‘MEDDLING OUTSIDERS’? HARMFUL TRADITIONAL PRACTICES, *PACTA SUNT SERVANDA*, AND THE DILEMMA OF HUMAN RIGHTS PRACTITIONERS

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ABSTRACT

The article looks into the difficult debate regarding the legitimacy and lawfulness of interventions against so-called ‘harmful traditional practices’, seeking to expose international law practice regulating culture, tradition and belief against the background of rights. The article explores the legal and moral objections against human rights interventions on issues of harmful traditional practices, and argues for an emphasis on positive legal obligations as a legitimate basis for outside intervention.

Keywords

Human rights treaties, harmful traditional practices, universality, cultural relativity, *pacta sunt servanda*.

1. INTRODUCTION

From early stages in their academic exploits, and through reiterated encounters in their careers, human rights practitioners have to deal with the relationship between human rights and culture. Through the many focus topics, human rights systems, and geographical areas in which human rights work is conducted, issues of bias, subjectivity, power and domination often are raised as challenges for the universal application of human rights norms, as well as used as a mirror to question human rights practitioners as agents of that universality.

Within the pervasive, still-ongoing debates on universality and cultural relativity; in few topics is this debate more prevalent than when discussing ‘harmful traditional practices’, as debates on their legality under international law, State obligations in addressing them, and the legitimacy of international, out-of-culture actors in bringing them into question; tend to reprise the wider jusphilosophical debate, but often with a face and a cause to be emotional about. When dealing with these issues in field contexts, human rights practitioners often have to deal with more than the intellectual rigours of this debate: often, issues of security, access, protection of staff and collaborators and relationship with institutional partners also interfere in the decision-making processes guiding *in-country* human rights work.

The moral and legal connotations of the dilemma between what is legally mandated and what is expedient, or possible; inspired the study below, which aims to identify the issue of harmful traditional practices within this universality-relativism debate and beyond, in a soul-searching effort to understand the moral standing of international human rights practitioners to deal with these practices. To do so, the article will delve into cultural relativistic and post-modern critiques of universal rights and those practitioners seeking to enforce them, identifying key criticisms and tension points as applicable to practitioners. To counter these claims, the article will look at the *pacta sunt servanda* nature of international law as a jusphilosophical bulwark, looking into the content of human rights law pertaining to harmful traditional practices in an attempt to uncover a moral, principled approach that allows practitioners to address their duties in a fashion that minimizes stalemate-generating criticism. The article will also use emerging professional

standards for field human rights officers as a guide for ethics and practice, discussing different types of interventions and attitudes applicable to them. In particular, this work will discuss whether international practitioners should engage in the individual protection of (would-be) victims of harmful traditional practices, particularly those in imminent danger; and if so; whether international law and professional standards offer a guide on how to best do it.

2. DEFINING 'HARMFUL TRADITIONAL PRACTICES'

Taken at plain meaning, the term 'harmful traditional practices' can encompass anything from the use of high-heel shoes in Western countries to 'honour killings' in several Asian societies, insofar as tangible damage or harm can be attributed to tradition. It is challenging to place together practices separated by their individual cultural contexts, and then address objectively whether they cause 'harm' -- the latter term, itself, requiring definition.

It is perhaps not a matter of semantics that the term 'harmful traditional practices' came to be so prominently used. It is often used as short-hand to a cluster of terms revolving around the common stems 'traditional practices harmful to (…)' and 'traditional practices affecting (…)', which refer to specific protected groups. Using 'harmful traditional practices' as a term avoids answering two problematic questions: harmful to what and to whom?

To cite but a few examples, the relevant Special Rapporteur mandate was entitled "traditional practices affecting the health of women and the girl child" (Warzazi 2005), there is an 'Inter-African Committee on Traditional Practices Affecting the Health of Women and Children', the Convention on the Rights of the Child (CRC) refers to "traditional practices harmful to the health of children" (United Nations 1989, art 24.3). The seminal Fact Sheet 23 published by OHCHR in 1995 uses "Harmful Traditional Practices Affecting the Health of Women and Children" as a title (OHCHR 1995, title).

Linklater comments that, if States often differ on a conception of good, they seem to have reached in international human rights law a form of moral consensus regarding certain forms of harm that should be eradicated. While the term 'harm' continues to be morally ambiguous and essentially contested, Linklater argues that international law is right to restrict the focus to prohibiting actions which cause grave mental and bodily harm, as going further may pose difficulties in the level of international consensus and on the resulting relationship between State and individual (Linklater 2005, p.330).

Milovanovic defines harm as

> the expression of some agency's energy to make a difference to others and it is the exclusion of those others who in the instant are rendered powerless to maintain or express their humanity (Milovanovic 2006, p.83).

