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Combating Harmful Traditional Practices: Mapping out the International Legal Framework

Tessema Simachew Belay

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Abstract

The issue of combating harmful traditional practices has been on the UN agenda since the 1950s. Earlier efforts only focused on the health impacts of harmful traditional practices. Developments starting from the late 1980s, however, have shown a shift to a broader human rights-based approach that conceptualizes the problem as Violence Against Women (VAW) and children. Though this progressive trend was firmly grounded in positive international law with the introduction of several regional treaties designed to combat VAW, the absence of a similar universal treaty has been a source of concern for many, triggering a debate. It is against the background of this broader debate that this paper aims to examine the adequacy of the international legal framework that is in place to combat harmful traditional practices. After reviewing and analyzing relevant provisions scattered in various treaties, the paper argues that, even without the need to introduce a separate treaty on violence against women, there are sufficient substantive rules in the existing treaties at the UN level that can help to combat harmful traditional practices. What is needed, therefore, is strengthening implementation, monitoring and access to justice efforts in a manner that takes into account the nature of harmful traditional practices both against women and children.

Keywords: Harmful Traditional Practices; Access to Justice, Violence Against Women; Violence against children; International Legal Framework; Regional Legal Framework

Combating Harmful Traditional Practices: Mapping out the International Legal Framework

Tessema Simachew Belay *

1. Introduction

Every society in the world has specific traditional cultural practices and beliefs.[1] While some of these traditional practices are beneficial to all members of society, others are harmful to a specific group such as women or children.[2] It is in situations where traditional practices provide no tangible personal, medical, social or financial benefit and instead cause harm to the victim that they are referred to as "Harmful Traditional Practices" (hereinafter HTPs).[3] The expression highlights both the harm the practices cause and the fact that they are motivated and justified by appeals to long-standing values and traditions.[4]

HTPs usually target vulnerable groups in a given society. For example, throughout the world, women and girls face a lot of difficulties due to harmful practices.[5] They are exposed to female genital mutilation (FGM), live under strict dress codes, are denied property rights, given as child brides, and killed for the sake of "honour" in the family etc.[6] It is therefore not surprising that "harmful practices" are usually conceptualized as one aspect of violence against women (VAW).[7]

The notion of VAW, as a comprehensive concept that encompasses diverse phenomena[8], is however a recent addition to the language of the international human rights movement. It was actually since the 1990s that strategic, international and thoughtful advocacy and work by many women's organizations have helped to bring enormous progress in terms of framing VAW as a human rights question and putting it on the global agenda.[9] This progress, in particular in the standard-setting arena, has nevertheless been uneven at the regional and

* Postdoctoral Fellow at the Law, Democratization and Media Project (LA-DEM-MED Project), Bahir Dar University Supervised by Dr. Prosper S. Maguchu, Vrije Universiteit Amsterdam

[1] UN, Fact Sheet on Harmful Traditional Practices, p. 1

[2] Ibid.

[3] Gerry Campbell et al, *Harmful Traditional Practices: Prevention, Protection and Policing*, Palgrave Macmillan, London, 2020, p. 4

[4] Ibid.

[5] Study of the Secretary-General, *Ending Violence against Women: From words to action*, United Nations, 2006, p.45

[6] Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms Radhika Coomaraswamy, Cultural Practices in the Family that are Violent towards Women, E/CN.4/2002/83, p. 7.

[7] Rosamund Shreeves, Martina Prpic, 'Harmful Practices' as a form of Violence against Women and Girls, European Parliamentary Research Service, Briefing, 2016, p. 1; See also the definition of violence in The UN Declaration on the Elimination of Violence against Women (1993), article 2.

[8] Mala Htun & Francesca R. Jensenius, "Fighting Violence Against Women: Laws, Norms, and Challenges Ahead", Daedalus, *the Journal of the American Academy of Arts and Sciences*, Vol. 49, No. 1, p, 144

[9] See Sumati Nair, "Violence Against Women: Initiatives in the 1990s, Development, Vol. 44, No. 3, (2001), p. 82; Claudia Garcia-Moreno & Avni Amin, "Violence Against Women: Where are we 25 years after ICPD and where do we need to go?", *Sexual and Reproductive Health Matters*, Vol. 27, No. 1, p. 346; See also Mala Htun & Francesca R. Jensenius, "Fighting Violence Against Women: Laws, Norms, and Challenges Ahead", *Daedalus, the Journal of the American Academy of Arts and Sciences*, Vol. 49, No. 1, p, 144

UN level. While some regions have managed to introduce binding VAW related treaties[10], most efforts at the UN level have so far been limited to the "soft-law" sphere.[11] As a result, some people have misgivings about the sufficiency of the existing legal framework at the UN that is in place to combat VAW. [12] Therefore, the need for a universal legally binding instrument on violence against women at the UN level has been a subject of debate in recent years.[13]

Against this background and building on the above-mentioned debate regarding the gaps in the legal framework on VAW at the UN level, this paper, aims to assess the adequacy of the international legal framework on violence against women and children. However, understanding standard-setting efforts to combat HTPs involves introducing some sort of cross-cultural and effective norms, the article begins with addressing some conceptual and theoretical hurdles in the fight against HTPs related to cultural relativism and the public/private dichotomy. The second section outlines how the international legal and policy framework governing HTPs and VAW have evolved over the years both at the UN level and in various regional human rights systems. Apart from showing the progressive evolution, the aim of the discussion here is to show how some of the regional human rights systems have a more detailed normative framework on HTPs and VAW. Based on this observation, the third section examines the problems and gaps in the existing global legal framework on HTPs and VAW and assesses whether it can sufficiently address the various important concerns in this field. Finally, some concluding observations.

[10] The regional treaties include: the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

[11] See UNGA Declaration on the Elimination of Violence Against Women, Reolution 48/104, 1993 and Committee on CEDAW and CRC, Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, 4 November 2014.

[12] See for example [12] Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/26/38, 28 May 2014, para 69 (suggesting there is a need to introduce a universal binding treaty) See also R.J.A McQuigg, "Is it time for a UN Treaty on Violence Against Women?", *The International Journal of Human Rights*, Vol. 22, No. 3, (2018) "(arguing there is a need to introduce a global treaty on the issue)

[13] Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/26/38, 28 May 2014, para 69 (suggesting there is a need to introduce a universal binding treaty); R.J.A McQuigg, "Is it time for a UN Treaty on Violence Against Women?", *The International Journal of Human Rights*, Vol. 22, No. 3, (2018) "(arguing there is a need to introduce a global treaty on the issue); Report of the Special Rapporteur on violence against women, its causes and consequences on the adequacy of the international legal framework on violence against women, A/72/134, 19 July 2017.

2. Theoretical and Normative Hurdles in the fight against HTPs

Attempts to combat HTPs understandably focus on their harmful nature. However, the fact that these practices are traditional[14] and as such embedded in the cultural norms of a certain community is always a source of the difficulty. As a result, the fight against HTPs inevitably involves overcoming arguments based on cultural relativism. In addition to arguments based on cultural relativism, the rather common public/private dichotomy is also another hurdle. A romanticized understanding of the family as a form of protection and safety for people living in it Is also a source of the problem.

