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# Cultural idiosyncrasies:

## Harmful Cultural Practices Affecting the Rights of Women and Children

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## **Abstract**

This thesis approaches the sensitive topic of Harmful Cultural Practices, affecting the rights of women and children. The importance of also discussing women's rights in these situations lies upon the fact that, most of these practices are directed to girls, which puts them into vulnerable situations. Moreover, it is possible to apprehend that, the International Community's attention has been rising when referring to these practices. Namely, because there is a possible tension between culture and human rights that on the one hand questions the universality of human rights and the concept of respect, advocated for on the Universal Declaration of Human Rights; on the other hand it questions the concept of culture, the understanding of cultural rights and cultural life. The settlement of this tension is only possible, after the understanding of the concepts above mentioned, and others, coupled with the analysis of international and regional laws, in order to gather legal information on the matter and observe the international community's understanding and position on harmful cultural practices.

This thesis is accordingly divided into four main chapters, plus introduction and conclusion, those being: Protecting Universality, Respecting Cultural Values; Legal Framework - International and Regional Legislation; Particular cases of Harmful Practices and Possible Approaches. Therefore, based on findings, it could be perceived that there is in fact, no sufficient clarification on the distinction between injurious and non-injurious practices, just as the existent legislation comes over as non-sufficient to prevent or eradicate such acts. Thereby, the drafting of a document that is fully dedicated to the understanding of harmful and non-harmful cultural practices was suggested, as well as the prevention, or in extreme cases, the eradication of injurious practices that interfere with human rights.



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## Introduction

“Globalization has changed the terms of interaction in global life, and it has created space both for implicit extensions of and explicit additions to the content of the human rights doctrine.”<sup>1</sup> Accordingly, human rights is not a static concept, it evolves as the society evolves. One of the great promoters to the evolving concept of all human rights, as we can perceive from the statement quoted above, is the Globalization phenomenon. The changing character of society and human rights is also relatable to culture: a concept that is constantly changing, which implies that what culture means to African people, does not mean the same to Asian people, thereby it is not static, so what it meant 10 years ago, it is not what it means at the present time.

The International Community has been facing a tension, between values of respect for every human culture, and the eradication of cultural practices that may interfere with human rights. Thereby, the concept of universality is questioned by the communities where the traditions are held, while the international community still attempts to trace a solution for these communities, to accept and understand the premises of universal human rights, without disrespecting or discriminating any cultural act, or person linked to those beliefs. With this in mind, this thesis also focuses on this controversy between some cultural beliefs and human rights. Thereby, tries to find a possible way to end this tension by: respecting, understanding and educating each side on boundaries and to reach a conclusion, on what is injurious and human rights breaching, or not.

Furthermore, bearing in mind the magnitude of the human rights field, this thesis will focus on Harmful Cultural Practices, affecting the rights of women and children, provided that these are still the two most vulnerable groups in society. When referring to women, it is

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<sup>1</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.39

important to explain, that the main focus will be on girls, once that, most of the practices are gender related, and practiced on women at young age. Moreover, in order to understand where the international community stands, in terms of legislation, it is necessary to analyze what has already been written, and pushed forward in terms of laws and its implementation. Consequently, part of this thesis is dedicated to the analyses of international and regional provisions concerning the rights of women, children and the entire scope of human rights. Taking into account that the practices, which will be further discussed, concern and affect some of the most protected rights, (that were the toughest to acquire, as well as make them being understood as universal); of the whole human rights spectrum. Provided that, it is also important to recognize the accomplishments on Harmful Cultural and Traditional Practices, which may support the solution and/or suggestion that this thesis intends to set forth. Moreover, the research performed on a legal basis, to this specific framework will be mostly presented in a chronological way, in order to demonstrate the increasing interest and concern with such practices by international actors.

Another key point to this research is the understanding of concepts that are closely linked to the topic being scrutinized. Concepts like ‘culture’, ‘cultural’, ‘cultural life’ and ‘cultural rights’ need to be as detailed as the definition of harmful cultural practices provided that without it, it is not possible to have a clear insight on the root of the problem and the problem itself. Additionally, the understanding of Article 15, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, which states “the right of everyone to take part in cultural life”<sup>2</sup>; together with the General Comment<sup>3</sup> concerning the same provision, academics points of view, and concepts above mentioned, which will help clarify the understanding of these cultural values and their importance in the society. The consciousness gained by analyzing these concepts and documents will give us a better insight on how to detect when a practice stops being harmless, and begins to become

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<sup>2</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI) (ICESCR)

<sup>3</sup> UN General Comment no.21, ‘Right of everyone to take part in cultural life’, (article 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), (21 December 2009), E/C.12/GC/21

injurious. Taking that into account, simplifying such a complex question comes as a challenge to the International Community, it is also necessary to explore the challenges that they face when coming across such tension and distinction of practices.

In addition, taking into account that there are hundreds of harmful cultural practices, this research will be focused on three, those being: Female Genital Mutilation, Child Marriage and Dowry practices; which have been gradually receiving the International Community's attention. However, some other practices will be briefly touched upon, in order to emphasize the pressing need of focus, and proper regulation on the matter. Thus, the practices with a focal point have an extremely discriminatory and violent character against women and girls, therefore, understanding the importance/burden of gender in these cases, when analyzing and criticizing such practices, has a great influence on this research.

Generally speaking, one of the main goals of this thesis is to understand whether it is possible or not to fully understand when a traditional practice becomes harmful, as well as, understanding if there is a possibility of creating a rule, to better acknowledge when a practice is injurious or not. Moreover, this study intends to advocate for a creation of a declaration/covenant that is fully dedicated to harmful cultural practices, coupled with the creation of a monitoring group and a committee to assure the correct implementation, and compliance with the international law. To conclude, the purpose of this research is not to eradicate every trace of traditional acts, customs and values, but rather to circumvent the practice in such way that it is no longer harmful. Only in the event of that not being possible, the eradication of the injurious practice shall be taken into consideration.



## **Chapter I – Protecting Universality, Respecting Cultural Values**

The concept of universal human rights creates a possible tension between culture and human rights. For decades the international community has been focusing on the promotion and protection of this principle (Universality of human rights); and therefore providing great importance to the right of self-determination, the prohibition of all kinds of discrimination, and the right to freely express ones' cultural and religious beliefs, among others. The universality of these fundamental rights is essential for the evolution of the world's society, and they constitute a set of rules that we should all respect and protect. However, the protection of cultural values has been proving to overlap with other fundamental rights; such as the right to life, health, and abolishment of all forms of inhumane treatment, punishment or torture, etc.

The awareness to the issue of Harmful Cultural Practices (HCP's) has been rising in the international community, these practices are conceptualized as something that is deliberately performed by one human being to another, causing physical and/or psychological damage, with only cultural or traditional purposes that have great consequences on the health and restriction of the rights of victims.<sup>4</sup> Moreover, these practices are a reflection of values, cultural and/or religious beliefs of a generational character that have a great impact on these communities' lives.<sup>5</sup> Although women and girls are the most vulnerable to these kinds of rituals, there are also some communities where men and boys are also submitted to these practices, and face the adverse effects of such values and beliefs. Additionally, the danger of these practices proceeds to grow, taking into account that, the society changes and evolves, and so do these customs. Therefore, there is

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<sup>4</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), 'Harmful Traditional Practices against Women and Legislation', EGM/GPLHP/2009/EP.07, p.2

<sup>5</sup> UN Office of the High Commissioner for Human Rights, 'Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children', (August 1995), p.1

no full listing of HCP's.<sup>6</sup> Throughout this chapter this possible tension between culture and human rights will be scrutinized, just the concepts attached to this debate.