He identifies two forms of harm: 'harms of reduction' occur when an offended party experiences a loss of some quality relative to their present standing (Milovanovic 2006, p.84). In turn, 'harms of repression' occur when an offended party experiences a limit or restriction preventing them from achieving a desired position or standing (Milovanovic 2006, p.85) – accounting for structural harms involved in discrimination processes.

The Institute on the Rights of the Child defines 'practice' as "following an action rule on a moral or social level" (Institute International des Droits de l'Enfant 2010). This practice is considered 'traditional' when

> it is rooted in a way of thinking, of doing or of acting that is an inheritance from the past" (...) considered compulsory in the process of inclusion of the individual or its family in the community, or is considered beneficial (Institute International des Droits de l'Enfant 2010).

From a human rights perspective, two points stand out: the emphasis on the practices' impact on health, and the limitation of the affected group to women and children. Regarding the former, it seems obvious that several practices affect whether participants can attain the highest standard of health. However, as will be demonstrated, traditional practices can affect a whole array of rights, including civil and political ones.

Equally, the emphasis on women and children narrows the issue to two groups that, albeit differentially and disproportionately affected, are not the sole targets of traditional practices affecting human rights. An UNMIL

periodic report, for example, portrays HTPs in a less discerning way: ritualistic murder, trial by ordeal, mass violence through 'country devil' ceremonies, and accusations of witchcraft all affected men as well as women (United Nations Mission in Liberia 2008, p.53).

The root of the definitional impasse lies in the inception of the international concern against female genital mutilation (FGM) in its various forms. In the negotiations preceding the CEDAW, a number of countries proposed that the provision dealing with HTPs specifically refer to the practice of FGM (Hodkin & Newell 2002, p.365). This proposal was opposed on the grounds that it would be wrong to single out one particular practice (Hodkin & Newell 2002, p. 365).

The term 'harmful traditional practices' was adopted in article 24(3) of the CRC to avoid highlighting any specific practice, as well as to prevent any practices from being unintentionally excluded (Van Bueren 1995, p. 28). According to Van Bueren, although the term is broad, it is specifically descriptive to include all HTPs (Van Bueren 1995, p. 28).

The impact and prevalence of FGM made it a priority and prominent poster-item to the cause. Fact Sheet 23 specifically incorporates language from feminist theory to claim that:

> The bleak reality is that the harmful traditional practices focused on in this Fact Sheet have been performed for male benefit. Female sexual control by men, and the economic and political subordination of women, perpetuate the inferior status of women and inhibit structural and attitudinal changes necessary to eliminate gender inequality (OHCHR 1995, p.2).

While fully appreciating that women and girls are disproportionally affected in both scale and gravity, and noting the urgency of tackling women/girl-specific HTPs, this work proposes that the term 'harmful traditional practices' needs broadening. A more correct terminology could, therefore, be 'traditional practices harmful to the enjoyment of individuals' human rights'. Grounding it on human rights, rather than on health, and removing the group qualifier, allow for a more systematic correlation of what is harmed – the enjoyment of human rights – and unpack the substance of possible remedies and corrections. Limiting traditions through human rights law, with its codified nature based on voluntarily-ratified norms, seems more precise than debates around essentially-contested concepts.

3. THE WIDER 'RELATIVITY VS. UNIVERSALITY' DEBATE

Any kind of human rights intervention in matters relating to culture or tradition tends to raise objections from a variety of critics. These objections are often fiercer when discussing the legitimacy of interference by 'meddling outsiders' to a particular culture. Indeed, debate about the universality of human rights norms vis-a-vis social mores in each individual culture is as old as human rights itself. As the world unveiled the Universal Declaration in 1948, the American Anthropological Society published its own note scoffing at the very idea of universal norms, denouncing it as the "newest facet of colonialism" (American Anthropological Society, apud Merry 2003, p. 3).

The debate has not subsided to this date, although it developed nuances beyond the scope of this work. In general terms, the argument revolves around whether the norms contained in the Universal Declaration of Human Rights can indeed claim to represent values espoused by the whole of humanity, and whether this is at all possible or desirable.

Baaz describes that, by tradition, the universalist notion of human rights has been founded on some version of 'natural law', in its ancient Greek, early Christian or medieval Catholic conceptions, where an essential human nature dictates certain moral standards to govern human relations, which can be deduced by reason, (Baaz 2009, p. 9). On the other hand, with the move from jusnaturalism into positivistic legal thinking, the incorporation of human rights as norms in the international legal system added the guise of a more voluntaristic arrangement. The same holds true of the UDHR, drafters of which included prominent figures from Chinese, Middle Eastern, Marxist, Hindu, Latin American and Islamic backgrounds (Ignatieff 2001, p. 106). The voluntaristic understanding of international law, based on the sovereign equality of nations to negotiate and freely choose to be bound by international norms, presents a compelling argument for their enforcement uniformly across all state parties.