First, cultural relativism has been one of the major objections against the universality and validity of human rights norms in a given local context. Proponents of cultural relativism often brand some human rights norms as external impositions from the Western world.[15] The history of Western colonial oppression against people in the global South provided the fertile political ground for culturally relativist stands. [16]

Arguments based on culture against universal norms emphasize the fact that traditional cultures have their norms of what women's lives should be, usually in a form of female modesty, deference, self-sacrifice and obedience.[17] Indeed, there are always reasons given by a certain culture to sustain certain harmful traditional practices. For example, in many cultures, FGM is justified as a mechanism to reduce women's desire for sex and the chances of sex outside marriage.[18]

There are several problems with the whole emphasis on culture and arguments emanating from such a stance. On the one hand, behind the emphasis on cultural difference, there is "a vision of culture as a homogenous and bounded entity with an excessive aggregation around a unified identity".[19] This understanding of culture does not seem to reflect its true nature.

Cultures incorporate competing and contradictory values and norms.[20]As such, they are scenes of debate and contestation[21]. At a particular time, cultures contain dominant voices, and they also contain the voices of women and other vulnerable groups which have not been

[14] "Traditional practices and values are cultural practices and values that have been developed, held and repeated by members of a culture over long periods of time (sometimes centuries or more). See Gerry Campbell et al, *Harmful Traditional Practices: Prevention, Protection and Policing*, Palgrave Macmillan, London, 2020, p. 4.

[15] Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Yakin Ertürk**,** Intersections between culture and violence against women, A/HRC/4/54, 17 January 2007, para 42

[16] Ibid, para 43

[17] Martha Nussbaum, "Women and Equality: The Capabilities approach", *International Labour Review*, Vol. 138, No. 3, (1999), p. 229

[18] See in general Kathleen Monahan, "Cultural Beliefs, Human Rights Violations, and Female Genital Cutting: Complications at the Crossroad of Progress", *Journal of Immigrant and Refugee Studies*, V. 5, No. 3, pp. 21-35

[19] Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Yakin Ertürk**,** Intersections between culture and violence against women, A/HRC/4/54, 17 January 2007 , para 43

[20] United Nations, *Ending Violence Against Women: From Words to Action, Study of the Secretary-General* (A/61/122/Add.1 and Corr.1), 2006, p. 31

[21] Martha Nussbaum, "Women and Equality: The Capabilities approach", p. 229

properly heard.[22] In other words, a particular value or norm may acquire authority when its proponents are brought to power or positions of influence due to political, economic and social developments.[23]

Cultures are not also static. They are constantly being shaped and reshaped by processes of ideological and material change at the local and global levels.[24] However, even while determining what needs to be changed and preserved over time, women appear to be disadvantaged. For example, while male leaders may willingly accept technology that massively affects culture, they may resist changes in women's status, showing a tendency to treat women as the repositories of cultural identity.[25]

Therefore, those who emphasize culture conveniently overlook the relations between culture, oppression and power structure thereby privileging the interpretation of the dominant voices in the culture. These arguments are results of "the patriarchal power structures which legitimize the need to control women's lives"[26] Besides, they would sustain the stereotypical perception of women as the principal guardians of sexual morality but with the uncontrolled sexual urges".[27] Because of all these, appealing to culture gives us more questions than answers[28] and could not be reasonably considered a good ground to sustain traditional practices with proven harm to people.

Secondly, the public/private dichotomy has been another challenge that affects efforts to tackle unfair gender norms. Within the Western liberal tradition, while men have been associated with the public sphere, women have been associated with the private sphere.[29] In this distinction which is prevalent well beyond the Western liberal tradition, gender norms which confine women to private spaces/in homes and families, do not only deprive them of the opportunity to participate in public life, but also make them vulnerable to violence and abuse in the private sphere.[30]

The public-private distinction is also used to determine matters that need state regulation.[31] While the public sphere is considered to constitute the appropriate terrain of state regulation, the private sphere is treated as beyond the purview of the state.[32] This understanding

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[22] Ibid.

[23] United Nations (2006), *Ending Violence Against Women: From Words to Action, Study of the Secretary-General* (A/61/122/Add.1 and Corr.1), 2006, p. 31

[24] Ibid.

[25] Ibid.

[26] UN Commission on Human Rights, "Report of the Special Rapporteur on violence against women, its causes and consequences," E/CN.4/2002/83, January 31, 2002, para. 14.

[27] Ibid.

[28] Martha Nussbaum, "Women and Equality: The Capabilities approach", p. 229

[29] Margaret Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory", *Journal of Law and Society*, Vol. 18, no. 4, (1991) , p. 449

[30] Expert Group Meeting on good practices in legislation to address harmful practices against women, EGM/GPLVAW/2009/EP.05, 11 May 2009, p. 2

[31] Catherine Moore, "Women and Domestic Violence: The Public/Private Dichotomy in International Law", *The International Journal of Human Rights*, Vol. 7, No. 4 (2003), p. 95

[32] Margaret Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory", p. 449; See also Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist approaches to international law", *The American Journal of International Law*, Vol. 85, No. 4, (1991), p. 627

contributes to the lack of social visibility of most types of violence against women and children including those committed through HTPs. These crimes instead of being seen as "national crimes" that deserve attention are instead treated as "natural", "personal", "private' or "domestic" and their goals and consequences are obscured and justified as chastisement or discipline.[33] In some countries, because crimes against women and girls are not treated as a public concern, compulsory mediation is advocated in family violence situations.[34]

The challenge emanating from the public or private distinction appears to be exacerbated by the rather romanticized understanding of the family as a "heaven in a hostile world".[35] This view seems to find expression in international human rights instruments that protects the institution of the family as the natural and fundamental unit of society. However, from the perspective of women and children facing violence in the family, this romanticized conception of the family may not be helpful. As some feminist scholars argue, the public/private dichotomy obscures the subjection of women to men within a universal, egalitarian and individualist order.[36] The distinction could lead to violence within the home to escape state scrutiny.

This is not however inevitable as, even with the public/private dichotomy, there are aspects of the private sphere that the State is willing to regulate. For instance, within the classical liberal theory which treats the family as quintessentially private, issues such as matrimonial matters, child welfare and incest are well-established subjects of state intervention.[37] The ambivalence to intervene on issues that concern the rights and safety of women and children is not therefore reflected in other areas. Whatever the historical trend, it is very important to overcome the challenges this traditional dichotomy creates in combating the violations of women's rights that usually happen behind closed doors of the private sphere.

3. Evolution in the International Legal and Policy Framework

The international legal and policy frameworks for tackling harmful traditional practices have evolved over the years. This evolution can be observed both at the UN level and in subsequent developments that occurred at the regional level.

3.1 International/UN level

[33] Jolanta Reingardiene, "Dilemmas in Private/Public Discourse: Contexts for gender-based violence against women in Lithuania, *Journal of Baltic Studies*, Vol. 34, No. 3, (2003), p. 355 citing Susan Pearce "From Private to Public Table: Private-Life Violence in Poland." Paper presented at the conference "Gendering Ethics/The Ethics of Gender," 23-25 June 2000, University of Leeds, United Kingdom.

