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WHEN CULTURE AND HUMAN RIGHTS COLLIDE: THE LONG ROAD TO THE ELIMINATION OF GENDER-BASED HARMFUL TRADITIONAL PRACTICES

SUMMARY: 1. Introduction. – 2. In Search of a Definition of Culture. – 3. The Outer Limits of Culture. – 3.1. Harmful Traditional Practices Are Incompatible with Human Rights Standards. – 3.2. Cultural Heritage Law Guarantees Internationally Recognized Human Rights. – 3.3. Cultural Relativism. 4. The Long Way to the Humanization of Cultures. 4.1. Whether Harmful Traditional Practices Are Prohibited Under International Law. – 4.2. Whether Harmful Traditional Practices Should Be Transformed or Eliminated. – 4.3. How the Transformation or Elimination of Harmful Traditional Practices Can Be Achieved? – 4.4. Obstacles to the Transformation or Elimination of Harmful Traditional Practices. – 5. Conclusions

1. *Introduction*

The 2017 documentary *Le cri étouffé* by Manon Loizeau has shed light on a tragic facet of the war in Syria, namely the rape of women and girls by the armed and security forces loyal to Bashar al-Assad as a means to weaken the rebels. This documentary shows that countless Syrian women – the wives, sisters, daughters and mothers of rebels – have been kidnapped and imprisoned in State prisons, from which their wardens have called their families threatening to rape the prisoners should their male relatives not give up the fight against Bashar al-Assad's government.

This organized, pre-meditated criminal tactic was based on the fact that in traditional Syrian society the rape of a woman is considered an incident that brings dishonour to the family of the victim. Sexual violence is a crime where the victim is stigmatised, not the offender. It is for this reason that the survivors of rape never speak about it knowing that they risk being rejected or murdered by their own family. In effect, following liberation, many of the victims of sexual violence in Bashar al-Assad's jails have been killed by their male relatives. The murder of a sexual violence survivor is regarded by the victim's family – and community – as a way to purge dishonour and as a means of restoring the integrity of the traditional or religious order. In sum, the documentary reveals that Syrian government

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officers have exploited a "harmful traditional practice" in order to weaken the resistance through ruthless acts of sexual violence[1].

Many women who have survived captivity and sexual violence have fled Syria to escape death. Interviewed for the film *Le cri étouffé*, some of these fugitives have described honour killings[2] as an inescapable and immutable aspect of their "culture".

Although it takes inspiration from *Le cri étouffé*, this article will not focus on the sexual violence committed in the context of the Syrian civil war. Rather, this poignant documentary motivated me to discuss a broader issue, namely whether the harmful traditional practices that impair women's and girls' enjoyment of fundamental human rights[3] can be regarded as components of a given "culture" – regardless of whether such practices take place in peacetime or in time of conflict.

This article is articulated as follows. First, it explores the notions of "culture"[4] (section 2) and "harmful traditional practice" in order to question whether the latter are compatible with international cultural heritage law and international human rights law (section 3). Next, it endeavours to discuss whether and how the practices that bring about the violation of core individual human rights of women and girl children should be transformed or discarded (section 4). This article argues that a holistic paradigm should be put in place – especially by the States concerned – in order to transform or abandon these practices. It therefore attempts to contribute to the definition of new directions for debate and action in order to ensure that the current legal regime come to grips with the challenges posed by harmful traditional practices. Section 5 concludes.

2. *In Search of a Definition of Culture*

Over time, numerous experts have attempted to provide a definition of culture. Virtually all these formulations, though using different wordings, offer valid depiction of the substance of this notion. For example, Shairer stated that «[c]ulture is a reflection of our humanity and frequently serves as a powerful symbol of collective identity of various groups of people»[5]. Stavenhagen proposed an anthropological understanding of culture, according to which it corresponds to «the sum total of the material and spiritual activities and products of a given social group [whether a minority or a dominant group,] […] [A]

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[1] Therefore, in Syria culture has been used as a "method of warfare". This can be defined as any specific tactical or strategic way of conducting hostilities that is intended to overwhelm and weaken the adversary. See M. SASSÒLI et al., *How Does Law Protect in War?*, Geneva, 2011, p. 280.

[2] Honour killings can be defined as the murder of women and girls because family members consider that a certain (suspected, perceived or actual) behaviour brings dishonour to the family, *e.g.* entering into sexual relations before marriage, refusing to agree to an arranged marriage, committing adultery, or dressing in a way that is viewed as unacceptable. See Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, paras. 29-30. See also K. LASSON, *Bloodstains on a "Code of Honor": The Murderous Marginalization of Women in the Islamic World* in *Women's Rights Law Reports*, 2009, p. 407 ff.

[3] This article focuses on women and girls as these are the most affected, but these practices also affect men and boys.

[4] The terms "culture" and "cultural heritage" will be used interchangeably in this article.

[5] S.L. SHAIRER, *The Intersection of Human Rights and Cultural Property Issues under International Law* in *It. YB. Int. Law*, 2002, p. 59 ff.

system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life»[6]. Donders regards culture «as a way of life, the sum of material and spiritual activities and products of a community»[7]. Another definition was provided by Murphy: «[c]ulture […] refers to the norms, values, standards by which people act, and it includes the ways distinctive in each society of ordering the world and rendering it intelligible»[8]. Finally, An-Na'im defined culture as «the totality of values, institutions and forms of behaviour transmitted within a society»[9].

Similar attempts to define culture are also contained in the legal instruments adopted by specialized international organisations – such as the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the Council of Europe (CoE).

The first document that it is worth mentioning is the Declaration on Cultural Policies. Adopted in 1982 at the World Conference on Cultural Policies (MONDIACULT), the Declaration contains two overlapping definitions[10]. On the one hand, the preamble defines culture as «[t]he whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs»[11]. On the other hand, its Article 23 provides that «cultural heritage […] includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries». Furthermore, the 2001 UNESCO Universal Declaration on Cultural Diversity (UDCD) establishes that culture should be regarded as «the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs»[12]. In addition, Article 2 of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter '2003 UNESCO Convention') provides that «'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills […] that communities, groups and, in some cases, individuals recognize as part of their cultural heritage». Moreover, Article 2(a) of the 2005 CoE Framework Convention on the Value of Cultural Heritage for Society (hereinafter '2005 CoE Convention') provides that «cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions».

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[6] R. STAVENHAGEN, *Cultural Rights: A Social Science Perspective*, in H. NIEC (ed.), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights*, Paris/Leicester, 1998, p. 1 ff., p. 5.

[7] Y. DONDERS, *Do Cultural Diversity and Human Rights Make a Good Match?* in *International Social Science Journal*, 2010, p. 15 ff., p. 19.

[8] R. MURPHY, *Culture and Social Anthropology: An Overture*, Englewood Cliffs, 1986, p. 14.

[9] A.A. AN-NA'IM, *Problems of Universal Cultural Legitimacy for Human Rights*, in A.A. AN-NA'IM, F.M. DENG (eds.) *Human Rights in Africa: Cross-Cultural Perspectives*, Washington D.C., 1990, p. 331 ff., p. 332.

[10] The conference was organized by UNESCO in Mexico City in the period 26 July-6 August 1982 and the Declaration is available at: www.culturalrights.net.

[11] Sixth preambular paragraph.

[12] Fifth preambular paragraph.

This overview would not be complete without mentioning General Comment No. 21[13] of the Committee on Economic, Social and Cultural Rights (CESCR)[14]. This provided its own understanding of culture as such: «[C]ulture is a broad, inclusive concept encompassing all manifestations of human existence […] [including] ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives»[15].

This brief overview leads to a number of remarks.

First, these definitions demonstrate that culture and cultural heritage incorporate protection that is not limited to tangible items (*i.e.* the material remains of past civilizations, be they movable or immovable) but extends to the intangible dimension of culture (*i.e.* the store of non-material meanings, knowledge, beliefs, customs, and habits, that are precious to individuals and peoples as the substratum of their identity and as witnesses of the lives of their ancestors)[16]. The intangible dimension of heritage has gained recognition as a vital factor in cultural identity, the preservation of cultural diversity, and promotion of creativity[17]. Human rights are to be considered as one of the elements of such a broad concept of culture[18]. According to one expert, human rights «have become 'culture'»[19]. In effect, the defence of cultural diversity and cultural identity is inseparable from the respect for human rights and fundamental freedoms[20]. Moreover, culture and human rights influence each other: on the one hand, culture impacts on the definition, content, perception, adjudication, and enforcement of human rights; on the other hand, human rights place limits to the expressions of culture[21].