### **1.1. Tension between Culture and Universal Human Rights**

“Universal human rights were one of the earliest global discourses”<sup>7</sup>. Ever since the adoption of the Universal Declaration of Human Rights (UDHR), there was an uprising tension between culture and human rights. Some anthropologists upon the implementation of the declaration submitted a statement opposing some of the UDHR's provisions, claiming that this declaration was not applicable to all human beings once they perceived that the values stated in the document were highly westernized, and lacked respect for different cultures.<sup>8</sup> The core of this tension is also highly related to the debate between universalism and relativism; and to the conception of human rights. Universalism is essential and relativism is improper, which means, inevitably that respect is lost. Cultural relativism by definition means that culture is part of a system just as it is, in other words static. Furthermore, it also theorizes that there is no space for change or contestation, therefore the development of respect for the concept of culture is extremely important for this theory. Consequently, this conception of culture becomes a barrier to the reformist plan of universal human rights.<sup>9</sup> This incompatibility mainly depends on how one theorizes culture. Anthropology and its scholars have found several ways of conceptualizing culture, which does not only lie upon cultural relativism. The new conceptions of culture go beyond values and beliefs; according to Sally Engle Merry, it is something flexible within a context

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<sup>6</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), ‘Harmful Traditional Practices against Women and Legislation’, EGM/GPLHP/2009/EP.07, p.2

<sup>7</sup> H. Silverman and D. F. Ruggles, *Cultural Heritage and Human Rights*, Springer, *Cultural Heritage and Human Rights*, H. Silverman and D. F. Ruggles, Chapter 1, 2007, p.12

<sup>8</sup> S. E. Merry, ‘Human Rights Law and the Demonization of Culture’, *Political and Legal Anthropology Review*, Vol. 26, No. 1, 2003, p.55

<sup>9</sup> Ibid (p. 57)

of globalization. To clarify, culture is in this theory, a product of all historical influences, in what way, culture can be made and remade within the global current context.<sup>10</sup>

The tension between culture and universality, when applied to HCP's gains more intensity. As academics began to believe that a set of universal rights were the pathway for establishing world order, the question of implementing these values, in communities with peculiar traditional practices, rose. The universality of human rights for us, is unquestionable, as it is the need to protect and respect them, therefore it is necessary to ensure that this set of rights gets fully embedded in all societies worldwide. Richard Schwartz suggests that the best chance to achieve the UDHR goal is to rely on human dignity, and find a compatible consensus between human rights and cultural traditions.<sup>11</sup> Therefore agreeing with the idea that, it is necessary to identify the exact point of cultural support to certain human rights, and seek for ways to legitimize and endorse those particular rights in terms of values, norms and processes of change inside the same cultural environment.<sup>12</sup>

In communities that perform HCP's, for an individual to take part in those rituals, creates a structure and provides a dimension in which citizens can face day-to-day issues and live in a meaningful way. Even though, these practices may cause great physical and psychological damage to the ones that engage in them.<sup>13</sup> Some authors believe that the records of abuses of human rights in the communities perform such practices are highly related with colonialism, and that this era erased any traces of a kind of fundamental rights and values, replacing them with violence and disrespect for human dignity.<sup>14</sup> Cultures like the African, which before the colonial era, had compatible premises with human rights,

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<sup>10</sup> Ibid (p. 56)

<sup>11</sup> A.A.An-Na'im, *Human Rights in Africa: Cross-cultural Perspectives*, Brookings Institution, *Human Rights in an Evolving World of Culture*, Chapter 14, R.D. Schwartz, 1990, p.368

<sup>12</sup> A.A.An-Na'im, *Human Rights in Africa: Cross-cultural Perspectives*, Brookings Institution, *Problems of Universal Cultural Legitimacy for Human Rights*, Chapter 13, A.A.An-Na'im, 1990, p.332

<sup>13</sup> B. Kühn, 'Universal Human Rights vs. Traditional Rights', *Topical Review Digest: Human Rights in Sub-Saharan Africa*, 2009, p. 60

<sup>14</sup> A.A.An-Na'im, *Human Rights in Africa: Cross-cultural Perspectives*, Brookings Institution, *Traditional Culture and the Prospect for Human Rights in Africa*, Chapter, J. Silk, 1990, p.292 and 293

gradually started to erase these conceptions. A lot of the human rights violations that took place in that time, converted all that was beforehand embedded in the African community shaped it to the settlers will. Therefore, one of the reasons why some African communities do not recognize the universality of human rights is deeply connected to the colonial era, and the deletion of certain premises that used to be paramount until the settlers arrival. Thereby, practices that were believed to prevent rape or conceiving with a stranger to the family and the community were adopted, as well as practices of violence, exploitation, slavery and discrimination against women, which were transmitted by the settlers.

<sup>15</sup>Although some might challenge and question the concept of universality and have problems with social change, it is clear that a set of universal human rights is the pathway towards development.<sup>16</sup>

Conversely, Dicle Kogacioglu, argues that the appropriation of the concept of tradition as an argument for the rising problems of gender inequalities and violence against women, are in a way governance problem. This author believes that with the right restructuring in governments policies', it would be possible to have a significant effect on reducing harmful practices and acts of violence against women, as well as severe improvement on the gender equality situation. On this basis, it is concluded that the institutional responsibility, plays a big part on the 'demonization' of tradition and culture over time. In this author point of view, if the states were to be more active, instead of finding a scapegoat.<sup>17</sup> Provided that, it is possible to understand that the tension between culture and universality is not the biggest concern of Kogacioglu, but the misuse of concepts, once she believes that what is at stake in these cases is not whether universality clashes with culture or not, but rather the states' accountability for poor legislation and lack of interest.

For the purpose of what has already been mentioned, the possible tension between culture and human rights lays upon the universality concept that many believe to be highly

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<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> D. Kogacioglu, 'the Tradition Effect: Framing Honor Crimes in Turkey', *A Journal of Feminist Cultural Studies*, 15:2, Brown University, 2004, p.120-123



westernized. The report drafted by the Global Citizenship Commission regarding the Universal Declaration on Human Rights questions the concept taking into account the several critiques made to the universal theory; “How are such claims to be understood? Specially, are they put forward as principles that everyone ought to accept regardless of his or hers cultural tradition, or are they meant to merely reflect the values of a particular segment of the human population?”<sup>18</sup>

In the event of universality actually being a western idea, it needs to be supported by reasons and arguments, and the opposite against has to have the chance put out their reasons and arguments as well in a way that a discussion is open, until a final conclusion is reached taking into account both sides. So in this way universality is not only western, and universal human rights are not a final and perfect moral way of thinking of our time, everything is constantly changing and everything shall be taken into consideration. In that way, one set of ideas or of laws will never be fully perfected, at least not until it is discussed by all parties.<sup>19</sup> Rises the question what does culture mean?