[34] Rashida Manjoo & Daniela Nadj, 'Bridging the Divide: An Interview with Professor Rashida Manjoo, UN Special Rapporteur on Violence Against Women' in Eve S. Buzawa, Carl G. Buzawa (Eds.), *Global Responses to Domestic Violence, Springer International Publishing*, 2017, p. 30

[35] David Herlihy, "Family", *The American Historical Review, Vol.* 96, No. 1, 1991, at p. 1.

[36] Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy', in S.I. Benn and G.F. Gaus (eds), *Public and Private in Social life* ,Croom Helm; New York, St. Martin's Press, 1983, at p. 283.

[37] Margaret Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory", p. 449

The topic of harmful traditional practices has been on the UN agenda since the 1950s, apparently well before the issue of violence against women become popular. The initial focus of the UN was however on the impact of HTPs on the health of women and children. However, in recent years, a more human rights-focused approach has been adopted.

3.1.1. Health Centered Approach

The attention in earlier UN HTPs related efforts was focused on the effect of these practices on the health of women and children and the importance of full and free consent of the intending spouses in the formation of marriage.[38] For example, the 1954 UN General Assembly Resolution 843(IX) specifically noted the fact that in certain areas of the world, women are subject to customs, ancient laws and practices relating to marriage and the family which are not consistent with the principles of the UDHR. Based on this, the Resolution urged States to abolish such customs, ancient laws, and practices by ensuring complete freedom in the choice of a spouse, abolishing the practice of Bride-price, guaranteeing the right of widows to the custody of their children and their freedom as to marriage, eliminating child marriages and the betrothal of young girls before the age of puberty and establishing appropriate penalties where necessary. Though the Resolution did not use the expression "harmful traditional practices" as such, both in its reference to customs, ancient laws and practices as well as in the kind of problems is referred to, it is clear that the focus of the resolution was on this issue. However, by characterizing the problem as a problem of "certain areas of the world", the resolution appears to have shown a tendency to "essentialize" the problem of harmful traditional practices as a concern of "certain" societies.[39] Besides, the resolution also seems to focus on the aspects of traditional practices that are against marriage based on the full and free consent of the intending spouses.

In 1958, in resolution 680 BII (XXVI), 1958) "the United Nations Economic and Social Council (ECOSOC) invited the World Health Organization (WHO) to study the persistence of customs subjecting girls to ritual operations, and the medical aspects of operations based on customs."[40] Similarly, in 1961, the ECOSOC asked the WHO if it would be possible to undertake a study of the medical aspects of operations based on customs to which many women were still being subjected.[41]

In the 1980s, the issue of HTPs was taken up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1984 the Commission on Human Rights, by resolution 1984/48 recommended to the Economic and Social Council to request the "Secretary-General to entrust a working group of experts designated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UNICEF, UNESCO and WHO with the task of conducting a comprehensive study on the phenomenon of traditional practices

[38] United Nations, Good Practices in Legislation on "Harmful Practices" Against Women, Report of the Expert Group Meeting, 2009, p. 4

[39] On this problem of essentializing cultures see Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Yakin Ertürk**,** Intersections between culture and violence against women, A/HRC/4/54, 17 January 2007, para 20

[40] Expert Group Meeting on good practices in legislation to address harmful practices against women, EGM/GPLVAW/2009/EP.05, 11 May 2009, p. 3

[41] United Nations Economic and Social Council resolution 821 II (XXXII), 1961.

affecting the health of women and children". After the ECOSOC endorsed the recommendation by resolution 1984/34 on 24 May 1984, the Working Group was established.[42] In 1986, the Working Group prepared a report on traditional practices focusing on female circumcision, traditional birth practices and preferential treatment of male children.[43]

The health-centred perspective in the fight against HTPs however had some drawbacks. For example, concerning the practice of FGM, the health-frame approach tried to eradicate the practice by raising awareness of the negative effects of the practice on the health of women.[44] However, the health frame, instead of helping to abolish the practice, opened the door for the medicalization of the practice as parents started to take their daughters to be cut by medically trained people working with cleaner instruments.[45] In addition, the earlier understanding of HTPs as a problem of "certain societies" was not helpful to the universalist aspiration of eradicating such practices as it provided a fertile political ground for culturally relativist arguments against change.[46]

3.1.2 The Move to Human Rights-Based Approach

Since the 1990s, harmful traditional practices became acknowledged as forms of violence against women constituting gender-based discrimination and violation of women's human rights.[47] As a result, there has been a growing realization that international human rights law provides the main international legal framework for tackling harmful traditional practices. Though most of the international human rights instruments do not directly talk about harmful traditional practices even more so about VAW, they have provisions that are useful to fight these practices. This has to do with the fact that, depending on their nature, harmful traditional practices, violate a wide range of human rights provisions.

First, harmful traditional practices involve violation of international human rights norms that prohibit discrimination.[48] This is because most harmful traditional practices specifically target women and girls. They are performed for male benefit.[49] More generally, HTPs are grounded in discrimination based on various grounds such as sex, gender, and age and are often justified

[42] Report of the Working Group on Traditional Practices, E/CN.4/1986/42, p. 4
[43] Ibid
[44] Camilla Yusuf & Yonatan Fessha, "Female genital mutilation as a human rights issue: examining the effectiveness of the law against female genital mutilation in Tanzania", *African Human Rights Law Journal* Vol. 13, No. 2, p. 362
[45] Ibid
[46] Martha Nussbaum, "Women and Equality: The Capabilities approach", p. 229
[47] United Nations, Good Practices in Legislation on "Harmful Practices" Against Women, Report of the Expert Group Meeting, 2009, p. 4
[48] As a corner stone of international human rights law, the non-discrimination principle is enshrined in a several key international instruments. See, for example, UN Charter, Article 1(2) and (3) Articles 13(1)(b), 55(c) and 76(c) of the UN Charter, See also Article 2 of UDHR; Article 2 of ICCPR; Article 2(2) of ICESCR; Article 2 of CRC.
[49] UN, Fact Sheet on Harmful Traditional Practices, p. 2

by invoking socio-cultural and religious customs and values as well as misconceptions regarding some disadvantaged groups of women and children.[50]

Apart from a violation of the principle of non-discrimination, HTPs can also be analysed as infringements of a wide range of human rights such as the right to life, the right not to be subject to torture or inhuman treatment, the right to liberty and security of person, the right to the highest standard of health etc. If we take the right to life, we can find a lot of HTPs that violate this right. HTPs such as honour killings which are mainly committed against women in the name of defending the honour of the family, deny the right to life of victims.[51] HTPs associated with strong son preference could also be considered as a denial of the right to life of girls.[52]

Several HTPs can also be considered as violations of the right to be free from torture, and inhumane and degrading treatment since they involve "severe pain and suffering".[53] Some HTPs would satisfy the traditional understanding of torture, inhuman and degrading treatment as an act perpetrated by the State. In this regard, we can for instance mention stoning, a practice which is usually applied as a sentence for adultery and other sexual offences in several Asian and African countries. This punishment is a form of torture and inhuman treatment.[54]

