effective alternative to traditional judicial proceedings, the UN Model Strategies stress that it should never be used at the expense of survivor safety or autonomy. In GBV instances, the strategies give the exact guidelines listed below:

3.3.2.1 Guidelines on ADR from the UN Model Strategies

The UN Model Strategies specify that ADR in GBV instances must be voluntary. Coercion, whether direct or indirect, has the potential to weaken the agency of GBV survivors, especially in cases of intimate partner violence. Compelling a survivor to participate in ADR may worsen their trauma, jeopardize their safety, and diminish their feeling of autonomy. Thus, the Model Strategies advocate for ADR to be available as an option rather than a mandatory process, reducing the risk that survivors will feel pressured to participate in mediation with their abusers.⁹³ Confidentiality is underlined as an important precaution in ADR proceedings for GBV cases. The UN Model Strategies advocate for strong measures to protect survivors' privacy and the potential consequences of releasing sensitive material. Confidentiality helps to prevent

⁹² UN Model Strategies, ECOSOC Resolution 1997/19, <https://www.un.org/en/ecosoc/resolutions>, (Accessed on 16/9/2024)

⁹³ Ibid

retaliation from abusers and lowers the danger of secondary victimization, which is especially significant when ADR involves reconciliation or mediation with an intimate partner or a family member. Recognizing the power dynamics that are typically present in GBV situations, the UN Model Strategies emphasize the importance of conducting a comprehensive screening for coercion or power imbalances before proceeding with ADR processes. This screening ensures that facilitators are aware of any power imbalances that may impede fair negotiations or lead to coercion. If severe imbalances are detected, the Model Strategies suggest against pursuing ADR because it may result in a compromised solution that does not truly reflect the survivor's interests or needs.⁹⁴ The UN Model Strategies urge against making ADR the default choice in GBV cases, emphasizing that survivors should not feel limited to ADR as their only route of redress. This approach represents an appreciation of the intricacies involved in GBV situations, where obligatory or default ADR may limit survivors' options and agency. The Model Strategies specifically warn that mandatory mediation might duplicate abuse dynamics, limiting a victim's ability to negotiate freely. Adhering to these recommendations, states and justice systems can develop ADR frameworks that respect survivors' choices while protecting their rights and promoting justice in a survivor-centered manner.

3.3.2.2 A victim-centered and trauma-informed approach to ADR

One of the most forward-thinking aspects of the UN Model Strategies is the emphasis on trauma-informed and victim-centered approaches to ADR in GBV cases. A trauma-informed approach in ADR contexts guarantees that survivors feel protected

⁹⁴ UN Model Strategies, ECOSOC, *ibid.*, n. 92

supported, and empowered, all of which are critical for allowing survivors to participate in the legal system without fear of re- traumatization. The UN Model Strategies recommend that ADR facilitators have specific trauma- informed training. This program teaches facilitators how to spot indicators of trauma, understand the impact of GBV on survivors, and respond properly. Trauma-informed facilitators can foster a supportive environment in ADR sessions, allowing survivors to engage without feeling overwhelmed or at risk of further psychological injury. Trauma-informed techniques, for example, stress attentive listening, empathy, and awareness of trauma triggers, which aids facilitators in preventing unintended re-traumatization during proceedings.⁹⁵

The UN Model Strategies encourage states to connect ADR mechanisms to comprehensive support services for survivors, including as legal aid, counseling, and advocacy.⁹⁶ Such wrap- around services give survivors the tools they need to make educated judgments about participation in ADR. Legal assistance and advocacy services assist survivors in understanding their rights and successfully navigating ADR processes, whereas counseling services give emotional support, allowing survivors to process trauma and participate in ADR without feeling overwhelmed. The UN Model Strategies prioritize victim empowerment in ADR processes. Emphasizing a trauma-informed approach, the Model Strategies prioritize survivors' sense of control over the proceedings, addressing the loss of power they may have felt in abusive situations. Survivors are encouraged to make their own decisions about involvement and are

⁹⁵ UN Model Strategies, 1997/19, <https://www.un.org/en/ecosoc/resolutions> (Accessed on 10/10/2024)

⁹⁶ Ibid

supported in claiming their rights, resulting in a framework that fosters healing while respecting their agency. Beyond procedural guidelines, the UN Model Strategies emphasize the importance of achieving outcomes that meet survivors' emotional and practical requirements. For many survivors, ADR provides an opportunity to find resolution and validation without the confrontational and frequently retraumatizing experience of traditional court proceedings. Survivors can engage in a discourse using ADR to communicate their experiences, seek acknowledgement, and, if wanted, attain closure. The Model Strategies thus advocate ADR methods that respect survivors' emotional journeys and strive for resolutions that promote both justice and healing.

Example of Use in National Justice Systems, The impact of the UN Model Strategies can be seen in jurisdictions that include survivor-centered ADR techniques into their justice systems. For example, in Canada, the Restorative Justice Act provides provisions for voluntary, trauma-informed mediation services in cases of intimate partner violence, giving survivors the option of pursuing a non-adversarial resolution rather than being forced into ADR processes. The Canadian model, which incorporates the UN's trauma-informed and non-coercive principles, demonstrates how ADR can be safely applied in accordance with the UN Model Strategies.

3.3.3 UN Women and UNFPA Guidelines for ADR in GBV Cases

The recommendations created by UN Women and the United Nations Population Fund (UNFPA) are key resources for implementing ADR procedures that address gender-based violence (GBV) while respecting victim safety and autonomy. These guidelines seek to operationalize international norms by giving practical protocols that prioritize

a survivor-centered approach, with an emphasis on issues like as power imbalances, mediator training, and survivors' influence over the ADR process. Together, these UN institutions promote for ADR methods that prioritize survivors' rights while also providing safer and more powerful alternatives to formal legal systems. Power imbalances are common in GBV instances, particularly in intimate relationship violence, when the perpetrator may have extensive control over the survivor's life. Recognizing these concerns, UN Women and UNFPA guidelines strongly recommend screening for power imbalances before to engaging in ADR.⁹⁷ This screening is necessary to assess whether ADR is appropriate in a given situation. For example, the UN Essential Services Package for Women and Girls Subjected to Violence recommends that full risk assessments be undertaken before ADR. According to the guidelines, if there are significant power imbalances that could impair the survivor's ability to negotiate freely, ADR should be reconsidered to prevent further harm.⁹⁸ The guidelines suggest that ADR practitioners evaluate the survivor's ability to assert their needs and preferences, which may be limited due to trauma or fear of retaliation. They should also consider the perpetrator's coercion or intimidation, which may hinder fair negotiation, and the perpetrator's level of control over the survivor, particularly in cases of financial or social dependency. In this context, UN Women and UNFPA emphasize that the goal of screening is to ensure that ADR processes are used only when they can be carried out in a way that respects and

⁹⁷ UN Women and UNFPA, Essential Services Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines, 2015, Available at <https://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence>. (Accessed 22/09/2024)

⁹⁸ ⁹⁸UN Women and UNFPA, *ibid*, n. 97

empowers the survivor while avoiding further victimization or re-traumatization. Both UN Women and UNFPA emphasize the significance of specialist training for ADR practitioners working on GBV cases. Given the sensitivity of GBV and the deep trauma that survivors may face, mediators and facilitators must possess abilities that go beyond typical mediation training. The UN Women Handbook for Legislation on Violence Against Women recommends training for mediators to understand gender dynamics and power imbalances, trauma-informed approaches to avoid re-traumatization, and effective communication techniques to build trust and support survivors in expressing themselves.⁹⁹ In many circumstances, UNFPA encourages that ADR mediators be trained in cultural sensitivity, as cultural norms surrounding gender and violence can vary greatly and influence a survivor's willingness to participate in ADR. This training is crucial to ensuring that mediators are prepared to manage the specific dynamics of GBV cases and to provide a safe atmosphere for survivors to engage in ADR if they so desire.¹⁰⁰ UN Women supports for a survivor-centered approach in ADR processes, arguing that survivors should have complete control over their participation. A key component of this autonomy is the survivor's right to resign from the ADR procedure at any moment without punishment. According to the UN Women and UNFPA Guidelines for Essential Services, ADR procedures should provide survivors the ability to set boundaries and withdraw if they feel unsafe, uncomfortable, or unwilling to proceed.¹⁰¹ This guideline helps to ensure that survivors do not feel compelled to remain in ADR out of fear or pressure,

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

especially when negotiating directly with a perpetrator. The emphasis on survivor autonomy is especially important in circumstances when survivors may feel pressured or obligated to participate in ADR because of family or community expectations. UN Women and UNFPA support for a model of ADR in which survivors have complete choice over their involvement, reducing the danger of secondary victimization. This method is consistent with the principles outlined in CEDAW, which emphasize the significance of consensual and non-coercive judicial processes for survivors of GBV. UN Women and UNFPA guidelines specifically stress the importance of secrecy and safety in ADR processes for GBV cases. The recommendations propose that all ADR sessions take place in a confidential context where survivors are safeguarded from any repercussions, including as reprisal from perpetrators or stigma from their communities. Private mediation sessions, precise guidelines for information sharing, and strong confidentiality requirements are all part of the safety standards. For example, the UN Women and UNFPA Essential Services Package recommends facilitators to get survivors' informed consent before disclosing any elements of the ADR process to third parties. This measure ensures that survivors can feel safe participating in ADR without fear of their statements or decisions being disclosed without their permission.¹⁰² Confidentiality is especially important in situations where social stigma or familial constraints may influence a survivor's desire to participate in ADR. Maintaining stringent confidentiality requirements, UN Women and UNFPA allow survivors to seek justice without jeopardizing their privacy, which is crucial in

¹⁰² UN Women & UNFPA, Essential Services Package, <https://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence>, (Accessed 10/10/2024)

cultures or communities where disclosing GBV experiences can result in ostracism or further suffering.

3.3.4 The Istanbul Convention to Prevent and Combat Violence Against Women and Domestic Violence

The Istanbul Convention, officially known as the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, is a game-changing regional convention that covers violence against women in depth and comprehensively. The Istanbul Convention, adopted by the Council of Europe in 2011 and taking effect in 2014, establishes a strong legal framework for avoiding violence, protecting victims, and prosecuting perpetrators. It requires state parties to take measures to protect women's rights to safety and autonomy, especially in circumstances of domestic violence and other kinds of gender-based violence (GBV).¹⁰³ One of the Convention's key elements is its approach to alternative dispute resolution (ADR) in cases involving violence against women. The Convention recognizes the hazards involved with ADR, such as mediation and reconciliation, particularly when power imbalances and persistent trauma limit a victim's ability to participate freely in these processes. Article 48 of the Convention clearly requires state parties to ensure that ADR is not imposed in cases of violence against women, providing a crucial safeguard against potential coercion and re-traumatization. Article 48 of the Istanbul Convention stands out as a key provision for controlling the use of

¹⁰³ Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*. Council of Europe Treaty Series No. 210. 2011, Retrieved from <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=210>. (Accessed 10/10/2024)

ADR in cases of violence against women. It expressly prohibits mandated ADR processes, such as mediation or conciliation, in cases of domestic violence or other types of gender-based violence. This limitation recognizes the inherent risks of mandated ADR for survivors, who may confront coercion, power imbalances, and intimidation, preventing them from properly advocating for their rights. Instead, the Convention requires states to ensure that ADR processes are voluntary, carried out with sufficient protections, and respectful of the survivor's autonomy. The convention call upon parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention."¹⁰⁴ Barring mandatory ADR, the Convention assures that survivors have agency over their decision to engage in ADR processes, shielding them from potential coercion or pressure from the court system or their communities. The clause notes that violence against women frequently involves deep power inequalities, which can render ADR unsuitable or dangerous for survivors, particularly when confronted with their abusers in a mediated context. Mandatory ADR might increase survivors' trauma by forcing them to communicate with their perpetrators. Limiting this, the Convention promotes a trauma-informed approach that considers survivors' emotional and psychological needs.

While the Istanbul Convention bans forced ADR, it does not fully preclude its use in GBV situations, as long as it is voluntary and with proper protections in place. States

¹⁰⁴ Council of Europe, 2011, article 48

are encouraged to guarantee that, when ADR is available, ensures survivor autonomy and voluntary involvement without pressure, including informed consent and withdrawal options. To deal with the intricacies of GBV cases, facilitators or mediators are trained in trauma-informed techniques and gender sensitivity.¹⁰⁵ These parameters are consistent with the suggestions made by other international authorities, such as UN Women and UNFPA, which emphasize the importance of survivor-centered, trauma-informed approaches in ADR processes. Applying these protections, state parties can guarantee that ADR in GBV cases prioritizes survivors' rights, safety, and well-being.

The Istanbul Convention has additional measures that indirectly strengthen the values outlined in Article 48 by promoting survivor protection and support in other settings. Article 18 calls for a comprehensive support system that includes access to specialized services for survivors, such as legal aid, counseling, and secure housing, so that they can make informed decisions. Article 56 provides for the protection of victims throughout court proceedings, emphasizing the importance of safety and sensitivity as survivors navigate legal systems. This article emphasizes that, while permitted, ADR must not jeopardize the survivor's safety or rights.¹⁰⁶ These laws promote a comprehensive strategy in which survivors of GBV are not only protected from compelled ADR but also get a variety of supportive services addressing their safety, legal rights, and psychological well-being.

¹⁰⁵ Ibid

¹⁰⁶ Ibid

Several countries have used the Istanbul Convention's Article 48 to change their ADR methods in GBV matters. For example, Spain, a Convention member, has passed laws restricting the use of mediation in domestic violence cases, ensuring that survivors are not forced to engage with their abusers in informal contexts.¹⁰⁷ Similar measures have been implemented in France to limit ADR in domestic abuse cases and safeguard survivors from potentially coercive situations.¹⁰⁸ These examples highlight the Convention's practical impact, as countries alter their legislation to comply with its principles for shielding survivors from mandatory ADR processes. The Istanbul Convention, by prohibiting mandatory ADR in Article 48 and emphasizing survivor safety and autonomy, establishes a clear framework for treating GBV situations while remaining sensitive to survivors' needs and rights. Prohibiting mandatory ADR and supporting survivor-centered alternatives, the Convention facilitates a legal system that respects survivors' autonomy, decreases the risk of re-traumatization, and recognizes the intricacies of GBV dynamics. When effectively implemented, the Convention's provisions ensure that ADR can be used by GBV survivors while respecting their rights and prioritizing their safety.

3.3.5 Combating Gender-Based Violence (GBV) through Alternative Dispute Resolution (ADR): The Role of the EU Mediation Directive 2008/52/EC

The European Union's Mediation Directive,¹⁰⁹ was enacted to encourage the use of

¹⁰⁷ Fernandez-Molina, E. *The Implementation of the Istanbul Convention in Spain: Legal Reforms and Challenges*. European Journal of Women's Studies, 27(2), 2020, pp. 221-236.

¹⁰⁸ Council of Europe, *GREVIO Report on France*. Council of Europe, 2019, Retrieved from <https://rm.coe.int/grevio-report-on-france/168098d0e7> (Accessed on 11/10/2024)

¹⁰⁹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008

mediation as a dispute resolution tool in the EU. The Directive's foundations and standards for creating and conducting mediation are primarily intended for civil and commercial disputes, but they are also useful when contemplating the use of Alternative Dispute Resolution (ADR) in gender-based violence (GBV) instances. Though GBV instances necessitate additional considerations to assure survivor protection, autonomy, and rights, the Directive's principles can facilitate safe, consensual, and fair mediation for GBV survivors when accompanied by required protections. This paper investigates how the EU Mediation Directive might be amended and implemented to ADR processes in GBV cases to make them survivor-centered, voluntary, and effective in combating GBV. One of the most significant contributions of the EU Mediation Directive to ADR methods in GBV matters is its emphasis on voluntary participation. Article 3 of the Directive states that mediation is "a voluntary process in which the parties attempt to settle their dispute with the assistance of a mediator." In GBV situations, voluntary involvement is critical for safeguarding survivors from further pressure or manipulation by their abusers, as compelled ADR can deprive victims of autonomy and increase trauma.

Furthermore, the Directive allows member states to decide whether mediation is appropriate in specific instances. Article 5.2 empowers courts to invite parties to employ mediation "where appropriate" rather than imposing mediation in inappropriate circumstances, acknowledging that not all disagreements are fit for mediation. This adaptability is especially crucial in GBV instances, where power imbalances and safety issues are frequently prevalent. By not making mediation mandatory, the Directive adheres to international standards such as the Council of

Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), which prohibits mandatory ADR in cases of violence against women. Confidentiality is a key principle of the EU Mediation Directive, as stated in Article 7, which states that "the mediator or anyone involved in the mediation shall not be compelled to give evidence in civil and commercial proceedings" regarding information obtained during the mediation process. This notion is critical in GBV cases, since survivors frequently fear revenge, stigma, or the revealing of personal information. Confidentiality can create a safe space for survivors to express themselves and negotiate outcomes without fear of repercussions.

However, anonymity in GBV mediation must be balanced against the demand for accountability and justice. The UN Women and UNFPA Essential Services Package for Women and Girls Subjected to Violence emphasizes the necessity of integrating mediation with support services and legal protections that ensure survivor safety while maintaining confidentiality.¹¹⁰ The Directive's approach to secrecy contributes to the creation of a secure ADR environment while permitting national laws to identify particular instances under which confidentiality can be waived, such as where the survivor's safety or the public interest needs disclosure. The EU Mediation Directive highlights the need for mediator training and quality assurance. Article 4.1 encourages member states to "ensure, by any means which they consider appropriate, that mediators are trained to a high standard"¹¹¹ High-quality mediator training, including

¹¹⁰ UN Women & UNFPA. (2015). *Essential Services Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines*. United Nations. Available at: <https://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence>. (Accessed 13/10/2024)

¹¹¹ Ibid

sensitivity to trauma and power imbalances, is critical in GBV instances. Mediators must be prepared to deal with the unique issues that GBV cases bring, such as the psychological and emotional impact on survivors and the possibility of power dynamics influencing the mediation process.

Organizations such as UN Women have stated that mediators in GBV cases must be specifically trained in trauma-informed and survivor-centered methods to mediation. Without this particular training, mediators may unintentionally re-traumatize survivors or fail to address the complexities of abuse and power dynamics. As a result, the Directive's emphasis on mediator competence is a critical component in adapting ADR to GBV cases, matching with global norms for gender-sensitive and trauma-informed mediation. The Directive addresses the enforceability of mediated agreements through Article 6, which allows member states to ensure that mediated settlements are enforceable if both parties agree to the terms. In GBV situations, enforceability must be carefully balanced against respect for the survivor's autonomy. Survivors must be able to withdraw from the mediation process or any agreements reached without fear of repercussions or coercion.