Conversely, culture-based objections to universality consist of cultural relativism,

essentialism or determinism (Booth 1999, p.36). In general terms, these approaches converge around the idea that culture so colours a society's rationality, coherence and set of values, that ideas such of human rights can only be interpreted in its context (Booth 1999, p.37).

According to Baaz, such ideas hold that human beings are so shaped by culture that they are unable to rise above its truths. Thus, there exists no neutral ground to judge such beliefs and each society is entitled to live by them (Baaz 2009, p.23). Yet, as intractably irreconcilable as these positions seem to be, there has been renewed energy from both sides to recognize the terrain between them as fluid and rich (Fluehr-Lobban 1998, pp.1-20).

Universalists have tried to understand the interplay of culture into the realization of rights as situated social action: rights to culture, rights as culture, culture versus rights, and culture as a way of improving analysis of rights (Cowan et al. 2001, pp. 1-26). There have been efforts to develop what is known as a minimal universalism, which recognizes moral plurality but seeks to evaluate such systems based on values deemed universal (Ribeiro 2006, p.13). The Committee on CESCR in its general comment on participation in cultural life acknowledges that culture as "a living process, historical, dynamic and evolving, with a past, a present and a future", which must not be seen as "a series of isolated manifestations or hermetic compartments" (UN Committee on Economic Social and Cultural Rights 2009, para.12). Similarly, advances in anthropology since 1945 makes dialogue of the field with human rights a much less daunting task. As Merry points out:

> The contemporary anthropological understanding of culture envisions a far more fluid, contested, and changing set of values and practices than that provided by the idea of culture as tradition. (...) Local systems are analysed in the context of national and transnational processes and are understood as the result of particular historical trajectories. This is a more dynamic, agentic, and historicized way of understanding culture (Merry 2003, p.22).

4. POSTSTRUCTURALIST CHALLENGES TO OUTSIDE INTERVENTION

Objections to outside intervention, however, are not only based on standard cultural relativism, as the type described above. Other perspectives question motivations behind the narratives espoused by human rights international institutions. This segment will devote a few paragraphs to describe these challenges, focusing on the postmodern narrative analysis, identitarian challenges, post-colonial thought, subaltern speech, and of Orientalism as a mode of dominance discourse. These brief descriptions will then be used as lenses with which to see and interpret 'outside' human rights intervention.

Foucault has influenced a whole movement within academia that focuses on discourse analysis, coring the power relationship out of the discourse meanings, expressed through language and behaviour and their relationship to power. Through his genealogical work, Foucault sought to uncover how discourse was produced to govern social groups, and how the social world, as expressed through language, is affected by various sources of power (Diaz-Bone et al. 2007). Categorizations, relationships (personal and institutional), politics and ideology come into scrutiny. As the postmodern wave sweeps through academia, grand-narratives are put into question, foundation structures made relative, and issues of protagonism, symbols and representation are raised from superfluous to central in the debates within each field. How human rights norms came about; who participated in the discussions, the underlying power relationships of rule formation and implementation, and the forms of discourse used to reinforce, mask or misdirect from them, became focus of critique.

De-colonial critics, for example, focus on the western-centric nature of the philosophy underpinning much of international relations, international law, and human rights law in particular. They point to a Universal Declaration of Human Rights drafted at a time where colonialism was still dominant in much of the world, and which extensively borrowed language from Western constitutions. They look at the global human rights organizations and point to their headquarters, their senior staff composition, the source of their funding and the different approaches they adopt in southern and northern nations; and see these as a direct continuation of the underlying power relationship present during colonial domination.

Franz Fanon's work was a landmark in de-colonial thought, focusing on the inferiority

complex imposed upon the Black Subject, so that they attempt to appropriate and imitate the culture of the colonizer; attempting to put on what he calls "white masks" (Fannon 1952). In colonizing cultures, the attempt to associate "blackness" with "wrongness" is embedded in social practices; with language being used as a tool to shape slave and master identities (Fannon 1952, p.11). In this context, the proscription of harmful traditional practices may be portrayed as masking an attempt to identify non-white practices with barbarism, aimed to perpetuate a sense of inferiority among non-western folk, essential for western continuous dominance.

Edward Saïd's influential concept of Orientalism takes matters further, noticing how warped outside-perceptions of Eastern cultures and practices, shaped by European colonial and imperial attitudes, were fomented through art and academia. By essentializing the Oriental 'other', Western civilization engages in the self-affirmation of its own narrated self; becoming itself a tool of political domination (Said 1978, pp.2-3). The presentation of certain practices as 'traditional' acts to depict these societies as tradition-focused, opposite to the 'modern' Western societies; instilling a sense of exoticism and remoteness associated with them; while the worldly, presumed western human rights practitioner ventures forth to address these violations wherever they are found (Said 1978, p.26). That frames the Orient, and the Global South as a whole, as a frame and a stage for perpetual Western protagonism.