However, even HTPs like FGM which are not directly practised by the State can be considered torture. This understanding is justified since "the State's obligation of due diligence to prevent violence against women has been interpreted more recently to create liability for torture by non-state actors with the "acquiesce" or inaction or complicity of the State."[55] It is based on this understanding that the CAT Committee recognizes FGM as torture when there is evidence of State inaction, complicity or acquiescence.[56] Similarly, the practice of witch-hunting and witch-burning is based on superstition and belief in evil spirits, a practice known in many societies for centuries, involving torture and death of the women branded as such.[57]

In addition, due to their impacts on the health of women and children, harmful traditional practices can also be considered violations of the right to health and reproductive health rights. In this regard, General Comment 14 of the Committee on Economic Social and Cultural Rights noted the removal of all barriers interfering with access to health services including in the field of reproductive health is essential for the realization of women's right to health.[58] In

[50] Joint General Recommendation/General Comment No. 31, para 6
[51] UN Economic and Social Commission for Asia and Pacific, *Harmful Traditional Practices in Three Countries of South Asia: Culture, Human Rights and Violence Against Women*, Gender and Development Discussion Paper Series No. 21, UN ESCAP, Bangkok, p. 22
[52] Ibid, p. 28
[53] Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms Radhika Coomaraswamy, Cultural Practices in the Family that are Violent towards Women, E/CN.4/2002/83 , p. 8
[54] Office of the Special Representative of the Secretary-General on Violence against Children, *Protecting children from harmful practices in plural legal systems with a special emphasis on Africa*, 2016, p. 30
[55] Economic and Social Commission for Asia and the Pacific, *Harmful Traditional Practices in Three Countries of South Asia: culture, human rights and violence against women*, p. 10
[56] Ibid
[57] Ibid, p. 37
[58] CESCR, General Comment 14, para 21

this General Comment, understanding harmful traditional practices could pose a problem in this field, the Committee also noted the importance of undertaking "preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny… [women] their full reproductive rights."[59] Adopting effective and appropriate measures to abolish HTPs affecting the health of children, in particular the girl child, such as early marriage, female genital mutilation, preferential feeding and care of male children is very important.[60]

The Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child merit special mentions as instruments that have both general and specific provisions concerning harmful traditional practices. The Convention on the Elimination of all Forms of Discrimination Against Women generally obliges member States to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women". (Article 2, CEDAW) The relevance of this provision should be seen in the light of the gradual recognition of violence against women as a form of discrimination against women and the understanding that HTPs form part of violence against women.

The role of the Committee on the Elimination of Discrimination against Women in the recognition of violence against women and harmful traditional practices as human rights issues cannot be overstated. This role should be seen because the issue of VAW is not even explicitly mentioned in the Convention on the Elimination of All Forms of Discrimination Against Women.[61] Different reasons might be mentioned regarding why the CEDAW failed to include VAW in its provisions. First, since CEDAW was primarily focused on combatting discrimination against women this anti-discrimination framework is not the first discourse that comes to mind while dealing with VAW.[62] Second, the omission is also a reflection of the attitude at the time towards violence against women which was not given sufficient attention at the international level being primarily approached from a criminal law perspective.[63] The absence of a specific provision on VAW in CEDAW can also be seen as a reflection of the endemic reluctance to address the issue at the time the treaty was adopted.[64]

This is not to say that there are no provisions in CEDAW that cover some aspects of VAW as we understand it today. For example, Article 6 of the Convention requires States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women

[59] Ibid

[60] Ibid, para 22

[61] Anna Saber & Francisco Rivera Juaristi, "Written submission prepared by the International Human Rights Clinic at Santa Clara University School of Law in response to the call for submissions issued by the UN Special Rapporteur on Violence Against Women," *Santa Clara Law*, October 1, 2016. http://1x937u16qcra1vnejt2hj4jl.wpengine.netdna-cdn.com/wp-content/uploads/161001_VAW-Questionnaire_SantaClaraIHRC.pdf

[62] R.J.A McQuigg, "Is it time for a UN Treaty on Violence Against Women?", *The International Journal of Human Rights*, Vol. 22, No. 3, p. 2-3

[63] Ibid., p. 3

[64] Dubravka Simonovic, "Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions," *Human Rights Quarterly,* V. 36, no. 3 (August 2014), p. 599

and exploitation of the prostitution of women." The prohibition of trafficking in women can be considered an aspect of VAW.[65]

Even more importantly, though CEDAW doesn't as such mention the phrase "harmful traditional practices", it has a couple of provisions that are directly relevant to the issue. First, Article 5(a) of the Convention requires states to take all appropriate measures "*to modify the social and cultural patterns of conduct of men and women, to achieve 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 stereotyped roles for men and women."* Considering many harmful traditional practices are strongly connected to and reinforce socially constructed gender roles and systems of patriarchal power relations[66] this provision is directly relevant to such practices.

In addition, CEDAW also has a provision that can address several harmful traditional practices related to marriage. Article 16 of the Convention requires States to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage inter alia through giving both sexes the same right to freely choose their spouses and enter into marriage with their free and full consent. (Article 16(1)(b)) This provision is relevant to combat forced marriage including abduction. Besides, Article 16(2) of the Convention also clearly states that the betrothal and marriage of a child shall have no legal effect prohibiting child marriage, which is a widely practised HTP. In light of the above provisions that deal with some aspects of HTPs, it is fair to say that the whole point regarding the absence of a clear provision on VAW in the CEDAW is only partly true when it comes to HTPs.

The CEDAW Committee has directly or indirectly referred to the issue of harmful traditional practices in many of its General Recommendations. In General Recommendation No. 3(1987), the Committee noted, "the existence of stereotyped conceptions of women, owing to sociocultural factors, that perpetuate discrimination based on sex and hinder the implementation of article 5 of the Convention".[67] The Committee urged "all States parties effectively to adopt education and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women."[68]

General Recommendation no. 14 was specifically about female circumcision, one of the widely known harmful traditional practices affecting women. .[69] General Recommendation No.19 showed the clear links between harmful practices and violence against women.[70] Several other general recommendations also raised the issue of harmful practices.[71]

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[65] Christine Chinkin, "Addressing Violence Against Women In The Commonwealth Within States' Obligations Under International Law," *Commonwealth Law Bulletin 40*, no. 3 (2014), p. 472

[66] Joint General Recommendation/General Comment No. 31, para 8

[67] Committee on the Elimination of Discrimination Against Women, General Recommendation No. 3: Education and Public Information Campaign, 1987

[68] Ibid

[69] Committee on CEDAW, General Recommendation No. 14

[70] Committee on CEDAW, General Recommendation No. 19

[71] See, for example, General Recommendation No. 21 (1994) on equality in marriage and family relations, General Recommendation No. 24 (1999) on women and health, General Recommendation No. 25 (2004) on

The Convention on the Rights of the Child (1989) has a more straightforward provision on harmful traditional practices. Article 24(3) of this Convention states: "States Parties shall take all effective and appropriate measures with a view to abolishing **traditional practices** prejudicial to the health of children." (emphasis added) Despite its narrow frame on its focus on health, this provision deals with harmful traditional practices apart from using the expression "prejudicial to the health of children" to refer to the harmfulness of such practices.