Second, and consequently, it appears that the term culture encompasses also the spiritual, religious systems of nations and communities. There can be little doubt that the practices that are regarded as forming part of a given religion constitute also a fundamental aspect of the culture of the communities that practice that religion. As such, these religious practices are often seen as non-negotiable and not subject to renunciation. They also

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[13] General Comment No. 21: Right of Everyone to Take Part in Cultural Life, UN Doc. E/C.12/GC21, 21 December 2009.

[14] The CESCR is the monitoring body charged with overseeing the compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[15] General Comment No. 21, cit. supra note 13, paras. 11, 13.

[16] The Western-rooted idea that only the material products of arts and architecture should be protected began to change in the early 1970s during the negotiations leading to the adoption of the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972. F. LENZERINI, *Intangible Cultural Heritage: The Living Culture of Peoples* in *Eur. Jour. Int. Law*, 2011, p. 101 ff., pp. 103-104.

[17] The process leading to the development of such a holistic perception accelerated as a result of globalization. In fact, the intensification of intercultural contacts, which in many cases translates into the imposition of certain cultural models over others, has quickly put under threat – and in some cases has led to the loss of – knowledge, expressions, practices, languages, and customs. For an examination of the shift from the protection of tangible heritage to intangible heritage see L. LIXINSKI, *Intangible Cultural Heritage in International Law*, Oxford, 2013, pp. 29-33.

[18] F. LENZERINI, *The Culturalization of Human Rights*, Oxford, 2014, pp. 118, 120.

[19] A.-B. S. PREIS, *Human Rights as Cultural Practice: An Anthropological Critique* in *Human Rights Quarterly*, 1996, p. 286 ff., p. 290.

[20] See Article 4 of the UDCD.

[21] LENZERINI, *The Culturalization*, cit., pp. 213, 227. See also *infra* Section 3.2.

encompass practices that, although not explicitly mentioned in the relevant religious texts, are regarded as required or justified by the adherents to the religion[22]. Notably, some of these practices are grounded on the presumed inferiority of women and girl children and can be dangerous to them. These "harmful traditional practices" include female genital mutilation (FGM), child (forced) marriage, polygamy, seclusion, veiling, and female infanticide[23]. Although these practices are endemic in many African and Asian countries, they also occur within immigrant communities in Western States[24].

Third, the above overview of the definitions of culture and cultural heritage underlines that international law has shunned away from carving rigid, static definitions because culture and cultural heritage are evolving notions. No culture is fixed in time; much of what we consider culture today is the result of continuous re-creation throughout history, with each layer adding to its meaning and value. «[C]ulture is inherently in constant and unstoppable evolution»[25]. As such, culture takes diverse forms across time and space and means different things to different people[26].

Fourth, the definitions provided above also reveal that culture is a human centred, socially constructed notion. This means that culture is not an objective fact about the world. On the contrary, the notion of culture and its limits depend on what nations, communities within nations and individuals recognise and cherish as valuable[27]. It follows that culture is not isolated, static or bounded, but is a permeable and dynamic phenomenon shifting in response to historical processes. As such, it is and can be created and recreated by communities and individuals autonomously or in response to inputs coming from their environment or to the interaction with other communities[28]. Accordingly, everyone – alone or in association with others or as a community – not only has the right to choose his or her own cultural identity, to know and understand his or her own culture and that of others, to identify or not with one or several cultures or to change that choice, but also the right to be involved in transforming the spiritual, material, intellectual, and emotional expressions that make the culture of a given community[29].

3. *The Outer Limits of Culture*

Against the background of the definition of culture and its implications, it is now necessary to define the notion of "harmful traditional practice". This can be defined as any pattern of conduct that: (i) is regarded by the members of a given community as forming part of their culture; (ii) is deeply rooted in the idiosyncratic socio-cultural and/or religious

[22] See S. BORELLI, *Of Veils, Crosses and Turbans: The European Court of Human Rights and Religious Practices as a Manifestation of Cultural Diversity*, in S. BORELLI, F. LENZERINI (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Leiden/Boston, 2012, p. 55 ff., p. 59.

[23] For a wider list see Joint General Recommendation / General Comment, cit. supra note 2, para. 9.

[24] See Joint General Recommendation / General Comment, cit. supra note 2, para. 18.

[25] LENZERINI, *The Culturalization*, cit., pp. 213, 227.

[26] D. GILLMAN, *The Idea of Cultural Heritage*, Leicester, 2006, p. 44.

[27] B. DICKS, *Heritage as a Social Practice*, in G. HOOPER (ed.), *Heritage at the Interface*, Gainesville, 2018, pp. 11-24, p. 12; F. FRANCIONI, *Culture, Heritage and Human Rights: An Introduction*, in F. FRANCIONI, M. SCHEININ (eds.), *Cultural Human Rights*, Leiden, 2008, p. 1 ff., p. 6; and GILLMAN, *The Idea of Cultural Heritage*, cit., p. 44.

[28] E.S. MERRY, *Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)* in *Political and Legal Anthropology Review*, 2003, p. 55 ff., pp. 65, 67. See also Article 2(1) of the 2003 UNESCO Convention.

[29] See also General Comment No. 21, cit. supra note 13, para. 15.

customs and prejudiced social attitudes according to which women and girls are inferior to men and boys; (iii) is perceived as having beneficial effects for the victims, their families and the wider community[30]; (iv) entails physical, mental or sexual harm or suffering, threats of such act, coercion and other deprivations of liberty[31], which often reach the threshold of torture or cruel, inhuman and degrading treatment[32], and therefore has the effect of impairing the dignity and/or integrity of women and girls and their ability to enjoy human rights and fundamental freedoms; and (v) is imposed on women and girls by family members, traditional and religious leaders and/or their community, regardless of whether the victim provides, or is able to provide, full, free and informed consent[33].

In sum, harmful traditional practices are grounded in discrimination based on sex, gender and age, and affect the safety, health and wellbeing of women and girl children[34]. Nevertheless, these forms of behaviour are maintained by social norms, *i.e.* informal rules that create a sense of obligation and that condition the behaviour of community members[35]. Ostensibly, such social norms tend to perpetuate male dominance.

At this juncture it is important to examine three issues in order to grasp the link between harmful traditional practices and culture and to discuss whether such forms of behaviour are compatible with international cultural heritage law and international human rights law.

3.1. *Harmful Traditional Practices Are Incompatible with Human Rights Standards*

The first issue relates to the fact that harmful traditional practices must be understood as barriers to the realisation of the rights of women and girls such as the right to integrity of the person, to sexual equality, to free consent to marriage and to the highest attainable standard of physical and mental health[36]. In effect, the result (or purpose) of the practices at issue is to maintain women in subordinate roles and contribute to their low level of political and social participation and of education, skills and work opportunities. It is thus not surprising that these practices are common in traditional patriarchal (and misogynistic) societies, where women have no right, must be subservient, and are considered commodities rather than human beings, and where men have the power to control not only their body and sexual behaviour, but also their movement, conduct, education, employment, and acquaintances[37].

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[30] In effect, these practices are often justified as necessary to protect women in the community, at school and in wider society. See Joint General Recommendation / General Comment, cit. supra note 2 paras. 6-7.

[31] CEDAW Committee, General Recommendation No. 19, 1992, para. 6.

[32] CEDAW Committee, General Recommendation No. 35, CEDAW/C/GC/35, 26 July 2017, para. 16.

[33] Joint General Recommendation / General Comment, cit. supra note 2, paras. 15-16, 59.

[34] It has been argued that terms "traditional", "cultural" and the like should not be used to describe practices that have the effect of impairing the ability of women and girls to enjoy human rights and fundamental freedoms for the reason that such positive terms may convey the idea that such practices have some merits. L.M. GARDNER, *A Dubious Designation: How One Simple Label Legitimizes Human Rights Abuse* in *International Legal Perspectives*, 2004, p. 16 ff.

[35] Joint General Recommendation / General Comment, cit. supra note 2, para. 57.

[36] M.P. STEPHEN, *Defining Cultural Rights*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjørn Eide*, Leiden/Boston, 2003, p. 293 ff., p. 300.

[37] General Recommendation No. 19, cit. supra note 31, para. 11; and Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2002/83, 31 January 2002, paras. 25-28.

It is not possible, within the limited space of this article, to provide a detailed examination of the substantive content of the rights at stake. However, it seems appropriate to focus on the right to life and on the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment for the reason that these are at the core of the right to integrity of the person[38].