Another influential de-colonialist writer, Gayatri Spivak, takes issue with the power relations between those aiming to speak for victims, and the victims themselves. In the influential essay "May the Subaltern Speak", she describes efforts by the West to conserve itself as 'Subject', perpetuating 'epistemic violence' that keeps the colonial subject in a position of otherness (Spivak 1988, p. 76). She describes how certain segments are 'historically muted' by intellectuals in order to be made objects in their studies:

> In seeking to learn to speak to (rather than listen or speak for) the historically muted subject, the post-colonial intellectual *systematically* 'unlearns' female privilege. This systematic unlearning involves learning to critique postcolonial discourse with the best tools it can provide, and not simply substituting the lost figure of the colonized (Spivak 1988, p. 91).

To exemplify her main argument, Spivak addresses the practice of *sati*, the self-immolation of widows in their husband's funeral pyres. She considers the British abolition of the practice as a classic narrative of "white men saving brown women from brown men"; being counterpointed only by a nativist narrative of the women actually wanting to die (Spivak 1988, p.92). To Spivak, these sentences justify one-another; with the *'muted-subject's'* discourse never achieving a protagonist role (Spivak 1988, p.91). She is notes that the protection of women in these contexts becomes the signifier for the establishment of a "good" society, "which must, at such inaugurative moments, transgress mere legality or equity of legal policy" (Spivak 1988, p.94). This good society, of course, exists as a construct from colonial place-of-speech.

Applied to human rights scholarship, de-colonial thinking has produced strong critiques of human rights practice. Chief among them are those of Makau Mutua, who describes human rights doctrine as "fundamentally eurocentric", and a "telling testament to the conceptual, cultural, economic, military and philosophical domination of the European West over non-European peoples and traditions" (Mutua 2002, p. 154). He cites the geneology of human rights jurisprudence from Western sources, the influence of western liberal thought and the borrowed language from the American Bill of Rights and the French Declaration of the Rights of Men as proof of this fundamental bias (Mutua 2002, p. 154). Despite well-meaning proponents, for Mutua modern human rights practice falls within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world:

> The white human rights zealot joins the unbroken chain that connects him to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise. Salvation in the modern world is presented as only possible through the holy trinity of human rights, political democracy, and free markets (Mutua 2002, p. 155).

Mutua charges mainstream human rights institutions with rebuking attempts to reconstruct human rights from a multicultural perspective, claiming their goal is to remake

"non-Europeans into little dark, brown and yellow Europeans – in effect dumb copies of the original". (Mutua 2002, p. 155) He sees this as a tool to re-entrench and revitalize ls and "the international hierarchy of race and colour in which whites (…) are the models and saviours of non-whites, who are victims and savages" (Mutua 2002, p. 155). He gives the harmful traditional practice of female genital mutilation as a specific example:

> Perhaps in no other area than in human rights advocacy over the practice labeled in the West as female genital mutilation (FGM) is the cultural arrogance of the European West more poignant. "Mutilation" implies the willful, savage, and sadistic infliction of pain on a hapless victim. It is language that stigmatizes as barbaric cultures that condone the practice and dehumanizes the women who are subjected to it. This formulation decontextualizes the cultural foundation of the practice and promotes the stereotype of barbaric machete-wielding natives only too eager to inflict pain on women in their own societies. It is a view that is racist (Mutua 2002, p.155).

Boaventura Souza Santos may offer a more conciliatory critique. He identifies modern human rights as marked by three essential tensions: between social regulation and social emancipation; the dialectical tension between State and Society; and between the Nation State and what we call Globalization, the latter being identified by Santos as a context in which human rights developed as part of global governance and global civil society(Souza Santos 2002, pp.39–41). His work attempts to reconcile human rights with its double context of globalization, on one side, and cultural fragmentation and identity politics, on the other. He sees trends of 'localized globalisms' and 'globalized localisms', both feeding a trend of cosmopolitanism, the "cross border solidarity among groups that are exploited, oppressed or excluded by hegemonic globalization (…) and the emergence of issues which, by nature are as global as the globe itself" (Souza Santos 2002, pp.42–43). Globalization may be hegemonic, from above, or counter-hegemonic, from below. He sees a role for human rights as an emancipatory script, if done as part of cosmopolitanism. However:

> As long as human rights are conceived as universal, they will operate as a globalized localism, a form of globalization from above (…) will be an instrument of (…) the struggle of the West against the rest. To operate as a cosmopolitan, counterhegemonic form of globalization, human rights must be reconceptualised as multicultural, (…) a precondition for a balanced and mutually reinforcing relationship between global competence and local legitimacy(Souza Santos 2002, p. 44)

For human rights to become cosmopolitan, Souza Santos considers imperative transcending the debate on universalism and cultural relativism; a debate which he considers inherently false and whose polar opposites are equally detrimental to an emancipatory conception of human rights. Instead, he proposes:

> Against universalism, we must propose cross-cultural dialogues on isomorphic concerns. Against relativism, we must develop cross-cultural procedural criteria to distinguish progressive politics from regressive politics, empowerment from disempowerment, emancipation against regulation (Souza Santos 2002, p. 46).