## **1.2. Interpreting Culture and Correlated Concepts**

In order to fully understand what the declarations and covenants mean by cultural rights, it is necessary to clearly define concepts like ‘culture’, ‘cultural’, ‘cultural rights’ and ‘cultural life’; not only in the eyes of the International Community but also by analyzing theories and ideas of academics. Since this concept is extremely broad and wide, there are many possible interpretations for what culture might mean, and what can be considered and understood as part of a culture.

Most of the academics agree that culture can be something more spiritual, for example values and beliefs, or more physical, like monuments and historical artifacts, but it can also

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<sup>18</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.36

<sup>19</sup> Ibid (p.37)

be both. Cristina De Rossi, an anthropologist, believes that; "Culture encompasses religion, food, what we wear, how we wear it, our language, marriage, music, what we believe is right or wrong, how we sit at the table, how we greet visitors, how we behave with loved ones, and a million other things"<sup>20</sup>. While Spencer-Oatey, gives a greater importance to the behavioral pattern of culture; "Culture is a fuzzy set of basic assumptions and values, orientations to life, beliefs, policies, procedures and behavioral conventions that are shared by a group of people, and that influence (but do not determine) each member's behavior and his/her interpretations of the 'meaning' of other people's behavior"<sup>21</sup>. All in all, for these academics and for most of the academic community, culture can be widely defined, but it will always lie upon behavior and customs as a foundation of the concept.

As mentioned earlier, 'culture' and 'cultural', do not necessarily mean the same thing. Culture, has already been briefly defined by some authors; moreover cultural, can be seen as way of referring to the way of life of a certain community. As an illustration, those can be ways in which people interact with each other, religious beliefs and moral beliefs; as well as arts, music, dance and theatre that represent that way of living and enjoying the everyday life in a certain community or society. In other words, while culture is the set of values, cultural is the way of living with those values.<sup>22</sup>

Additionally, the drafting of the General Comment (GC) no.21, regarding the right of everyone to take part in cultural life of the ICESCR (art.15, para. 1 (a)), was really important on the clarification of the clear meaning of the rights as well as the concept, which helped the signatories states to clarify the forms of implementation of such right. As presented on the 13<sup>th</sup> point of the GC, the committee foresees; "(...) culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and

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<sup>20</sup> K. A. Zimmermann, 'what is Culture?', *Live Science*, [website], 2017, <https://www.livescience.com/21478-what-is-culture-definition-of-culture.html>, (accessed 10 June 2018)

<sup>21</sup> Ibid

<sup>22</sup> Cambridge University Press, 'Cultural', *Cambridge dictionary*, [website], 2018, <https://dictionary.cambridge.org/dictionary/english/cultural>, (accessed 30 June 2018)

man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.”<sup>23</sup> All things considered, we can conclude that cultural rights include cultural practices, which it does not mean that it allows the violation of other rights in order to completely fulfil this one. In fact, it is clearly stated in this GC that in no circumstance may a state, or a community, evoke cultural diversity in order to breach human rights that are guaranteed in this or any other document of international law.

Taking into account, the concepts that have already been clarified, it is also possible to understand the difference between cultural rights and cultural life. Cultural rights are dedicated to human beings having the right to have the way of life that they choose, in the system of beliefs that they want and performing the rituals (artistic and non-artistic) that they want. Whereas, cultural life is integrated in these cultural rights, in other words, it is one’s cultural right to have a cultural life.<sup>24</sup>

To conclude, when we speak of cultural practices, it is necessary to understand that these practices are connected to certain community and/or societies’ way of living. Moreover, not all practices attached to these customs are harmful, and there is a great importance to distinguish them, in order to not only, not disrespect the harmful ones, but also to respect the non-injurious ones.

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<sup>23</sup> UN General Comment no.21, ‘Right of everyone to take part in cultural life’, (article 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), (21 December 2009), E/C.12/GC/21

<sup>24</sup> Cambridge University Press, ‘Cultural’, *Cambridge dictionary*, [website], 2018, <https://dictionary.cambridge.org/dictionary/english/cultural>, (accessed 30 June 2018)

### **1.3. Separating Harmful Practices from non-Harmful**

As mentioned above, not all traditional practices are harmful, and there is a lack of explanation on this matter, which makes people think, when discussing such practices, that they are all harmful. It is important to lie down what makes them harmful and what are the ones that really constitute human rights violations and on what grounds.<sup>25</sup> On the one hand, it is easy to separate the harmful practices from the non-harmful ones, when analyzing a cultural practice it is necessary to carefully go through every stage of it, in order to understand if it conflicts with any human right in the name of culture. Although, once that there is not any international provision that clearly lays down the distinction, prohibition and/or freedom from such practices; proving that it constitutes a human rights violation becomes harder. Additionally, taking into account that states are given the liberty to interpret international law, with some conditions, and that in developing countries human rights provisions are to be progressively implemented; it seems that, if we intend to blame something or someone for gross violations of human rights, which take place in the name of culture, we can accuse states for being reckless and ignoring these incidents, that in a way, compromises the living and health situation of their citizens.<sup>26</sup>

All in all, it is all about interpretation; thereby, if a practice is directly breaching fundamental rights and freedoms, it is possible to say that they are harmful for the people that are submitted to such procedures. For example; the practices that will be later approached in this thesis, constitute a major violation of the right to health, therefore, it constitutes a human rights violation, and states are fully obligated to take measures to ensure that every individual right is claimed, without the interference of others.<sup>27</sup>

On the other hand, it is really difficult to understand whether there is a violation of human rights or not. For most of the communities that perform these practices, they constitute no

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<sup>25</sup> C.A.A.Packer, *Using Human Rights to Change Tradition – Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa*, New York, Oxford, Intersentia, 2002, p.66

<sup>26</sup> Ibid (p. 57 and 58)

<sup>27</sup> Ibid

harm, they are part of a ritual, and for most of them it is an honor to go through those rituals in order to become either an ‘adult’ or part of the community.<sup>28</sup>

The lack of proper legislation on the matter does not help to properly define whether a practice is harmful or not, as well as, proper education and awareness-raising in order to let women know what their rights are, and what human rights are.<sup>29</sup> Without the proper knowledge inside communities it is hard to advocate pro-human rights and not sound highly westernized. Additionally, as most of the populations that are active practitioners, were colonized peoples, a foreigner setting of rules might not be very well received. Overall, understanding whether or not a practice constitutes or not a human rights violation, is itself a challenge to the International community.

#### **1.4. International Community and the Existing Challenges**

This sub-chapter is highly connect to the previous one, taking into account, that knowing or understanding when a practice becomes harmful, is itself a challenge to the International community. In other words, in a way, we can say that one of the challenges faced by the international community is the recognition of violations when it comes to these practices, as it also is a challenge, to make the signatory parties realize the importance of the full implementation of human rights, and of human rights education in society. Even so, the biggest challenge will always be, making every community and country believe that a universality of rights does not necessarily mean that this is a westernized way of thinking; it only means that it is a peaceful way for the whole world to respectfully live in society.