The right to life is the most fundamental of all other rights. The pre-existence of life is the condition for the operation of all other human rights and fundamental freedoms. The Human Rights Committee referred to the right to life as «the supreme right from which no derogation is permitted even in time of public emergency»[39]. Apart from the fact that under the law of any State the intentionally taking of somebody's life is a crime, all international human rights instruments enshrine a positive obligation incumbent on States to protect life. These include Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the European Convention on Human Rights (ECHR), and Article 4 of the American Convention on Human Rights (ACHR). These insist that no one shall be arbitrarily deprived of life.

Similarly, the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment (and from the threat of these acts) is guaranteed by various international human rights treaties. Apart from the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[40], these include Article 3 ECHR, Article 5 ACHR, Article 7 ICCPR, and Article 19 of the Convention on the Right of the Child. While the gravest violations of the physical and mental integrity of a person amount to torture, a variety of physical and mental cruel, inhuman or degrading maltreatments of lesser seriousness are also prohibited. The formal definition of torture under Article 1 CAT has three core elements: severe pain or suffering (physical or mental); it must be inflicted for a certain purpose; it must be inflicted by or under the aegis of public officialdom. As far as other ill-treatment is concerned, it includes any treatment that would amount to torture but was not inflicted for a public purpose[41].

The following examples testify to the harmful effects of some traditional practices on the individual right to integrity. Child (forced) marriage is the marriage where one of the parties (normally girls under 18 years of age) has not personally expressed her full and free consent to the union with a husband who may be decades older. In addition to limiting the enjoyment of the right to freedom of movement of the girl, this practice contributes to higher rates of school dropout, early pregnancies, and it often results in sexual violence by the husband[42]. Honour killings entail the taking of the life of the victim – a woman – to uphold the honour of a man, a family or a community[43]. Female infanticide is the practice of murdering baby girls either shorter after birth or during early childhood. This is based on societal preference for male children and the low value associated with females[44]. FGM – *i.e.*, the cutting away of all or part of a female's external genitalia – results in a host of disorders. In the most severe case it results in death. In all other cases it entails physical

[38] N.S. RODLEY, *Integrity of the Person*, in D. MOECKLI et al. (eds.), *International Human Rights Law*, Oxford, 2010, p. 209 ff.

[39] Human Rights Committee, General Comment No. 6: Article 6 (Right to Life), 1982, para. 1.

[40] The Committee against Torture acknowledged that women are especially at risk of torture or ill-treatment. See General Comment No. 2, HRI/GEN/1/Rev.9, Vol. II 376, paras. 21-22.

[41] RODLEY, *Integrity of the Person*, cit., p. 216.

[42] Joint General Recommendation / General Comment, cit. supra note 2, paras. 20-24.

[43] See note 2.

[44] GARDNER, *A Dubious Designation*, cit., pp. 18-19.

violence and pain, post-traumatic stress disorder, and long-term health complications including infections, painful urination and menstruations, and postpartum difficulties[45]. For these reasons FGM has been defined as an anti-woman practice which merely aims at restricting women's sexuality and ensuring women's subordination to men[46].

The prevention of and response to such forms of gender-based violence are linked to the recognition that human rights are universal, inalienable, indivisible and interdependent and to the prohibition of gender discrimination. For instance, under Article 3 ICESCR, States Parties undertake «to ensure the equal right of men and women»[47]. Moreover, Article 1 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits discrimination against women, which is defined as «any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women […] of human rights and fundamental freedoms»[48]. In addition, Article 4 of the 1993 Declaration on the Elimination of Violence against Women[49] recognises that the humanity and equality of women extends to the private sphere, and calls on States to prevent, investigate and punish acts of violence against women whether those acts are perpetrated by public authorities or institutions or by any private person, organization or enterprise. An equitable society cannot be attained if the human rights of half of human society – women – are violated. Inequality impacts on women's personal development, economic independence and on their enjoyment of a range of rights, including access to education, employment, and politics[50]. As clarified by the UN Special Rapporteur on violence against women: «Violence is not only a human rights violation but also a key factor in obstructing the realisation of women's and girls' rights to security, adequate housing, health, food, education, and participation. Millions of women find themselves locked in cycles of poverty and violence, cycles that fuel and perpetuate one another»[51].

3.2. *Cultural Heritage Law Guarantees Internationally Recognized Human Rights*

The second issue revolves around the fact that international instruments – especially the legal instruments relating to the protection of the intangible cultural heritage – invariably include clauses according to which culture cannot be invoked to infringe upon

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[45] Although FGM is not sanctioned by any religion, the reasons for its practice are varied: to safeguard cultural identity, preserve fertility, ensure marriageability, improve hygiene, and comply with religion prescription. World Health Organization, "Female Genital Mutilation", Fact Sheet, July 2008. The origin of FGM has not yet been established, but records show that the practice predates Islam. See F.P. HOSKEN, *The Hosken Report: Genital and Sexual Mutilation of Females*, in *Women's International Network News*, 4th rev. ed., Lexington (Mass.), 1994.

[46] MERRY, *Human Rights Law*, cit., p. 58.

[47] See also Article 2(2) ICESCR, which prohibits discrimination in the guarantee of Covenant rights. These provisions are replicated in Articles 2(2) and 3 ICCPR.

[48] See also General Recommendation No. 19, cit. supra note 31, para. 1.

[49] Declaration on the Elimination of Violence Against Women, UN GA, Res. 48/104 of 20 December 1993.

[50] C. CHINKIN, *Gender and Economic, Social, and Cultural Rights*, in E. RIEDEL, G. GIACCA, C. GOLAY (eds.), *Economic, Social, and Cultural Rights in International Law*, Oxford, 2014, p. 134 ff., p. 138.

[51] Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: Political Economy of Women's Human Rights, UN Doc. A/HRC/11/6, 18 May 2009, para. 14.

core human rights. This demonstrates that the drafters were aware of the fact that culture can encompass «practices which appear to be at odds with human rights standards»[52].

The first example is provided by Article 2(1) of the 2003 UNESCO Convention. This provides that «[f]or the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments». Similarly, Article 2(1) of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter '2005 UNESCO Convention') affirms «[n]o one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms». Moreover, Article 6(a) of the 2005 CoE Convention provides that «[n]o provision of this Convention shall be interpreted so as to limit or undermine the human rights and fundamental freedoms which may be safeguarded by international instruments». In addition, Article 4 UDCD states that «[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law». Furthermore, Article 46 of the 2007 Declaration of the United Nations (UN) on the Rights of Indigenous Peoples provides that the «exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations». Resolution 59/165 of the UN General Assembly is also relevant to the present discussion as it condemned honour killings by stressing that «such crimes are incompatible with all religious and cultural values»[53].

Finally, it is worth mentioning the statements of two human rights bodies. The Human Rights Committee emphasised that «[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes», and stressed that «[…] States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights»[54]. Furthermore, the Committee established that the «rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights»[55]. Likewise, the CESCR recalled that «no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope»[56].

All in all, these provisions indicate that the imperative of cultural heritage protection should not be used to uphold violent or discriminatory practices, even if an individual consent to a cultural practice that affects him, and even if the group to which that individual belongs believes that such a practice is valid[57]. Indeed, it appears that harmful patterns of conduct which do not conform with international human rights standards are not worthy of protection. The international community does not want to tolerate violations of core human rights because the individual or the group concerned refuses to acknowledge the health, psychological and social consequences of such practices. Put

[52] LENZERINI, *The Culturalization*, cit., p. 127.
[53] UN General Assembly, Resolution 59/165, Working towards the elimination of crimes against women and girls committed in the name of honour, UN Doc. A/RES/59/165 (2005) adopted 20 December 2004.
[54] General Comment No. 28: Article 3 (The Equality of Rights between Men and Women), Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 5.
[55] *Ivi.*, para. 32.
[56] General Comment No. 21, cit. supra note 13, para. 18.
[57] A. XANTHAKI, *Multiculturalism and International Law: Discussing Universal Standards* in *Human Rights Quarterly*, 2010, p. 21 ff., p. 43.

differently, the protection of cultural heritage assumes the observance of human rights values and the protection of human beings.

At this juncture it is worth mentioning the view according to which when a certain practice is at odds with human rights standards it is not possible to establish *a priori* when and on the basis of which criteria the former should yield to the latter. As it is «impossible to objectivize all the endless components and variables connoting a concrete case where human rights are affected by cultural considerations», when «a conflict between human rights and culture arises, it must be settled on a case-by-case basis through balancing the different rights at stake with each other and ascertaining (to the extent possible) which of them is to be attributed more weight in the concrete case»[58].