According to the UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Fields of Crime Prevention and Criminal Justice, ADR in GBV cases should be entirely voluntary, with survivors maintaining control of the process, including the right to leave if they feel uncomfortable or unsafe.¹¹² As a result,

¹¹² UNODC, *UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*. United Nations Office on Drugs and Crime, 2014, Available at: https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Model_Strategies_VAW.pdf. (Accessed 13/10/2024)

the Directive's recommendations on enforceability should only be used in GBV instances where survivors freely consent to the terms and retain the right to advocate for their own safety and wellbeing. The Directive also promotes accessible and inclusive ADR processes. Article 5.1 advises that member states "encourage the use of mediation" and make it available to all, including through public awareness.¹¹³ In GBV situations, access to ADR must be combined with access to support services such as counseling, legal aid, and victim advocacy. This complete support allows survivors to make educated decisions about mediation participation and outcomes. In countries where the Directive has been implemented alongside other safeguards, survivors of GBV have benefited from ADR mechanisms linked to social and legal support institutions. For example, in Spain, mediation in domestic abuse cases is strictly controlled, with survivors receiving legal and psychological support throughout the process.¹¹⁴ Such practices support the Directive's goals of accessible ADR and guarantee that survivors have the resources they need to participate in mediation meaningfully and safely.

The EU Mediation Directive, while essentially a framework for civil and commercial disputes, has significant concepts for ADR in cases of GBV, particularly when modified with suitable protections. Emphasizing voluntary participation, confidentiality, mediator training, enforceability, and accessibility, the Directive is

¹¹³ European Parliament and the Council of the European Union. *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters*, Official Journal of the European Union, L 136, 24 May 2008, pp. 3–8. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0052>. (Accessed 13/10/2024)

¹¹⁴ Fernandez-Molina, E. *The Implementation of the Istanbul Convention in Spain: Legal Reforms and Challenges*. *European Journal of Women's Studies*, 27(2), 2020, pp. 221-236.

consistent with worldwide standards such as the Istanbul Convention and the UN Model Strategies, which promote survivor-centered ADR methods in GBV situations. The Directive's adaptability allows states to incorporate ADR into their legal systems as a potential option for survivors seeking resolution outside of the official court system, as long as it is implemented with utmost regard to the survivor's rights and safety. When combined with trauma-informed, gender-sensitive methods, the EU Mediation Directive provides a solid framework for ADR to make important contributions to the global fight against gender-based violence.

3.3.6 The Role of the International Association of Women Judges (IAWJ) Guidelines for Gender Sensitive Justice

The International Association of Women Judges (IAWJ) created the Gender-Based Violence and Justice in the Courts: Gender Sensitivity Training Toolkit to provide practical and concrete guidance to court authorities worldwide.¹¹⁵ This is a comprehensive resource meant to assist judges and legal practitioners in dealing with cases involving gender-based violence (GBV) while remaining sensitive to the special issues that survivors experience. Although primarily concerned with court procedures, the principles articulated in the IAWJ guidelines are extremely important to Alternative Dispute Resolution (ADR) in GBV matters. Encouraging gender-sensitive approaches in ADR proceedings, the IAWJ recommendations hope to ensure that ADR mechanisms respect and emphasize survivor autonomy, safety, and justice. This essay examines how these standards can be used within ADR to improve

¹¹⁵ International Association of Women Judges, *Gender-Based Violence and Justice in the Courts: Gender Sensitivity Training Toolkit*. International Association of Women Judges, 2017, Available at: <https://www.iawj.org/resources/>. (Accessed 14/10/2024)

survivors' access to justice, prevent re- traumatization, and empower women in their pursuit of fair outcomes in GBV cases. The IAWJ guidelines provide an important contribution by emphasizing survivor-centered and trauma- informed approaches to justice. The IAWJ toolbox encourages court officers to understand the psychological and emotional effects of gender-based violence on survivors and to handle such cases with care and respect. In the context of ADR, these principles highlight the importance of mediators and arbitrators using trauma-informed approaches to ensure that survivors feel safe and empowered throughout the dispute settlement process.¹¹⁶

Incorporating trauma-informed approaches into ADR for GBV cases requires mediators to be taught to recognize trauma responses, such as increased anxiety or emotional distress that survivors may exhibit during mediation sessions. This understanding enables mediators to provide a safe environment in which survivors can engage without fear of being re-traumatized. For example, having a peaceful, courteous, and flexible ADR environment gives survivors a sense of control over the process, fostering trust and enabling for a more meaningful examination of settlement choices. This approach is consistent with the UN Women and UNFPA Essential Services Package for Women and Girls Subjected to Violence, which also suggests trauma- informed approaches for ADR practitioners dealing with GBV cases.¹¹⁷

One of the IAWJ guidelines' major tenets is respect for survivors' autonomy and the voluntary character of their participation in legal proceedings, which also extends to ADR. Voluntary engagement is especially important in GBV cases since power

¹¹⁶ Ibid

¹¹⁷ UN Women & UNFPA, *ibid*, n. 110

asymmetries between the survivor and the perpetrator are widespread, particularly in intimate relationship violence settings. Forcing survivors into ADR risks exacerbating power disparities and making survivors feel pushed to accept agreements with which they may not completely agree or feel confident negotiating. The IAWJ guidelines underline that survivors must be given clear information regarding ADR processes, including the opportunity to withdraw at any time. This principle is crucial for preserving the survivor's feeling of agency and allowing them to make informed decisions about whether to continue with ADR. The European Union Mediation Directive 2008/52/EC likewise promotes voluntary mediation and provides a legal framework for guaranteeing that ADR is not imposed on unwilling parties.¹¹⁸ Combining the IAWJ's emphasis on voluntary participation with EU regulations, ADR in GBV cases can provide a more adaptable and survivor-centered approach to justice. The IAWJ toolbox strongly recommends for judges to be trained in gender-sensitive approaches to justice, which includes understanding the social, cultural, and economic elements that lead to gender-based violence and have an impact on survivors' experiences. This emphasis on training applies equally to ADR, where mediators and arbitrators play critical roles in ensuring a fair and balanced process. Understanding gender-specific power dynamics in GBV cases is critical for ensuring that ADR outcomes do not unintentionally benefit the offender or overlook the survivor's needs and rights.

¹¹⁸ European Parliament and the Council of the European Union, *ibid*, n. 113

Gender-sensitive training enables ADR practitioners to identify and rectify power inequalities between the parties. Mediators trained in this method are more suited to reduce the danger of coercion, manipulation, or control by the perpetrator. The UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Fields of Crime Prevention and Criminal Justice also recommend that ADR professionals receive specialized training to handle GBV cases, thereby supporting the gender-sensitive practices promoted by the IAWJ toolkit.¹¹⁹ This method helps to guarantee that the ADR process is fair, respects the survivor's perspective, and avoids reinforcing existing inequities. The IAWJ recommendations underline the significance of survivor safety and anonymity, stating that these are crucial to building trust in the legal system for GBV survivors. Maintaining anonymity in ADR processes is critical for protecting survivors from potential retaliation by the offender and ensuring that sensitive material shared during mediation or arbitration is not used against them in other settings.

Emphasizing secrecy, the IAWJ principles are consistent with Article 7 of the EU Mediation Directive, which states that mediators cannot be forced to reveal information provided during mediation sessions unless all parties agree. Furthermore, maintaining a confidential ADR procedure helps alleviate survivors' anxieties of shame or punishment, resulting in more open and honest communication. This is especially crucial in places where discussing GBV carries social stigma, or where

¹¹⁹ UNODC. (2014). *UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*. United Nations Office on Drugs and Crime. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Model_Strategies_VAW.pdf. (Accessed on 16/10/2024)

survivors may face threats or ostracism from their communities or families for speaking out. The IAWJ toolkit recommends that judges and court officials collaborate with local support services such as legal aid, counseling, and shelters to offer survivors with a complete support system throughout their interactions with the justice system. This approach applies equally to ADR in GBV instances, where connecting survivors to support services can improve their ability to engage meaningfully in ADR and make decisions that benefit their well-being.

Support services can empower survivors by addressing both emotional and practical needs, including information about their rights, emotional support, and resources for safe relocation if necessary. The UN Essential Services Package for Women and Girls Subjected to Violence emphasizes the importance of an integrated support system, calling for ADR processes that link survivors to medical, legal, and psychological resources. Such wraparound programs give survivors the tools they need to pursue justice confidently and safely, boosting the ADR process's effectiveness in combating GBV.

3.3.7 The WHO Guidelines for Mediation in Cases of Intimate Partner and Sexual Violence.

Gender-based violence (GBV), especially intimate partner violence (IPV) and sexual violence, has severe physical, psychological, and social consequences for survivors. In response to the frequency and impact of IPV and sexual assault, the World Health Organization (WHO) issued Responding to Intimate Partner assault and Sexual Violence Against Women: WHO Clinical and Policy Guidelines in 2013. These guidelines define best practices for healthcare providers, policymakers, and

organizations who work with survivors, offering insights that are directly applicable to Alternative Dispute Resolution (ADR) processes. Providing standards for survivor safety, trauma-informed practices, and ethical mediation techniques, the WHO guidelines provide a framework for conducting ADR in GBV situations while respecting survivor autonomy and well-being. This essay investigates how the WHO standards contribute to safe, effective ADR in GBV situations, with a focus on trauma-sensitive methods and ethical concepts that support survivors and prevent re-traumatization.

The WHO guidelines underline that survivors of IPV and sexual violence should not be coerced into mediation or pressured to participate in ADR, despite the possible hazards to survivors of GBV. In cases involving intimate partner or sexual ¹²⁰assault, power dynamics between the parties are frequently drastically skewed, raising the danger of coercion, manipulation, or even revenge. The WHO guidelines align with international principles by encouraging voluntary participation, such as the UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Fields of Crime Prevention and Criminal Justice, which also advocate for voluntary ADR in GBV cases to protect survivors from undue influence or harm.¹²¹In ADR processes, WHO principles can help mediators ensure that survivors enter and remain in mediation of their own free will. Clear procedures should be in place that allow survivors to withdraw from mediation if they feel threatened or intimidated,

¹²⁰ World Health Organization. *Responding to Intimate Partner Violence and Sexual Violence Against Women: WHO Clinical and Policy Guidelines*. WHO Press, Geneva, 2013, Available at: <https://www.who.int/publications/i/item/9789241548595>. (Accessed 14/10/2024)

¹²¹ UNODC, *ibid*, 112

emphasizing the significance of survivor autonomy. Voluntary engagement promotes a sense of control and empowerment, which is critical for survivors who may believe their control was taken away through violence or abuse.

The WHO recommendations place a premium on a trauma-informed approach, highlighting the importance of healthcare practitioners, mediators, and ADR facilitators understanding and accounting for the impact of trauma in their interactions with survivors. Trauma-informed care in ADR guarantees that practitioners foster a supportive environment in which survivors feel valued, validated, and safeguarded from future psychological trauma. Mediators educated in trauma-informed methods are more able to assess and address survivors' emotional and psychological needs. Understanding trauma symptoms, such as increased anxiety, emotional retreat, or trouble making decisions, is part of this training, as is adjusting mediation approaches to meet these needs. Trauma-informed ADR, for example, may include giving survivors more time to analyze and respond to statements, as well as providing survivors with private meetings to discuss concerns away from their abusers. These practices are consistent with the UN Women Essential Services Package for Women and Girls Subjected to Violence, which emphasizes the necessity of trauma-informed approaches in all justice processes handling GBV cases.¹²² The WHO recommendations place a heavy emphasis on secrecy in interactions with survivors, citing it as a vital component in developing trust and guaranteeing survivor

¹²² UN Women & UNFPA, Essential Services Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines. United Nations, 2015, at: <https://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence>.

protection. Confidentiality is also crucial in ADR settings, as survivors' sensitive information must be protected from disclosure in order to guarantee their safety and dignity.

In ADR for GBV cases, confidentiality standards should prohibit the dissemination of any information disclosed during mediation without the survivor's consent. This is consistent with Article 7 of the EU Mediation Directive, which states that material provided during mediation must be kept confidential and not utilized in subsequent legal procedures unless both parties agree. Adhering to stringent confidentiality regulations, ADR practitioners can ensure that survivors feel safe sharing their experiences and seeking solutions without fear of repercussions or shame. Respecting survivor privacy also honors their dignity and acknowledges their right to control information about their own lives and experiences. One of the WHO guidelines' key recommendations is to thoroughly screen for power imbalances when working with survivors of IPV and sexual assault. Power disparities between a victim and their abuser might jeopardize the fairness and effectiveness of the mediation process. In intimate partner assault cases, for example, a survivor may feel threatened or coerced to agree to terms that benefit the offender, especially if there has been a history of control or coercive behavior.

The WHO recommendations propose that ADR practitioners analyze potential hazards and take appropriate action to overcome power inequalities. This could entail holding separate sessions (caucuses) to allow the victim to express their concerns without confronting the perpetrator directly. It may also be necessary to have an advocate or

support person present to provide emotional support to the survivor throughout the process. Deliberately regulating power relations, ADR can become a safer, more balanced procedure that helps survivors achieve fair resolutions. The WHO recommendations also emphasize the significance of cultural sensitivity and understanding of various survivor experiences, recognizing cultural, societal, and personal aspects all influence GBV responses. Cultural sensitivity is critical in ADR because it ensures that the mediation process takes into account the survivor's culture, beliefs, and experiences, which may influence how they see justice and safety.

3.4 Regional Legal Standards and Guidelines for ADR in GBV Cases

The prevalence of gender-based violence (GBV) against women in Africa necessitates the development of effective legal frameworks and alternative dispute resolution (ADR) mechanisms that are specifically adapted to the region's distinct socio-cultural and legal contexts. Regional frameworks offer critical guidelines for states to address gender-based violence (GBV) through diverse justice mechanisms, including alternative dispute resolution (ADR), which may be less formal and more accessible than conventional court systems. The role of ADR in addressing GBV is enhanced by the initiatives of the African Union and various regional legal frameworks, including the Maputo Protocol, the African Charter on Human and Peoples' Rights, and the SADC Protocol on Gender and Development. This essay examines the role of regional instruments in supporting alternative dispute resolution (ADR) mechanisms that empower survivors of gender-based violence (GBV), emphasizing victim-centered, culturally sensitive, and legally grounded approaches.

3.4.1 The Maputo Protocol Addresses the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, known as the Maputo Protocol, is a significant regional treaty that protects the rights of women in Africa. Established in 2003 and implemented in 2005, the Protocol requires African states to implement substantial actions to address discrimination and violence against women. The Maputo Protocol is significant for its clear provisions addressing gender-based violence (GBV) and its advocacy for accessible justice, prompting African states to explore and adopt alternative dispute resolution (ADR) mechanisms in their efforts to protect and empower survivors of GBV.

Article 4 of the Maputo Protocol mandates that states implement specific legal measures to safeguard women against violence. This article requires the implementation of mechanisms enabling women to live free from violence and promotes the creation of accessible justice systems that consider the specific challenges encountered by survivors of gender-based violence, such as stigmatization, trauma, and financial or geographic obstacles that hinder access to formal justice systems. The Protocol establishes a framework that allows member states to incorporate ADR mechanisms in GBV cases as a component of a comprehensive strategy to improve access to justice.¹²³

One of the central elements of the Maputo Protocol is its emphasis on accessible justice systems for women, as articulated in Article 8. This article's language encompasses

¹²³ Article 4 of the Maputo Protocol, 2003

both traditional courts and alternative justice mechanisms, including mediation, conciliation, and arbitration. In the context of gender-based violence, alternative dispute resolution provides a feasible avenue for justice for survivors who may be reluctant or unable to participate in formal court systems due to geographical barriers, financial limitations, or the daunting characteristics of conventional judicial procedures.¹²⁴ ADR mechanisms serve as tools for empowerment. ADR facilitates adaptable, survivor-focused methods for resolving conflicts. Mediation enables survivors of gender-based violence to engage in discussions regarding reparations or resolutions directly with perpetrators in secure and facilitated environments, fostering empowerment and restoration. ADR practices frequently function beyond the confines of formal judicial processes, allowing for adaptability, confidentiality, and the integration of culturally sensitive approaches that uphold women's rights. The Protocol prioritizes accessible justice, consistent with international guidelines that identify alternative dispute resolution (ADR) as a crucial element of an inclusive justice framework, particularly for marginalized communities. The Maputo Protocol recognizes ADR as a component of "accessible justice," enabling member states to establish non-court mechanisms that remain legally binding, enforceable, and supported by national and regional legal authorities.¹²⁵ The adaptability in legal enforcement is crucial for states tackling gender-based violence in regions with restricted formal judicial systems.

¹²⁴ Article 8 of the Maputo Protocol, *ibid*, n. 125

¹²⁵ *Ibid*

The Maputo Protocol is strategically significant in shaping the cultural and legal framework in Africa, as it explicitly acknowledges the role of cultural contexts in influencing women's experiences of justice. Cultural sensitivity can inform the design and implementation of ADR mechanisms in African states, enhancing both accessibility and alignment with local values and customs. Article 17 of the Protocol advocates for the promotion of positive cultural values grounded in the principles of equality, peace, freedom, dignity, and justice. This emphasizes the necessity for justice processes that honor the lived experiences and traditions of African women. Cultural considerations play a significant role in alternative dispute resolution (ADR) mechanisms. Considering the diversity of African societies, alternative dispute resolution facilitates community-based approaches in gender-based violence cases. Community elders or leaders can receive training in gender-sensitive practices and be incorporated into Alternative Dispute Resolution (ADR) procedures, thereby enhancing the comfort and support experienced by survivors. This method is especially effective in rural and underserved regions, where community leaders significantly influence dispute resolution processes. The Maputo Protocol mandates that community-based processes must fully safeguard women's rights and refrain from reinforcing patriarchal norms or coercing survivors into settlements.

Moreover, ADR in GBV cases should be executed by mediators and facilitators who possess training in gender sensitivity and trauma-informed care. The Maputo Protocol recognizes that effectively addressing gender-based violence necessitates an understanding of power imbalances, trauma, and the intricate dynamics between survivors and perpetrators. This requirement is consistent with the directives from the

United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), emphasizing that alternative dispute resolution mechanisms in gender-based violence cases must be voluntary, safeguard the survivor, and be devoid of coercion. The Maputo Protocol advocates for the implementation of training programs for ADR facilitators, focusing on gender sensitivity, trauma effects, and ethical standards to ensure the safe application of ADR. This is particularly significant in cases of gender-based violence involving intimate partner violence, where the survivor may encounter persistent threats and manipulation from the perpetrator. Training equips ADR professionals to identify signs of coercion or intimidation, thereby safeguarding survivors and establishing ADR as a viable and secure alternative.¹²⁶

The Maputo Protocol establishes a comprehensive framework for African nations to tackle gender-based violence through alternative dispute resolution. The provisions regarding accessible justice and attention to cultural and gender issues provide a clear directive for states to incorporate ADR into their justice systems, ensuring that these mechanisms uphold women's rights. The Maputo Protocol advocates for a balance between cultural respect and compliance with international human rights standards in the promotion of ADR for GBV cases. ADR mechanisms established under the Protocol offer a more expedient, informal, and potentially empowering avenue for justice for survivors of GBV throughout Africa. The Protocol enhances accessibility and safety for survivors by prioritizing survivor autonomy, cultural sensitivity, and gender-sensitive training in the development of ADR frameworks. The Maputo

¹²⁶ Maputo Protocol, *ibid*, article 15 - 24

Protocol serves as a significant instrument for justice reform in Africa, promoting accessible, culturally relevant, and survivor-centered approaches to gender-based violence (GBV).