Unlike CEDAW, the Convention on the Rights of the Child also has a clear provision on violence against children. Article 19 (1) of the CRC requires States to take various measures to "protect the child from all forms of physical and mental violence…" (emphasis added) In its General Comment No. 13, the CRC Committee interpreted the expression "all forms of ...violence" to include "harmful practices". In a non-exhaustive list of examples of harmful practices, the Committee included "corporal punishment", "female genital mutilation", "amputations, binding, scarring, burning and branding"; "forced marriage and early marriage"; "honour" crimes; "retribution" acts of violence; and "uvulectomy and teeth extraction" etc.[72]

Though girls are solely or more exposed to most of these acts of violence, some of the practices target both boys and girls. For example, corporal punishment, scaring, burning or branding, teeth extraction etc. targets both sexes. Therefore, though HTPs and violence generally have a gendered component[73], it is also important to keep in mind that male children can be subjected to harmful traditional practices. As a result, the characterization of HTPs as both violence against women and children can help to indicate both the gendered nature of most of these practices and their broader scope in sometimes affecting children irrespective of gender.

This perspective is affirmed by the most important treaty body instrument on combatting HTPs: the "Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices"[74] In this Joint general recommendation/general comment the Committees have also expressly recognize that boys could be the victims of violence, harmful practices and bias.[75]

In addition to the above discussed human rights instruments, several other human rights treaties have provisions relevant to the fight against HTPs. For example, provisions such as Article 10(2) of the International Covenant on Economic, Social and Cultural Rights which require that marriage must be entered into with the free consent of the intending spouses are very important.

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temporary special measures, General Recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, and General Recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations.

[72] Committee on CRC, General Comment 13, para 29

[73] Committee on CRC, General Comment 13, para 19

[74] Committee on CEDAW and CRC, Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, 4 November 2014.

[75] Ibid, para 3

3.2. Regional Legal Framework

In addition to the instruments at the UN level, several instruments which are useful in the fight against VAW and HTPs are also found at the regional level. Based on how early they have introduced a specific treaty that directly addresses VAW, we will briefly discuss the Inter-American, the African and the European Human Rights Systems.

3.2.1. The Inter-American Approach: A separate treaty on VAW

In the Inter-American Human Rights system, there are several general instruments which are relevant for combatting HTPs and VAW. The American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, and the Inter-American Convention to Prevent and Punish Torture can all be important in this area.

In addition to the more general instruments, the Inter-American system has also a specific treaty devoted to the issue of VAW. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), which was adopted in 1994, is one of the most ratified instruments in the inter-American system.

The Convention tried to define violence against women in a way that overcomes the public/private dichotomy that can be a hurdle to effective protection against VAW. According to the Convention, VAW is "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, **whether in the public or the private sphere**"[76] (emphasis added) In addition, Article 7(b) adopts a due diligence framework by requiring member states to "apply due diligence to prevent, investigate and impose penalties for violence against women".

The Convention has also tried to recognize the relationship between gender violence and discrimination by indicating VAW is a manifestation of historically unequal power relationships between women and men and by linking women's right to a life free of violence with the right to be free from all forms of discrimination.[77] However, with the specific focus of this instrument on the issue of VAW, it is difficult to say the issue of HTPs is conceptualized both as violence against women and children in the Inter-American system. As a result, combatting HTPs still requires using the more general human rights treaties in addition to the specific treaty on VAW.

[76] See Article 1 of The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)
[77] Ibid, Preamble and Article 6

3.2.2. The African Approach: HTPs as Violence against Women and Children

Unlike the Inter-American System, in Africa, there is no specific treaty that solely deals with VAW. However, the African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women in Africa (Maputo Protocol) have provisions relevant to the fight against HTPs. The African Charter on the Rights and Welfare of the Child also has very clear provisions on various harmful traditional practices. As a result, it is fair to say that HTPs in the African system are conceptualized as violence against women and children.

The Maputo Protocol, in particular, has a specific provision devoted to the issue of HTPs. Article 5 of the Maputo Protocol requires the Member States of the treaty 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."* This provision, instead of emphasizing the "traditional" nature of the practices, focuses on their harmfulness and their effect on the rights of women. In this way, the prohibition of harmful practices is defined broadly without an explicit reference to "tradition". This characterization might help to cover the majority of harmful traditional practices that affect women and girls.

Apart from this general prohibition, this provision demand states to take all necessary legislative and other measures to eliminate harmful practices. These measures include awareness creation (Article 5(1)); legal prohibition of all forms of female genital mutilation (Article 5(b)); and provision of necessary support for victims (Article 5(c)). The support can take several forms. It could be through basic "health services", involving "legal and judicial support" or take the form of "emotional and psychological counselling". It could even include "vocational training to make them self-supporting". (Article 5 (c)) In addition to the above measures, States are also expected to take preventive action to protect *"women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance".*

Just like the Maputo Protocol, the African Charter on the Rights and Welfare of the Child also has several provisions that address the issue of HTPs. For example, Article 1(3) of the Charter provides that "any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged". Considering HTPs are traditional practices that are inconsistent with many human rights, this provision covers them.

Article 21 of the Charter specifically deals with "Protection against Harmful Social and Cultural Practices"**.** Unlike Article 5 of the Maputo Protocol which was mentioned above, this provision, in addition to the harmful nature of these practices, also refers to their social or cultural origin.

Sub Article 1 of Article 21 is formulated in a rather broad way that could enable the inclusion of several harmful traditional practices. In this provision, State Parties to the Charter are required to "take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child". In particular, states are expected to take appropriate measures to eliminate "(a) those customs and

practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or another status."

Sub article 2 of article 21 singles out early marriage as one HTP which affects children. In this provision, child marriage and the betrothal of girls and boys are prohibited. As such states are expected to take effective action to prevent early marriage. This involves specifying the minimum age of marriage to be 18 years and making registration of all marriages in an official registry compulsory.

As already noted, in addition to those that specifically mention HTPs, more general human rights provisions are relevant in this field. These include the right to life, prohibition of torture, inhumane and degrading treatment and punishment, the right to security of the persons and the right to health. These kinds of provisions are found in several regional human rights instruments in Africa. In general, even in the absence of a separate regional treaty on VAW, African human rights instruments seem to have sufficient cover the issue of HTPs in a way that conceptualizes the problem both as violence against women and children.

3.2.3. The European Approach: A specific VAW and domestic violence instrument

In the European region as well, instruments and provisions which are relevant to HTPs are found in different forms. On the one hand, there are general human rights provisions enshrined in instruments such as the European Convention on Human Rights, the European Social Charter and the EU Charter on Fundamental Rights which are affected by HTPs. These include the right to life (Article 2 of the ECHR), prohibition of torture (Article 3 of the ECHR), the right to health, etc.