3.3. *Cultural Relativism*

The third issue is connected to the theory of cultural relativism and to the doctrinal debate opposing cultural relativism to the idea of the universalism of human rights.

As is well known, universalism is founded on the assumption that existing internationally recognized human rights should be enjoyed by all individuals for the reasons that human rights are immutable prerogatives that are innate to the human being and inextricably linked to the dignity inherent in any human being, regardless of the country of nationality or of residence and of the culture prevailing therein[59]. In this sense, it has been affirmed that human rights «transcend social and cultural idiosyncrasies by grounding moral judgments in universal principles»[60]. It follows that each tradition and practice identified as cultural must stand the test of universal human rights and show its capacity to build and maintain human dignity to be legitimate[61].

By contrast, cultural relativism asserts that human rights are contingent on time and place. More specifically, it posits that the human rights standards that are used for judging behaviour must be relative to the society in which they have been established[62]. In other words, this anthropological doctrine contends that individuals' or groups' practices or beliefs cannot be judged against human rights norms that are absent in the relevant country. This idea is grounded on the fact that there is an infinite variability of beliefs, moralities and preferences in the world, which in turn derives from the huge assortment of heterogeneous models and diverse environmental contexts in which human societies have developed. Accordingly, cultural relativists argue that human rights should evolve and be perceived consistently with such diversity of models[63]. In this sense one author maintained that «local cultural traditions […] determine the existence and scope of […] [the] [human] rights enjoyed by individuals in a given society […] [and] no trans-boundary legal or moral

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[58] F. LENZERINI, *Freewheeling and Provocative: Why Using Pre-established Criteria for Settling Culturally-based Human Rights Disputes Is Impracticable* in *Dir. um. dir. int.*, 2018, p. 549 ff., p. 571.
[59] LENZERINI, *The Culturalization*, cit., pp. 3-4.
[60] K. YOUNCE SCHOOLEY, *Comment. Cultural Sovereignty, Islam, and Human Rights. Toward a Communitarian Revision* in *Cumberland Law Review*, 1994, p. 651 ff., p. 692, cited by LENZERINI, *The Culturalization*, cit., p. 4.
[61] J.-B. MARIE, *L'universalité des droits de l'homme revisitée par la diversité culturelle*, in G. VINCENT (ed.), *La partition des cultures: droits culturels et droits de l'homme*, Strasbourg, 2008, p. 379 ff., p. 387.
[62] J.J. SHESTACK, *The Philosophical Foundations of Human Rights*, in J. SYMONIDES (ed.), *Human Rights: Concept and Standards*, Paris, 2000, p. 31 ff., p. 56.
[63] LENZERINI, *The Culturalization*, cit., pp. 6-7.

standards exist against which human rights practices may be judged acceptable or unacceptable»[64].

With respect to gender-based violations, relativism has been often used by tyrants that endorsed or condoned abusive practices to dismiss accusation that such practices amounted to human rights violations; rather, they classified such forms or behaviour as belonging to the customs of the nation and hence immune from scrutiny[65]. This explains why the expressions "culture" or "tradition" are regularly used by the actors denying women rights as a trope for cultural relativism[66]. Therefore, cultural relativism differs from universalism in that it asserts that no human right principle can be said to be universal (even if set out in international treaties)[67], just as a given value or moral judgment cannot be perceived as valid by the whole humanity because perceptions of values by the diverse human communities may be very different, even diametrically opposed[68]. This also means that what is regarded as a human rights violation in one State may be considered acceptable practice according to another culture in a different State[69].

Moreover, relativists argue that cultural relativism acts as a counterpart to the abusive effects of universalism. They assert that the only interest of human rights proponents is to impose Western values on non-Western countries, thereby perpetuating the history of subjugation and colonization[70]. They contend that cultural relativism is a bastion for the protection of the value of cultural diversity[71]. In relation to this, Stavenhagen stressed that «the diversity of cultural values runs counter to the major thrust of human rights thinking in the world today, which holds the universality of human rights to be the basic underpinning of the human rights edifice»[72].

On the other hand, human rights proponents stigmatise cultural relativism because, as said, it can be used by repressive governments and rulers as a justification for their discriminatory and violent practices – such as limitations on speech, the subjugation of women, amputation of limbs and other cruel punishments – committed against unprotected populations in pursuit of their own goals[73].

In light of the above discussion it would seem that universalism and relativism are irreconcilable. For instance, whereas cultural relativists would justify gender-based abusive practices as long as it can be proved that they belong to the customs or religion of a given group, human rights activists would defend women and girl children demanding that harmful practices be outlawed, even if these belong to their culture[74]. In reality, the

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[64] F. TESÓN, *International Human Rights and Cultural Relativism* in *Virg. Jour. Int. Law*, 1985, p. 869 ff., pp. 870-871, cited in LENZERINI, *The Culturalization*, cit., p. 4.
[65] K.L. ZAUNBRECHER, *When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender-Based Human Rights Violations* in *Houston Journal of International Law*, 2011, p. 679 ff., p. 688.
[66] See Report of the Special Rapporteur in the Field of Cultural Rights on "Universality, Cultural Diversity and Cultural Rights", A/73/227, 25 July 2018, para. 51.
[67] SHESTACK, *The Philosophical Foundations*, cit., p. 56.
[68] LENZERINI, *The Culturalization*, cit., pp. 4-5.
[69] ZAUNBRECHER, *When Culture Hurts*, cit., p. 688.
[70] M.-B. DEMBOUR, *Critiques*, in D. MOECKLI et al. (eds.), *International Human Rights Law*, Oxford, 2010, p. 64 ff., p. 76; and LENZERINI, *The Culturalization*, cit., pp. 8-12.
[71] DEMBOUR, *Critiques*, cit., p. 76.
[72] STAVENHAGEN, *Cultural Rights*, cit., 8. On universality, see the Report of the Special Rapporteur in the Field of Cultural Rights, cit. supra note 66.
[73] SHESTACK, *The Philosophical Foundations*, cit., p. 58.
[74] D. OTTO, *Women's Rights*, in D. MOECKLI et al. (eds.), *International Human Rights Law*, Oxford, 2010, p. 345 ff., p. 347. See also the "Statement on Human Rights" submitted to the UN Commission on Human Rights

opposition universalism-relativism should not be perceived in black-and-white terms. The reason is that many cultural relativists have espoused intermediate approaches based on the assumption that there exists a basic core of human rights that are unalienable and inherently non-derogable. These moderate cultural relativists refuse to justify practices that are harmful to women and girls and refrain from demanding their preservation – although they do not deny that they belong to the culture of the relevant group[75].

4. *The Long Way to the Humanization of Cultures*

Against the background of the meaning of the notions of culture and harmful traditional practice delineated above and of the problematic aspects attached to them, it is now necessary to focus on four issues: the first is whether international law prohibits gender-based violence deriving from harmful traditional practices (section 4.1); the second is whether the transformation or eradication of such practices is desirable and necessary (section 4.2); the third is how the transformation or eradication of harmful traditional practices can be most effectively achieved (sections 4.3); the fourth issue relates to the obstacles to the prevention and elimination of harmful practices (section 4.4).

4.1. *Whether Harmful Traditional Practices Are Prohibited Under International Law*

The prohibition and criminalization of gender-based violence deriving from harmful traditional practices is strong and fairly adequate under international law. This is the result of the convergence and mutual support of international human rights law, international humanitarian law and international criminal law. The objective of this composite legal framework is to prevent the health, psychological and social negative consequences for the victims and to punish perpetrators. To reiterate, the harmful traditional practices that bring about abuse and murder cannot be justified on cultural grounds in today's world as women's rights to life and safety is guaranteed in all human rights treaties adopted since 1948. As a result of this converging *opinio juris* and State practice, the prohibition of gender-based violence against women has evolved into a principle of customary international law[76]. Therefore, it appears that new international law instruments are neither desirable nor necessary.

Nevertheless, it should be pointed out that there is a considerable, appalling discrepancy between the obligations set forth in existing international legal instruments and the situation on the ground.

Gender-based violations in general and sexual violence in particular have been, and to a large extent continue to be, among the most frequent crimes occurring during armed

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by the Executive Board of the American Anthropological Association in 1947, whereby the following question was discussed: "How can the proposed [Universal Declaration of Human Rights] be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?" (*American Anthropologist*, October-December 1947, Vol. 49, p. 539 ff., p. 539).