Promoting social change can be quite demanding, especially when it comes to shaping mentalities at such a big level. It is really important, while in this process of change, to clearly state that, harmful cultural practices do not simply occur in African or Middle Eastern Countries. As a matter of fact, practices like child marriage were not internationally

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<sup>28</sup> UN Office of the High Commissioner for Human Rights, ‘Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children’, (August 1995), p. 1 and 2

<sup>29</sup> Ibid (p. 20 and 21)

seen as harmful until the 1970's, which also does not mean that it stop being performed in most of the signatories states, it is really not true.<sup>30</sup> There are very high rates of child marriage in the Americas, and the highest one according to UNICEF's 2018 report on child marriage is still South Asia with 44% of child brides.<sup>31</sup>

Another great challenge to the international community is the gender inequality that is created and enforced with these practices. In these cases, culture is used as an excuse to ignore the gaps between genders, including the most extreme demonstration of all, violence against women. As it was mentioned before, HCP's are a form of violence against women, not only because they jeopardize women's life and health, but also because women are the most affected in these situations.<sup>32</sup> Another challenge is the creation of norms to these practices, in order to eliminate some, and control others. The difficulty of this process does not only rest upon the international community, but it also rests onto the understanding of human rights by the communities' side. With this in mind, it is important to educate and have a proper dialogue with the communities about international concerns, without being misunderstood and taken as someone who is trying to change their system of beliefs and way of living.

All in all, the hardest task for the international community is the full acceptance, implementation and education of universal human rights, in order to accomplish their initial premises, of advocating for peace, and a universal set of rules that works in that interest. If that is reached, then it would not only be easier to draft a proper convention on harmful practices that are performed in the name of culture, but also, communities would effortlessly acknowledge the injurious parts of the acts, and would not argue against its elimination or prohibition. Moreover, 'The Sustainable Development Goals' had the target

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<sup>30</sup> C.A.A.Packer, *Using Human Rights to Change Tradition – Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa*, New York, Oxford, Intersentia, 2002, p. 57

<sup>31</sup> UNICEF, 'Child Marriage – Latest Trends and Future Prospects', [website], 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>, (accessed 2 July 2018), pp3

<sup>32</sup> Johns Hopkins Bloomberg School of Public Health –Global Health Now, 'Gender Inequality is not Cultural is Universal', [website], 2015, <https://www.globalhealthnow.org/2015-07/gender-inequality-not-cultural-its-universal>, (accessed 15 February 2018)

to eliminate harmful practices by 2030, however according to statistics that will not be possible; even though the rates of performance are declining at a large scale.<sup>33</sup>

### **1.5. Summary**

This chapter gives us a look on one of the oldest debates within the International Community, Academics and within Society. The intrinsic tension between culture and human rights, when discussing harmful cultural practices, leads us to one debate, which some believe to be over, while others do not, but it undeniably raises questions, regarding universalism and cultural relativism. Regardless the academics opinion on this debate, we reach the conclusion that Universality is essential for the world's evolution, taking into account that it not only promotes peace, as it also promotes social change, while shaping mentalities. Nevertheless, it is quite relevant, respecting and protecting culture and cultural rights. Even if there are some practices that overlap with human rights, those do not include: nor every culture, neither every practice. Moreover, drawing a distinction between harmful and non-harmful cultural practices comes as a great challenge to the International Community; especially because there is no proper legislation laying down provisions to distinguish, classify and criminalize these acts. Bearing this in mind, some authors believe that blame, not only sets onto the International Community and the lack of legislation, but also sets onto the states, that are reckless about these situations, and have the tendency to frame culture for its lack of responsibility.

One of the most important aspects of this chapter is the interpretation of culture, and other concepts that makes us clearly understand what does the International Community mean by 'cultural life', and 'cultural rights'. In shortened form, and as it was already mentioned, in this chapter, it is one's cultural right to have a cultural right.

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<sup>33</sup> UNICEF, 'Child Marriage – Latest Trends and Future Prospects', [website], 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>, (accessed 2 July 2018) , p.4 and UNICEF, 'Female Genital Mutilation/Cutting: A global Concern', [website], 2016, <https://data.unicef.org/topic/child-protection/female-genital-mutilation/>, (accessed 2 July 2018), p.1

Now that we have briefly discussed the tensions and debates that are connected to harmful cultural practices, we will now take a look on the relevant legal framework, the current situation and achievements.



## Chapter II- Legal Framework - International and Regional Legislation

The study of HCP's, on this research, is mainly focused on practices performed on children, and predominantly the ones conducted in Africa, Asia and Middle East. Even though, the concept of HCP's was primarily used to describe Female Genital Mutilation (FGM),<sup>34</sup> a practice that will be further discussed in the following chapters, Cultural Practices are now also considered as a way to widespread discrimination against women, based on culture and religion.<sup>35</sup> Even though the International Community has been aware of these kinds of practices, action was only taken, when these practices started questioning the universality of human rights.

The Vienna declaration of 1993 emphasizes the importance of eradicating practices that are harmful and discriminatory to women, and to all human beings.<sup>36</sup> Moreover, according to a United Nations (UN) report from an expert group meeting that took place from the 25<sup>th</sup> until the 28<sup>th</sup> of May of 2009, "These practices have remote and mysterious origins, and are based on absurd and vague reasons, amount to violence against women and they have proved difficult to eliminate"<sup>37</sup>. Considering this statement, the International community believes that the only viable way to cease these gross violations or overlapping of rights is through sensitization and legislation.<sup>38</sup> Bearing this in mind, it is worthwhile analyzing the solicitations made until the present time, by the International Community, through declarations, conventions, covenants, and so on and so forth:

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<sup>34</sup> S. E. Merry, 'Human Rights Law and the Demonization of Culture', *Political and Legal Anthropology Review*, Vol. 26, No. 1, 2003, p.58

<sup>35</sup> A.A.An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa*, Zed Books, *Mediating Culture and Human Rights for Women in Africa: A framework for community level*, Chapter , F. Butegwa, 2002, p. 113

<sup>36</sup> S. E. Merry, 'Human Rights Law and the Demonization of Culture', *Political and Legal Anthropology Review*, Vol. 26, No. 1, 2003, p.58 and Vienna Declaration and Program of Action (adopted World Conference, 25 June 1993)

<sup>37</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), 'Harmful Traditional Practices against Women and Legislation', EGM/GPLHP/2009/EP.07, p.2

<sup>38</sup> Ibid

### A) Universal Declaration of Human Rights (UDHR)

In 1948, after the world rested upon the decision that “Never Again”, so that no world population would ever live to see something similar to what happened during World War II, there was a pressing need of drafting a document, which was morally binding a set of rules, in order to live in peace, society and respect. This beautifully drafted declaration recognizes that every human being is a holder of “equal and inalienable rights”<sup>39</sup> and they should be fully recognized as such, as their intrinsic dignity. Throughout the preamble of this declaration, it is discussed how important it is to recognize and understand the true value of the rights represented in the declaration, which without recognition, implementation is not possible.<sup>40</sup> Moreover, in the present declaration it is also stated that no human being shall be submitted to any kind of torture, punishment, inhuman or degrading treatment, which is not compatible with certain HCP’s that are nowadays considered as a form of torture or degrading treatment regarding women and children.<sup>41</sup> Moreover, concerning child marriage; article 16 of the UDHR clearly states that only men and women of full age (18 years-old) are allowed by this international law instrument to get married, bearing in mind that free and full consent shall be of both spouses and not only of one party, in what way it also prohibits forced marriage and dowry practices.<sup>42</sup>