However, there is also an instrument at the Council of Europe level that is devoted to the issue of preventing and combatting violence against women and domestic violence. (Istanbul Convention) The Istanbul Convention is described as "the most far-reaching international treaty to tackle this serious violation of human rights".[78]

The Istanbul Convention covers all kinds of violence against women and domestic violence including those that can be characterized as HTPs. In the preamble of the Istanbul Convention, the list of VAW that is mentioned includes some known HTPs such as "forced marriage, crimes committed in the name of so-called "honour" and genital mutilation". The Convention has, in addition, specific provisions which are directly relevant to HTPs.

Article 12(1), of the Istanbul Convention, requires States Parties to "take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men to eradicate prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or stereotyped roles for women and men." This is an important provision considering most HTPs are grounded on discriminatory social norms.

[78] Council of Europe, "Preventing and Combating Violence against Women", available at https://www.coe.int/en/web/genderequality/violence-against-women#{%2216800160%22:[0]}

The Istanbul Convention has specific provisions on several HTPs. There are, for example, two provisions on forced marriage in the Convention. Article 32 deals with the issue of "civil consequences of forced marriages". This provision requires States Parties to "take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim". Article 37 (1), on the other hand, talks about the need for States Parties to criminalize forced marriage. Sub Article 2 of Article 37 requires the criminalization to include "the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in to force this adult or child to enter into a marriage".

Article 38 of the Convention deals with the issue of female genital mutilation. The provision requires States Parties to criminalize "excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris" (38(a)); "coercing or procuring a woman to undergo" the above (38(b)); or "inciting, coercing or procuring a girl to undergo" any of these above acts. (38(c))

Given the number of provisions in the Istanbul Convention that deal with various HTPs, it is probably fair to say that this is the most detailed treaty on this issue. However, since it is a treaty that focuses on VAW, it can be said that the Violence against Children aspect of HTPs is missing. As a result, to the extent HTPs affect male children, the other more general human rights treaties remain relevant in the fight against such practices.

4. The Debate Over the Need for a Stand-alone UN Treaty on VAW

Unlike some of the above regional systems, there is no specific treaty on VAW at the UN level. This in turn raises questions on the adequacy of the legal framework at the universal level. This has been a subject of debate in a form of whether there is a need to introduce a stand-alone treaty on VAW. In this section, after a brief explanation of the existing framework at the UN level focusing on the CEDAW framework, some arguments for and against the need to introduce a stand-alone treaty on VAW will be reviewed.

4.1 The Existing Soft law-driven UN Normative Framework on VAW

At the UN level, the protection of women from violence can be said to have been broadly addressed in various human rights instruments. These instruments include the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women etc.[79] As instruments specifically dedicated to women's rights in a way that provides a gender perspective to all human rights instruments[80], the Convention on the Elimination of All Forms of Discrimination against

[79] Report of the Special Rapporteur on Violence Against Women, its causes and consequences, A/HRC/32/42, 19 April 2016, p. 9, para 26
[80] Ibid

Women and the Optional Protocol are probably the most important ones in this regard. However, there is no specific legally binding UN treaty on VAW.[81] The issue of VAW is not even explicitly mentioned in the Convention on the Elimination of All Forms of Discrimination Against Women.

During the drafting process of the Convention, there were limited attempts to include expressions related to violence against women. During the drafting of Article 6, the delegation from Belgium proposed the inclusion of the words "attacks on the physical integrity of women" in the provision.[82] In trying to justify the proposal the Belgium delegation noted that, while such acts are legally disavowed and punished in most countries, they nevertheless continue to constitute part of custom and tradition.[83] However, the proposal was not supported and, apart from Portugal touching upon the issue again, this was pretty much the limit of attempts to directly refer to the issue of VAW in the Convention. As a result, CEDAW failed to mention terms such as 'violence', 'rape' and 'assault'.

How is then the normative gap regarding VAW addressed in the exiting UN treaty framework? The approach followed by U.N. treaty bodies to address VAW is to "employ creative forms of legal interpretation to fit VAW within the more general human rights treaties."[84] For example, the CEDAW framework for VAW is based on three sources that constitute the Convention, General Recommendations and case law.[85] As noted above, the text of the CEDAW does not directly talk about VAW. However, the CEDAW broadly articulates the obligations States have to refrain from any act of discrimination against women and to eliminate discriminatory legislation and formulae new non-discriminatory ones. (Article 2) Using the Convention's broad formulations, the CEDAW Committee at first used General Recommendations as an interpretative tool to fill this gap in the treaty.[86]

In 1989, General Recommendation No. 12 on the CEDAW Committee stated that states parties are required 'to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life'[87] General Recommendation 12 was very brief. Nevertheless, it stated that States Parties to CEDAW should include in their periodic reports to the CEDAW Committee information in connection to legislative and other measures to protect women from all types of violence. [88] Interestingly though, apart from stating that articles 2, 5, 11, 12 and 16 of the Convention required states parties 'to act to protect women

[81] Anna Saber & Francisco Rivera Juaristi, "Written submission prepared by the International Human Rights Clinic at Santa Clara University School of Law in response to the call for submissions issued by the UN Special Rapporteur on Violence Against Women," *Santa Clara Law*, October 1, 2016. http://1x937u16qcra1vnejt2hj4jl.wpengine.netdna-cdn.com/wp-content/uploads/161001_VAW-Questionnaire_SantaClaraIHRC.pdf

[82] Marsha A Freeman, C. M. Chinkin, and Beate Rudolf, *The UN Convention On The Elimination Of All Forms Of Discrimination Against Women: A Commentary*, (Oxford: Oxford University Press, 2012)

[83] Time for a change, p. 5-6 citing "Summary Record of the 638th Meeting," UN Doc. E/CN.6/SR.638, (UN Economic and Social Council - Commission on the Status of Women, 26th Session, Geneva, September 17, 1976).

[84] Ibid

[85] Council of Europe, The Istanbul Convention and the CEDAW Framework: A Comparison of measures to prevent and combat violence against women, Working Paper by the Council of Europe Secretaria, p. 1

[86] 2014 Report, p. 7

[87] CEDAW Committee (8th Session), 'General Recommendation No 12' (1989) Violence against Women

[88] See General Recommendation No. 12, para 1-4

against violence of any kind" ', General Recommendation No. 12 did not explain how violence against women was encompassed by CEDAW. Considering none of these provisions expressly refer to violence against women, the assertion remained vague.[89]

In 1992, in General, Recommendation 19, the CEDAW Committee further interpreted the Convention to include the issue of VAW as part of its remit. This is where the Committee tried to explain in a more precise manner how various provisions of CEDAW can be interpreted to encompass the issue of VAW and how VAW is form discrimination. The General Recommendation stated: "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."

This interpretation is reached by relying on the impact of violence against women impairing and nullifying "the enjoyment by women of human rights and fundamental freedoms under general international law and human rights conventions."[90] This interpretation is grounded both in the multiple articles of CEDAW that prohibit discrimination in all forms as well as fundamental rights recognized in other conventions and general international law including international humanitarian law. The CEDAW Committee reiterated this position in General Recommendation No. 28 (2010) as well.