[75] LENZERINI, *The Culturalization*, cit., pp. 7-8. See also BORELLI, *Of Veils*, cit., p. 56.

[76] General Recommendation No. 35, cit. supra note 32, para. 2. This means that the prohibition of gender-based violence against women is binding on all States whether or not they have signed up to CEDAW.

conflicts[77]. Likewise, violence against women continues to be pervasive around the world in times of peace despite the normative developments occurred over the past few decades at the international level and the commitment of the vast majority of States to promote equality, fight discrimination, and criminalise gender-based violence[78]. In particular, it must be noted that femicide, violence and discrimination are common, regrettably, not only in the developing States plagued by fundamentalist views, but also in developed, democratic States – though to different degrees[79]. Gender-based violence is deeply entrenched in our predominantly patriarchal and misogynistic societies[80] in all spaces of human interaction, from the family to the media, with high levels of impunity[81]. Factors such as political and social crises, economic decline, displacement and migration, natural disasters and the degradation of natural resources can lead to the brutalization of societies and to increased gender-based violence[82]. In addition, it must be noted that the States where gender-based violence deriving from harmful traditional practices is endemic are averse to UN human rights treaties, especially the clauses providing for gender equality within the family. This is evident considering that such States have not ratified certain key treaties, or have placed reservations[83], or have limited the scope and effectiveness of such conventions. As a consequence, in the States opposing the international instruments calling for gender equality, women fare worse than men with respect to every measure of human wellbeing and social status, including political participation, legal standing, access to economic resources and employment, wage differential, educational opportunities and available healthcare[84].

In sum, the described discrepancy cannot be explained by the existence of a gap or lack of clarity in international law. Rather, it derives from incomplete or unsatisfactory law-making (or law-amendment) and law-enforcement at the national level. In effect, it is beyond doubt that international law rules prohibiting and criminalizing harmful practices against women and girl children remain dead letters if they are not properly translated into

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[77] See the resolutions with which the UN Security Council acknowledged that sexual violence is used as a tactic of warfare: 1820 (2009); 1888 (2009); 1960 (2010); 2106 (2013); 2272 (2016); and 2467 (2019). See also G. GAGGIOLI, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law* in *Int. Rev. Red Cr.*, 2014, p. 503 ff.; T. MERON, *Rape as a Crime under International Humanitarian Law* in *Am. Jour. Int. Law*, 1993, p. 424 ff.; and K. WACHALA, *The Tools to Combat the War on Women's Bodies: Rape and Sexual Violence against Women in Armed Conflict* in *Int. Jour. Hum. Rights*, 2012, p. 533 ff.

[78] General Recommendation No. 35, cit. supra note 32, para. 7. See also "Progress of Sustainable Development Goal 5 in 2019". See also OTTO, *Women's Rights*, cit., pp. 346-347.

[79] Gender-based violence does not exclusively occur in Islamic countries. Culturally grounded violence against women is common where the Islamic culture is absent, especially among poor and/or rural populations, like India, Brazil or Guatemala.

[80] Report of the Special Rapporteur on Violence against Women, UN Doc. A/HRC/35/30, 13 June 2017, para. 100.

[81] General Recommendation No. 35, cit. supra note 32, paras. 6, 20, 30.

[82] General Recommendation No. 35, cit. supra note 32, para. 14.

[83] In particular, the reservations with which Islamic States condition the application of provisions on the proviso and within the limits that they are compatible with the principles and rules of Islamic law – which have been made with respect to the CEDAW, the ICCPR, the ICESCR, and the Convention on the Rights of the Child – have been objected to by most Western States for being inconsistent with the object and purpose of the treaty concerned, pursuant to Articles 20-23 of the Vienna Convention on the Law of Treaties. LENZERINI, *The Culturalization*, pp. 89-101.

[84] ZAUNBRECHER, *When Culture Hurts*, cit., p. 681.

domestic laws and implemented at the domestic level[85]. It is through appropriate law-making and law-enforcement that States can send a clear message of condemnation of harmful forms of behaviour and provide legal protection and redress for victims, and end impunity[86]. It the same vein, it must be signalled that domestic courts often dismiss human rights rules as non self-executing on the grounds of their alleged vagueness or incompleteness in order to hinder the possibility for private actors to invoke such rights[87].

However, existing international human rights conventions are not free from flaws. An important problem relates to the enforcement power of existing treaty monitoring bodies. It must be noted that States (especially those with poor human rights records) have limited the scope and effectiveness of human rights conventions by opposing the inclusion of strong enforcement provisions. As a result, the implementation of most treaties relies on political and quasi-judicial approaches to the exclusion of the judicial method. In effect, the most prevalent system for overseeing the realisation of human rights treaties is the reports system. According to this system, the periodic reports submitted by States Parties to a treaty as to the measures adopted at the national level to give effect to that treaty are published by the monitoring body so as to promote compliance. Publicity is the only strength of this system as States do not want to be identified as an example of bad practice in the international arena. Instead, the reports system is devoid of any form of sanction (even for the delayed submission of the reports). This means that it cannot properly operate as an enforcement measure.

For the purposes of the present article, it is interesting to look at the CEDAW. This convention articulates that gender-based violence is never acceptable but merely requires States Parties to take «appropriate measures» to implement its obligations and prohibitions. Moreover, it sets up a monitoring mechanism and a reporting obligation for the States Parties, which are managed by the Committee on the Elimination of Discrimination against Women (hereinafter 'CEDAW Committee')[88]. As a quasi-judicial body, the CEDAW Committee can examine the reports of States Parties[89], and make general recommendations to provide authoritative guidance to States on the provisions and themes of the CEDAW[90]. In addition, since the entry into force of the Optional Protocol[91], the Committee can consider complaints from individual or groups of individuals alleging violations of the CEDAW by States Parties to the Optional Protocol[92], and initiate inquiries into situations

[85] See Report of the independent expert for the United Nations study on violence against children, Paulo Sérgio Pinheiro, A/61/299, 29 August 2006, para. 98; and General Recommendation No. 35, cit. supra note 32, para. 7.
[86] Although gender-based violence resulting from harmful traditional practices is prohibited and criminalized, prosecutions are rare. The reasons for this are numerous. In some parts of the world people do not trust police, social services or other authorities, or there are no accessible, safe or trusted ways to report cases of violence, especially in rural areas. Also, gender-based violence remains under reported and under prosecuted because of the shame, stigma and emotional trauma ascribed to victims. Joint General Recommendation / General Comment, cit. supra note 2, para. 31.
[87] Unfortunately, there is no consensus as to which features may indicate the direct or indirect applicability of a treaty since the solutions elaborated by national courts on this matter vary significantly. F. STAIANO, *The Italian Implementation of the Council of Europe Convention on Violence against Women and Victims' Rights to Reparations*, in *It. YB. Int. Law*, 2014 p. 269 ff., pp. 274-275.
[88] See Articles 17-18.
[89] Article 18.
[90] Article 21.
[91] The Optional Protocol to the CEDAW was adopted on 12 March 1999.
[92] Article 2 of the Optional Protocol.

of grave or systematic violations of women's rights[93]. Similarly, the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter '2011 CoE Convention'), the first and most comprehensive treaty with exclusive reference to violence against women, does not envisage any jurisdictional organ in charge of its interpretation and implementation. Instead, the Convention establishes a monitoring mechanism based on two bodies: the Group of experts on action against violence against women and domestic violence and the Committee of the Parties. However, none of these bodies can receive individual complaints.

4.2. *Whether Harmful Traditional Practices Should Be Transformed or Eliminated*

Although harmful traditional practices are protected or tolerated in many States, they can and should be transformed or eradicated. As explained, international (cultural heritage) law rejects the argument that harmful practices are shielded from scrutiny on the ground that they belong to the culture or identity of a given community. Rather, the protection of cultural diversity and cultural identity entails a commitment to human rights protection and the repudiation of any violent, abusive and discriminatory behaviour. More importantly, it can be argued that harmful traditional practices can be transformed or eradicated because culture is not a static phenomenon. As emphasised, culture is a dynamic and evolving notion whose content and meaning can be developed as a result of the interaction amongst the members of the relevant community, between the members of the relevant community with other communities, or as a response to inputs coming from the outer environment. Present generations can thus use, reframe and evolve the heritage received from past generations according to contemporary needs and interpretations for the benefit of future generations[94].