The criticisms espoused by de-colonial thought are often closely mirrored by the post-modern variants of other identity-entered perspectives. According to Taylor, there is a growing demand for recognition, which may be tied intrinsically to identity. Taylor argues that identity demands the recognition of others, with the lack of recognition or, more often, *mis*recognition, causing becoming the source of marginalization for certain identities(Taylor 1994, p.23). He sees this as a common thread with colonized peoples, persons of African descent in the Americas and Europe, women, and indigenous peoples, leading to the emergence of a 'politics of difference'. He explains:

> The projection of an inferior or demeaning image on another can actually distort and oppress, to the extent that the image is internalized. Not only contemporary feminism but also race relations and discussions of multiculturalism are undergirded by the premise that the withholding of recognition can be a form of oppression(Taylor 1994, p. 36).

Feminist Susan Moller Okin discussed the effects of anxiety about cultural imperialism on feminist critique. She posits that it may engender a kind of relativism that makes it difficult to represent *any* belief or practice as

oppressive to women or at odds with gender equality. Speaking of minority groups within Western Societies, she is concerned that calls for difference recognition in matters of family law or protection of cultural practices is likely to have much greater impact in the lives of women and girls, because these are often the spaces traditionally attributed to women (Okin 1999, p.15). She also suspects that in the subjugation and control of women by men may be the very aim of culture, citing female genital mutilation and the obliging women to marry their rapist as efforts by culture to control female sexuality (Okin 1999, p.13).

These are mere examples from a cluster of new challenges facing a more pragmatic, positivistic view of the current protection afforded by the international human rights system. In the next segment, this article will review the extent of obligations regarding these practices, and how much cultural leeway is afforded in their implementation.

5. RIGHTS UNDER THE GENERAL HUMAN RIGHTS TREATIES

Under the ICCPR and ICESCR, State parties are required to respect, protect and fulfil human rights. The term 'respect' refers to not depriving someone of a right by action or omission (Human Rights Impact 2011). By their obligation to 'protect', States are required to inhibit third-party interference with their enjoyment (Human Rights Impact 2011). This must be done through the enactment and enforcement of legislation, and through other proactive measures that account for their duty to 'fulfil' human rights (Human Rights Impact 2011).

Several HTPs end with the death or permanent mutilation of the victim. The right to life and security of person is considered paramount as a precondition to the enjoyment of any other right, (UN Commission on Human Rights 1982). It is non-derogable, applicable even in wartime, and makes no exception for cultural grounds (UN Human Rights Committee (CCPR) 1988, para.1).

Other practices that, albeit not causing permanent damage, cause substantial pain, take place with the knowledge of agent of the State, and are inflicted as punishment, may be within the CAT definition of torture (Nowak 2008, para.54). It is the case of trials by ordeal, which also harm several fair trial guarantees protected in ICCPR. Unequal or partial enforcement of these norms – often turning a blind eye when these are practiced in certain contexts (gender, background) – may amount to discrimination. Other affected rights include the right to the highest attainable state of health – the case with force-feeding, FGM or foot-binding – and the right to consent to marriage.

5.1. Vienna Declaration, CEDAW and CRC

Central to the organization of the human rights movement since 1993, the Vienna Declaration had already pointed to the importance of the elimination of gender bias and:

> the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism (United Nations World Conference on Human Rights 1993, para. 38)

Both the CEDAW and CRC conventions also contained elements of such boldness. Article 5(a) of CEDAW creates a positive obligation for state parties to take appropriate measures 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 superiority of either of the sexes or on stereotyped roles for men and women (United Nations 1981, art 5(a)).

The obligation to take 'appropriate measures' does allow some deference to national and cultural contexts and permits sovereign decision-making on the manner in which to approach the goal. The CEDAW Committee has, in practice, been stern on such justifications. Article 1 of CEDAW defines 'discrimination against women' as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms

> in the political, economic, social, cultural, civil or any other field (United Nations 1981, art 1).

Taken literally, this definition makes it very difficult to justify omission in applying to women the same protections that are afforded to men in situations where great bodily harm is inflicted, e.g. FGM or breast ironing. As a comparison, both practices fit the definition of "aggravated assault" in several African penal codes. While non-discrimination does not necessarily require uniform treatment irrespective of circumstances, omission to enforce the law on grounds of cultural appropriateness generates a distinction tantamount to discrimination.