The adoption of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women(the Optional Protocol) in 1999 gave the CEDAW Committee another tool to elaborate on issues related to VAW.[91] The case law developed in the communication procedure introduced to grant women access to justice at the international level[92] has covered a lot of issues important to women including VAW. For example, in *A.T. v. Hungary*, the Committee decided that states may be held responsible for private acts so long as they fail to act with due diligence to prevent violation or failed to investigate and punish acts of violence.[93] In practice, the CEDAW Committee uses several substantive provisions in the Convention to address the issue of violence against women.[94] For example, while it invokes article 5 on stereotyping and the consequences thereof, it uses articles 11 and 12 on sexual harassment and sexual and reproductive health violations respectively.[95] Article 16 is used on matters relating to marriage and family.[96] General Recommendation No. 35 on Gender-based Violence against women which updated General Recommendation No. 19 can currently be considered the latest document that represents the position of the CEDAW's Committee on the issue.[97]

[89] R.J.A McQuigg, Is it time for a UN Treaty on Violence Against Women?, p. 4
[90] General Recommendation 19, para 7
[91] Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, A/HRC/32/42, 19 April 2016, para 29
[92] Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, A/HRC/32/42, 19 April 2016, para 29
[93] Ibid
[94] Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/26/38, 28 May 2014, p. 7 & 8
[95] Ibid.
[96] Ibid.
[97] Committee on CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017.

The CEDAW framework to combat VAW is supplemented by some 'soft law' instruments. These include the Beijing Declaration and Platform for Action and the subsequent five, 10- and 15-year follow-up processes, and resolutions by the United Nations (UN) General Assembly (GA), Human Rights Council and Commission on the Status of Women (CSW).[98] The 1993 General Assembly Declaration on the Elimination of Violence against Women (DEVAW) is particularly a very important instrument in this area.[99] In 2013, the UN Commission on the Status of Women also issued a very important soft law instrument with a comprehensive set of conclusions on 'The elimination and prevention of all forms of violence against women and girls.[100] In addition, the special procedures of the Human Rights Council (formerly Human Rights Commission), in particular the work of the Special Rapporteur on Violence against Women, further strengthen the understanding of legal measures required to address the issue of VAW.[101]

4.2. The Debate on the need to introduce a new UN Treaty on VAW

Several arguments are raised both in support of the idea of a new stand-alone treaty on VAW and against it. A related controversy as to whether there is a need to introduce a new treaty monitoring body for such a stand-alone treaty is also raised.

4.2.1. Arguments for a new stand-alone UN Treaty on VAW

First, people support the introduction of a new stand-alone treaty on VAW based on the enormity of the problem and the need for global attention to the issue.[102] Indeed, albeit in varying degrees, violence against women is found in all countries of the world.[103] Around 35% of the women are estimated to have experienced either physical or sexual violence in their lives by their partners or strangers.[104] The statistics are staggering indicating that the phenomenon of violence against women is universal in scope.[105]

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[98] Christine Chinkin, "Addressing Violence Against Women In The Commonwealth Within States' Obligations Under International Law," *Commonwealth Law Bulletin 40*, no. 3 (2014), p. 473

[99] See United Nations General Assembly, UNGA Res 48/104 'Declaration on the Elimination of Violence against Women' (20 December 1993).

[100] UN Commission on the Status of Women, 'The Elimination and Prevention of all Forms of Violence against Women and Girls' (March 2013) E/CN.6/2013/L.5.

[101] Christine Chinkin, "Addressing Violence Against Women In The Commonwealth Within States' Obligations Under International Law," p. 473

[102] Ronagh McQuigg, Why the World Needs a UN Treaty to Combat Violence against Women., Bologs.lse.ac.UK, 2016 available at https://blogs.lse.ac.uk/europpblog/2016/03/12/why-the-world-needs-a-un-treaty-to-combat-violence-against-women/

[103] UN Statistics Division, 'The World's Women 2015 – Trends and Statistics' (2015), 142, available at http://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_chapter6_t.pdf

[104] Ibid Ronagh McQuigg, Why the World Needs a UN Treaty to Combat Violence against Women., Bologs.lse.ac.UK, 2016

[105] Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge: Cambridge University Press, 2013), xi.

Despite the enormity of the problem, the responses of states to the issue remain extremely problematic.[106] On the one hand, not every country has laws on violence against women.[107] Those who have such laws fail to focus on preventing violence from occurring while focusing on responding to the violence that has already occurred.[108] Besides, the existing laws on VAW may not be implemented at all, or are not implemented in ways that help women.[109]

In general, there appears to be a serious implementation gap in the exiting VAW framework.[110] The fact that VAW continues at a pandemic level throughout the world despite the CEDAW being in effect since 1981, makes some observers doubt if CEDAW is the appropriate mechanism to end VAW.[111] This is not surprising considering the enormity of the problem and the existence of implementation gaps. Nevertheless, one should still note a lot of other reasons other than the absence of a specific treaty on VAW that affect the effectiveness of combating VAW.

Second, some observers question the sufficiency of the existing legal framework because CEDAW has a very broad scope and VAW is just one among many forms of discrimination. Indeed, since CEDAW defines the problem of Women's human rights in terms of discrimination, its agenda for national action is primarily shaped by its broad focus on discrimination in various areas such as political and public life, education, health and employment.[112] According to this view, though this broad perspective on discrimination includes VAW, it does not prioritize it. Consequently, a new global treaty on VAW will be detailed enough to address issues specific to such violations of human rights and draw sufficient attention to the issue. The trend in international human rights law so far indicates that "whenever a violation is codified in a global treaty, the broad understanding is that the issue is so grave that it warrants international attention."[113]

Third, some arguments for a new stand-alone treaty on VAW are based on questions regarding the binding nature of the CEDAW framework.

For instance, Rashida Manjoo, the former UN Special Rapporteur on VAW in her 2014 report to the UN Human Rights Council noted that "although soft laws may be influential in developing norms, their non-binding nature effectively means that States cannot be held responsible for violations." This argument should be seen in the light of the broader controversy on the status of general recommendations whose binding nature is often questioned by states.[114] The controversy surrounding the role of the Human Rights

[106] R.J.A McQuigg, Is it time for a UN Treaty on Violence Against Women?, p. 5
[107] UN Statistics Division, 'The World's Women 2015 – Trends and Statistics' (2015), 160
[108] UN Statistics Division, 'The World's Women 2015 – Trends and Statistics',160
[109] Ibid
[110] Report of the Special Rapporteur on violence against women, its causes and consequences, U.N.Doc.A/ HRC/32/42, 19 April 2016, at para. 43.
[111] Global Rights For Women, Time for change: the Need for Binding International Treaty on Violence Against Women, p. 1
[112] Ibid, p. 2
[113] Response by Commissioner Lucy Asuagbor (Special Rapporteur on the Rights of Women in Africa) On questions on the adequacy of the legal framework on violence against women., p. 2
[114] Ibid Ronagh McQuigg, Why the World Needs a UN Treaty to Combat Violence against Women., Bologs.lse.ac.UK, 2016

Committee following its famous General Comment 24 on reservations can be a good example.[115]

Similarly, in debates regarding the binding nature of the framework established by the CEDAW Committee to address VAW, the status and impact of General Recommendations is a controversial issue. In this regard, the CEDAW Committee is of the view that General Recommendation 19, as the Committee's authoritative interpretative tool reflects its position on VAW and in conjunction with some provisions of the Convention is a source of binding obligation.[116] However, since treaty mechanisms are ultimately based on State-consent such arguments work only so long as member states do not raise serious objections.