Taking into account that one of the main, and one of the most important goals of this declaration is advocating for respect regarding communities and religions, this declaration also draws a provision that discusses this matter, claiming that everyone should have the right to freely change their religions or beliefs without any prejudice or judgment.<sup>43</sup> Additionally, and because the idea of universality must be accompanied with cultural diversity, article 27 of the Declaration, states that everyone has the right to fully enjoy and

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<sup>39</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (A) (UDHR), preamble

<sup>40</sup> Ibid

<sup>41</sup> Ibid (art 5)

<sup>42</sup> Ibid (art 16)

<sup>43</sup> Ibid (art 18)

be part of the cultural life in its community.<sup>44</sup> Apart from this, all these provisions entail duties to the community, so that every citizen is able to fully develop his/her personality. It is also important to emphasize that states have the ability to impose limitations on provisions, but, not as they wish. This right that is given to states is highly monitored, and in order to impose those limitations some requirements have to be met.<sup>45</sup>

- Margin of Appreciation

In the report *The Universal Declaration of Human Rights in the 21<sup>st</sup> century*, this ‘margin of appreciation’ that is given to the states, is demystified and explained.<sup>46</sup> According to what is read on article 29 of the UDHR, it is possible to conclude that, some limitations to individual rights would be either necessary or desirable to the states.<sup>47</sup> Moreover, it is argued that the fact that rights can be limited onto the justification of “morality, public order and general welfare”<sup>48</sup> can be quite problematic.<sup>49</sup> In this report by the Global Citizenship Commission, they argue that “If “morality” is seen as the customs and mores of a particular society, then the UDHR, will fail in its central purpose of creating a common understanding of human rights and the circumstances in which it is appropriate to limit these rights.”<sup>50</sup> Therefore, there is a remaining difficulty in understanding on what grounds do we set ourselves for limiting rights, especially because the article corresponding to the explanation of such is not clear on its implementation. Thus, it also does not mention that the lack of resources cannot count as an excuse to the deployment of a limitation to a right, as it is explicitly expressed on article 22 of the Declaration<sup>51</sup>, “Everyone, as a member of

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<sup>44</sup> Ibid (art 27)

<sup>45</sup> Ibid (art 29)

<sup>46</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.57

<sup>47</sup> Ibid

<sup>48</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (A) (UDHR), art 29 (1)

<sup>49</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.58

<sup>50</sup> Ibid

<sup>51</sup> Ibid

society has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and free development of his personality.”<sup>52</sup>

Even though, a state is given a chance to interpret provisions in this declaration and in other covenants (the so called margin of appreciation), does not allow unlimited interpretation. Therefore, to explain, the signatory parties shall not go against the main principles of the charter, though it is not necessary to follow every last detail of every provision.<sup>53</sup>

#### B) UN General Assembly resolutions

In 1954, the UN General Assembly adopted a resolution calling upon member states to eliminate customs, ancient laws and practices contrary to the UDHR affecting the rights of women. This resolution, recommended that special efforts were made through media to inform the public about these principles, and other legislation concerning the status of women.<sup>54</sup>

In 1993, the General Assembly issued a declaration on the elimination of violence against women that defines this type of action as something that embodies (but not only), “Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (...)”<sup>55</sup>. In this declaration, violence against women is divided by places of occurrence, and different kinds of perpetrators; (within the family, within the general community and when perpetrated by the state). Moreover in

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<sup>52</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (A) (UDHR), Art 22

<sup>53</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.38

<sup>54</sup> A.A.An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa*, Zed Books, *Mediating Culture and Human Rights for Women in Africa: A framework for community level*, Chapter , F. Butegwa, 2002, p.114

<sup>55</sup> UNGA, ‘Declaration on the Elimination of Violence against Women’, (20 December 1993), UN Doc A/RES/48/104, art 1(a)

article 3, it is stated that women are entitled to the full enjoyment of all the fundamental rights and freedoms, such as the right to have the highest attainable physical and mental health and to not be subjected to any kind of ill or inhumane treatment or punishment.<sup>56</sup> Furthermore, it is also explicitly written on this resolution that no state party shall invoke any “custom, tradition or religious consideration to avoid their obligations with respect to its elimination”<sup>57</sup> Additionally, the General Assembly advises state parties to promote meetings and seminars to widespread the awareness of the issue.<sup>58</sup> Nevertheless, it is important to remember that when using this method of awareness-raising, it is important to take into consideration that using proper language and non-evasive dialogue is extremely important in order to bond and better communicate. The basis of respect is of utmost importance when discussing these issues with societies that have not still accepted the concept of universal human rights.

### C) International Covenant on Economic Social and Cultural Rights (ICESCR)

This covenant proclaims that every human being has the right to self-determination and to cultural life regardless its beliefs and customs.<sup>59</sup> Furthermore, this covenant recognizes in its Preamble that “(...) rights derive from the inherent dignity of the human person (...)”<sup>60</sup>, which clearly is a barrier to HCP’s coupled with article 2,3,4,5,10,12 and 13 that establish great incompatibilities with some of the cultural practices. Such incompatibilities make reference to physical and mental health, forced marriage, gender equality, limitations to the covenant and so on and so forth. The ICESCR causes an overlapping of freedoms and fundamental rights that reveals part of the tension felt between culture and human rights. By declaring that every human being has the right to participate in any events of the cultural life on which he/she is integrated in, combined with the right to self-determination, even though it is crucial to the premise of universal human rights; it gives a moral

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<sup>56</sup> Ibid (Art 3 (f) and (h))

<sup>57</sup> Ibid (Art 4)

<sup>58</sup> Ibid (Art 5)

<sup>59</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI) (ICESCR), Art 1 and 15

<sup>60</sup> Ibid , Preamble

advantage to the ones practicing and protecting rituals or customs that are physically and mentally harmful, when discussing the validity of such practices.

As mentioned above, this document is a great example of the tension between culture and human rights, as it clearly states that even though this covenant advocates for ‘the right to participate in every event of cultural life’, it also states that, nothing written in the ICESCR should come as way to destroy or put at stake any rights or freedoms recognized in the covenant.<sup>61</sup>

#### D) Convention on the elimination of all forms of discrimination against women (CEDAW)

Drafted in 1979, this convention declares that all states parties to this convention should condemn all kinds of discrimination against women. As well as, draft policies to achieve such goals, including principles of gender equality, protection against any kind of discrimination, abolishing any laws; regulations or practices that affect women’s safety and condition in society.<sup>62</sup> Moreover, in Article 5 it declares:

“States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;”<sup>63</sup>

All in all, even though this convention is mainly directed to women, the above quoted article has a broader approach that ends up including men, women and all Harmful Cultural Practices.

#### E) Convention on the Rights of the Child (CRC)

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<sup>61</sup> Ibid (art 5)

<sup>62</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 December 1981) UNGA Res 34/180 (CEDAW), Art 2

<sup>63</sup> Ibid (art 5)

This convention advocates that every state party shall take all measures to ensure the implementation of the rights that follow, within the maximum extent of their available resources.<sup>64</sup> According to Article 14, freedom of conscience, thought and religion of a child, that at an early stage is subjected to the parents' guidance, which is under some limitations when prescribed by law or when affecting public safety, order, health and morals or any fundamental rights or freedoms.<sup>65</sup> This article can be instantly linked with HCP's, and here it strictly states that one's freedom cannot interfere with another's set of fundamental rights, especially when jeopardizing a child's health.