3.4.2 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights, known as the Banjul Charter, was adopted in 1981 and serves as a foundational human rights instrument in Africa. While it does not directly address gender-based violence (GBV) or alternative dispute resolution (ADR), the provisions concerning human dignity, equality, and access to justice offer a substantial foundation for interpreting the Charter's endorsement of ADR in GBV cases. The Charter underscores the right to a fair hearing and advocates for justice, thereby implicitly endorsing ADR as a supplementary mechanism to formal justice systems when suitable, ensuring that justice remains accessible, equitable, and considerate of survivors' needs.

Article 7 of the Banjul Charter is essential in promoting the right to access justice, highlighting individuals' rights to have their cases adjudicated, to engage in a fair judicial process, and to appeal unfavorable decisions. This article emphasizes the accessibility of justice, suggesting that ADR mechanisms may facilitate meaningful access to justice for survivors of GBV. Many survivors of gender-based violence find traditional court systems to be inaccessible due to factors such as intimidation, financial burden, or the risk of re-traumatization. ADR provides a more expedient and supportive avenue for achieving resolutions that maintain the dignity of survivors and

respect their individual circumstances. The¹²⁷ Charter's emphasis on the right to dignity and respect for individual humanity is consistent with the application of ADR in cases of GBV. Alternative Dispute Resolution (ADR) can be designed to mitigate the adversarial characteristics of formal litigation, providing an environment where survivors are respected and enabled to engage in the justice process. This process can be trauma-informed, minimizing the risk of re-traumatization by enabling survivors to address grievances within a controlled and supportive environment. Additionally, ADR mechanisms designed for GBV cases provide privacy and confidentiality, which are often sought by survivors. The interpretation of Article 7 in favor of ADR is consistent with other international legal frameworks, including the UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendations, which emphasize the necessity of providing accessible justice mechanisms that address the needs of survivors. When ADR is voluntary and honors the survivor's autonomy, it serves as an effective mechanism for justice aligned with the principles of fairness and equity outlined in the Charter.

Article 2 of the African Charter mandates equality and prohibits discrimination, establishing a framework for the development of gender-sensitive alternative dispute resolution mechanisms. Gender sensitivity is essential in alternative dispute resolution, as gender-based violence cases frequently entail power imbalances between survivors and perpetrators. The Charter integrates principles of equality into ADR practices, thereby establishing mechanisms that safeguard survivors from coercion and intimidation, ensuring equitable and impartial proceedings. The Charter's emphasis on

¹²⁷ Ibid

non-discrimination and justice is consistent with CEDAW's recommendations regarding gender-sensitive justice. CEDAW emphasizes the necessity for justice systems to cater to the distinct needs and challenges faced by survivors, including the impacts of trauma, emotional vulnerability, and the requirement for confidentiality. ADR mechanisms based on these principles would emphasize the well-being of survivors, providing support and accommodations that consider the power dynamics present in GBV cases. The Charter's focus on equitable treatment requires training for ADR facilitators to comprehend the complexities of gender-based violence, including the dynamics of control and trauma. ADR practitioners require specialized training in gender-sensitive methodologies to ensure that ADR mechanisms effectively and safely serve survivors. This guarantees that ADR processes uphold respect, confidentiality, and support, consistent with the human rights principles outlined in the Charter.

3.4.3 (SADC) Protocol on Gender and Development

The Southern African Development Community (SADC) Protocol on Gender and Development, established in 2008, serves as a detailed regional framework focused on eliminating gender-based violence (GBV) against women and advancing gender equality. The SADC Protocol does not explicitly mandate ADR mechanisms; however, it urges member states to develop “effective, responsive, and accessible” legal systems for women, thereby establishing a foundation for ADR as a viable complement to formal judicial processes in cases of GBV.

Article 20 of the SADC Protocol emphasizes the necessity of accessible justice systems, promoting women's access to legal remedies in instances of gender-based

violence (GBV).¹²⁸ When designed to be voluntary, safe, and centered on the survivor, ADR fulfills accessibility requirements by offering a less intimidating alternative to the formal court system. This is particularly beneficial for survivors who may experience concerns regarding retaliation, stigmatization, or financial burdens linked to conventional litigation. The SADC Protocol underscores the significance of safety and responsiveness, emphasizing the necessity of ADR processes that enable survivors to maintain control and autonomy throughout the proceedings. Effective ADR mechanisms under the Protocol would prevent coercion, ensuring that survivors participate in these processes voluntarily and with complete awareness of their rights. This is consistent with CEDAW's recommendations regarding alternative dispute resolution in gender-based violence cases, emphasizing that such processes should empower survivors rather than coerce them into settlement.

South Africa exemplifies a legal system that incorporates ADR protocols in domestic violence cases, prioritizing safety and voluntariness as fundamental principles. The Domestic Violence Act of 1998 in South Africa permits mediation under certain conditions, contingent upon the survivor's informed consent and the assessment of safety. This approach is consistent with the provisions of the SADC Protocol, promoting an accessible justice system that emphasizes the protection of survivors. The SADC Protocol mandates that states offer comprehensive support services for survivors of gender-based violence, including medical, psychological, and legal assistance. Integrating ADR mechanisms with support services enhances the ability to

¹²⁸ The Southern African Development Community (SADC) Protocol on Gender and Development, 2008

address the holistic needs of survivors. Access to legal and psychological support during alternative dispute resolution processes ensures that survivors are adequately informed and feel supported throughout the resolution process.

Holistic support in Alternative Dispute Resolution (ADR) mechanisms integrates counseling, legal advocacy, and medical assistance, enabling survivors to participate effectively in the justice process. Incorporating legal aid into alternative dispute resolution can empower survivors by ensuring their comprehension of rights and the implications of agreements reached. Providing counseling services can reduce the emotional impact of interactions with perpetrators, thereby supporting a healing process that is consistent with the Protocol's comprehensive approach to addressing gender-based violence (GBV).¹²⁹ Numerous nations within the SADC region have initiated efforts to integrate ADR with support services. Zimbabwe's One-Stop Centers provide survivors of gender-based violence with access to multiple services, such as legal aid, counseling, and health care. These centers illustrate the potential of integrated ADR models that are supportive, accessible, and empowering for survivors, consistent with the objectives of the SADC Protocol. The African Charter on Human and Peoples' Rights and the SADC Protocol on Gender and Development establish a robust framework for the implementation of Alternative Dispute Resolution in gender-based violence cases across Africa. The African Charter's emphasis on dignity, equality, and access to justice endorses Alternative Dispute Resolution (ADR) as a supplementary mechanism that can empower survivors and offer accessible justice

¹²⁹ Develop a One Stop Centre, <https://www.spotlightinitiative.org/develop-one-stop-centre#:~:text=The%20One%20Stop%20Centre%20provides,legal%20support%20and%20police%20support>. (Accessed 12/10/2024)

alternatives. The SADC Protocol emphasizes the importance of accessible and responsive legal systems for women, highlighting the potential of Alternative Dispute Resolution (ADR) to provide safe, voluntary, and supportive mechanisms for addressing gender-based violence (GBV). When implemented with an emphasis on gender sensitivity, cultural appropriateness, and survivor-centered principles, ADR serves as an effective mechanism for justice that is consistent with the human rights principles of the African Charter and the gender justice objectives of the SADC Protocol. The regional frameworks prioritize legal access, holistic support, and survivor protection, thereby promoting more inclusive and responsive justice systems for GBV survivors throughout Africa.¹³⁰

3.4.4 African Union's Guidelines for Gender Equality and Women's Empowerment

The African Union has also created Guidelines on Gender Equality and Women's Empowerment, which help to build a supportive regional framework for ADR in GBV cases. These rules prioritize gender equality and the protection of women's rights, particularly the right to be free of violence. Although these recommendations are not legally enforceable, they establish important norms for member states in advancing women's rights and can influence the adoption of gender-sensitive ADR methods. The AU guidelines emphasize the need of gender equality in achieving fair and successful ADR in GBV cases. The principles promote equality in justice proceedings, encouraging ADR practices that consider the survivor's perspective and needs. Under these recommendations, ADR mechanisms are encouraged to treat survivors

¹³⁰ Ibid

with dignity and respect, while ensuring that mediation and other ADR approaches do not jeopardize women's rights or allow abusers to avoid punishment.

The AU guidelines also emphasize the necessity of training justice practitioners on gender sensitivity. This is especially essential in ADR, where mediators play an important role in fostering fair and balanced sessions. These guidelines assist prevent secondary victimization by training ADR practitioners to understand gender dynamics and the psychological effects of GBV. They also ensure that ADR is survivor centered. Such training is vital for fostering an environment in which survivors feel heard and supported throughout the ADR process.

3.5 Conclusion

This chapter analyzed the role of international and regional standards in facilitating alternative dispute resolution (ADR) for addressing gender-based violence (GBV). Global frameworks such as the UN Model Strategies and CEDAW established a basis for safe, voluntary, and gender-sensitive alternative dispute resolution mechanisms. Regional frameworks, including the Maputo Protocol African Charter, and SADC Protocol, strengthen these principles in African contexts, promoting culturally attuned, accessible justice solutions. The guidelines prioritize voluntary, survivor-centered alternative dispute resolution and promote the provision of support services, including legal aid and counseling. This model integrates a rights-based and culturally sensitive approach to alternative dispute resolution, thereby promoting justice and healing for survivors of gender-based violence.

CHAPTER FOUR

ADR FRAMEWORKS FOR GENDER-BASED VIOLENCE AGAINST WOMEN IN TANZANIA

4.1 Introduction

This chapter examines the role of alternative dispute resolution (ADR) frameworks in addressing gender-based violence (GBV) against women in Tanzania, highlighting both international and national instruments that advocate for survivor-centered justice. Given the prevalence of GBV in Tanzania, ADR offers a viable approach to improve access to justice, particularly in marginalized communities where formal court systems may be unavailable. This chapter analyzes Tanzania's incorporation of global standards such as CEDAW and the Maputo Protocol within its legal framework, focusing on their priorities of safety, voluntary participation, and cultural sensitivity. This chapter assesses the effectiveness and accessibility of ADR in aiding survivors of GBV. This chapter examines the role of alternative dispute resolution (ADR) frameworks in addressing gender-based violence (GBV) against women in Tanzania, highlighting both international and national instruments that advocate for survivor-centered justice. Given the prevalence of GBV in Tanzania, ADR offers a viable approach to improve access to justice, particularly in marginalized communities where formal court systems may be unavailable. This chapter analyzes Tanzania's incorporation of global standards such as CEDAW and the Maputo Protocol within its legal framework, focusing on their priorities of safety, voluntary participation, and cultural sensitivity. This chapter assesses the effectiveness and accessibility of ADR in aiding survivors of GBV.

4.2 Introduction to ADR and Gender-Based Violence in Tanzania

Alternative Dispute Resolution (ADR) processes are becoming more important in Tanzania's efforts to combat gender-based violence. ADR involves resolving conflicts outside of typical legal systems, such as mediation, negotiation, and arbitration. ADR's flexibility and community-centered approach are well suited to Tanzania's socio-cultural milieu, where traditional legal systems and local customs play an important part in dispute settlement.

4.2.1 Overview of ADR Mechanisms

The evolution of Alternative Dispute Resolution (ADR) in Tanzania is a synthesis of indigenous customs, colonial legal systems, and modern legislative frameworks. This unique blend highlights Tanzania's rich historical and cultural context, which has influenced the country's ADR mechanisms over time. Initially, ADR was strongly ingrained in traditional Tanzanian societies, where indigenous conflict resolution procedures were common even before colonialism. These early systems emphasized the value of communal peace, reconciliation, and restorative justice, with village elders, clan leaders, or recognized community members frequently acting as mediators or arbitrators. Disputes were handled during community gatherings through negotiation, mediation, and conciliation, with a focus on social cohesion rather than punitive measures.¹³¹ This strategy made indigenous ADR methods very adaptable to a wide range of disputes, including family and land issues, while also ensuring that they were culturally specific and respectful of different ethnic norms.

¹³¹ McQuoid-Mason, D. Could traditional dispute resolution mechanisms be the solution to reducing the volume of litigation in post-colonial developing Countries – Particularly in Africa? *OÑATI SOCIO-LEGAL SERIES*, VOLUME 11, ISSUE 2, 2021, pp. 589–604

The introduction of colonial forces in Tanzania constituted a watershed moment, introducing Western-style litigation and formal legal institutions that changed the landscape of dispute settlement. German and then British colonial authorities developed official courts, eliminating traditional dispute resolution procedures and relegating customary law to specific sectors like as family, marriage, and land.¹³² While the British colonial administration followed an indirect rule approach that allowed for some integration of customary law, this tolerance was limited. Despite these limits, customary practices persisted, particularly in rural communities where informal dispute settlement was crucial. The colonial period also established formal arbitration, primarily for economic disputes, establishing the groundwork for future ADR regimes. Nonetheless, the formal judicial system was essentially unavailable to most Tanzanians, as it was complex, contentious, and primarily conducted in English, limiting involvement by non-English speakers.¹³³

Following independence in 1961, Tanzania took measures to formalize indigenous customs inside its legal system. The government enacted the Judicature and Application of Laws Act (JALA),¹³⁴ which allows for the ongoing use of customary procedures, particularly in personal and family law cases, primarily helping rural communities. This Act took an important step toward legitimizing ADR by legally recognizing the role of traditional dispute settlement in Tanzania's legal framework. ADR methods gained popularity during the independence era because to their ease of

¹³² Bennett, T., Access to Justice and human rights in the traditional courts of sub-Saharan Africa. In: T. Bennett et al., eds., *African Perspectives on Tradition and Justice*. Antwerp: Intersentia, 2012, p. 19

¹³³ Ibid

¹³⁴ JALA. 1961

use, low cost, and ability to promote communal harmony.¹³⁵ Arbitration processes developed during the colonial period continued to affect ADR, particularly in civil and commercial disputes, preserving a balance between conventional and formal techniques. Tanzania's ADR experienced significant institutional restructuring in the late twentieth century. During the 1980s and 1990s, the Civil Procedure Code of 1966 was changed to promote the use of ADR, notably mediation and arbitration, in civil cases. These modifications were part of a larger judicial reform package aimed at reducing court backlogs and enhancing access to justice. Notably, the Commission for Mediation and Arbitration (CMA) was established under the Labour Institutions Act of 2004 to resolve labour disputes through conciliation and arbitration, indicating a significant step toward institutionalizing ADR as an effective complement to litigation. Tanzania has continued to enhance ADR through new legislation and policy efforts. The Arbitration Act¹³⁶ greatly changed the country's legal system by modernizing arbitration provisions and bringing them in line with worldwide standards. ADR has since been used to resolve a broader range of disputes, including gender-based violence (GBV), land difficulties, and business disagreements. Government agencies, civic society, and legal aid organizations have all pushed ADR as a realistic instrument for improving access to justice for underprivileged populations, particularly in rural areas where the official court system is less accessible. ADR approaches, including as mediation, arbitration, and traditional conflict resolution, are now widely recognized and being integrated into Tanzania's legal education programs and community outreach projects, reaffirming their importance in improving judicial efficiency.

¹³⁵ Ibid

¹³⁶ Cap. 15, R.E. 2019

Today, ADR is not only a tool for reducing court congestion, but it also provides a path to social justice, particularly for vulnerable populations such as GBV survivors and rural communities. Mediation is one of the most popular ADR strategies in Tanzania. Mediation is a process in which a neutral third-party mediator conducts negotiations between opposing parties to help them reach a mutually accepted agreement.¹³⁷ In cases of GBV, mediators frequently attempt to create a secure environment that promotes open discussion and allows survivors to express their concerns without fear of retaliation. Arbitration, although less common in GBV cases, arbitration is a formal ADR process in which an arbiter hears both sides and renders a binding ruling. In cases of GBV, arbitration may be used to resolve property issues or financial settlements related to violence or abuse. Negotiation is a direct, informal process that allows the conflicting parties to come to an agreement, frequently with the help of community leaders or counsellors. Negotiation is very beneficial in Tanzania for settling familial and marital problems since it develops cooperation and frequently leads to longer-term outcomes. Traditional and Community-Based Approaches engages Traditional councils or elders' gatherings are frequently used as a form of ADR in rural and local communities, particularly when dealing with family issues and certain types of violence.¹³⁸ These settings provide a culturally sensitive approach to gender-based violence, emphasizing respect for local norms and values. Conciliation, like mediation, involves a conciliator who helps the warring parties identify areas of

¹³⁷ BEDA, D. Assessment of The Implementation of Mediation as an Alternative Dispute Resolution in Litigation Process in Tanzania: A Case of High Court in Mwanza Registry, Master of Arts in Peace and Security Studies (MPSS) of the Institute of Accountancy Arusha, 2023, p. 13

¹³⁸ Otieno, H.J., 2016 The Effectiveness of Traditional Dispute Resolution Mechanism in Facilitating Women's Access to Justice in Land Disputes [online]. LLB Research Dissertation. University of Nairobi, pp. 19–20

agreement and viable solutions.¹³⁹ This strategy is frequently used to reduce tensions, especially in situations where emotions are high, as in many GBV disputes.

ADR processes offer an alternative to the conventional judicial system, which can be expensive, sluggish, and often unavailable to GBV survivors, particularly those living in rural or marginalized areas. ADR provides greater privacy, speedier resolutions, and a less frightening environment than courts, which might be critical for GBV survivors who would otherwise avoid official procedures due to fear or stigma.

4.2.2 Brief Context on GBV Prevalence and Challenges in Tanzania

Gender-Based Violence (GBV) is still a major issue in Tanzania, offering enormous social, legal, and public health challenges. Despite legal frameworks and policies aimed at preventing and addressing gender-based violence, cultural norms, inadequate resources, and enforcement gaps continue to impede effective responses. GBV is frighteningly widespread across all age categories and demographics in Tanzania, emphasizing the importance of strong prevention measures and victim care networks. According to the Tanzania Demographic and Health Survey, over 40% of women aged 15 to 49 had suffered physical violence at least once in their lives, demonstrating the prevalence of such violence in Tanzanian culture.¹⁴⁰ Furthermore, roughly 17% of these women reported experiencing sexual violence. These data show a significant threat to women's physical and mental health, stressing the importance of policies that address core causes and properly enforce protective laws.¹⁴¹

¹³⁹ BEDA, *ibid.* n. 137, p. 14

¹⁴⁰ Tanzania Demographic and Health Survey (TDHS) from 2015-2016

¹⁴¹ *Ibid*

Similarly, the National Survey on Violence Against Children, undertaken by UNICEF in partnership with the Tanzanian government, found disturbing data on child abuse. According to the poll, about three in ten girls and one in seven boys had experienced sexual violence before the age of eighteen.¹⁴² The high rate of sexual abuse among adolescents calls for increased community awareness, greater legal safeguards, and effective procedures to detect and prevent violence against children.