In addition, the CEDAW committee in its General Recommendation 21 recognizes "the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they lay in restricting the exercise of basic rights by women" (UN Committee on the Elimination of All Forms of Discrimination Against Women 1994, para.3). Several other general comments and recommendations also identify FGM as a form of discrimination against women[1].

The CRC contains very detailed provisions on the relationship of cultural practices and the enactment of children's rights. The principles of best interest, non-discrimination, the right to life, survival and development, and the right to respect for the views of the child are 'foundation' principles which interplay in interpreting article 24 of the CRC, recognizing the right to enjoy the highest attainable standard of health, and which mandates appropriate and effective measures abolishing traditional practices prejudicial to the health of children (Le Roux 2009, para.26). The CRC's General Comment 4 specifies that the obligations of State parties include: "to protect adolescents from all harmful traditional practices, such as early marriages, honour killings and female genital mutilation" (UN Committee on the Rights of the Child 2003, para. 39g).

5.2 Group rights to culture and belief?

There is considerable debate as to whether certain human rights can be enjoyed by individuals only in conjunction of each other – as in rights to culture, to association and assembly – or whether collectives themselves may be considered corporate entities, rights-holders on their own account (Kymlika 1995, pp.34–48). More eager proponents of the latter view hold that, in cases where the interest of the group's right contradicts the wishes of an individual member, the group may develop governance mechanisms to determine as a collective the outcome of this conflict (Jovanovic 2005).

There remains the matter on whether the groups that engage in harmful practices have a collective right to manifest their culture and tradition without interference. This would be in line with the right of peoples to "freely pursue' their cultural development, and of individuals to "take part in cultural life" as stated in articles 1 and 15 of the ICESCR (United Nations 1966 articles 1 and 15). However, the Covenant itself in article 4 recognizes that such rights can be subjected to limitations, if these are lawful, compatible with the nature of the right and aimed to promote general welfare in a democratic society (United Nations 1966, art. 4). Article 5 of the same Covenant proscribes interpretation in such a way as to give any group or person

> any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present covenant (United Nations 1966,art. 5).

It is indeed dangerous to elevate the rights of groups above that of individuals. Although individuals may associate and interact in their enjoyment of human rights, such a right remains indivisible and interdependent of the remainder of human rights, of which groups have no legitimate claim on. Ignatieff understands this universality makes "a radical demand to human groups that they should be, insofar as possible, consensual, or at least respect an individual's right to exit when the constraints of the group become unbearable." (Ignatieff 2001, p.109)

The Economic, Social and Cultural Rights Committee also endorses this analysis, stating in its General Comment 21 that the right to take part in cultural life involves a "decision by a person whether or not to exercise the right" (UN Committee on Economic Social and Cultural Rights 2009,39 (g), para II (7)), denoting a choice. Furthermore, it states that "while account must be taken of national and regional particularities and various historical, cultural or religious backgrounds, (...) no one may invoke cultural

diversity to infringe upon human rights" (UN Committee on Economic Social and Cultural Rights 2009, para. C (18)).

The Committee then explains that limitations are necessary in particular in the context of "negative practices, including those attributed to customs or traditions that infringe on human rights (UN Committee on Economic Social and Cultural Rights 2009, para.C (19))" Note that the scope here is not limited to health, or on the rights of particular groups, as is the case with CEDAW and CRC.

5.3 The legitimacy of outside-group interventions

At the outset, it must be recognized that the issue is amplified when intervention by outsiders is involved. It may lead to a closing in of the group, and over-valuation of the practice as symbolic of resistance to foreign domination. As Tharoor puts it,

> in an age when wars have been waged in the name of human rights (...) and when human rights discourse is increasingly serving as a flag of convenience for other, far more questionable political agendas, (...) these objections need to be taken very seriously (Tharoor 2000, para.2)

However, as Tharoor points, the accusation of masking hidden agendas also applies to at least some of those who cite culture as a defence against human rights (Tharoor 2000, para.13). Arguments that seek to essentialize culture ignore changes that these have undergone naturally, be it through power dynamics and social processes within cultures, through contact with outside ideas via international trade, travel and other relations, as well as through participation in interstate relations as a sovereign nation and subject of international law.

The *pacta sunt servanda* nature of international law avoids the cultural imposition argument by the underlying sovereign assumption behind a State's choice to adhere to a human rights treaty. As these obligations are *erga omnes*, this provides some legitimacy to other States to question state compliance to the agreed-upon norms. This extends, by nature of the international human rights system, to international organizations and international NGOs operating legally in these countries.

It must be recognized that the language of human rights is also used internally to challenge culture and tradition. Native voices seem more legitimate advocating change, avoiding the type of misplaced protagonism described by Saïd and Spivak. One example is the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children. It has an in-group reforming voice that can act with more familiarity and moral authority. Its 24 national committees engage with government and practitioners to develop action plans to eradicate the practices. They nevertheless use the language of universal rights, but their regional and national character grant an in-depth understanding of the local context, and added legitimacy to its interventions.