Furthermore according to the CRC, every child has the right to be protected from any kind of physical and mental violence, maltreatment or exploitation.<sup>66</sup> Equally important is the provision laid down on article 29, which strives for the child's education, that should lead to a full development of one's personality and abilities, respecting his or hers own cultural identity and others. This article clearly endorses that a child's education should be drawn on human rights, bearing in mind that this is a way of preparing the child for the responsibility of living in a free society, where respecting the others', peace, and other basic rules of civilization shall be respected according to the convention at hand.<sup>67</sup> Also it is required by this convention that all state parties take all appropriate measures to prevent the exploitive use of a child in prostitution, pornography or any kind of unlawful sexual activity.<sup>68</sup>

#### F) Vienna Declaration and Programme of Action

Adopted by the World Conference on Human Rights, this declaration fully endorses the respect for all fundamental rights and freedoms, eliminating every kind of discrimination.<sup>69</sup> Moreover, the document clearly states that "all human rights are universal, indivisible and

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<sup>64</sup> Convention on the Right of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 (CRC), art 4

<sup>65</sup> Ibid (art 14)

<sup>66</sup> Ibid (Art 19 )

<sup>67</sup> Ibid (Art 29)

<sup>68</sup> Ibid (Art 34)

<sup>69</sup> Vienna Declaration and Program of Action (adopted World Conference, 25 June 1993), p. 1

interdependent and interrelated.”<sup>70</sup> In that way, all cultural, historical, political and religious settings must be taken into consideration, and it is the duty of the states to protect and promote those rights regardless of these backgrounds.<sup>71</sup>

Reinforcing the universality of human rights, this declaration foresees the elimination of all violation of these rights and their causes, as well as the hindrances to its enjoyment.<sup>72</sup>

Furthermore on the second part of this declaration, which dedicated to ‘equality, dignity and tolerance’<sup>73</sup>, it is expressed the pressing necessity to eradicate any customs or practices that may have harmful effects for women and children, which also causes a tension between the respect for culture and human rights of the ones concerned.<sup>74</sup>

#### G) Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children

The plan, drafted in 1994 by the Economic and Social Council (ECOSOC), is based on deliberations taken at some seminars that took place regarding the topic, with purpose of introducing changes to readdress the situation at a national and international level.<sup>75</sup> This plan strives for the elimination of all traditional practices and urges the states to ratify CEDAW and CRC.<sup>76</sup> Moreover, this document has two stages of action, national and international. It foresees that the states should clearly express their political will on putting an end to HCP’s, particularly FGM, and especially the states where the practice is more frequent. Education and cooperation with religious institutions, as another fundamental point of this action plan, even if all with the same purposes, the end of Harmful Practices concerning the health of women and children.<sup>77</sup> Furthermore, concerning international action, the plan urges for a constant review of international laws, declarations and

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<sup>70</sup> Ibid (art 3)

<sup>71</sup> Ibid

<sup>72</sup> Ibid (art 13)

<sup>73</sup> Ibid, part ‘B’

<sup>74</sup> Ibid (art 38 and 49)

<sup>75</sup> ECOSOC, ‘Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children, (adopted 22 July 1994), E/CN.4/Sub.2/1994/10/Add.1

<sup>76</sup> Ibid, (Art.61)

<sup>77</sup> Ibid (p.2- p.8)



conventions. It also advocates for the promotion, protection, defense and involvement of the international community on the matter.<sup>78</sup>

#### H) Conventions from International Labor Organization (ILO)

Some ILO conventions are also relevant for this research as they also advocate for the elimination of the worst forms of child labor, which in some countries are highly related to their parents' or guardians' cultural and religious beliefs. ILO convention no. 182 on the worst forms of child labor, addresses the issue of child sale, child prostitution and child pornography, among others. The International Labor Organization also takes into account the importance of education and the dire need of taking these children out of these environments, which according to ILO are mostly related and caused by poverty.<sup>79</sup>

#### I) Reports

- Report of the Expert Group Meeting on 'Good Practices in Legislation on "Harmful Practices" Against Women'

According to this report, Harmful Practices reflect the existent violence and discrimination against women in society.<sup>80</sup> This report was drafted taking into account some harmful practices, such as; FGM, female infanticide, prenatal sex selection, child marriage, "honor" crimes, etc.<sup>81</sup> This report mentions some UN General Assembly Resolutions that calls upon all member states to revise, amend and abolish any laws that might have a discriminatory or a harmful impact on women.<sup>82</sup> Even though the plea has been made, there are still countries, which have laws that allow harmful practices and discrimination.<sup>83</sup> Thus, the expert group believes that the legislative changes shall be made at a national, regional and

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<sup>78</sup> Ibid (p.8- p.9)

<sup>79</sup> International Labor Law Convention on the Worst Forms of Child Labor, (adopted 17 June 1999, entered into force 19 November 2000), C182, ILO

<sup>80</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), 'The CEDAW Convention and Harmful Practices against women: the work of the CEDAW committee', EGM/GPLVAW/2009/EP.05, p.1

<sup>81</sup> Ibid

<sup>82</sup> Ibid (p.2)

<sup>83</sup> Ibid

international level, with the criminalization of the acts and the effective monitoring of such laws.<sup>84</sup>

#### I) African Charter on Human and People's Rights

The African Charter on Human and People's Rights imposes a duty on states party to promote and ensure through teaching, education and the respect of the rights and freedoms contained in the charter.<sup>85</sup> This document entered into force in 1986, after being drafted in 1981. Its preamble imposes on member states the "duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa"<sup>86</sup>. Furthermore, it is specifically written on article 17, paragraph 2 the following "Every individual may freely take part in the cultural life of his community"<sup>87</sup>, which as we saw on the previous chapter, refers to one individual have the right to enjoy his community's way of living, which may or may not be problematic, taking into account the harmful character of some practices, performed in some communities. Moreover, on the following paragraph of the same article (17<sup>th</sup>) it is declared that "The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state".<sup>88</sup> Even though this article seems to be in agreement with traditional practices regardless of its consequences, article 18 declares that the states shall make sure of the elimination of every kind of discrimination and violence against women, making sure that the rights of women and children are protected<sup>89</sup>. Therefore, in a way, this article sets a boundary to article 17, making it possible for non-harmful practices to exist, while prohibiting the ones that are injurious to certain groups within the community.

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<sup>84</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), 'The CEDAW Convention and Harmful Practices against women: the work of the CEDAW committee', EGM/GPLVAW/2009/EP.05, p.2-10

<sup>85</sup> A.A.An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa*, Zed Books, *Mediating Culture and Human Rights for Women in Africa: A framework for community level*, Chapter , F. Butegwa, 2002, p.114

<sup>86</sup> African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (OAU) CAB/LEG/67/3/Rev 5 (African Charter), preamble

<sup>87</sup> Ibid (art 17)

<sup>88</sup> Ibid

<sup>89</sup> Ibid (art 18)

In addition to what has already been mentioned, this charter also reinforces the idea of the rest of the international treaties and covenants, thereby meaning that, the main propositions of education, teaching and respect for all human rights and freedoms are also laid down in this charter, with duties and obligations.<sup>90</sup>

Overall, the International Community is advocating for the end of these practices, through education and proper legislation, conversely there are some documents that urge to protect culture and its practices, moreover, the freedom one has to practice and to be a part of his/hers culture cannot be denied. For this reason, the enjoyment of this freedom is subjected to certain limitations, one is free to practice his own culture when not causing any harm to himself or to others.