Combating Gender-Based Violence (GBV) in Tanzania is difficult due to cultural, systemic, and logistical factors that undermine the country's legal and policy framework, which includes the Sexual Offences Special Provisions Act,¹⁴³ the Law of the Child Act of 2009, and the National Plan of Action to End Violence Against Women and Children.¹⁴⁴ Men are usually portrayed as dominant actors in family and community settings, justifying violence against women, particularly in home environments, which are frequently seen as private concerns. This assumption leads to low reporting rates, preventing many victims from seeking justice. The societal stigma surrounding GBV, particularly sexual violence, causes social isolation for survivors and frequently lays responsibility on victims themselves, prohibiting many from coming forward owing to fears of retaliation and a lack of proper witness protection procedures. Furthermore, poor access to justice, particularly in rural regions, presents a substantial barrier, as rural victims confront logistical and financial difficulties in accessing urban-centered judicial systems. The lack of skilled people in rural areas, combined with a scarcity of resources, exacerbates the problem, resulting in

¹⁴² ¹⁴²National Survey on Violence Against Children (VACS) 2009

¹⁴³ (SOSPA) of 1998

¹⁴⁴ (2017-2022).

inconsistent implementation of GBV legislation.¹⁴⁵ Law enforcement officers, who frequently lack specific training in dealing with GBV cases, are usually ill-equipped to provide the essential assistance, and insufficient resources impede community awareness programs that could otherwise promote respect for victims' rights. Furthermore, the lack of a specific domestic violence law, as well as the fragmented application of existing provisions in the Law of Marriage Act and the Penal Code, complicate efforts to protect victims, particularly minors, who are vulnerable due to loopholes that permit child marriage under certain conditions. To effectively address gender-based violence in Tanzania, comprehensive approaches involving legal reforms, increased community education, increased funding for GBV prevention, and specific training for law enforcement and judicial personnel are required to build a supportive justice system that prioritizes survivors and promotes gender equality.

4.2.3 Importance of ADR in Addressing GBV in Marginalized Communities

Alternative Dispute Resolution (ADR) is critical in combating gender-based violence (GBV) in Tanzania, particularly for vulnerable communities that face socio-cultural and systemic barriers within established legal systems. One of the most significant benefits of ADR is its accessibility, especially for people in remote areas who may lack the financial resources, transportation, or experience to traverse traditional judicial systems. Mediation and community-based dispute resolution are often less expensive and can take place locally, making them more accessible to victims who would otherwise be discouraged by practical barriers. Furthermore, ADR is frequently founded in local practices, which increases its cultural sensitivity and acceptance in

¹⁴⁵ VACS, *ibid*

groups skeptical of formal legal institutions. ADR creates a familiar setting for victims by involving recognized community figures such as elders as mediators, encouraging open communication and reconciliation in line with community values. ADR's non-adversarial nature contrasts with the confrontational atmosphere of traditional litigation, allowing for communication and mutual agreement, which reduces trauma and promotes healing. ADR also empowers victims by participating them actively in the dispute resolution process, fostering a sense of agency and control that is essential for recovery. Its secrecy allows victims to seek aid without fear of being exposed or stigmatized.¹⁴⁶ Furthermore, ADR frequently yields faster resolutions than regular court proceedings, which is critical in GBV situations where delays can increase suffering. Another distinguishing feature of ADR is its holistic approach to healing, which includes counseling and support services for survivors, as well as addressing the underlying causes of violence and preventing future episodes. While ADR is not a replacement for formal legal systems, it does supplement current frameworks by providing alternate avenues to justice, especially for individuals who are afraid to interact with the formal system for fear of retaliation.¹⁴⁷ ADR makes a significant contribution to addressing GBV in Tanzania by providing accessible, culturally relevant, and powerful resolution procedures. It creates a safe space for victims seeking justice while also promoting community healing and reconciliation, making it a crucial component of larger efforts for advancing gender equality and preserving vulnerable individuals' rights.

¹⁴⁶ Zack, A.M., "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", 136 (1) (Spring), *International Labour Review*, 1997, p.95,

¹⁴⁷ *Ibid*

4.3 National Legal Framework for ADR in Tanzania

The national legal framework for Alternative Dispute Resolution (ADR) is influenced by a variety of laws and policies aimed at providing methods for settling conflicts outside traditional judicial systems. This approach is critical for tackling issues such as gender-based violence (GBV) by providing accessible and culturally acceptable remedies.

4.3.1 Arbitration Act, 2020¹⁴⁸

The 2020 Arbitration Act regulates Alternative Dispute Resolution (ADR) in Tanzania, primarily by encouraging arbitration as a favoured method of settling various conflicts. This Act modernizes and consolidates the legal framework for arbitration, aligning it with worldwide norms while also meeting local needs. The following is a thorough examination of how the Arbitration Act administers ADR in Tanzania, highlighting major clauses and significant cases. The Scope of Application specified in Section 2 states that the Act apply to all arbitration agreements, including commercial disputes, family concerns, and GBV-related issues. This broad applicability creates a framework for both domestic and international arbitration, allowing parties to resolve disputes effectively. For example, firms in Tanzania can use arbitration to resolve conflicts rather than traditional court processes.

Section 5 focuses on the Arbitration Agreement and requires that such agreements be in writing. This can be a single document or put within a contract. This provision improves contract clarity and enforcement by requiring parties to explicitly consent to

¹⁴⁸ Act No. 2 of 2020

arbitration. For instance, when a contractor and a client enter into a contract that includes an arbitration clause, any arising disputes can be resolved through arbitration, circumventing lengthy court litigation. Sections 9– 12 of the Act further outline the Appointment of Arbitrators** process, including the credentials required for appointment. This flexibility enables parties to select either a single arbitrator or a panel, depending on the complexity of the dispute. This is especially significant in GBV instances, where a sophisticated understanding of the issues at hand is required. To achieve a fair resolution, parties may choose an arbitrator who specializes in gender issues. Sections 18–20 of the Powers of Arbitrators give arbitrators broad authority to control the arbitration procedure. This includes the authority to hold hearings, compel document production, and give interim awards. This flexibility is essential for adapting the arbitration procedure to the specific circumstances of each case. An arbitrator dealing with a GBV case may emphasize confidentiality and employ a non-adversarial approach to ensure the victim feels secure during the proceedings. One of the primary benefits of arbitration, as stated in Section 22, is the Confidentiality of Proceedings. The Act expressly states that arbitration proceedings must remain secret unless the parties agree otherwise. This is particularly significant in GBV cases, where survivors may be hesitant to disclose their experiences due to the fear of societal stigma. The confidentiality clause provides a safe space for victims to share their situations without the risk of public exposure, thereby encouraging them to pursue justice through arbitration.

The Act also addresses the Recognition and Enforcement of Awards in Sections 36 to 38, affirming that arbitration awards are enforceable in Tanzania, with limited grounds

for contestation. This provision enhances the legitimacy of arbitration as a dispute resolution mechanism, assuring parties that their agreements will be honoured. For instance, if an arbitration award mandates that a perpetrator of GBV provide restitution to the survivor, this decision can be enforced by Tanzanian courts, thus ensuring accountability. Furthermore, Sections 43 to 44 discuss the Appeal Process, limiting the grounds for appealing arbitration awards to promote finality and efficiency in dispute resolution. This limitation encourages parties to resolve their conflicts through arbitration instead of engaging in prolonged court battles. For example, a victim of GBV opting for arbitration can expect a quicker resolution, alleviating the uncertainty often associated with traditional court appeals. The Arbitration Act, significantly shapes the landscape of ADR in Tanzania by offering a structured, efficient, and culturally sensitive framework for resolving disputes, including those related to GBV. Focusing on written agreements, ensuring confidentiality, appointing qualified arbitrators, and providing for the enforcement of awards, the Act enhances the accessibility and effectiveness of arbitration as a viable alternative to conventional court proceedings. This legislative framework supports broader initiatives aimed at empowering victims and fostering gender equality within Tanzania's legal context.

4.3.2 The Law of Marriage Act¹⁴⁹

The Law of Marriage Act controls several areas of Alternative Dispute Resolution (ADR) in Tanzanian marriage and family conflicts. This Act includes legislative provisions that enable ADR processes, such as reconciliation and mediation, to address

¹⁴⁹ The Law of Marriage Act of 1971, Cap. 29

marital issues in culturally sensitive, cheap, and accessible ways, therefore decreasing the need for formal litigation. The following is an analysis of how the Law of Marriage Act combines ADR ideas and processes, with specific clauses and practical examples. The Law of Marriage Act stresses reconciliation as the preferable means of settling marital disputes before formal court action is taken. Section 101 requires parties seeking divorce or separation to make attempts toward reconciliation. This clause clearly states that when a court receives a divorce petition, it must submit the case to a Marriage Conciliatory Board unless there are extraordinary circumstances, such as violence or an irreversibly shattered marriage. For example, if a couple is experiencing nonviolent marital conflict, the court will refer them to a local conciliatory board for mediation. A board of respected community people would work with the parties to settle the difficulties amicably, potentially saving the marriage while avoiding the emotional and financial burdens of a legal divorce case. Sections 102 and 103 of the Act establish Marriage Conciliatory Boards, which play an important role in alternative conflict resolution for marriages. These boards are made up of members nominated by the community, who are often conversant with local customs and practices. The boards' goal is to promote conversations and seek settlements that are acceptable to all parties, with a focus on preserving family unity if possible. The conciliation process is less formal than court proceedings, making it a more accessible option for parties who are unfamiliar with legal procedures. For example, a couple facing communication issues or financial difficulties can benefit from the conciliatory board's advice on reaching concessions, thereby sustaining the marital partnership.

Section 106 requires that a conciliation board certificate be obtained before a divorce petition is submitted in court. This certificate shows that the parties attempted conciliation but were unable to reconcile their differences. This requirement emphasizes the law's preference for ADR processes, ensuring that spouses genuinely consider reconciliation before pursuing litigation. For example, if a husband and wife seek divorce due to ongoing arguments about money management, they must submit a conciliatory board certificate while filing for divorce in court. This provision may encourage parties to engage in meaningful reconciliation attempts, minimizing the number of cases that end up in costly and confrontational court proceedings. Section 107 of the Law of Marriage Act empowers courts to arbitrate disputes between spouses who come before the court, particularly those involving support, custody, or matrimonial property. This mediation method incorporates an ADR approach within the judicial system, allowing judges or court-appointed mediators to support mutually beneficial agreements without requiring a full trial. For example, in a custody battle during a separation, the court can mediate to help parents reach an arrangement that prioritizes the child's best interests. This mediation procedure lessens the emotional toll of combative litigation while allowing for a more collaborative approach to delicate family concerns.

The Law of Marriage Act indirectly promotes ADR by upholding family values and local customs during dispute settlement. Sections throughout the Act acknowledge the importance of elders and community leaders in directing marital concerns, recognizing that these people can provide culturally appropriate assistance. By adding ADR processes that are consistent with Tanzanian cultural norms, the Act makes ADR

more acceptable and accessible to the community, particularly for those who are uncomfortable with the formal legal process. A family undergoing a marital split, for example, may want to confer with a local elder or community leader who is familiar with their background and family dynamics before going to court. This cultural sensitivity in ADR encourages responses that are consistent with society and family standards, improving the chance of compliance and satisfaction. Sections 115 and 125 establish ADR processes for resolving concerns of spousal and child maintenance, as well as custody agreements. The legislation encourages parties to establish solutions on certain concerns by peaceful ways, with little court interference. Courts frequently facilitate mediation to assist spouses in resolving these concerns outside of court, which is especially effective in reducing court caseloads and speeding up outcomes. For example, instead of going to court, a split spouse may use mediation to determine the father's financial obligations to the children. Mediation allows both parties greater latitude in formulating an agreement that is tailored to their individual circumstances. The Law of Marriage Act incorporates ADR as a critical component in resolving marital problems in Tanzania, particularly through its emphasis on reconciliation and mediation. The Act encourages accessible and effective dispute resolution processes that prioritize family unity and cultural values by establishing Marriage Conciliatory Boards, imposing conciliation criteria, and encouraging culturally aligned settlements. By establishing ADR proceedings prior to litigation, the Act not only relieves burden on the formal judicial system, but also promotes resolutions that are more likely to be long-term and satisfying to all parties.

4.3.3 National Plan of Action to End Violence Against Women and Children in Tanzania¹⁵⁰

The National Plan of Action to End Violence Against Women and Children (NPA-VAWC) is a critical framework for Tanzania's violence prevention and response efforts. Embracing Alternative Dispute Resolution (ADR) as a fundamental component, the plan aims to increase access to justice for survivors of abuse by providing culturally sensitive and effective paths. ADR procedures under the NPA-VAWC are noted for their capacity to deliver prompt, community-based remedies that help victims avoid additional stress. The NPA-VAWC highlights the importance of ADR in improving judicial access for survivors, particularly in underserved populations.¹⁵¹ Survivors of abuse, particularly those from vulnerable communities, frequently face challenges in the formal judicial system, including financial and logistical difficulties. To address this, ADR techniques like mediation and community-based reconciliation provide alternate paths to justice. For example, a domestic abuse survivor in a remote Tanzanian village can seek settlement through a local women's group, avoiding the intricacies of judicial proceedings and allowing them to pursue justice in a familiar, supportive environment.

Strategic Outcome 5 emphasizes community engagement as a critical component of establishing a safe environment for women and children. The NPA-VAWC provides provisions for training community leaders in ADR, allowing them to handle delicate issues including gender-based violence (GBV) and child welfare in an effective and

¹⁵⁰ 2017/8-2021/2

¹⁵¹ Strategic Outcome 3, the NPA-VAWC, *ibid*

culturally appropriate manner. A community leader versed in ADR procedures, for example, may mediate a child maltreatment case, providing an expedited resolution that maintains family cohesion while avoiding the lengthy formal court process. This community-driven method adheres to local standards and allows communities to handle issues constructively. Recognizing the sensitivity of violence cases, the NPA-VAWC requires the establishment of secure and discreet locations for ADR, so that survivors can pursue justice without fear of shame. Priority Intervention Area 3.2 emphasizes the significance of secrecy, especially in cases of sexual abuse, when survivors may be unwilling to report incidents for fear of societal repercussions. For example, NGOs that work with women and children can provide secure spaces for ADR sessions, giving survivors a private and secure environment that encourages honest communication while reducing the fear of public exposure. The NPA-VAWC's Priority Intervention Area 4.3 encourages the integration of ADR with critical social welfare services, acknowledging that survivors frequently require more than just legal remedies. Linking ADR with counselling, legal assistance and other support services serves survivors' immediate legal demands as well as their emotional and social needs. For example, a young lady experiencing domestic violence may benefit from an ADR session conducted by a social welfare officer, in which she can bargain for both immediate protection and access to support services such as counselling, resulting in a more comprehensive approach to settlement.

Given the specific needs of GBV survivors, the NPA-VAWC emphasizes the significance of gender-sensitive training for ADR practitioners under Strategic Objective 2. This training equips facilitators to approach cases with empathy and an

understanding of the power dynamics that are common in GBV instances. For example, in cases of intimate partner violence, a gender-sensitive ADR facilitator would be aware of the survivor's vulnerabilities, emphasizing their safety and ensuring that the mediation does not drive the survivor into a potentially dangerous reconciliation. Advocating for gender-sensitive procedures, the Plan hopes to increase survivors' trust in ADR, so strengthening ADR's role as a dependable and supportive choice.

4.3.4 The Penal Code, Cap. 16

Tanzania's Penal Code, Cap. 16 controls criminal offenses and imposes punishments through formal legal procedures. However, several articles of the Penal Code provide an indirect foundation for Alternative Dispute Resolution (ADR) techniques by allowing for discretion, community engagement, and pre-trial settlements in specific circumstances. Although ADR techniques are not officially stated in the Penal Code, several clauses promote non-adversarial, restorative practices, especially when dealing with minor infractions in the community. Reviewing these clauses, we can see how the Penal Code is consistent with ADR concepts, allowing for less formal but effective conflict resolution inside Tanzania's legal system.

Section 89 is a notable example, as it provides flexibility in dealing with small infractions that disrupt public order but do not cause severe harm. This section recognizes that not all disagreements require formal court proceedings; rather, some can be effectively resolved through community-led ADR processes such as reconciliation or mediation. For example, minor physical altercations can be managed through community mediation, giving the parties a means to resolve problems without

resorting to criminal proceedings. This is especially useful in rural areas where access to official courts may be limited, as it allows community elders or local leaders to facilitate resolutions that promote social harmony. ADR principles also apply to minor assault and battery situations, as specified in Section 241. This clause gives judges the authority to urge reconciliation in small crimes when harsh punishment may not be appropriate. A magistrate, for example, may recommend mediation in a case where neighbors have had a minor argument, as long as both parties consent, and the offense did not cause substantial harm or result from recurring hostile behavior. This flexibility promotes a rehabilitative approach by reducing the formal caseload in the court system while treating minor criminal concerns constructively. Furthermore, Section 66 of the Penal Code expands the possibility of non- custodial penalties in domestic conflicts, particularly in cases where punitive measures may not benefit the parties concerned. For example, in circumstances of small violations within homes, such as petty larceny or minor property damage, courts may choose reconciliation and mediation to incarceration. Family mediation, an ADR approach, can be a more successful solution for promoting family cohesion while avoiding jail. Taking reconciliation into account in domestic disputes, Section 66 indirectly supports ADR ideas that promote family unity over rigid legal prosecution. Section 37 promotes community engagement in conflict resolution, emphasizing the importance of local leaders in addressing cases involving first-time or minor offenders, particularly in marginalized regions. The Penal Code, by incorporating local authority, allows for informal ADR techniques that keep small issues out of criminal court. For example, if a young person commits vandalism in the community, local leaders may arrange mediation or community service as a kind of reparation. This type of intervention

benefits both the offender and the community while avoiding formal prosecution and the resulting sanctions. In addition to encouraging community involvement, Sections 38 and 39 of the Penal Code emphasize the need of rehabilitation in punishment, particularly for young or first-time offenders. These sections include non-custodial penalties such as probation, fines, and community service, which complement ADR ideals by allowing offenders to make reparations without facing criminal charges. Instead of being punished to prison, a first-time offender who commits a petty theft may be assigned to community service or reconciliation meetings with the victim. This method lowers the stigma associated with formal criminal punishments and promotes restorative justice. Section 234 of the Penal Code, which addresses property-related offenses, also promotes out-of-court settlements in situations with little damage or loss. When issues over property emerge, such as small theft or accidental damage, the Penal Code provides for reconciliation and restitution rather than full prosecution. In many cases, ADR processes allow parties to reach an agreement on compensation or repair without resorting to formal legal proceedings. For example, if one person accidentally damages another's property, a magistrate may offer mediation to facilitate reimbursement and maintain connections, so avoiding unnecessary legal proceedings.