Various international human rights instruments contain unambiguous demand for change. For instance, the Article 1(2) of the 1966 UNESCO Declaration of Principles of International Cultural Co-operation declares that «[e]very people has the right and the duty to develop its culture». CEDAW is more explicit in that it calls on States Parties to «take all appropriate measures […] to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women»[95] and to «modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women»[96]. Likewise, Article 24(3) of the 1989 Convention on the Rights of the Child obliges States Parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. The 1993 Declaration on the Elimination of Violence against Women is also relevant. This prohibits the invoking of custom, traditions or religious considerations as justifications for acts of violence[97]. Moreover, the Vienna Declaration and Programme of Action[98] recognizes that «the human

[93] Article 8 of the Optional Protocol.
[94] J. BLAKE, *International Cultural Heritage Law*, Oxford, 2015, pp. 272-273.
[95] Article 2(f).
[96] Article 5(a).
[97] Articles 1 and 4.
[98] Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights», emphasises that «[g]ender-based violence and all forms of sexual harassment and exploitation […] are incompatible with the dignity and worth of the human person, and must be eliminated», and affirms that the «full and equal participation of women in political, civil, economic, social and cultural life […] and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community»[99]. These commitments were reiterated in the 1995 Beijing Declaration and Platform for Action, in which it was asserted that «any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated»[100]. The 2030 Agenda for Sustainable Development[101] is also relevant to the present discussion. As well known, the Agenda includes 17 Sustainable Development Goals and 169 Targets. Goal 5 is about achieving gender equality and empowering all women and girls. It explicitly calls on States to end all forms of discrimination and violence against all women and girls (Targets 5.1, 5.2), and to eliminate all harmful practices, such as child forced marriage and female genital mutilation (Target 5.3).

Important provisions are also contained in the legal instruments adopted by regional organizations. Article 12(1) of the 2011 CoE Convention provides that States Parties shall «take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women». States shall also «ensure that culture, custom, religion, tradition or so-called 'honour' shall not be considered as justification for any acts of violence covered by the scope of this Convention»[102]. Further, Article 42 establishes that States Parties shall «take the necessary […] measures to ensure that, in criminal proceedings […], culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts». The 1990 African Charter on the Rights and Welfare of the Child stresses that «[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall […] be discouraged»[103], and that «State Parties […] shall take all appropriate measures to eliminate […] [the] customs and practices discriminatory to the child on the grounds of sex or other status»[104]. Likewise, Article 2(2) of the Protocol to the African Charter declares: «States Parties shall commit […] to modify the social and cultural patterns of conduct of women and men […] with a view to achieving the elimination of harmful cultural and traditional practices […] which are based on the idea of the inferiority or the superiority of either of the sexes»[105]. In addition, Article 5 of the same Protocol obliges all States Parties to «prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards». Finally, Article 8(b) of the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against

[99] Article 18.
[100] Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, para. 224.
[101] "Transforming Our World: The 2030 Agenda for Sustainable Development", adopted by the UN General Assembly with Resolution 70/1 of 25 September 2015.
[102] Article 12(5).
[103] Article 1(3).
[104] Article 21(1)(b).
[105] Article 4(2)(d) reiterates the same idea: «States Parties shall take appropriate and effective measures to […] eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women».

Women provides that «States Parties agree to undertake […] specific measures […] to modify social and cultural patterns of conduct of men and women […] to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women».

The rationale underlying these provisions is threefold. First, culture should not be seen as encompassing ancient traditions, beliefs, customs, and practices inherited from the past that cannot be modified for the reason that they provide continuity in social attitudes. In other words, culture should not be regarded as an obstacle to progress or to women's rights and equality because of religious beliefs, unfounded taboos or stereotyped visions. Second, culture does not belong to State organs or to the male religious or traditional leaders. Women have also the right to participate in decisions to change or cease cultural practices as well as the right not to participate in tradition or practices that infringe on their rights and dignity. Third, cultural communities not only can survive but can also grow and prosper despite the transformation or elimination of the forms of behaviours that infringe universal human rights standards. As emphasised, the modification or abolition of harmful traditional practices brings about the evolution of the culture of a given community. Moreover, those challenging a particular practice or tradition do not necessarily wish to dissociate from the community. On the contrary, they aim at strengthening their community[106].

However, it must be acknowledged that, with respect to conflicts between cultural systems and human rights, there exist no objective criteria to precisely and empirically distinguish between cultural practices that are acceptable under the perspective of human rights standards and those which are to be considered incompatible with such standards. Neither the distinction between derogable and non-derogable human rights, nor the consideration of the physical harm resulting from the performance of a given practice can be taken as objective criteria to settle *a priori* such conflicts. On the one hand, international law prohibits the practices that bring about the violation of the non-derogable human rights (such as the right to life and the freedom from torture) of women and girl children[107]. No cultural practice or belief can be tolerated if they violate non-derogable rights. This is not tantamount to say that there is a hierarchy among rights because, as well known, human rights law does not accept it[108]. However, available practice demonstrates that the most absolute rights – such as the right to life and the freedom from torture – are not treated uniformly around the globe. Not only death penalty is still practiced in many countries; there is also no consensus on the nature and status of the right to abortion (as against the right to life of the embryo and/or foetus) and on the meaning and content of inhuman and degrading treatments. On the other hand, the fact that a given practice entails evident physical harm is not conclusive, even when it determines irreversible consequences on the health or body of the victim. The reason is that in many cases the infliction of physical harm is accepted by the victims and their families for the reason that it is necessary

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[106] See the Report of the Special Rapporteur in the Field of Cultural Rights, cit. supra note 66, paras. 56-57, 64-65.

[107] LENZERINI, *Freewheeling and Provocative*, cit., pp. 549-550, 570.

[108] Xanthaki believes that cultural practices that restrict human rights without going so far as to violate the core of these rights can be tolerated in the name of cultural diversity. Among these "gray cultural practices" she includes the wearing of headscarves: «an adult woman who has reached the decision to wear a scarf after careful reflection, without considerable coercion or manipulation by others, and while living in a relatively open community must be free to do so». XANTHAKI, *Multiculturalism and International Law*, cit., pp. 43-46.

to achieve a superior good, either for the victims or for the community. In sum, when conflicts between human rights and culture arise these should be solved on an *ad hoc* basis through balancing the different rights at stake with each other[109].

4.3. *How the Transformation or Elimination of Harmful Practices Can Be Achieved?*

Having established that the practices that are harmful to women and girl children can and should be transformed or abandoned, the question remains how these developments can be most effectively achieved.

In order to respond to this question, it is important to reiterate that the primary responsibility to protect vulnerable groups and individuals from the violations of their rights rests with States. International human rights law largely leave it up to States to decide what measures they must take against gender-based violence. Accordingly, States can be held responsible for failing to deploy preventive measures or to take appropriate measures to investigate, prosecute, punish and provide reparations for acts or omissions by any private person, organization or enterprise that result in gender-based violence[110]. Violations of human rights do not need to have been directly attributable to the State to invoke its obligation to respect, protect and fulfil human rights[111].

Regardless of the above, it is submitted that the prevention and elimination of harmful practices require the establishment by each State of a holistic strategy, one that complies with existing human rights standards, that includes a vast array of legal and policy measures, and that ensures the involvement and cooperation of all relevant actors at the local, national and international levels[112]. The content and structure of such a comprehensive strategy can be delineated by referring to the statements and recommendations adopted in the past decades by human rights bodies.

First, State should adopt (or revise existing) national legislation in order to criminalise all forms of gender-based violence[113]. The associated sanctions may serve a deterrence function[114]. States should also guarantee that victims of gender-based violence have access to justice and effective legal remedies and that perpetrators are held accountable[115].