It is rightly so that universality incorporates national contexts. As Baaz points out, both implementation and enforcement of human rights have been almost completely national by nature (Baaz 2009, p.8). It is through properly inclusive national dialogue, developing the national ownership of the idea to change practices, that enduring change can be produced.

6. ROLES FOR INTERNATIONAL HUMAN RIGHTS PRACTITIONERS AND ORGANIZATIONS

Operating within the bounds of mutually-contracted obligations may avoid toxic narratives on civilization and barbarism, cultural inferiority and other toxic undertexts that reinforce a counter-universalist backlash. This reverberates in unison with the state-building nature of human rights work, so that the intervention may be phrased in these terms rather than as a critique on culture itself. It is in this context of cooperating with the State in order for it to meet its human rights obligations that human rights practitioners are capable of interacting with parliamentarians, activists, civil servants and local groups to discuss traditional practices. A few of these tasks are outlined below.

6.1 Monitoring and Reporting

The practice of monitoring and reporting lies at the base of any protection intervention, as part of a strategy to increase the chances that the violations witnessed by human rights practitioners will lead to accountability. Monitoring – the physical presence of human

rights professionals to follow-up on allegations of human rights violations – provides the baseline information that will inform an assessment of problems and challenges faced in the host state. Further, monitoring may also play a preventive function, as a deterrent to violations (Mahony apud O'Flaherty 2007, p.10). Reporting is not necessarily public (O'Neill 2010, p.44) - many cater to a particular international or government audience. Professional reporting is never "neutral", but 'for' human rights as determined by international law. As such, in line with treaty body guidelines, reports should include separate data on vulnerable groups of the population (O'Neill 2010, p.44).

When monitoring and reporting on human rights violations, human rights practitioners must reflect what the reality on the ground is, guided by international standards. If harmful traditional practices make a substantial part of cases encountered, such prevalence must be reflected in the organization's reporting, protection and state-building strategies, becoming part of the organizational workload and a motivating factor in its advocacy interventions.

Dialogical practices in monitoring would emphasize muted voices within the country contexts, with reports containing quotes from local victims, activists and opinion-framers. Reports may also introduce case studies and regional comparisons on how States with similar issues dealt with challenges of implementation. Report dissemination among the national and regional public is also essential; as introspective reports, or those geared to the technical audiences in Geneva and New York, may reinforce colonialist perceptions.

6.2 Legislative Support

By the very nature of rights and freedoms, people are free to do as they please, unless they are bound by law to do otherwise. Practices not forbidden are permissible practices. Ergo, if a practice is harmful to the rights of others, it must be outlawed or regulated through law so that it ceases to be damaging. All other efforts to eliminate the practices will be ambiguous if the practice remains legal on the books. The UN Special Rapporteur on Harmful Traditional Practices herself recommended that, although measures should be accompanied by information and awareness,

> "states should accelerate the drafting of legislation that outlaws all forms of violence against women and girls, including harmful traditional practices, and prescribes penalties that are commensurate with the gravity of such acts (Warzazi 2005, para.89)."

Legislative reform lies at the heart of the agenda in post-conflict societies, and human rights organizations are in a privileged position to give input on such developments. Several countries are legislating on the issue of traditional practices (Institute International des Droits de l'Enfant 2010, p.8)[2]. Embedding rights language in these provisions is essential to its diffusion into the national dialogue, human rights organizations may negotiate access so that they become legitimate sources of knowledge and materials for those seeking to legislate and make policy on traditional practices.

Legislation is a sovereign prerogative and, assuming democratic freedoms as the best-case-scenario; a dialectic and dialogical process with broad social participation. The *pacta sunt servanda* approach entails disseminating treaties, general comments and international case law on an isonomic basis to all stakeholders in the process, particularly those aiming for compliance. When hearings and technical processes invite input, using these channels to raise national cases and to highlight the work of national or regional activists engaging with the issues, may also be a dialogical basis for intervention.

6.3 Civil Society Outreach

So far, the issue has been discussed as if the impetus for change and reform came exclusively from outside. This is seldom the case: even in closed societies, there are voices seeking reform and emancipation, and these voices are increasingly speaking the language of human rights. These voices tend to be forgotten in international debates on the issue. The person victimized by the practice, those rising against them, remain valid in-culture voices to determine what exactly such culture is or prescribe. Assuming that only those holding the knife may speak for culture is the main weakness of the essentialist argument.

International human rights organizations may have a role in the development of their national counterparts, facilitating access to

resources, materials and capacity-building; fostering national dialogue, sponsoring the elevation of *in-culture* voices against certain practices, and projecting these local voices and case-studies into the wider network of global efforts. In this way, the intervention is still framed on international treaty obligations, with national sovereign and grassroots protagonism respected. Such approach is also more resilient in the longer term, as it invests in a native human rights capacity that may transcend the outside organizations' engagement, or even the boundaries of the project's specific goals.