4.3.5 The Law of the Child Act,

The Law of the Child Act,¹⁵² in Tanzania provides major support for Alternative Dispute Resolution (ADR) methods, with a focus on child-centered restorative justice that reduces the adversarial features of legal proceedings for minors. This Act applies ADR ideas to conflicts and transgressions involving children, encouraging ways that

¹⁵² The Law of the Child Act, .R.E. 20109 (LCA

promote reconciliation, rehabilitation, and community involvement over punitive measures. Section 95 of the Law of the Child Act is a key clause that promotes ADR principles by encouraging reconciliation in situations involving minor infractions committed by children. This clause authorizes the use of mediation or arbitration as alternatives to formal criminal processes, particularly when dealing with problems between the child and the victim. For example, if a youngster commits a minor larceny or is involved in a nonviolent incident, the court may propose that both parties seek a reconciliatory solution rather than proceeding to trial. Including families and community elders, this approach promotes forgiveness and social reintegration, lessening the potentially stigmatizing impacts of criminal procedures on children. Furthermore, Section 119 of the Act states that the best interests of the child take precedence in judicial proceedings, a premise that frequently favors ADR procedures. This provision empowers the court to bypass formal legal proceedings in circumstances when other methods will benefit the child's growth and wellbeing. For example, if a kid is involved in a family conflict, such as parental neglect or custody, the court may recommend family mediation. This procedure allows parents and guardians to settle issues in a non-adversarial setting, while keeping the child's needs and welfare at the forefront. The Act also allows for the use of ADR to rehabilitate rather than punish, as highlighted in Section 102, which allows for the conditional discharge of a child offender. This clause reflects an ADR-aligned attitude by granting magistrates the authority to release young offenders on probation, frequently with terms that include family or community-based treatment. For example, if a youngster engages in small vandalism, the court may impose community work or participation in a mediation program with the victim. This arrangement encourages the

child to accept responsibility, promotes reconciliation, and allows the youngster to avoid the harsh effects of criminal charges. Section 66 of the LCA facilitates ADR in child support and custody issues by emphasizing amicable settlements. Parents who disagree on custody or support duties are encouraged to resolve their differences outside of court, generally through a structured mediation procedure. ADR allows parties to establish an agreement suited to the child's best interests, reducing the strain on family relations caused by lengthy court battles. In addition, the LCA promotes ADR for juveniles through Section 97, which requires that youth in dispute with the law be addressed in methods that prioritize rehabilitation. This provision allows for processes in which the kid, family, and community members engage in restorative dialogues, which can include apology letters, mediation sessions, or agreements on remedial measures. This not only remedies the harm done, but also creates a conducive environment for the child's moral and social rehabilitation. The Law of the Child Act, 2009 regulates ADR in Tanzania by incorporating child-centered, restorative methods throughout its provisions. It encourages reconciliation, community involvement, and non-adversarial solutions, particularly for minor infractions and family disputes, while ensuring that the child's wellbeing is prioritized. The Act corresponds with ADR principles through specific measures such as Sections 95, 119, and 102, promoting rehabilitative justice above punishment and facilitating community-based solutions that protect children's rights and reintegrate them into society.

4.4 Challenges in Implementing ADR for GBV in Tanzania

4.4.1 Barriers to Effective ADR Implementation

Implementing Alternative Dispute Resolution (ADR) for gender-based violence

(GBV) in Tanzania has several problems that limit its effectiveness. Cultural, social, logistical, and legal constraints all create unique challenges to the fair and effective resolution of GBV matters outside of typical courtroom settings. Understanding these obstacles is crucial for determining how ADR strategies can best serve GBV survivors in Tanzania. Cultural norms and traditions have a considerable impact on the perception and use of ADR in Tanzania, particularly in GBV situations. Many Tanzanian communities adhere to patriarchal traditions that place women in subservient positions, and GBV is frequently viewed as a private family concern rather than a public infraction. This impression can discourage women from seeking outside assistance, as community leaders or elders may urge them to address issues discreetly to maintain family harmony. According to a study conducted by Kaijage and Tibaijuka, traditional leaders frequently mediate in situations of domestic violence by pushing women to return to their spouses rather than seeking justice, structuring ADR in a way that perpetuates power disparities rather than resolving issues equally.¹⁵³ Furthermore, cultural biases may influence community ADR facilitators' impartiality, undermining the fairness of ADR decisions for women experiencing GBV. This issue is highlighted by the Law of Marriage Act, which requires elders or religious authorities to reconcile in marital conflicts, including domestic violence situations, even when official legal involvement is required. As Cotran and Rubin point out that the presence of traditional leaders frequently reflects patriarchal prejudices, resulting in decisions that disadvantage women, particularly in rural areas where traditional

¹⁵³ Kaijage, F., & Tibaijuka, M. *Traditional Leaders and Gender-Based Violence in Tanzania: Examining the Role of Culture in GBV Cases*. Dar es Salaam: Institute of Social Work Publishing, 2018

norms are more prevalent.¹⁵⁴

Social stigma and normalization of GBV are additional factors that impede ADR's effectiveness in addressing GBV. GBV survivors frequently experience societal pressure to remain silent in order to avoid putting shame on their families or communities. As a result, women may be hesitant to participate in ADR for fear of social isolation, retaliation, or being labelled as disobedient. This social reluctance was emphasized in a 2016 study by the Legal and Human Rights Centre (LHRC), which discovered that even in ADR settings, women frequently withdraw their complaints against perpetrators due to societal expectations to forgive and forget, further limiting the accountability of GBV offenders.¹⁵⁵ Furthermore, social attitudes toward ADR as a technique for "resolving family issues" lead to a scenario in which serious crimes such as assault or rape are downplayed or classified as private. This contradicts the fundamental concepts of justice and human rights that underpin ADR and discourages GBV sufferers from pursuing fair remedies. The laws governing domestic violence in Tanzania lacks robust wording that empowers ADR mechanisms to address social stigmas, reducing ADR's effectiveness in building a safe environment for survivors. Furthermore, skilled ADR practitioners in Tanzania are frequently concentrated in metropolitan areas, making it difficult for rural residents to access experienced facilitators. This logistical gap has an impact on the quality of ADR processes and outcomes, since community members or untrained facilitators may lack the skills required to handle complicated issues such as GBV in a sensitive and equitable

¹⁵⁴ Cotran, E., & Rubin, N. Readings in African Law. London: Africana Publishing Company, 1995

¹⁵⁵ Legal and Human Rights Centre (LHRC), Annual Report on Human Rights and Access to Justice in Tanzania. Dar es Salaam, 2018

manner. According to the Legal and Human Rights Centre's Annual Report, without appropriately educated ADR practitioners, ADR outcomes may lack the procedural safeguards required to ensure that GBV survivors are treated fairly.

The Tanzanian legal system creates extra impediments to efficiently adopting ADR in GBV situations. The Penal Code and Criminal Procedure Act, which govern criminal offenses in Tanzania, do not specifically provide provisions for ADR in cases of serious GBV violations, limiting ADR's use in cases that necessitate punitive rather than reconciliatory techniques. Although the Law of the Child Act, permits ADR in minor conflicts affecting children, there is no comparable provision in the Penal Code or associated statutes for ADR in GBV cases, indicating an insufficient legal basis for such interventions. Furthermore, Tanzanian legislation does not sufficiently empower ADR institutions to impose remedies in GBV situations. ADR practitioners lack the institutional capacity to carry out binding resolutions, leaving survivors without effective protection if agreements are broken. This gap, revealed in a study by Mallya and Othman (2020), highlights the need for legislative reforms to effectively support ADR for GBV, particularly in rural areas where ADR remains a crucial alternative due to limited court access.

Cultural, societal, logistical, and legal constraints impede ADR's efficacy in dealing with GBV situations in Tanzania. Cultural traditions frequently favour family unity above justice, while social stigma and practical constraints impede access and fair use of ADR for GBV survivors. Tanzania's ADR framework lacks elements that empower it in cases of gender-based violence, resulting in inconsistencies and restricting its protective function. To address these problems, legal reforms empowering ADR

mechanisms, additional funding for ADR training and infrastructure, and community-based activities to reshape cultural conceptions of GBV and dispute resolution are required.

4.5 Conclusion

This chapter examined Tanzania's ADR frameworks for addressing Gender-Based Violence (GBV) against women, assessing its benefits, limitations, and justice implications in a gender-sensitive context. While alternative dispute resolution (ADR) is less adversarial and more accessible than formal courts, it suffers systemic, cultural, and logistical problems, particularly for women in rural regions. For ADR to be effective in GBV situations, it must prioritize survivor safety, incorporate culturally informed techniques, and strengthen women's voices. The chapter also stressed the need for legal reforms and policy changes to increase ADR's participation in GBV cases, specifically through court guidelines, gender-sensitive mediator training, community education, and dedicated resources. To connect ADR frameworks with the requirements of GBV survivors, the system must overcome these constraints in order to promote a justice approach that promotes restorative justice while protecting women's dignity and rights.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a complete summary, conclusion, and suggestions based on the research on Alternative Dispute Resolution (ADR) frameworks for addressing Gender-Based Violence (GBV) against women in Tanzania. Combining previous chapters' presentation, it provides crucial insights into the effectiveness and limitations of ADR as a strategy for GBV cases in Tanzania. Recognizing the need of accessible and culturally appropriate avenues to justice, particularly for women in vulnerable communities, this chapter examines how ADR frameworks can both assist and impede justice for GBV survivors. The study seeks to improve the ADR system by suggesting strategic legal and legislative changes, community involvement, and resource allocation to foster an inclusive, survivor-centered approach to ADR for GBV cases. This final chapter emphasizes the significance of improving ADR methods to promote a justice system that balances restorative justice with the preservation and empowerment of women's rights.

5.2 Summary of Findings

This study has focused on exploring the landscape of alternative dispute resolution (ADR) in connection to situations of gender-based violence (GBV) in Tanzania. Conducting an analysis of the environment, the objective of this inquiry is to gain an understanding of the current situation, the challenges that are being faced, and the variables that are influencing the implementation of ADR. To identify and investigate the legislative frameworks, obstacles that women face, the influence of international

guidelines, and the impact of community norms on alternative dispute resolution (ADR) for gender-based violence (GBV) in Tanzania, the goal of this study is to identify and investigate these factors. Important research questions serve as the study's guiding principles. Through utilizing frameworks such as the Civil Procedure Code, the Law of the Child Act, and the Penal Code, Tanzania's legal system encourages alternative dispute settlement (ADR), also known as alternative conflicts resolution. Remedy options that do not involve adversarial conflict are made available by these frameworks in certain circumstances that do not involve significant harm. The use of community arbitration, mediation, and reconciliation are all common types of conflict resolution that are implemented at the local level. This is especially true in rural areas, which have limited access to formal proceedings. Alternative conflict resolution seeks to make justice more accessible, and these solutions provide methods that are less formal and burdensome than traditional litigation. This is in line with the goal of alternative dispute resolution, which is to make justice more accessible. However, in the context of gender-based violence (GBV), the usefulness of alternative dispute resolution (ADR) is hindered by a lack of comprehensive legal standards that are tailored exclusively to GBV cases, differences in the implementation of ADR, and a lack of standardized methodologies that take into consideration the complexities of cases involving violent abuse. These factors all contribute to the fact that ADR is not effectively utilized. When women seek justice for gender-based violence (GBV) through alternative dispute resolution (ADR), they encounter a variety of obstacles, including cultural shame, logistical and financial constraints, and other obstacles. A significant number of women are prevented from pursuing alternative dispute resolution (ADR) due to cultural norms that either prohibit the reporting of abuse or

carry a social shame. In addition, there is a significant information gap concerning the rights that are available as well as the methods of alternative conflict resolution that are available. Alternative dispute resolution (ADR) processes have structural restrictions that are present, which also influence women's access to justice. These limits are inherent in the processes. Among these problems is the absence of training for mediators that consider gender diversity, as well as inadequate protective measures for survivors. In the absence of safeguards against coercion and restrictions against disclosure of sensitive information, survivors may find themselves in the most hazardous of situations. Additionally, women who are facing gender-based violence may find alternative dispute resolution (ADR) inefficient or out of reach due to cost limits or restricted availability in rural areas. Indicative of a global push for a justice system that protects and empowers women's rights is the effect of international treaties and best practices, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the guidelines on access to justice for survivors of violence that have been established by the United Nations. Even though Tanzania has indicated that it is willing to comply to these principles, it is still unclear to what extent the ADR framework is in accordance with these criteria. It is possible that alternative dispute resolution (ADR) could be more effective in cases of gender-based violence (GBV) if it is based on international best practices that emphasize survivor-centered approaches, gender-sensitive mediator training, and community involvement. This would be accomplished by giving women's rights and safeguards a higher priority. When it comes to incidents of gender-based violence, the outcomes of alternative dispute resolution (ADR) are also highly influenced by community-based support networks and the cultural views of the local community. Although traditional

community institutions frequently provide accessible and informal channels for conflict resolution, particularly in rural regions, cultural attitudes on gender-based violence (GBV) may have an impact on the success or limitations of alternative dispute resolution (ADR). This is the case even though GBV is a phenomenon that is particularly prevalent in rural areas. If social standards that diminish or legitimate violence against women remain in place, it is likely that survivors of violence against women will feel forced to reconcile or suffer abuse to maintain the cohesiveness of their families. This is because they are expected to maintain the cohesiveness of their families. Additionally, the combination of these limitations and the authority that is sometimes given onto community leaders who may not have a strong commitment to gender equity can result in alternative conflict resolution rulings that tend to favor the cohesion of the group over the justice of the individual. When it comes to addressing the issue of gender-based violence against women in Tanzania, the findings offer light on the advantages and disadvantages of alternate conflict resolution processes. Even though alternative dispute resolution (ADR) provides an alternative to formal litigation, there is a need for systemic adjustments to be made to guarantee that ADR can meet the needs of survivors of gender-based violence (GBV). It is imperative that several reforms be implemented, such as training that is sensitive to gender issues, community education on women's rights, and adherence to international conventions that prioritize the protection and empowerment of survivors. It is possible that resolving these concerns could result in the development of an alternative dispute resolution framework that is accessible and therapeutic for survivors of gender-based violence. This would be done with the intention of building a legal system that is more inclusive and equitable for all Tanzanian women.

5.3 Conclusion

The purpose of the study on ADR Frameworks for Gender-Based Violence Against Women in Tanzania was to provide a comprehensive analysis of the ways in which Alternative Dispute Resolution (ADR) processes are utilized to address instances of gender-based violence (GBV). The research was carried out with the intention of providing this analysis. The purpose of this research is to provide a comprehensive overview of the potential and limitations of alternate methods of conflict resolution in Tanzania. Tanzania will be the primary focus of the research to be conducted. Several actions are taken to accomplish this objective, including investigating international influences, identifying the challenges that women face, conducting an examination of Tanzania's legislative framework, and analyzing the implications of community initiatives on alternative dispute resolution systems. An investigation of a phenomenon that is multidimensional in nature is shed light on by the findings, which are as follows: In rural communities, where traditional legal paths are limited, alternative dispute resolution (ADR) has the potential to be an effective method of obtaining justice. This is especially true in rural areas. This is particularly true in circumstances in which the available legal options are restricted. When it comes to women who have been victims of gender-based violence, the existing alternative dispute resolution system faces the risk of not being able to provide complete justice that is centered on the survivor. The reason for this is that there has not been a substantial change in the system, and there has not been a demonstrable conformance with the standards that are prevalent internationally. The likelihood of this threat occurring to women who have been victims of abuse is higher than the likelihood of this happening to other vulnerable groups. Although Tanzania's legal system

recognizes the use of alternative dispute resolution (ADR) approaches, the study found that there is a lack of specific and specialized instructions for dealing with situations of gender-based violence (GBV) using ADR. This is even though the ADR techniques are acknowledged by Tanzania's legal system. On the other hand, these legal frameworks are not well equipped to cope with the sensitivities and protection requirements that are specifically associated with gender-based violence (1GBV). Examples of alternative dispute resolution (ADR) techniques that are permitted by the existing legal frameworks include mediation, reconciliation, and community arbitration. (ADR) stands for alternative dispute resolution. The Civil Procedure Code, the Penal Code, and the Law of the Child Act are all examples of regulations that fall within this category. Alternate approaches to dispute resolution are made possible through the utilization of these technologies. The employment of alternative dispute resolution (ADR) may, on occasion, put the safety of survivors in peril. This is a possibility that should be taken into consideration. Because of this, the overarching objectives of justice and empowerment can be put in peril while the process is continuing. This is the case because there are no clear procedural safeguards in place for individuals who have been victims of gender-based violence (GBV), which is the reason why this statement is true. Tanzania is in serious need of putting into action an alternative dispute resolution (ADR) strategy that takes a methodical and gender-sensitive approach to the resolution of disputes. This is a direct consequence of the situation that has arisen. The care of survivors ought to be given the utmost importance, responsibility ought to be guaranteed, and the ultimate goals of justice ought to be supported by utilization of this method.

Furthermore, the study found that women are commonly hindered from employing alternative dispute resolution (ADR) approaches for survivors of gender-based violence due to the social and technological challenges that they face. This was determined as a result of research. Numerous women, particularly those who live in rural regions, are subjected to a significant amount of social humiliation, cultural demands that need to be resolved, and financial challenges. This is especially true for women who are underprivileged. Rural areas are characterized by a high incidence of situations like this one. This problem has a disproportionately negative impact on people living in rural areas. Because mediators do not receive training that is sensitive to gender issues, women who seek alternative dispute resolution (ADR) may experience emotions of uncertainty and a lack of support. This is because mediators do not receive training that is inclusive of gender concerns. One of the reasons for this is that there is a scarcity of training that considers gender perspectives. The absence of protective measures, such as safeguards against coercion and safeguards against the release of confidential information, is another factor that contributes to the climate. This factor is in addition to the climate itself. To empower women within alternative dispute resolution frameworks and to minimize the barriers that women encounter when attempting to seek justice for gender-based violence, it is of the utmost necessity to overcome these disparities. This is a necessity that cannot be overstated. The accomplishment of these objectives is of the utmost significance.

The study not only highlights the potential of these tools and practitioners, but it also indicates the potential of international legal tools and best practices to strengthen Tanzania's alternative dispute resolution framework for instances involving gender-

based violence. This helps to ensure that Tanzania can effectively address violence against women. This is a significant contribution to the field that has been made. The existence of a variety of instruments that offer an outline of best practices that place an emphasis on survivor-centered approaches, gender-sensitive facilitator training, and strong community support for survivors is something that may be found. All of these can be discovered. The United Nations Guidelines on Access to Justice for Victims of Violence and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are two examples of treaties that fall under this category. Both treaties were created by the United Nations' General Assembly. The United Nations was the organization that drafted both treaties. Even though Tanzania has ratified such treaties, there is a lack of consistency in the application of these principles in alternative conflict resolution procedures at the local level. Indeed, this is the situation all around the nation. If these global requirements, which include gender sensitivity and an emphasis on survivor safety, were acknowledged, it is possible that the efficiency and accessibility of alternative dispute resolution methods for addressing gender-based violence (GBV) would be significantly improved. This would be a possible outcome. This would be a significant move in the right direction. These are the outcomes that would take place if these standards were put into effect.