Second, States should modify or repeal the legal provisions that justify, allow or lead to harmful practices, such as legislation that allows for child marriage, provides the defence of so-called honour as an exculpatory or mitigating factor for crimes committed against

[109] LENZERINI, *Freewheeling and Provocative*, cit., pp. 555-567, 571.
[110] General Recommendation No. 35, cit. supra note 32, paras. 21-24. See also Article 2 CEDAW. The 2011 CoE Convention contains important innovations in this respect. First, it focuses on State obligations with respect to the acts and omissions of both its own organs and agents and those of non-state actors (Article 5). Second, it calls on States Parties to make sure that their domestic legislation envisages certain offences (including psychological violence, stalking, physical violence, sexual violence including rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation), and specific aggravating circumstances (Articles 33-39, 46).
[111] L. GRANS, *The Concept of Due Diligence and the Positive Obligation to Prevent Honour-Related Violence: Beyond Deterrence* in *Int. Jour. Hum. Rights*, 2018, p. 733 ff., p. 735.
[112] Joint General Recommendation / General Comment, cit. supra note 2, paras. 31-36.
[113] Joint General Recommendation / General Comment, cit. supra note 2, para. 32.
[114] J. KLUGMAN, *Gender Based Violence and the Law*, Background Paper for World Development Report 2017, p. 1.
[115] See Joint General Recommendation / General Comment, cit. supra note 2, para. 55(o); and General Recommendation No. 35, cit. supra note 32, para. 29(a) and (b).

girls and women, or enables a perpetrator of rape and/or other sexual crime to obtain reduced sanctions or impunity. In addition, the customary and religious rules that condone behaviours that give rise to harmful patterns of conduct and that are not consistent with legislative prohibitions should also be addressed[116].

Third, States' laws should provide protection and support for victims, namely by establishing facilities for their safety and recovery and social reintegration[117]. For instance, State should ensure that victims of violence have access to shelters and protective orders[118], but also to legal and psychological counselling, financial assistance, education, and training and assistance in finding employment[119].

Fourth, States must adopt measures to ensure the monitoring and evaluation of the results achieved[120], as well as preventive measures[121]. Many are the preventive measures that can be adopted by the States where harmful forms of behaviour are customarily practiced. However, the most important are those aimed at addressing the root causes of harmful practices[122]. As said, the survival of these practices is due to the fact that they are entrenched in beliefs and attitudes and prescribed by social norms that are perpetuated by male-dominated power structures. Practitioners and communities keep them in place and do not question such practices – even if they are not personally in agreement with the practice or even if they are aware of and fear their harmful effects – in order not to be marginalized, stigmatized, targeted by extremists, or to lose economic and social support and acceptance within the community[123]. Therefore, domestic preventive measures should aim at challenging individuals' blind allegiance to such norms. In this sense, the active participation of all relevant stakeholders – including women's organisations, those who engage in harmful practices and local religious leaders – is key. It is only by involving these stakeholders that communities can explore and agree upon new social rules.

The first preventive measure that one should consider is the collection, analysis and dissemination of quantitative and qualitative data and statistics on harmful practices disaggregated by sex, age, geographical location, socioeconomic status in order to allow the identification and adoption of effective policies and legal instruments[124]. Additionally, the training on human rights and gender for public officials – including police officers, judges, prosecutors, teachers, social workers and healthcare workers – is also important[125]. Furthermore, States should develop awareness-raising campaigns targeting not only law-enforcement, education, health, social services personnel, but also and especially local

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[116] Joint General Recommendation / General Comment, cit. supra note 2, paras. 30, 42; General Recommendation No. 35, cit. supra note 32, para. 29(c).

[117] General Recommendation No. 19, cit. supra note 31, para. 24(b), (k) and (r).

[118] A "shelter" (or "refuge") is an emergency and temporary «safe accommodation for women and children who have been exposed to, or are at risk of violence». "Protection orders" impose a range of restraints on the person subject to the order, including the obligation to leave a shared home and to keep at a certain distance from the victim. See the Report of the Special Rapporteur on Violence against Women, cit. supra note 80, paras. 55, 61.

[119] Article 20 of the 2011 CoE Convention.

[120] Joint General Recommendation / General Comment, cit. supra note 2, paras. 41, 55(n).

[121] General Recommendation No. 19, cit. supra note 31, para. 24(t).

[122] See Joint General Recommendation / General Comment, cit. supra note 2, para. 17, 31; and General Recommendation No. 35, cit. supra note 32, para. 30(a).

[123] Joint General Recommendation / General Comment, cit. supra note 2, paras. 57-59.

[124] Joint General Recommendation / General Comment, cit. supra note 2, paras. 37-39.

[125] General Recommendation No. 35, cit. supra note 32, para. 30(e). See also GRANS, *The Concept of Due Diligence*, cit., p. 747.

communities, traditional and religious leaders and practitioners, and victims of harmful practices. These campaigns should allow the individuals and the communities concerned to: (i) become aware of their rights, freedoms, powers and obligations; (ii) discuss existing traditional practices, the hazards connected to them and the reasons as to why they should be transformed or eliminated; (iii) decide whether or not to conform to harmful traditional practices; (iv) challenge the customs that create and sustain the (collective) sense of obligation toward such practices of individual community members; and (v) explore alternative ways to fulfil their values or celebrate traditions without violating the human rights of women and girl children[126]. Awareness-raising campaigns should also allow the relevant stakeholders to participate in the drafting and implementation of domestic legislation against harmful practices[127], affirm the values and activities of a community that are consistent with human rights, and include information on experiences of successful elimination by formerly practising communities with similar backgrounds[128]. Awareness-raising initiatives should be developed in parallel with educational programmes. Women and girls – but also men and boys – need to be equipped with skills and competencies to assert their rights and challenge discriminatory social norms. In this connection it must be observed that there is a clear correlation between the low educational attainment of women and girls and the prevalence of harmful practices[129].

The idea that education about human rights should be promoted and developed lies in manifold sources. The most relevant consist of the clauses contained in human rights treaties[130], UNESCO conventions[131] and UN documents[132]. Furthermore, the 2030 Agenda for Sustainable Development[133] provides further momentum for promoting human rights education as Sustainable Development Goal 4 endorses «inclusive and equitable quality education» for all and includes human rights education under Target 4.7.

All in all, these instruments emphasise the role of education as an individual right and as a key tool to empower individuals, communities and the civil society at large to challenge, transform or eliminate the harmful traditional practices that are incompatible with the human rights standards. Education can help to attribute to human rights a concrete role in the life of people. If their content and role are made intelligible, human rights can be empathised and incorporated by the people concerned, which can progressively see them as components of their everyday life. Eventually, «community members become accustomed to human rights, perceive that they are socially needed, and voluntary accept their role as determining factors of their mutual relationships in a somewhat natural way»[134]. Put differently, educational programmes promise to make

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[126] Joint General Recommendation / General Comment, cit. supra note 2, paras. 59, 61, 76.
[127] Joint General Recommendation / General Comment, cit. supra note 2, paras. 45, 55(a); and General Recommendation No. 35, cit. supra note 32, para. 30(b).
[128] Joint General Recommendation / General Comment, cit. supra note 2, para. 81.
[129] Joint General Recommendation / General Comment, cit. supra note 2, paras. 17, 57-59, 61-62.
[130] See Articles 28-29 of the Convention on the Rights of the Child; Article 10 CEDAW; and Article 11 of the African Charter on the Rights and Welfare of the Child.
[131] See Article 10 of the 2005 UNESCO Convention; Articles 2(3) and 14 of the 2003 UNESCO Convention; and Article 5 UDCD.
[132] See the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; and the 2011 Declaration on Human Rights Education and Training.
[133] See supra note 101 and related text.
[134] LENZERINI, *The Culturalization*, cit., p. 218.

human rights an integral part of the life of individuals and groups, which thus cease to be abstract directives imposed from an external entity[135].

The holistic strategy just described has been essential to fight the pervasiveness of violent or discriminatory practices, such as foot binding[136], *satee*[137], girl-child (forced) marriage, female infanticide, and FGM.

The case of FGM is telling. State authorities, human rights groups and international organisations have worked together with local communities, including practitioners, the victims and their families, with a view to eliminate FGM. As a result of this joined action genital cutting has been reduced in some States[138] and outlawed in others[139]. This result has not been achieved only as a result of the legislative prohibitions. Public awareness and educational campaigns involving the people who practiced, experienced or witnessed the hardship caused by FGM have also been essential[140]. In effect it appears that FGM has been permanently abandoned in the communities where direction was given by religious leaders[141].

This example allows the following few reflections.

First, the case of FGM demonstrates that the attitudes of communities and their members can change if information about the harm caused by contested practices and convincing reasons as to why they should be abandoned comes from trusted sources[142]. In other words, efforts to contest, change or eradicate harmful forms of behaviour are most effective when they originate from within the cultural group that practices them.