J) Protocol to the African Charter on Human and People's Rights on Rights of Women in Africa –Maputo Protocol<sup>91</sup>

Women's condition in Africa is quite particular, several beliefs and religions, lead to several ways of accepting and respecting a woman. In 2003<sup>92</sup>, it was adopted a protocol to the African Charter on Human and People's rights on Rights of Women in Africa.

This gender oriented protocol was created according to the provisions previously laid down by the African Charter on Human and People's Rights. The need for further clarification, special protection and promotion of some rights and freedoms that were already expressed in the charter, as well as, the need to make sure that the states would correctly implement provisions, lead its drafting. For instance some of the provisions that needed closer attention were, the principle of non- discrimination and the duty of every state to ensure the end of any kind of violence and discrimination against women, as it was already laid down in other international documents.<sup>93</sup> Over and above, the protocol goes a bit deeper on understanding and laying down proper provisions on harmful practices, defining them as

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<sup>90</sup> Ibid (art 25 and 26)

<sup>91</sup> Protocol to African Charter on Human and People's Rights on the Rights of Women (Maputo Protocol) (adopted 11 July 2003) AHG/Res.240 (XXXI) (1995)

<sup>92</sup> Ibid (p. 23)

<sup>93</sup> Ibid (p. 1 to 3)

“(…) all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.”<sup>94</sup> Throughout the article where this definition is presented it clearly is stated that the signatory parties shall make all efforts to ensure the elimination, prohibition and condemnation of any act that fits the description that has just been presented.

Even so, when reading article 17:

“1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

1. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.”<sup>95</sup>

Though have already gone through the understanding of ‘cultural context’, the notion of ‘positive’ is also a bit controversial, considering that what some communities might see as positive cultural context, others might find it harmful, so in a way, there is no automatic way of recognizing a harmful practice, because the concept of harmful may vary.

#### K) African Charter on the Rights and Welfare of the Child

This charter was drafted in 1990, but only in 1999 it entered into force. Similarly to the Maputo Protocol, this charter also partly rests upon the foundations of the African Charter on Human and People’s Rights. On its preamble, it is recognized “that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security,”<sup>96</sup> which sets aside any practice that might interfere with these particular needs. In light of what the Convention on the Rights of the Child also

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<sup>94</sup> Ibid ( art 4 (G))

<sup>95</sup> Ibid (art 17)

<sup>96</sup> African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (OAU) CAB/LEG/24.9/49 (1990) , Preamble

defines as part of this group, any human being that is below the age of 18 years-old, is considered a child.<sup>97</sup>

Concerning the practice of harmful traditions, according to this charter it is the obligation of the states to make sure “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.”<sup>98</sup> Also, taking into account that some of the practices infringe the right to life, health, education and full development, thereby, it is worthwhile analyzing article 5, which refers to ‘survival and development’. This article declares that is the duty of the states to ensure the “survival, protection and development of the child”<sup>99</sup>, and that every child has the right to life.

In a way, contradicting, or giving an opening for future breaches, article 11, which concerns education, declares that the child’s education shall not only be aimed at respect and promotion of human rights, but it also should preserve and strengthen ‘positive’ African values and tradition.<sup>100</sup> But in a way, as said before, the positivity of a practice is highly subjective, taking into account that if a community deeply believes that a certain practice is not harmful, no argument in the world, for as strong as it can be, can change their minds.

Even though, the charter lays down some provisions, some already mentioned, that are strictly against any kind of practice that might be in any way dangerous for the child. Both article 16 and 21 refer to these injurious acts; the first one(article 16) is dedicated to child abuse and torture, which some practices do entail, and article 21 concerns ‘Harmful Social and Cultural Practices’<sup>101</sup>, that might be one of the greatest achievements in terms of legislation when it comes to harmful practices.

#### L) Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women

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<sup>97</sup> Ibid, (art 2)

<sup>98</sup> Ibid (art 1, para 3 )

<sup>99</sup> Ibid, (art 5, para 2 )

<sup>100</sup> Ibid, (art 11 para 2 ( a) and (c) )

<sup>101</sup> Ibid (Art 16 and 21)

Adopted in 1994, in Brazil, the Organization of the American States (OAS), also felt the need to clarify and develop a convention fully directed to women and to the end of any kind of violence and discrimination against them. Moreover, there was a need of declaring that women's rights were and are human rights, as well as explaining in detail what these rights included, as explained in article 4 of this declaration.<sup>102</sup> On article 1, it is defined the scope of violence and discrimination against women and what it means; "For the purposes of this Convention, violence against women shall be understood as 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."<sup>103</sup> With this in mind, and taking into account what was previously mentioned, (about the clarifying what rights are included in women's rights), article 4, says that every women has the right to the protection, enjoyment and recognition of all human rights in all human rights instruments<sup>104</sup>; "(...)these rights include, among others: a. The right to have her life respected; b. The right to have her physical, mental and moral integrity respected; c. The right to personal liberty and security; d. The right not to be subjected to torture; e. The right to have the inherent dignity of her person respected and her family protected; f. The right to equal protection before the law and of the law; g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights; h. The right to associate freely; i. The right of freedom to profess her religion and beliefs within the law; and j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making."<sup>105</sup>

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<sup>102</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) (adopted 9 June 1994), preamble and art 4

<sup>103</sup> Ibid (art 1)

<sup>104</sup> Ibid (art 4 )

<sup>105</sup> Ibid

## **2.1. Legal Achievements**

### **- Maputo Protocol**

This protocol expresses some obligations that fall upon the signatory parties, relevant for the elimination of Harmful Traditional/Cultural Practices. Moreover it is important to mention that, throughout the protocol when using the word ‘women’ the writers’ also includes girls.

“States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programs;

b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them;

c) Provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

d) Protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance”<sup>106</sup>

In this protocol it is also laid down a minimum age for a women to get married, that being 18 years-old<sup>107</sup>, due to that fact that early marriage not only often leads to early and dangerous pregnancies’, as it also often leads to domestic violence and other kinds of violence and discrimination against women. Moreover, there is an article fully dedicated to

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<sup>106</sup> Protocol to African Charter on Human and People’s Rights on the Rights of Women (Maputo Protocol) (adopted 11 July 2003) AHG/Res.240 (XXXI) (1995), art 5

<sup>107</sup> Ibid (art 6)

health and reproductive rights, bearing in mind that these are two of the rights that women are most deprived of when undergoing the practices being studied. The article declares the following – “States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted”<sup>108</sup> further explaining what these rights include. Overall, the primary statement summarizes what the article entails, but even so, we should emphasize the fact that it is also specifically written, in one of the paragraphs of this article, that the signatory parties shall take all appropriate measures to ensure that every woman has access to affordable, adequate health care, with that including education and communication programs especially for women in rural areas.<sup>109</sup>

This protocol gives great importance to women’s sustainable development, by making sure that every party does everything in their power to ensure that women are being fully accepted and integrated in society, sharing the same rights as men.<sup>110</sup>

Taking into account that a great deal of harmful practices that are performed against women take place in Africa, even if, not only, the drafting and implementation of this protocol, pushed several states to make major improvements in their legislative department. In some cases, the practices fell to zero per cent, in other cases it dropped significantly, but the eradication was not yet possible, but all of that was posterior to the adoption of this protocol.<sup>111</sup>

**- African Charter on the Rights and Welfare of the Child:**

This charter, clearly states that any practice that might overlap any right established in the charter shall be eradicated.