Community-based support networks and cultural attitudes play and are very crucial roles in the implementation and repercussions of alternative dispute resolution in cases of gender-based violence (GBV). These roles are played by and encompass a wide range of factors. As a result of the fact that GBV is a form of violence that is committed against women, this is the case. Even though community-based alternative dispute

resolution (ADR) provides avenues that are more accessible and less confrontational, particularly in geographically isolated places, cultural norms and attitudes can have a significant impact on women's motivation to seek justice. This is especially true in areas where women are more likely to be physically separated from their families. When it comes to geographically remote regions, this is very effective. This is especially true in areas where women are more likely to be by themselves than in other parts of the world. Whether it be traditions that place a high value on the cohesiveness of the family or that restrict the open discussion of violence against women, there is a possibility that the success of alternative conflict resolution strategies in achieving the objective of achieving solutions that are fair and just could be impacted. This is a possibility because there is a possibility that these traditions could have an impact. Finding a means to strike a balance between honoring cultural values and making a commitment to gender equality and human rights, Tanzania must find a way to improve the efficacy of alternative dispute resolution (ADR) in situations including gender-based violence (GBV). This would allow Tanzania to boost the effectiveness of ADR in situations involving GBV. Because of this, Tanzania would be able to enhance the effectiveness of non-traditional methods of conflict resolution, which would be extremely beneficial. Putting into effect a complete plan to improve alternative dispute resolution frameworks for gender-based violence in Tanzania is vital, as indicated by the findings of this study, which have shown that it is essential to put this plan into action. There is evidence to support this assertion, which was presented by the findings of the study. Through the alignment of alternative dispute resolution procedures with international standards, the provision of rigorous gender-sensitive mediation training, and the provision of community norms that support survivor welfare, Tanzania can

construct an alternative dispute resolution system that is more inclusive and successful. Women who are seeking justice in instances involving gender-based violence (GBV) would have the option of adopting alternative dispute resolution (ADR), which would be more secure, more easily available, and more democratic. Another option would be to seek justice through traditional legal channels. In situations where there is a presence of GBV, this would be the case. An alternative dispute resolution (ADR) system will become a truly effective and therapeutic tool for protecting the rights and dignity of women in Tanzania who have been victims of gender-based violence (GBV) after such a fundamental reform has been put into place. This will be the case after the ADR system has been put into place. This is going to be the case because the system will make it possible for women to have their rights and dignity safeguarded.

5.4 Recommendations

The study recommendations on ADR Frameworks for Gender-Based Violence Against Women in Tanzania seek to address significant deficiencies in present ADR processes and pave the way for the development of a more effective, accessible, and survivor-centered system. The guidelines recommendation below identifies critical actions for Tanzanian policymakers, legal practitioners, community leaders, and foreign stakeholders to consider when promoting ADR in situations of gender-based violence (GBV) against women.

5.4.1 Establishing a Legal Framework for GBV-Related ADR.

Tanzania should create a legal framework that explicitly specifies the function of ADR in GBV cases, while also addressing survivors' specific sensitivities and protection needs. Current ADR processes are based on generic legal requirements and lack

instructions for dealing with gender-based violence. This dedicated legal framework should include clear procedural safeguards for survivors, such as mandated secrecy, protection from compulsion, and access to legal counsel. Customizing ADR policies to GBV, Tanzania may ensure that ADR mechanisms protect survivors' safety and dignity while providing accessible and effective justice.

5.4.2 Enhanced Gender-Sensitive Training for ADR Facilitators:

Gender-sensitive training for mediators, arbitrators, and other ADR facilitators is critical to ensuring that ADR proceedings are tailored to the specific needs of GBV survivors. ADR facilitators should be trained on trauma-informed methods, power imbalances, and the dynamics of pressure and intimidation that can arise in GBV cases. Training programs should cover gender equity, cultural biases, confidentiality, and the necessity of empowering survivors. This investment in capacity training will prepare facilitators to address GBV situations with better empathy, skill, and understanding, resulting in a safer ADR environment for women.

5.4.3 Incorporating International Standards and Best Practices into ADR for GBV:

Integrating ideas from international conventions and best practices, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the United Nations Guidelines on Justice for Victims of Violence, can considerably improve Tanzania's ADR systems. These guidelines promote survivor-centered approaches, strong protective measures, and community-based support. Implementing these criteria in Tanzanian ADR systems would align ADR frameworks with global best practices, ensuring that ADR processes are inclusive,

protective, and respectful of women's rights. Incorporating these criteria can help strengthen Tanzania's adherence to its international duties and boost the country's reputation for human rights and gender equality.

5.4.4 Enhancing Community Education and Awareness Programs:

Community awareness campaigns are critical for increasing acceptance and knowledge of women's rights in ADR, particularly regarding GBV. Public education campaigns should educate communities on ADR options for GBV, survivors' rights, and the importance of gender equity in ADR processes. To reach remote and vulnerable areas, these programs may involve collaborations with local leaders, non-governmental organizations, and media outlets. Community education would not only assist to decrease stigma and cultural barriers, but it would also allow survivors to seek justice and support from their own communities. Creating a conducive social context is critical to make ADR an accessible, acceptable, and successful method of justice.

5.4.5 Improving Access to ADR for Rural and Marginalized Communities:

Access to ADR remains a significant barrier, particularly for women in rural and underprivileged communities. To remedy this, the Tanzanian government should build mobile ADR units, expand ADR facilities to neglected areas, and educate community-based mediators who understand local cultures and languages. Establishing ties with local organizations and community groups can also help to expand ADR services to rural places. Tanzania can ensure that all women, regardless of location or socioeconomic position, have access to ADR frameworks for GBV by making them more physically and monetarily accessible.

5.4.6 Increased Resources for ADR Implementation in GBV Cases:

Adequate funds and resources are required to conduct successful ADR in GBV instances. The government, in partnership with international partners and non-governmental organizations (NGOs), should provide adequate funding for ADR-related infrastructure, training, and public education. Funding can be used to establish ADR facilities, train gender-sensitive facilitators, and create teaching materials for community outreach. Resources should also be allocated to meet logistical requirements such as transportation and survivors' security. With these investments, ADR can become a long-term, dependable, and effective tool for dealing with GBV instances.

5.4.6 Implementing Monitoring and Evaluation Mechanisms for ADR in GBV Cases:

Regular monitoring and evaluation are required to determine the efficacy of ADR in GBV cases and identify areas for improvement. The government should form an impartial agency to evaluate ADR proceedings, ensure conformity with legal criteria, and provide input on ADR results. Data collection on ADR instances involving GBV should include information on survivor satisfaction, settlement times, and recurrence rates to help track ADR's long-term effectiveness in preventing further violence. This rigorous oversight will allow Tanzania to continuously enhance its ADR framework in response to real-world results and problems.

5.4.8 Fostering Partnerships with International Organizations and NGOs

Collaboration with foreign organizations and non-governmental organizations (NGOs)

can provide Tanzania with vital technical help, financing, and experience to advance ADR in GBV cases. NGOs and international agencies have expertise implementing ADR for GBV in a variety of situations and may provide insights into best practices, training programs, and survivor-centered methods. Furthermore, international collaborations can assist support community outreach, ADR training, and capacity-building projects that are critical to boosting ADR accessibility and efficacy. These collaborations can enable a multi-stakeholder strategy that aligns Tanzania's ADR frameworks with worldwide norms while also providing further support to GBV survivors.

5.4.9 Promoting Survivor-Centered ADR Approaches

Using a survivor-centered approach within ADR frameworks is critical for developing processes that really respect the rights and needs of GBV survivors. This method prioritizes the survivor's well-being, autonomy, and voice during ADR proceedings, ensuring that they feel supported and empowered throughout the process. ADR guidelines should emphasize the importance of survivor consent, confidentiality, and voluntary participation in ADR processes, with explicit options for withdrawing if the survivor is uncomfortable. A survivor-centered approach ensures that ADR promotes healing and justice, rather than re-traumatization.

5.4.10 Advocating for Legal and Policy Changes to Support ADR in GBV

Cases

Finally, consistent advocacy for legislative and legal reforms is required to institutionalize improvements in ADR for GBV situations. Stakeholders, including civil society, legal professionals, and international organizations, should collaborate to

persuade governments about the need for reform. These reforms might close legal protection gaps for survivors, increase funding for ADR programs, and guarantee that ADR processes reflect Tanzania's cultural and social reality while following to international human rights norms. Legal changes should further define the roles and obligations of ADR practitioners in GBV cases, making it easier to enforce standards and defend survivors' rights throughout Tanzania.

These recommendations highlight the importance of a thorough and inclusive approach to enhancing ADR mechanisms for GBV cases in Tanzania. Tanzania may construct an ADR system that effectively supports GBV-affected women by focusing on survivor-centered methods, raising community awareness, improving access, and guaranteeing conformity with international standards. These ideas, if followed, have the potential to transform ADR into a powerful tool for justice, empowerment, and healing for GBV survivors across the country.

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Appendices



GENDER-BASED VIOLENCE AGAINST WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW: OPTIONS FOR STRENGTHENING THE INTERNATIONAL FRAMEWORK

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GENDER-BASED VIOLENCE AGAINST WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW: OPTIONS FOR STRENGTHENING THE INTERNATIONAL FRAMEWORK

DISCUSSION PAPER

A. INTRODUCTION

1. The issue of gender-based violence against women (GBVAW) and the obligations of States under international law to take steps to prevent such violence, to punish perpetrators and to provide support for the survivors have been consistent topics for discussion and action at the international level over the last 30 years. During that period the issue has moved from a relatively little-discussed matter to a regular topic on international agendas, and the widespread and varied nature of violence against women has been increasingly documented.

2. Despite the many legal, policy and other measures adopted at the international and national levels and the advances that have been made, gender-based violence against women continue to be widespread and present in all regions and countries, in familiar and new forms. Not only have new forms of violence emerged such as cyberviolence (including cyberstalking, online threats of violence, and revenge porn), but longstanding forms of violence persists and legal and practical failures to address violence are ubiquitous. Many countries still have laws and cultural, customary or religious laws, practices and attitudes which are conducive to or legitimate violence against women. There are many examples of laws making it extremely difficult or effectively almost impossible to prove criminal cases of sexual violence (for example, restrictive evidentiary rules); impunity for acts of GBVAW committed by both State and non-State actors is commonplace.

3. As a result, there have been calls to strengthen the existing international legal and accountability framework addressing GBVAW, in particular by the elaboration of a new United Nations convention on gender-based violence against women but also in other ways. While recognising that the elimination of GBVAW will be possible only through a multifaceted approach, advocates of a new convention see international law and a new convention as important components of any strategy to stimulate further action at the international and national levels to address the causes and consequences of such violence.

4. The adoption of a number of regional conventions that deal explicitly with violence against women and the obligations of States to combat it has provided impetus for these calls. These conventions include the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994

(Convention of Belém do Pará), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (Maputo Protocol), and the Council of Europe Convention on preventing and combating violence against women and domestic violence 2011 (Istanbul Convention). The call for a new UN convention has been based in part on the argument that there is a 'normative gap' at the international level, and that the adoption of a treaty similar to these regional treaties would eliminate that gap.

5. The question of whether a new UN convention on GBVAW an appropriate and effective way of would be contributing significantly to the struggle against GBVAW, is an important one, and an examination of the issue once again is timely.¹ There are of course many other measures that need to be taken, whether or not such a convention is adopted. This paper takes up the question of what international and national (legal) measures might be taken to render more effective efforts to eliminate GBVAW. It provides an overview of the role that international law and practice has played in advancing these efforts, and engages in particular with the question of whether a new convention is desirable, and what other measures might be adopted independently of or in conjunction with elaboration of a new instrument.

6. This paper argues that in seeking to strengthen existing frameworks, it is important to recognise that existing international human rights law already imposes extensive and detailed obligations on States to address GBVAW, and that proposals for a new normative instrument and other measures should not undermine but rather complement existing protections. It argues that greater efforts need to be devoted to the invocation and implementation of the existing standards, whatever position is adopted on the question of the desirability of a new treaty.

7. The paper first provides a brief description of current status of international human rights law relating to violence against women, followed by a sketch of the major developments in the international response to the problem of violence against women since the early 1990s. It then describes the nature and legal significance of the work of the CEDAW Committee under the Convention and the responses of States parties. It then sets out and evaluates one of the principal arguments made to support

¹ The issue was the subject of considerable discussion in the early 1990s, in response to a Canadian proposal that a new convention on the subject be adopted. The matter was considered at an expert group meeting held in Vienna in 1991: E/CN.4/1992/4 (1991). At that time concerns similar to those expressed in relation to the latest proposals were raised. These included in particular the already binding coverage of CEDAW obligations with respect to violence against women, the need not to undermine the work of the CEDAW Committee in developing the interpretation of the Convention and monitoring its implementation in relation to VAW, and the need to strengthen implementation mechanisms. These discussions were part of the process that led to the adoption of *General recommendation 19*, the Declaration on the Elimination of Violence against Women (DEVAV), the Optional Protocol to CEDAW Convention and the establishment of the mandate of the Special Rapporteur on violence against women.

the elaboration of a new convention, namely the claim that there is a 'normative gap' in international law that should be remedied by a new convention that explicitly addresses violence against women. It outlines the principal questions that should be addressed as part of deliberations over the desirability of a new convention, and outlines possible advantages and potential drawbacks of a new convention might be. It then The paper concludes by noting other options for strengthening the current international law framework and its implementation and sets out a number of principles that should be observed in future effort to improve the international legal framework relating to GBVAW.

THE CURRENT STATE OF INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE IN RELATION TO VIOLENCE AGAINST WOMEN

8. The obligations of States under international human rights treaties have been interpreted by courts and other expert bodies as requiring States parties not only to ensure that State officials do not themselves engage in gender-based violence against women, but also that they take appropriate measures to prevent the infliction of violence by private actors, to investigate and punish such actions, and to provide protection and support for the survivors of violence. At the UN level, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) has articulated the obligations of States parties to the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) to eliminate violence against women, in particular in its *General recommendation 19* (1992). Other UN human rights treaty bodies, such as the Human Rights Committee and the Committee against Torture, have also made clear that States parties' obligations under the International Covenant on Civil and Political Rights 1966 (ICCPR) and the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) include eliminating public and private violence against women; regional human rights bodies have reached similar conclusions under their general human rights conventions.

9. In the case of the UN human rights treaties bodies, the application of the treaties to GBVAW has been articulated by the supervisory bodies in their general comments and recommendations, decisions under individual complaints procedures or in reports on inquiries, concluding observations on the reports of States parties, and in other formal statements. The legal status and practical relevance of these interpretive statements and decisions ('pronouncements') are discussed below, where the argument is made that, in light of their acceptance by States parties, these can be accepted for the most part as authoritative interpretations of the relevant treaty obligations. Quite apart from their formal legal status, these outputs of the UN human rights treaty bodies have in practice been important and influential interpretations for governments, courts and tribunals and advocates seeking to give effect to the relevant treaties, and their impact should not be underestimated through focusing only on their formal legal status.

THE EMERGENCE OF VIOLENCE AGAINST WOMEN AS AN INTERNATIONAL ISSUE: A BRIEF REVIEW²

10. At the time of the elaboration of the CEDAW Convention during the 1970s, violence against women, particularly in the private sphere, was largely considered to be a 'private' matter -- not an international concern, nor a human rights concern. Accordingly, although there was a late proposal introduced by Belgium to include 'attacks upon the integrity of women' in the draft Convention,³ the treaty does not include an explicit provision on violence against women, other than in article 6 which addresses trafficking and the exploitation of the prostitution of the prostitution of women.

11. Interest in the issue of violence against women coincided with growing emphasis on human rights and the blurring of the boundary of the responsibility of the State for public and private spheres of life and was manifested in the work of the United Nations congresses on the prevention of crime and the treatment of offenders,⁴ the world conferences on women convened in Copenhagen in 1980⁵ and in Nairobi in 1985,⁶ and other events such as the World Assembly on Ageing. Discussions during the elaboration of the Convention on the Rights of the Child (CRC) highlighted the abuse which children, including girls, experienced, and accordingly article 19 of that Convention was the first human rights treaty to oblige States parties to take all appropriate legislative, administrative, social and educational measures to protect all forms of physical or mental violence, injury or abuse, neglect or negligent

² See also the review of developments of the last two decades in the *Report of the Special Rapporteur on violence against women, its causes and consequences*, Rashida Manjoo [SRVAW 2014 report], UN Human Rights Council, 26th session, paras 6-42, UN Doc A/HRC/26/38 (2014).

³ UN Doc E/CN.6/591/Add. 1 (1976), 4; Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1993) 91; Kate Rose-Sender, 'Emerging from the Shadows: Violence against Women and the Women's Convention' in Ingrid Westendorp (ed) *The Women's Convention Turned 30: Achievements, Setbacks and Prospects* (Intersentia, 2012) 453, 455-458. This echoed language in the outcome document of the 1975 Mexico World Conference on Women (Report of the World Conference of the International Women's Year', Mexico City, UN Doc. E/CONF.66/34, para 51, 1975).

⁴ See, eg, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, 25 August - 5 September 1980, Ch I, Section B, UN Doc A/CONF.87/14/Rev.1 (1981)

⁵ *Report of the World Conference of the United Nations Decade for Women, Copenhagen, 14-30 July 1980* (United Nations, 1980), UN Doc A/CONF.94/35, resolution 5.

⁶ *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985* (United Nations, 1986), UN Doc A/CONF.116/28/Rev.1, paras 76, 258 and 288.

treatment, maltreatment or exploitation, including sexual abuse.⁷ Other forms of exploitation are addressed in articles 35 and 36 of the CRC.⁸

12. The United Nations General Assembly took up the issue of domestic violence in 1985 and in its first resolution on violence against women requested the Eighth United Nations Congress on the Prevention of Crime and Criminal Justice to give the issue special attention.⁹ Other intergovernmental bodies followed suit. Beginning in 1986 the UN Economic and Social Council convened a number of meetings and produced publications on the subject. In 1987 the Commission on the Status of Women (CSW) identified violence against women within the family and society as falling within the Nairobi Forward-looking Strategies priority theme of peace.

13. In the following years ECOSOC called for consolidated efforts by intergovernmental and non-governmental organizations to eradicate VAW,¹⁰ and requested further research on the subject to be undertaken.¹¹ In its resolution on the first review and appraisal of the Nairobi Forward-looking Strategies, ECOSOC called for urgent and effective steps to eliminate the pervasive violence against women in the family and society,¹² while in the same year it recognized that domestic violence may cause physical and psychological harm to members of the family and requested the Secretary-General to convene a further expert group meeting to draw up guidelines on domestic violence.¹³

14. The Commission on the Status of Women also began to dedicate greater attention to the issue and convened an expert group meeting in 1991 to consider options to strengthen the international legal framework to strengthen the international legal framework. While one of the proposals before the meeting was the adoption of a specific convention on VAW, this meeting concluded that a declaration would be an appropriate instrument in this context, as it would further emphasize the pervasive and egregious nature of violence against women and would also address States which had not ratified the CEDAW Convention. The meeting also recommended other incremental approaches: the elaboration and promotion by the CEDAW Committee of a general recommendation on violence against women; the creation and appointment of a special rapporteur on violence against women; strengthening of

⁷ Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007), vol II, 512-521.