Second, it appears that education is essential to reconcile the protection of cultural heritage with the protection of human rights, which thus become mutually reinforcing. Put differently, human rights education and training can contribute to the "humanization" of culture by rendering obsolete all harmful practices. In effect, the means that have been deployed to eradicate FGM from the "culture" of the countries concerned were (and still are) founded on the objective to protect women's right to life, right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment, right to liberty and security, right to physical and mental health and integrity, right to equality in the family, and the right not to be discriminated against[143]. Human rights law has therefore the potential to challenge the naturalness of abhorrent and harmful forms of behaviour[144]. International human rights law can therefore contribute to the evolution of the beliefs and practices of nations and communities within nations by providing the standards that can be used to distinguish the components of the legacy that should be discarded from those that can be transmitted to future generations[145]. It is within the perimeter determined by existing

135 *Ivi*.

136 A. FOREMAN, *Why Footbinding Persisted in China for a Millennium* in *Smithsonian Magazine*, February 2015.

137 In India, *satee* was the (self-)immolation of recently bereaved wives on their husbands' funeral pyres. A. DIVYA, *Why Sati Is Still a Burning Issue* in *The Times of India*, 16 August 2009.

138 The "Progress of Sustainable Development Goal 5 in 2019" reveals a significant decline in the prevalence of female genital mutilation in the period 2000-2018.

139 See J. BURKE, *Sudan Bans FGM and Breaks with Hardline Islamist Policies* in *The Guardian*, 12 July 2020.

140 Joint General Recommendation / General Comment, cit. supra note 2, para. 17.

141 S. LATHAM, *The Campaign against Female Genital Cutting: Empowering Women or Reinforcing Global Inequity?* in *Ethics and Social Welfare*, 2016, p. 108 ff.

142 Joint General Recommendation / General Comment, cit. supra note 2, para. 75.

143 General Recommendation No. 19, cit. supra note 31, para. 7.

144 OTTO, *Women's Rights*, cit., p. 350.

145 BLAKE, *International Cultural Heritage*, cit., pp. 272-273.

human rights standards of universal character that the different cultures of the world may flourish up[146].

Third, it appears that, besides national and local actors, other entities may contribute to the definition, interpretation and development of national culture(s). International organisations often assist State authorities in identifying adequate measures to address the structural cause of harmful practices and support and monitor States' efforts aimed at challenging, modifying or eliminating practices harmful to women and girls. Within the UN, the following bodies are concerned with the realization of women's human rights: the CEDAW Committee, the Special Rapporteur on Violence against Women, Its Causes and Consequences[147], the Working Group on the Issue of Discrimination against Women in Law and in Practice[148], the High Commissioner for Refugees (UNHCR)[149], and the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict[150]. It is also worth mentioning that the World Health Organization (WHO)[151] and the UN Children's Fund (UNICEF)[152]. Non-governmental organisations (NGOs) also play a key role in the fight against discriminatory practices. For instance, with respect to monitoring, NGOs can provide the CEDAW Committee with information about the situation on the ground in States Parties so as to fill in the gaps of States' reports[153].

4.4. *Obstacles to the Transformation or Elimination of Harmful Traditional Practices*

It must be acknowledged, however, that certain obstacles may thwart the establishment and the development of the holistic strategy described above.

First, the organizational, human and financial resources necessary to establish rules, policy tools, monitoring mechanisms and preventive measures are not available in all States. Disease outbreaks such as Ebola and COVID-19 further undermine the capacity of States to transform or end harmful practices. Indeed, dozens of countries have already reported

146 LENZERINI, *The Culturalization*, cit., pp. 230, 232.

147 The first Special Rapporteur (an independent expert) was appointed in 1994 by the UN Commission on Human Rights (see at: http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx).

148 Established by the Human Rights Council in September 2010, the Working Group's focus is to identify, promote and disseminate, in consultation with States and other actors, good practices related to the elimination of laws that discriminate against women (see at: http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx).

149 The UNHCR is mandated to provide international protection to refugees. In this context, it shares the responsibility with States for ensuring that refugees are protected against sexual violence (see at: http://www.unhcr.org/women.html).

150 Established by UN Security Council Resolution 1888 (2009), the Office serves as the UN's spokesperson and political advocate on conflict-related sexual violence, and is the chair of the network "UN Action against Sexual Violence in Conflict" (see at: https://www.un.org/sexualviolenceinconflict/about-us/about-the-office/).

151 As a specialized agency of the UN that is concerned with international public health, the WHO focuses on the practices affecting the safety and health of women and children (see at: http://www.who.int/mediacentre/factsheets/fs241/en/).

152 UNICEF devotes special attention to girl children and to the need to reduce disparities in the treatment of boys and girls (see at: https://www.unicef.org/gender/).

153 ZAUNBRECHER, *When Culture Hurts*, cit., pp. 709, 713.

an increase in violence against women since the outbreak of COVID-19[154] due to the loss of livelihoods, and disruption of support networks and access to information, education and services[155].

Second, State authorities may be unable to define effective policy and legal measures to address the main structural cause of harmful traditional practices, namely the aura of legitimacy stemming from social norms which are dominant in a given community. The reason is that local communities and practitioners may become recalcitrant to the intervention of the central government[156].

Third, the initiatives of international organisations and NGOs may also be met with suspicion or hostility by the States and the communities where contested harmful practices occur. One reason is that the intervention of external entities is frequently perceived not just as an intrusion in domestic affairs but as (another) manifestation of Western countries' imperialism. Another reason is that the members of the communities concerned tend to refuse the idea that their traditions and customs can be scrutinized, modified or extinguished as they constitute an integral part of their heritage[157].

Fourth, it may prove difficult to establish a dialogue with religious and traditional leaders and practitioners of harmful practices and to convince them to change their attitude and to inform their communities.

Overall, these hurdles indicate that the transformation or eradication of centuries-long harmful practices grounded on the idea of the inferiority of women requires the time span of some generations. The reason is not only that the injustices and crimes stemming from multi-secular discriminatory beliefs have been seriously addressed only in recent times. Indeed, the fight against the violation of human rights began only after the Second World War, when individual rights have been proclaimed all over the world in multilateral treaties and domestic constitutions. Incidentally, the spread of the COVID-19 pandemic put at risk the gains made in the past decades. The main reason is that oppressive social customs are adhered to also by women. Indeed, in the countries where harmful practices are endemic, women often do not refuse the beliefs regarding them as inferior to men for the reason that they see them as essential to maintain their relationship with the community. Women's sense of identity is inextricably linked with membership in the community and therefore they may be averse to exchange this sense of belonging for extraneous ideas proclaiming equality and dignity under the label of human rights[158]. This means that the development and success of the holistic paradigm described above can be hindered by the same misogynistic views and archaic beliefs that give rise to the harmful practices under consideration. In sum, more time should be accorded to the human rights movement to secure the eradication of harmful practices.

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[154] See Joint statement by the Special Rapporteur and the EDVAW Platform of women's rights mechanisms on COVID-19 and the increase in violence and discrimination against women, 14 July 2020 (available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26083&LangID=E).

[155] See UN, Policy Brief: The Impact of Covid-19 on Women and Girls, 9 April 2020 (available at: https://www.unwomen.org/en/digital-library/publications/2020/04/policy-brief-the-impact-of-covid-19-on-women#view); and UNICEF, Technical Note on COVID-19 and Harmful Practices, May 2020 (available at: https://www.thecompassforsbc.org/sbcc-tools/technical-note-covid-19-and-harmful-practices).

[156] GRANS, *The Concept of Due Diligence*, cit., p. 740.

[157] ZAUNBRECHER, *When Culture Hurts*, cit., p. 692.

[158] See also the Report of the Special Rapporteur in the Field of Cultural Rights, cit. supra note 66, paras. 5, 7.

5. *Conclusions*

The primary purpose of this article was to debunk the mistaken idea that gender-based harmful practices cannot be expunged from the culture of a given community. It is for this reason that this article has demonstrated that international law clearly and adequately prohibits gender-based discriminatory and violent practices. Furthermore, it has pointed out that harmful practices should not be justified or tolerated for the mere reason that they are ingrained in the beliefs of the community to which the victims belong. More importantly, this article has stressed out that international law requires the eradication of harmful practices. In this sense, it has emphasised that governments should guarantee women's and girls' rights through the adoption of a holistic approach. However, this article has also acknowledged that the eradication of heinous practices cannot be achieved quickly. This is due to the fact that often harmful practices and beliefs are questioned neither by practitioners nor by victims. It is as if practitioners' and victims' ancestors directed them to believe that there is only one manner to live in the community. By way of contrast, the present article has submitted that human rights norms and institutions can empower people to envision new definitions of culture and alternative forms of behaviour. Put differently, human rights can help loosening the grip of the past and consign to the dustbin of history gender-based harmful practices.