6.4 Protection of Individuals

The technical cooperation actions outlined above tend to be generally uncontroversial to governments and national counterparts, or at least to those who are on the reformist side of the agenda. Reporting publicly on human rights issues tends to have a little more 'bite' to it, sometimes leading to government disavowal or societal backlash. However, far more sensitive for organizations like the U.N is the matter of interfering with the performance of harmful traditional practices in real time, in situation where it is within the capabilities of a human rights presence to thwart a planned ritual or ceremony that will cause harm to an individual. Interference in such cases carry the risk of antagonizing local counterparts or even undermining the security environment in which the organization operates locally. Would this perhaps justify that foreign human rights organization focus on the long-term changing of beliefs, without coming into conflict with those who still act upon them?

The answer here is 'no'. As Ignatieff puts it:

Rights are meaningful only if they confer entitlements and immunities on individuals; they are worth having only if they can be enforced against institutions such as the family, the state, and the church. Rights are inescapably political because they tacitly imply a conflict between a rights holder and a rights 'withholder', some authority against which the rights holder can make justified claims (Ignatieff 2001, p.108).

The definition of protection is key understanding the scope of moral interventions available to international human rights practitioners working on the field. O'Neil has argued that the concept has reached the status of a 'buzzword' for international actors (O'Neill 2010, p.43), amongst which there is no consensus definition. The Inter-Agency Standing Committee (IASC) adopted an ICRC-led compromise position, defining protection as "all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law" (OHCHR Staff 2006, pp.121–122). Howen points out that this common definition, while undoubtedly correct, is "too abstract and broad to be used in an operational setting" (Howen 2007, p.35). He posits that in its common sense meaning, protection conveys the idea of "preventing or ending harm or injury, usually suffered by someone, from a particular source" (Howen 2007, p.36). This definition may also be expanded in order to consider that 'someone' may be injured as part of a group, as with the case with indigenous peoples.

Arguably, protection also includes the ethical commitment of doing no harm as well as a positive obligation to act in the face of violations, or what Ulrich brands the 'principle of beneficence'. According to him, "the commitment to protecting vulnerable subjects from exposure to harm can also, in a wider sense, be interpreted as a matter of positively alleviating or reducing the risk of harm perpetrated by others" (Ulrich 2007, p.77).

This view is reflected in the arising ethical standards for human rights field work, which, in Ethical Commitment 4, states:

> Human Rights Professionals recognize their special responsibility towards the most vulnerable members of society, in particular regarding the protection, as a matter of the *highest priority*, of individuals who face *immediate* risk of grave human rights violations (Statement of Ethical Commitments 2010, Ethical Commitment 4)[3]

The idea behind recognizing a special responsibility does not ignore the hard choices HROs have to make regarding their intervention. Rather, it seeks to aid establishing basic priorities in situation of ethical ambiguity (Ulrich 2007, p.65). If the highest priority is to be accorded to individuals risking harm, other considerations, such as that of building relationships with the community or the political sensitivities of particular government, may need to be compromised upon.

The appropriate response to such impending cases, as per the ethical commitments applicable to human rights professionals, is that:

> Human Rights professionals have a duty to react to actual and impending human rights violations that they confront and to alert their own organizations and, where appropriate, government authorities and other relevant actors (Statement of Ethical Commitments 2010, Ethical Commitment 10).

That actions may be undertaken in partnership with governmental authorities and actors, is in keeping with international legal responsibilities of States with regards to protecting rights-holders. Guiding Principle 2 complements this view, supporting not only attempting to prevent violations from occurring, but adding an obligation to ensure accountability for those that have occurred (Guiding Principles for Human Rights Field Officers 2010, Guiding Principle 2).

CONCLUSION

This article attempted a discussion of harmful traditional practices that transcends the usual 'universality versus culture' debate by incorporating elements from the *pacta sunt servanda* nature of international human rights law. It was seen that, given the fluidness of culture and the inherent intersection between different cultures across history, it is legitimate for outside-group individuals, organizations and States to engage with their in-group counterparts to challenge the impact of such practices on the implementation of sovereignly adopted treaty obligations. Not only is this desirable, it is actually essential for the fulfilment of human rights' treaties' purpose.

The power dynamics within the culture, and the empowerment of those seeking to challenge the cultural status quo from within, seem most suited as the entry-level for support by outside partners. It is perhaps the framing of interventions, and the attitude with which one approaches the question, that will make the difference whether the intervention is from a colonialist *meddling outsider* or a global human rights advocate.

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NOTES

1. See CEDAW Committee General Recommendations 14, 19, and 21.
2. IDDE, n. 12, 8.
3. Emphasis mine.