⁸ Id at 723-737.

⁹ GA resolution 40/36 (1985).

¹⁰ ECOSOC resolution 1988/2.

¹¹ ECOSOC resolution 1989/67.

¹² ECOSOC resolution 1990/19.

¹³ General Assembly resolution 45/114 (1990).

the communications procedure of CSW¹⁴ and, in the event these mechanisms proved ineffective, consideration of a substantive Optional Protocol to the Convention on violence against women.¹⁵ Subsequent years saw the adoption of an important general recommendation on the theme by CEDAW (1992), the adoption by the UN General Assembly of the Declaration on the Elimination of Violence against Women (1993), the establishment of a special rapporteur on the subject by the UN Commission on Human Rights (1994), and the adoption of the procedural Optional Protocol to the CEDAW Convention in 1999.

15. Parallel to these developments was the work of the Committee on the Elimination of Discrimination against Women, which had commenced its work under the CEDAW Convention in 1982. The Committee became conscious of the systemic nature of violence against women through its consideration of States parties' reports and information provided by non-governmental organizations during its first decade. In response, the CEDAW Committee adopted *General recommendation 12* on violence against women in 1989, in which it identified articles of the Convention which imposed obligations on States parties to address violence against women, identified sites of such violence as the family, the workplace and other areas of social life, and recommended that States parties report on legislation and other measures adopted to protect women against violence and provide support services, as well as compiling statistical data on the incidence of violence. The Committee built on this in *General recommendation 14* (1990) on female circumcision, identifying this as a traditional practice harmful to women's health and making recommendations for its eradication.

16. In the lead-up to the 1993 Vienna World Conference on Human Rights, the Committee allocated part of its 1992 session to a discussion of violence against women which would reflect on Convention articles which related particularly to the issue. The outcome of this was the Committee's *General recommendation 19* (1992). The Committee has also addressed the issue in a number of its other *General recommendations*, many of its decisions and its inquiry reports under the Optional Protocol, and regularly comments on the issue in its concluding observations on the reports of States parties. States parties have regularly reported under the Convention on violence against women in response to the Committee's requests.

17. The legal status and impact of the practice of the CEDAW Committee is addressed below. The practice of the CEDAW Committee, in particular *General recommendation 19*, has had a significant influence in many countries on the actions of government, the approach of courts, tribunals and national human rights institutions, and has been an important reference point for advocates.

¹⁴ The CSW conducted a review of its communications procedure earlier in 1991 (see E/CN.6/1991/10), but did not adopt any major modifications to the existing procedure.

¹⁵ E/CN.6/1992/4 (1991).

CALLS FOR A NEW CONVENTION –THE JUSTIFICATIONS OFFERED

18. The persistence and emergence of new forms of GBVAW has led to calls for the bolstering of the existing international framework by the adoption of a new convention which explicitly addresses gender-based violence against women, along the lines of the regional conventions on the subject mentioned above. These calls reflect the view that international law standards and procedures can make a difference and that a new binding instrument.

19. Various arguments have been put forward in support of a new convention. The first is that there is ‘normative gap’ in international law because

- (a) there is no explicitly binding UN human rights treaty addressing GBVAW, which needs to be recognised as ‘a human rights violation in and of itself’; and
- (b) the many standards and the jurisprudence that has developed on the topic are all ‘soft law’ and not binding under international treaty law or customary international law.

20. A related argument is that there is a pressing need to provide more coherent and detailed guidance to States as to the steps they should take in order to address GBVAW, especially in relation to ‘obligations of due diligence’. It has also been argued that a specific, focused treaty will help to bring about the transformative changes that are needed to eliminate violence. Further, the adoption of the regional treaties on the subject demonstrate that there is a widely held view among States and civil society organizations that such treaties are normatively and practically useful. The following sections elaborate in more detail some of potential advantages and possible drawbacks of a new convention.

EVALUATION OF THE ‘NORMATIVE GAP’ ARGUMENT

The ‘normative gap’ argument

21. One of the central arguments made in support of the development of a new convention is the argument that there exists a ‘normative gap’ on the subject of GBVAW international human rights law. A leading proponent of a new convention and the existence of a ‘normative gap’ has been the former Special Rapporteur on violence against women, Professor Rashida Manjoo. She has argued that there is a ‘normative gap’ in international law in relation to violence against women because there is no ‘legally binding specific instrument on violence against women’ and that none of the more detailed prescriptions in non-binding instruments have become part of customary international law. In Professor Manjoo’s view:

[t]he lack of a legally binding instrument on violence against women precludes the articulation of the issue as a human rights violation in and of itself, comprehensively addressing all forms

of violence against women and clearly stating the obligations of States to act with due diligence to eliminate violence against women.¹⁶

22. While Professor Manjoo acknowledges that there has been much development in the elaboration of international standards relating to violence against women (including under the CEDAW Convention), nonetheless

The current norms and standards within the United Nations system emanate from soft law developments and are of persuasive value, but are not legally binding. The normative gap under international human rights law raises crucial questions about the State responsibility to act with due diligence and the responsibility of the State as the ultimate duty bearer to protect women and girls from violence, its causes and consequences.¹⁷

23. The ‘normative gap’ argument thus places considerable emphasis on the international legal status of the international norms and standards that address violence against women. Professor Manjoo notes that the legally binding CEDAW Convention does not address the issue explicitly and systematically. She emphasises that, while the *General recommendations* and other output of the CEDAW Committee do address violence against women, as do the more detailed UN Declaration on the Elimination of Violence against Women and other programmatic and policy documents, none of these are in themselves legally binding as a matter of international law:

There are many ‘soft law’ documents that address the issue, including the Vienna Declaration and Programme of Action, the Declaration on the Elimination of Violence against Women, the Beijing Declaration and Platform for Action, and general comments and recommendations of treaty bodies. ***However, although soft laws may be influential in developing norms, their non-binding nature effectively means that States cannot be held responsible for violations.***¹⁸

24. Accordingly, there is a ‘normative gap’ that is not adequately remedied by the range of non-binding instruments nor through treaty body practice.¹⁹ Professor Manjoo argues that it is important to the struggle against violence against women that there be explicit, binding and detailed prescriptions of the steps that States must take to combat such violence -- and that these should be contained in a new treaty on the subject. Professor Manjoo places particular importance on the need to elaborate the

¹⁶ SRVAW 2014 report, above n 2, para 68.

¹⁷ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo [SRVAW 2015 report], UN Human Rights Council, 29th session, para 63, UN Doc A/HRC/29/27 (2015).

¹⁸ SRVAW 2014 report, above n 2, para 68 (emphasis added).

¹⁹ Professor Manjoo has also argued that explicit and detailed obligations in relation to violence against women have not become part of customary international law. Ibid. Professor Manjoo may have been too quick to dismiss the possibility that there is a customary international law norm relating to the prevention and punishment of violence against women. While the existence of a customary international law rule can be difficult to prove, this may be one case where there is a general obligation, even if there is not agreement as to every detail.

content of the ‘due diligence’ obligation of States in relation to such violence. She sees the adoption of legally binding treaties at the regional level and the practice under those treaties as positive support for the potential effectiveness of a similar convention at the universal level.

25. Professor Manjoo argues that:

[I]t is time to consider the development and adoption of a United Nations binding international instrument on violence against women and girls, with its own dedicated monitoring body. Such an instrument should ensure that States are held accountable to standards that are legally binding, it should provide a clear normative framework for the protection of women and girls globally and should have a specific monitoring body to substantively provide in-depth analysis of both general and country-level developments. With a legally binding instrument, a protective, preventive and educative framework could be established to reaffirm the commitment of the international community to its articulation that women’s rights are human rights, and that violence against women is a human rights violation, in and of itself.²⁰

Evaluation of the ‘normative gap’ argument

26. While the rhetorical and strategic advantages of an argument based on the existence of a ‘normative gap’ argument are clear, the assertion of the existence of such a gap bears further examination. Whether the claim is correct depends not only on how one defines the concept, but also on a detailed analysis of the text of the Convention in light of its object and purpose and in light of the practice of States parties to the Convention. This paper argues that the claimed existence of a ‘normative gap’ is not persuasive as a matter of international treaty law, and that pressing for a new treaty on the ground that there is such a gap is a potentially counter-productive strategy.

The legal status of CEDAW’s practice in relation to VAW: General recommendations and other practice

27. As noted earlier, the CEDAW Committee has set out its views on the scope of States parties’ obligations under the Convention to eliminate public and private violence against women in a number of general recommendations (in particular *General recommendation 19*), as well as in its concluding observations, decisions on individual communications, and reports of inquiries relating to individual States parties. It is well-accepted that such pronouncements of the United Nations human rights treaty bodies are not in themselves formally binding as a matter of international law. This is case with CEDAW’s pronouncements – they are not as such formally binding interpretations of the Convention.

28. Leaving the matter there, though, as the ‘normative gap’ argument does, involves an inadequate analysis of the meaning of the CEDAW Convention, because it

²⁰ SRVAW 2015 report, above n 17, para 64.

fails to apply the accepted international law approach to the interpretation of treaties to the Convention. The fact that the CEDAW Committee may not have the legal power to issue formally binding interpretations of the Convention, does not mean that its interpretations are not an accurate statement of the scope of States parties' binding obligations under the treaty. The question is whether the Convention, properly interpreted, imposes such obligations on States parties, not the formal legal status of CEDAW's views.

29. This section first briefly analyses the Convention's coverage of GBVAW in the light of the standard rules of treaty interpretation. It argues that CEDAW's interpretation of the Convention as including GBVAW is a correct interpretation of the Convention construed in accordance with those rules. It further argues that the responses of States parties to CEDAW's interpretation of the Convention as imposing obligations in relation to GBVAW can be viewed as subsequent State practice that establishes the agreement of States parties as to the interpretation of the treaty.

Interpreting the CEDAW Convention

30. The starting-point for the interpretation of an international treaty is the ordinary meaning' of the terms of the treaty in their context and in the light of [the treaty's] object and purpose'.²¹ Also to be taken into account in the interpretation of a treaty are other agreements adopted at the same time as the treaty, and subsequent practice of the States parties that establishes their agreement as to the meaning of the treaty.²² The drafting history of the treaty may also be taken into account in certain circumstances as a subsidiary means of interpretation.

31. In the case of the CEDAW Convention, States parties assume wide-ranging obligations across all fields of social life. Those obligations are, broadly speaking, to eliminate all forms of discrimination against women in those areas and to ensure that women enjoy human rights and fundamental freedoms generally and in a number of specific areas, on the basis of equality with men. In addition, article 5 of the Convention requires States parties to take all appropriate measures to modify social and cultural patterns of behaviour in order to eliminate prejudices customary and other practices which are based on the idea of the superiority of either sex or on stereotyped roles for men and women.

32. The Convention requires States parties to ensure that State actions do not involve discrimination and in particular that public officials do not engage in discriminatory acts. Equally importantly, the Convention explicitly obliges States

²¹ Vienna Convention on the Law of Treaties, art 31(1). While the Vienna Convention would not apply directly to the interpretation of the CEDAW Convention because although the Vienna Convention entered into force after the conclusion of the CEDAW Convention, its provisions on interpretation are generally accepted as forming part of customary international law.

²² *Id*, art 31(3).

parties to take all appropriate measures to eliminate discrimination by private persons ('any person, organization or enterprise', article 2(e)), to modify existing laws, regulations, customs and practices which constitute discrimination (article 2(f)), and to ensure that there is effective legal protection of women against any act of discrimination.

33. The obligations of States parties with respect to non-State actors are what has been traditionally described as the obligation of 'due diligence', a concept derived from classical international law in relation to State responsibility for injuries to aliens but one which has been taken up and extensively developed in modern human rights law.

34. Article 2(e) of the Convention plainly obliges States parties to take all appropriate measures to ensure that women are protected against discrimination by non-State actors. It supplements the obligations of a State party in relation to actions of the State itself, in relation to which a State party is obliged to ensure that public authorities and institutions act in conformity with the obligation to refrain from engaging in any discrimination against women. Other provisions of the Convention also require States parties to take action in relation to various forms of discrimination by private persons in specific areas (for example, articles 2(f), 5, 6, 7, 11, 13 and 16), but the general 'due diligence' obligations apply across all the areas specified in the Convention and, because of the broad definition in article 1 of 'discrimination against women', to all other human rights and fundamental freedoms as well.

35. The obligations of the State in relation to its own officials and actions appear to impose a more demanding standard ('undertake... (d) to refrain from engaging in ... discrimination and to ensure that public authorities and institutions shall act in conformity with this obligation') than is imposed in relation to non-State actors ('undertake ... to take all appropriate measures to eliminate discrimination').

*Violence against women as a form of 'discrimination against women'*²³

36. The next issue is whether violence against women in its many forms falls within the concept of 'discrimination against women' as defined in article 1 of the CEDAW Convention, or is covered by other provisions of the Convention that do not use the language of discrimination (for example, articles 5 and 6). The CEDAW Committee has argued and it appears consistent with the ordinary meaning of the treaty language that as gender-based violence against women is gendered in its forms and incidence, it can be understood as a form of discrimination against women. Thus, such violence involves discrimination against women in the equal enjoyment of their rights, both those rights explicitly mentioned in the Convention as well as those incorporated by reference in the definition of 'discrimination against women' in article 1 – including

²³ See Christine Chinkin, 'Violence against Women' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: Oxford University Press, 2012) 443-474.

the right to life, right to integrity of the person, the right to be free from torture and cruel, inhuman or degrading treatment, the right to health, and other rights, the enjoyment of which is limited by violence.

37. This reading is also consonant with the object and purpose of the Convention – the elimination of all forms of discrimination against women -- something which must be understood as comprehensive in scope as well as dynamic in operation, to be applied to newly emerging forms of discrimination or existing forms of discrimination that are named as such.

38. This approach to interpreting the Convention is essentially the one adopted by CEDAW in its *General recommendation 19* and which it has reaffirmed consistently in its practice since that time. The CEDAW Committee's view of the meaning of the Convention as regards violence against women and the resulting obligations thus appears to lead to the same result that follows from the application of the ordinary rules of treaty interpretation. Furthermore, to the extent that there may be any doubt about this as the proper interpretation of the treaty, we can look to State parties' practice under the treaty: this appears to confirm that States have accepted that the Committee's interpretation of their obligations under the Convention in relation to violence as the correct interpretation of the treaty.

*The practice of States parties and its relevance to the interpretation of the Convention*²⁴

39. The importance of States parties' responses to the CEDAW Committee's pronouncements in its formally non-binding *General recommendations*, concluding observations, Optional Protocol cases and inquiries is that they constitute 'State practice' that may be relevant to the interpretation of the treaty. Article 31(3)(b) of the VCLT provides that in interpreting a treaty:

3. There shall be taken into account, together with the context:

...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ...²⁵

²⁴ This issue has recently been considered in depth by the International Law Commission. See International Law Commission, 'Conclusion 13[12]: Pronouncements of expert treaty bodies', *Report of the International Law Commission*, sixty-eighth session, 2 May-10 June and 4 July-12-August 2016), advance version (18 August 2016) [*ILC 2016 Report*], UN Doc A/71/10, 247-258 (2016) and International Law Commission, *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur* [*Nolte Fourth Report*], Sixty-eighth session, UN Doc A/CN.4/694 (2016).

²⁵ The pronouncements of treaty bodies may also be relevant under article 32 of the VCLT as 'other practice' that 'may' be taken into account as a supplementary means of interpretation, though that has not finally been resolved. See *ILC 2016 Report*, above n 24, at 255-257, paras 20-27.

40. The practice referred to in article 31(3)(b) is the practice of *States parties*, not that of the CEDAW Committee. However, it is clear that the responses of States parties to the pronouncements of a treaty body may constitute relevant State practice in this context.²⁶ The practice must be of *all* of the States parties and it must establish the *agreement* of those parties; relying on subsequent State practice to elucidate the terms of the treaty is thus not an easy hurdle to overcome.²⁷ As the Appellate Body of the World Trade Organisation has commented, for ‘practice’ to fall under article 31(3)(b), there must be

a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.²⁸

41. Express endorsement of a particular interpretation may not be required. However, the International Law Commission has cautioned that mere silence or the absence of objections cannot assumed to be consent or acquiescence. Nonetheless, where a State party is aware of other parties’ or the expert treaty body’s interpretation in circumstances in which a reaction would be expected, and remains silent, this may constitute agreement.²⁹ The concluding observations on individual State party reports

²⁶ See International Law Commission, ‘Conclusion 13[12](3)’, *ILC 2016 Report*, above n 24, at 247 and *Nolte Fourth Report*, above n 24, at 19, para 43. For earlier discussions see International Law Association Committee on International Human Rights Law and Practice, *Final report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals, Report of the Seventy-first Conference, Berlin (2004)* 621, paras 19-27; International Law Commission, *Subsequent Agreement and Subsequent Practice in relation to the interpretation of treaties*, ‘Draft Conclusion 5: Commentary’, para 13, *Report of the International Law Commission on its Sixty-fifth session (6 May–7 June and 8 July–9 August 2013)*, UN Doc A/68/10, 45 (2013) (‘Statements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty’).

²⁷ *ILC 2016 Report*, above n 24, at 252, para 12 (‘this result is not easily achieved in practice’); and *Nolte Fourth Report*, above n 24, at 19, para 44.

²⁸ WTO Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, at 106 (footnote omitted). See also *Assange v The Swedish Prosecution Authority (Rev 1)* [2012] UKSC 22, [2012] 2 AC 471, in which a number of members of the UK Supreme Court cited with approval a passage from Villiger’s leading text on the Vienna Convention relating to article 31(3)(b) (Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, 2009)):

...it requires active practice of some parties to the treaty. The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must establish the agreement of the parties regarding its interpretation. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection.

²⁹ See the discussion of the relevance of silence in International Law Commission, *ILC 2016 Report*, above n 24, at 254-255, paras 18-19 (referring to ‘Draft Conclusion 10[9] (2): ‘Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction’). See also International Law Commission, *Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, by Georg Nolte,

and the adoption by the Committee of views or reports under the communications procedures, would clearly give rise to circumstances in which States parties would be expected to express an objection to the Committee's interpretations if they disagreed with them.

42. The issue is thus whether States parties' responses to CEDAW's pronouncements on the existence and scope of obligations under the Convention in relation to violence against women establishes the agreement of States parties as to the interpretation of the CEDAW Convention in this regard.