4.2.2. Arguments Against a new global treaty

Arguments against the need to adopt a new global treaty and a monitoring mechanism that specifically addresses Violence Against Women are raised by various entities.

The first concern is related to fears regarding the fragmentation and increased burden on states. For example, the CEDAW Committee once argued against the idea of a stand-alone treaty and monitoring mechanism on VAW based on the need to "avoid fragmentation of policies and legislation at the UN level". The Committee argued: that "a new instrument and its new monitoring body would certainly increase the burden of State parties and reinforce the trend of fragmentation".[117] This, according to the CEDAW Committee, will be contradictive from a viewpoint of State parties which have urged the Committee to streamline its activities.[118]

The possible creation of inconsistent or conflicting standards with the existing regional instruments through a global treaty is another concern.[119] If a global convention is also accompanied by its own treaty monitoring body, some fear that it might add to state parties' monitoring fatigue.[120] This concern is understandable since States are already expected to report to several treaty bodies depending on the number of treaties they ratified. This has an

[115] Mechlem, Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights", Vanderbilt Journal of Transnational Law, Vol. 42, p. 926. However, it is worth noting that the ICJ has recognised that the opinion of a UN Human Rights Committee, 'should be given 'great weight'. A*hmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* 2010] ICJ Rep, para 66.

[116] Report of the Special Rapporteur on violence against women, its causes and consequences on the adequacy of the international legal framework on violence against women, A/72/134, 19 July 2017, para 15

[117] Response of the Committee on Elimination of All Forms of Discrimination Against Women for the Call for submissions on the adequacy of the international legal framework, https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/InternationalLegalFramework.aspx

[118] Ibid

[119] Replies submitted by the Council of Europe Group of action against violence against women and domestic violence (GREVIO) for the Call for submissions on the adequacy of the international legal framework, https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/InternationalLegalFramework.aspx

[120] Ibid

impact on the national costs of the reporting procedure in terms of resources, time and staff with the relevant expertise.[121]

The second category of arguments against a stand-alone treaty and monitoring mechanism is related to fears regarding falling behind the existing standards and resource diversion. One advantage of the current approach at the UN level is the use of General Recommendations and other soft law instruments to elaborate global standards on VAW. This approach enables treaty bodies to advocate for a more progressive approach. If the issue is subjected to a normal treaty-making process, there is a fear that cultural-relativist arguments which currently lurk in the background come to the forefront and either prevent the adoption of important standards or open the floodgate of reservations. It is also suggested that the current international political climate, as well as economic situation, is not conducive to a global drafting exercise in the area of women's rights.[122] Fears regarding reaching a global consensus are therefore pragmatic reasons to oppose a new global treaty on VAW.

The above argument appears to be an admission about what has been achieved by the treaty bodies using soft law instruments at the global level might not get the support of states in a formal treaty-making process. However, considering at least three regions have already adopted regional legal frameworks to combat VAW, what would be the problem if States in those regions take the initiative to globalize the binding standards they have accepted at the regional level? Wouldn't other countries join the effort at least to avoid being left out of the process? After all, international incentives and pressure to conform or domestic pressure when a government wants to boost its reputation at home can play a significant role in influencing states to ratify human rights treaties.[123] These optimistic arguments notwithstanding, the risk of regressive changes while attempting to develop a stand-alone UN treaty on VAW cannot be ignored.

The above arguments against the introduction of a separate VAW treaty at the UN level have a broader focus. Nevertheless, they are relevant to HTPs to the extent that such practices can be conceptualized as VAW. Two issues however seem to make the broader debate on the adequacy of the existing international framework on VAW less pressing and less relevant when it comes to combating HTPs. First, while VAW is not explicitly dealt with in UN treaties, there are several provisions on HTPs. This reality shows that the very assumption on which the whole debate on the need to introduce a separate VAW treaty is based does not squarely apply to HTPs. Second, though some HTPs are VAW, there are traditional practices that harm both male and female children. As a result, in terms of conceptualization, HTPs are better understood as both violence against women and children. Seen from this angle, the

[121] Jan Lhotský, Human Rights Treaty Body Review 2020: Towards an Integrated Treaty Body System, (Thesis) EMA Award, 2016/2017, p. 26

[122] Response of the Council of Europe Group of action against violence against women and domestic violence (GREVIO) in the framework of Stakeholder consultation on the adequacy of the international legal framework on violence against women conducted by the UN Special Rapporteur on VAW

[123] Response by Commissioner Lucy Asuagbor (Special Rapporteur on the Rights of Women in Africa) On questions on the adequacy of the legal framework on violence against women**.** Available at https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/InternationalLegalFramework.aspx

introduction of a standalone treaty on VAW does not necessarily provide a comprehensive legal framework to fight HTPs. It is based on this understanding this paper forwards some concluding remarks regarding the adequacy of the existing international legal framework to combat HTPs.

5. Concluding Remarks

The debate on the adequacy of the international legal framework for Violence Against Women (VAW) has recently shifted to the need to introduce a stand-alone UN treaty with a monitoring mechanism. However, though most Harmful Traditional Practices (HTPs) constitute violence against women, there are some which fall outside this characterization. There are HTPs that affect children irrespective of gender. As a result, it is better to conceptualize HTPs as both Violence against Women and Violence against Children. This conceptualization challenges some of the arguments about the normative gap in the existing framework that relies on the absence of a clear articulation of VAW in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

On the one hand, certain HTPs like early and forced marriage are covered by several UN human rights treaties including CEDAW. Besides, a more general provision that requires States to "take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children" is found in the UN Convention on the Rights of the Child. This latter provision addresses HTPs that target children irrespective of their gender. This makes arguments based on the absence of binding treaty provisions less relevant in this area. Due to the above reasons, the argument about the normative gap at the UN level is not as strong as it looks when it comes to the specific issue of HTPs.

This coupled with the fact that the arguments against a stand-alone treaty on VAW such as fragmentation of norms and a possible regressive change from the existing norms make the issue of introducing a new treaty a rather risky endeavour in combating HTPs. With HTPs affecting both women and children, it is not also clear whether a possible standalone treaty would cover all HTPs. When it comes to combating HTPs, the problem of the existing framework is not therefore the absence of binding rules. Albeit scattered, there are sufficient substantive rules in the existing treaties that can help to combat HTPs. What needs to be strengthened is the effectiveness of the existing implementation, monitoring and access to justice efforts in a manner that takes into account the nature of HTPs both as violence against women and children. This further requires the use of joint monitoring efforts by treaty bodies dealing with the rights of children and women. The CRC Committee and CEDAW Committee have already started that by adopting the first joint General Recommendation/General Comment on HTPs. That effort itself is an affirmation of the need to conceptualize HTPs as violence against women and children. As part of ongoing efforts to reform the treaty bodies system, ways should be devised to facilitate similar joint works in other monitoring activities such as review of state reports and individual communications.

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