43. A definitive answer to this question would require a comprehensive examination of State responses to CEDAW's pronouncements in their reports, their responses to lists of issues and concluding observations, and the positions they take in individual communications and inquiries and in response to the outcomes of those procedures, are all relevant sources, as are statements made in other contexts about the Convention.³⁰ The approach taken in this paper is to examine a sample of State responses in recent years to assess State practice against article 31(3)(b) and, in particular to try to identify instances in which State parties have objected to the legal interpretation of the Convention (as opposed to its application to the facts of a particular case).³¹

44. CEDAW's practice provides States parties with many opportunities to respond to its interpretations of the CEDAW Convention and to take exception to them if the State party considers the Committee's interpretation of the treaty to be incorrect. CEDAW's General recommendations are circulated and are freely available to States parties and States parties are asked to report on violence and in accordance with *General recommendation 19* on a regular basis, and this is reflected in CEDAW's concluding observations.³²

45. States have indicated their acceptance of the Convention's coverage of violence generally and of *General recommendation 19* in particular in a number of ways, both

Special Rapporteur, UN Doc A/CN.4/671, paras 58-70 (2014) and *Nolte Fourth Report*, above n 24, at 20-21, paras 47-48.

³⁰ See *ILC 2016 Report*, above n 24, at 252-253, paras 13-15 (referring to the relevance of stances taken by States in the adoption of resolutions in political bodies): *Nolte Fourth Report*, above n 24, at 19, paras 45-46 (same).

³¹ This summary is based on primary research carried out in 2015 by Erin O'Connor Jardine, at the time a student associate of the Australian Human Rights Centre, Faculty of Law, University of New South Wales, Sydney, Australia (www.ahrcentre.org). It was prepared for a workshop organised by IWRAW Asia Pacific in 2015 to explore the issues arising from suggestions that a new convention on violence against women be adopted.

³² For example, the 152 sets of concluding observations adopted by the CEDAW Committee from January 2009 to March 2015 included 92 specific references to GR 19, with all concluding observations contained a section headed 'violence against women'.

tacit and explicit. For example, in the 109 State party reports submitted under the Convention between January 2010 and March 2015, there were explicit endorsements of *General recommendation 19* by 29 States parties. There were also eleven general endorsements of CEDAW's *General recommendations*. All States parties reported on violence against women in their periodic reports, in pursuance of their obligation under article 18 of the Convention to report on 'the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect'.

46. Acceptance by States parties, whether by conduct or explicit endorsement, can also be seen in a number of individual communications considered under the Optional Protocol to CEDAW. Of the 40 cases concluded in the period under review, 24 cases involved complaints in relation to violence against women. In 20 of those cases States parties recognised or explicitly endorsed *General recommendation 19*, even in cases in which they argued that there had been no failure to carry out the relevant obligations. No State dissented from the general gist of *General recommendation 19*; the only aspect of substantive interpretive disagreement was over the applicability to refoulement decisions of the Convention's obligations in relation to violence.³³

47. Overall, then, this material indicates broad support amongst States parties for an interpretation of the Convention that imposes binding obligations in relation to violence, the general features of which can be seen in *General recommendation 19*. Equally importantly, there appears to have been no objection to the substance of *General recommendation 19* in any of the materials studied for the 2010-2015 period, whether in the reporting, communications or other procedures.³⁴ (This probably reflects the longer-term position as well, pre-2010.)

48. A review of this sample of the responses of States parties to the Convention over the last five years suggests that there is a strong argument that the subsequent practice of States parties shows that they have endorsed the interpretation of the Committee taken in its *General recommendation 19* and that as a result this General recommendation can be viewed as a statement of the binding effect of the Convention in relation to violence against women. In other words, States parties are bound under the Convention to carry out the types of actions set out in *General recommendation 19*.

³³ For example, Denmark argued that its obligations extended only to 'individuals under its jurisdiction and cannot be held responsible for discrimination in another country.' *M E N v Denmark*, Communication No 35/2011, 26 July 2013, para 4.9). The Committee held the communication inadmissible, but nonetheless went on to affirm that the Convention barred States parties from returning women to other countries in certain circumstances (*id* at para 8.4).

³⁴ States have formally objected to general comments proposed or adopted by other treaty bodies: see the examples in Andrew Byrnes, 'The Meanings of International Law: Government Monopoly, Expert Precinct or Peoples' Law?' (2014) 32 *Australian Yearbook of International Law* 11-32.

49. While a definitive conclusion to that effect would require a comprehensive survey of the responses of States, it is striking that no State party appears to have taken exception to the Committee's interpretation of the Convention as applying to violence against women by public and private actors. As noted above, silence in the face of Committee pronouncements may not in itself be enough to establish the agreement of the States parties. However, *General recommendation 19* as an appropriate interpretation of the Convention, the acceptance of the *General recommendation 19* as the appropriate standard for argument in Optional Protocol cases, and the consistently positive responses to CEDAW requests to report on violence against women, strongly support the conclusion that the practice of States parties would therefore satisfy the criteria for recognition as State practice which establishes the agreement of States parties as to the meaning of the treaty under article 31(3) (b) of the Vienna Convention on the Law of Treaties. In other words, there are binding international legal obligations to eliminate public and private violence against women, and no normative gap.

50. However, a further question might arise, however, in relation to the details of the obligations in relation to violence that can be established in this way. The content of CEDAW's *General recommendation 19* sets out in some detail the steps that States parties should take, but it does not purport to be exhaustive or the mandates that every State party take all the individual steps that it might list. It is true that the CEDAW Committee practice does not have the detail of the Istanbul Convention, for example, but that does not mean that the general and specific obligations set out in the *General recommendation 19* are not binding. It goes rather to the level of detailed specification that is appropriate or desirable in an international normative regime.

Conclusion on the existence of a normative gap and the dangers of asserting that there is one

51. In light of the above analysis, while it may be accurate to say that there is no UN convention that explicitly and systematically addresses violence against women, the claim that there is a 'normative gap' disregards the results reached by the ordinary processes of treaty interpretation involving interpretation of the language of the Convention in light of its object and purpose is confirmed by what appears to be consistent practice by States parties. Thus, the CEDAW Convention properly interpreted requires States parties to take action to prevent and punish both State and private violence against women.³⁵

52. In short, there is no 'normative gap'. To suggest otherwise may have the unfortunate effect of providing ammunition for those who wish to resist the

³⁵ This paper has not addressed in detail the obligations in relation to violence against women that exist under other UN human rights treaties and which have been explicated by other human rights treaty bodies. There is a similar argument to be made about the practice under a number of those treaties about the existence and scope of obligations in relation to violence against women.

application of the Convention to GBVAW to argue that CEDAW's general recommendations on the subject represent no more than exhortation rather than an accurate statement of States parties' legal obligations. That would be an unfortunate outcome of an endeavour to improve the situation in relation to the elimination of violence against women through the use of international legal norms.

B. THE POTENTIAL ADVANTAGES AND POSSIBLE DRAWBACKS OF A NEW CONVENTION

53. However, the fact that there may be no normative gap is not determinative of whether a new convention is necessary or desirable. The fundamental question is whether a new convention would contribute to the elimination of violence against women. The process of elaborating a new convention might involve the specification of obligations or rights that are 'new' -- at least in their focus or perspective or level of detail-- even if they can be said to be derived from more general statements of 'universal' rights and obligations. The establishment of a separate monitoring mechanism might also help to spur government and community activity and advocacy around specific themes and in this ways contribute to effective practical change. At the same time one must also weigh the putative benefits of a new convention against its possible drawbacks, including that it might undermine existing norms and procedures. Advocates of a new convention have not carried out an assessment of the potential drawbacks of such an instrument, and how this might affect the arguments for a new treaty, its form or content.

Some possible advantages of a new convention

54. A number of advantages of a new convention may be identified. First, a new convention might offer the opportunity to clarify the detail of various aspects of States' obligations, and bring them together in a more concise instrument that is clearly a binding normative instrument addressed directly to States. At the moment the argument that there are binding obligations in relation to GBVAW (as set out above) might be seen as complex; an instrument directly and explicitly setting out obligations might be more persuasive to public officials and easier for them to use. The drafting of a new treaty might provide the opportunity to define terms such as 'gender-based violence against women' and to give more detailed content to obligations of due diligence.

55. Secondly, the drafting and existence of a new convention is likely to provide a focus for activism and to provide advocates with a new tool that can be invoked in various contexts to help drive social and legal change. Thirdly, it may provide governments and policymakers with an updated and coherent framework for developing or strengthening laws, policies and programs to address GBVAW. There may be further arguments to be made in addition to these.

Possible drawbacks

56. While a new convention would add to the current body of legal norms; however, the fundamental question is whether the adoption of a convention would be an overall positive contribution to the struggle against violence against women, and whether there are any drawbacks that should temper enthusiasm for a new binding instrument. Possible drawbacks include:

57. *Danger of undermining the CEDAW Convention:* It is not clear from proposals for a new convention exactly what relationship is envisaged between convention and existing norms and practices (especially those of CEDAW). There is a danger of undermining the advances achieved under the CEDAW Convention (especially if advocates continue to assert the existence of a 'normative gap' argument continues to be used or providing a pretext for States to suggest CEDAW does not cover GBVAW (or, at least, does not impose binding obligations)).

58. *Need for a holistic analysis and recognition of context:* A specific convention on violence may detract from a holistic analysis of the broader discriminatory context in which GBVAW arises, and lead to a focus on symptoms to the neglect of the underlying systemic causes of violence. This may involve 'definitional creep' whereby most forms of discrimination become 'violence', eg 'structural violence' and 'economic violence'.

59. *Different normative and institutional contexts:* The UN human rights treaty system is different to the regional systems which have adopted a specific violence convention. Neither the Council of Europe nor the Organisation of American States had a CEDAW-equivalent convention at the time they adopted their violence conventions; there was thus only a very limited body of jurisprudence on international human rights law and violence against women and the conventions significantly supplemented the existing norms and procedures available under those systems in relation to GBVAW. In the case of the African Union, the Maputo Protocol is the region's CEDAW-equivalent and contains general obligations and those specific to VAW. Thus, arguing for a UN convention on the basis that the regional systems have adopted them fails to take full account of the different coverage of sex discrimination issues in the various systems.

60. *Less flexibility:* While a treaty is a binding instrument, once the text of a treaty has been negotiated it can be difficult to amend it, as times and circumstances change and new forms of violence against women emerge. This may be contrasted with an instrument such as a declaration, or the interpretive practice of a treaty body – each of these is a very flexible method of adapting to changing circumstances without going through the lengthy and arduous intergovernmental process to negotiate an updated amendment to a treaty.

61. *Dangers of the political process:* The political process of drafting a new convention runs the risk of States trying to limit what is understood as violence by excluding certain practices from any definition (whether in the text of a convention or

in reservations to a new convention), or to open up disagreement with and challenges to the CEDAW approach in General recommendation 19 or its Update.

62. *Possibility of excessive duplication of bodies and procedures:* If a new treaty were to establish a new monitoring mechanism, this might be – and would be seen by States as – excessive duplication, given the existence of CEDAW Committee, the Special Rapporteur on Violence against Women, and the Working Group on Discrimination against Women in Law and Practice (as well as the other UN human rights mechanisms that address GBVAW as part of non-gender-specific mandates, quite apart from any regional mechanisms). One way to minimise concerns on this account would be to link any new convention closely to the CEDAW Convention normatively and any new procedure to the CEDAW Committee institutionally.

63. *Transaction costs and diversion of resources:* The elaboration of a new convention would involve a lengthy and resource-intensive campaign to persuade States to draft a convention, and to participate in what could be a drawn-out and contentious process. If that were successful, then a further political campaign would be required to persuade States to ratify it; it would be some time before any convention reached the current 189 States parties to the CEDAW Convention.³⁶ Both these processes may draw energy and resources away from implementation efforts based on existing obligations (though one might also expect some synergy between both efforts).

SOME GUIDING PRINCIPLES

64. Against the background of this overview of the possible advantages and drawbacks of a new convention, this section suggests a number of guiding principles that should be adopted in the consideration of whether or not to pursue the development of a new convention on GBVAW and, if such a goal is adopted, how this might be appropriately pursued. These are:

- (a) *Recognition that we are not starting with a blank sheet:* The starting-point of any discussions and conceptualisation of a new convention or other measures should be that such an effort will not be drawing on a blank sheet at the UN level, nor will it be adding a gender-specific treaty to a human rights system that does not have a general women's human rights treaty. This means that care needs to be taken to recognise the importance and impact of existing norms and practice, and to build on them, not undermine them or give States any pretext for contesting or watering down existing standards.

Any new measures should recognise the role that existing international obligations and standards have played in supporting government action, institutional change and women's human rights advocacy at the domestic level, and explore ways to consolidate and build on those achievements – including

³⁶ There are 107 States parties to the Optional Protocol to the Convention.

through drawing the significant jurisprudential work that has been undertaken to explicate the content of the obligations of States both positive and negative in relation to violence perpetrated by both State and non-State actors (including work on the nature of 'due diligence' and 'due diligence obligations').

- (b) *Affirmation of CEDAW and other existing obligations*: Any new treaty should affirm the existing binding obligations under the CEDAW Convention to take all appropriate measures to eliminate all forms of gender-based violence against women committed or tolerated by State or non-State actors; and indicate that it is providing further detail as to how States can more effectively fulfil those obligations.
- (c) *Recognition of need for better implementation*: Any new measures should recognise that there is a significant failure of implementation at the national level and that significant efforts and resources needed to be devoted to implementation, in particular by supporting legal and other forms of action at the domestic level. In addition to exploring ways to enhance follow-up to CEDAW concluding observations (which now all contain a separate section explicitly dealing with violence against women). This should include encouragement of and support for the adoption of laws recognising and addressing GBVAW (including marital rape), the adoption of national policies on violence against women and the designation or establishment of national mechanisms for monitoring the implementation and effectiveness of the relevant laws and policies, and prioritising GBVAW- initiatives in legislative and budgetary actions.
- (d) *Adoption of a holistic and contextual approach to GBVAW*: Any new international measures, including a treaty, should adopt a holistic analysis of GBVAW that reflects the indivisibility of rights and an understanding of GBVAW as rooted in broader patterns of the denial of women's right to equality and the enjoyment of all rights (as is reflected in the CEDAW Convention).
- (e) *No retrogression*: Any new treaty should not permit the erosion or roll-back of any existing obligations or standards.
- (f) *Expansive and flexible definition of violence*: Any new treaty should adopt a definition of violence that is expansive, flexible and dynamic. However, it should not adopt a definition that is so broad that most forms of discrimination against women are brought under the rubric of 'violence against women'.

- (g) *Need for clarity relating to due diligence obligations:* Any new treaty should embody conceptual clarity in relation to the concept of 'due diligence', in particular distinguishing between 'obligations of due diligence' as a type of obligation (steps the State should take in relation to non-State actors), and 'due diligence' as a standard of conduct or fault.
- (h) *Linking monitoring procedures to existing mechanisms:* Any new international monitoring procedures should be linked to existing procedures. If a treaty were to be considered –
- (i) it should be a further optional protocol to the CEDAW Convention
 - (ii) it should focus on ways in which such a treaty might further strengthen existing procedures for enhancing implementation and ensuring accountability and thus be a procedural rather than a substantive convention (perhaps along the lines of the Optional Protocol to the Convention against Torture)
 - (iii) it should assign any monitoring role to the CEDAW Committee (among the largest of the UN human rights treaty bodies); and
 - (iv) if substantive provisions are included, they should reaffirm that the Convention covers all forms of GBVAW and should in no respect fall below the existing standards articulated under the Convention by the CEDAW Committee.
- (i) *Avoidance of duplication or overlap:* Any new treaty should avoid duplicating procedures that already apply to GBVAW. For example, there would appear to be little justification for establishing a new treaty with its own individual communications or inquiry procedure when CEDAW already has that role, and it is open to States parties to the Convention to adhere to those procedures. If they have not already done so, they should be encouraged to do so. However, consideration might be given to whether a preventive and educative visits function similar to that established by the Optional Protocol to the Convention against Torture might be adopted.
- (j) *Specification of role for national institutions:* Any new treaty should include provision that specifically address the role of different national institutions in addressing violence against women, including national human rights institutions and other public bodies with a relevant mandate. These might draw on the provisions in OP-CAT and the Convention on the Rights of Persons with Disabilities.
- (k) *Limitation on reservations:* Any new treaty, especially one that contains any substantive provisions, should prohibit reservations.

ADOPTION OF A MULTI-PATH STRATEGY

Whatever may occur with regard to the development of a new convention, its adoption and entry into force would be years off, and there is a need to focus on improving implementation of existing standards now. There is a range of options that could be undertaken in parallel with or instead of the elaboration of a new convention. These include:

- a. Building on CEDAW's jurisprudence and practice in relation to GBVAW;
- b. Drawing on and strengthening the jurisprudence of other UN human rights treaty bodies and mechanisms;
- c. Using regional conventions and procedures where available (and developing further procedures, for example in Asia Pacific or its sub-regions); and
- d. Continuing to draw on international law standards to influence domestic level decision-making.

65. Another option is the renewal by CEDAW of *General recommendation 19*, a process which is well underway, with the CEDAW Committee releasing a draft update to *General recommendation 19* for comment on its website in late July/early August 2016.³⁷ This 'complements and updates the guidance to States parties set out in General Recommendation No. 19, and provides further clarification of their obligations to all women within their territories.'³⁸

66. The adoption of a supplementary *General recommendation* by the CEDAW Committee has the advantage of speed and will produce useable results more rapidly than a treaty drafting process. *General recommendations*, with their ability to be updated and supplemented, are flexible tools that can ensure that the Convention is kept up to date; amending treaties is a much harder prospect. Whether all of the content of the new (or updated or supplementary) *General recommendation* would represent binding interpretations of the Convention will depend on the specific content and also on how States parties react. In any case, the content of the draft supplementary *General recommendation* is a summary or digest of the past practice of CEDAW that has been accepted by States parties over the last 25 years. Of course, a new or updated *General recommendation* does not preclude parallel advocacy for a convention.

CONCLUSION

67. IWRAW Asia Pacific recognise that the CEDAW Convention is a creature of its time and that, if one were drafting such a convention today, violence against women would be explicitly addressed and probably in some detail. It also recognises CEDAW's *General recommendation 19* is itself almost a quarter of a century old, though the

³⁷ See 'Draft General Recommendation No. 19 (1992): accelerating elimination of gender-based violence against women', CEDAW/C/GC/19/Add.1 (28 July 2016), available through www.ohchr.org/EN/HRBodies/CEDAW/Pages/DraftUpdateGR19.aspx (4 August 2016).

³⁸ *Id* para 6.

Committee has in its other *General recommendations* and in its practice been able to develop its understanding of the obligations.

68. IWRAW Asia Pacific also acknowledges that much needs to be done to eliminate the scourge of GBVAW and that strengthened international (legal) measures can contribute significantly to that struggle. The question of the form that any new measures take should be approached boldly but also carefully, and the critical issue is how best to ensure implementation of the standards of the Convention and other equality guarantees at the national level. IWRAW Asia Pacific suggests that any discussion of a new convention needs to recognise what has been achieved, carefully weigh the potential positive and negative consequences of pushing for a new convention, and to take into account the concerns and guidelines set out in this paper.