Once a child is not able at an early age to decide by her/him what decisions to make in several aspects that responsibility falls on the parents or guardians responsibility. Those

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<sup>108</sup> Ibid (art 14)

<sup>109</sup> Ibid, (art 14, 2 (a))

<sup>110</sup> Ibid (art 19)

<sup>111</sup> UNICEF, ‘Child Marriage – Latest Trends and Future Prospects’, [website], 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>, (accessed 2 July 2018), 3 and 4; and UNICEF, ‘Female Genital Mutilation/Cutting: A global Concern’, [website], 2016, <https://data.unicef.org/topic/child-protection/female-genital-mutilation/>, (accessed 2 July 2018),p.1



decisions may include, religious aspects, but even so, “parents and legal guardians shall subject their guidance and decisions in the enjoyment of the rights subject to the national laws and policies.”<sup>112</sup>

Concerning harmful practices, this charter, lays down the following article: “1. State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (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 other status. 2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”<sup>113</sup>

- **Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women:**

This declaration over and above the setting of the scope and understanding of women’s rights, it also has a clear stand on customary practices that might endanger the life, and health of women. That is shown by the following article “The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: (...) e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;”<sup>114</sup>

- **Expert Group Meeting on ‘Good Practices in Legislation on “Harmful Practices” Against Women’:**

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<sup>112</sup> African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (OAU) CAB/LEG/24.9/49 (1990), art 9, para 3

<sup>113</sup> Ibid (art 21)

<sup>114</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) (adopted 9 June 1994). Art 7 e)

This expert group alerts us to the fact that sensitization itself will no longer be a long-term solution. The range of the practices is so large and so deeply embedded in societies that in order to protect human rights and completely eliminate injurious practices and customs, by implementing legal obligations, binding for all.<sup>115</sup> Some of the suggestions made by this expert group are to address these practices through education and awareness-raising, combined with proper legislation, and a strong commitment to implement, which includes having the proper resources and educating women on the legislation concerning the practices. Moreover, the group highlights the need to distinguish a harmful practice from a non-harmful one, as it is written; “Any legislation that is proposed should draw clear distinction between the various practices, ensuring that sanctions are applied where necessary and other strategies used to deal with those that are not criminal in nature .”<sup>116</sup>

## **2.2. Summary**

Throughout this chapter it is possible to see, that there are many provisions relevant to the study of harmful cultural practices. Moreover, even though there are a number of clauses in several legal instruments that are highly related to these practices, either linked by the gender dimension, or directly related to the practices, there are no international legal documents fully dedicated to the matter. Additionally, the only article on harmful practices that has, an almost complete look upon these acts is a regional document (African Charter on the Rights and Welfare of the Child, art.21<sup>117</sup>), which does not have international enforcement. Apart from that, one of the biggest problems concerning the legal framework is the implementation. Taking into account that developing countries are confined to their resources and they are given, as any other state, a margin of appreciation, to consider the provision with regards to some requisites; some pretexts are used in order to not fully implement more costly provisions, just as the ones’ regarding harmful cultural practices.

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<sup>115</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), ‘Harmful Traditional Practices against Women and Legislation’, EGM/GPLHP/2009/EP.07, p.5

<sup>116</sup> Ibid (p. 9 and 10)

<sup>117</sup> African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (OAU) CAB/LEG/24.9/49 (1990) , art 21

Even though, since the drafting of the UDHR there has been an increasing concern with these practices, and on the tackling conducts, 70 years after the drafting of this document, there is still a lack of proper legislation on HCP's, especially the ones affecting the health of women and children. This way, this also touches upon gender issues that the International Community has been trying to tackle for years.

Since we have already taken a close look onto the relevant legislation concerning all harmful cultural practices, the next chapter will focus on the three cases chosen to approach (Female Genital Mutilation, Child Marriage, and Dowry Practice).



### **Chapter III – Particular cases of Harmful Practices**

There are thousands of Harmful Cultural Practices, and discussing why each one of them constitutes a human rights violation, would require a much more intensive study of the practices, such as field work. Therefore, and taking into account that HCP's are mainly performed on girls, which are doubly vulnerable because they belong to two of the most vulnerable groups in human rights, women and children, the cases chosen for analyzes are focused on girls.

Nonetheless, boys are also put through some cultural rituals, that do become harmful, and we will briefly look into a male practice in order to prove that all children are in grave danger when speaking of these practices. The simple fact that children are at the care of parents, and that they have to right to make every choice for them, is, in my point a view already a violation of these children's rights, but in a way, a child does not have a clear mind to make their own decisions. However, when it comes to practices as injurious as the ones that will be discussed, do the parents have the right mindset to decide as well? Children are vulnerable, because they are at the care of others, and women are vulnerable in the society as whole, and that is something that is still trying to be changed. And most of the practices that are performed not only are directed do girls, but they also intend to undermine and dominate women from an early age, in order for them to be submissive to every male character in their lives.<sup>118</sup>

As mentioned before, Harmful Cultural Practices are defined as something that is deliberately performed by one human being to another, causing physical and/or psychological damage with only cultural or traditional purposes that have great consequences on the health and restriction of the rights of the victims.<sup>119</sup> The following sub-chapter will present some cases of harmful cultural practices, which are very direct to

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<sup>118</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), 'Harmful Traditional Practices against Women and Legislation', EGM/GPLHP/2009/EP.07, p.2

<sup>119</sup> Ibid

the female population. At the same time, as mentioned above, there are also rituals, which are very harmful for the male child, but tend to be overlooked. Mainly because men are supposed to be stronger and wiser than women, for that reason, no men would, in the mind of certain communities, put themselves through harmful paths. For a male child it would be an honor, a proof of strength and chance to become a recognized man inside their community. However, some male rituals are indeed violent, sexual abusive and might have some deep future psychological consequences in a near future. That is the case of the Sambian ritual in Papa New Guinea. This ritual focuses on the initiation of boys, into strong male warriors; once boys are believed to be feminine figures until they perform the ritual. One of the most important things that we can take out of studying this ritual is that, discrimination against women is engrained at an early age, through the teaching of the elderlies. What makes this practice harmful, in my point of view and in a human rights point of view, is the violent and sexual character that this practice entails. Until the third stage of this ritual, boys are severely beaten in the nose, in order to bleed and be purified from the female contamination. Thus, they will also perform oral sex to the older members of the tribe and ingest their semen in order to become stronger and fertile. In this community it is believed that semen is the essence of the male sprit, and therefore the more a boy ingests it, the more masculine and stronger he gets. According to studies this would be the last time that men would perform homosexual practice, moreover, they only are allowed to have heterosexual intercourse with the intension to procreate otherwise it is believed that if they do it out of pleasure it may kill them.<sup>120</sup>

Another practice that will not be carefully studied, is the so called “honor crimes”. This practice consists on killing women for family honor.<sup>121</sup> According to the *Expert Group Meeting on Good Practices in Legislation on “Harmful Practices” Against Women*, some

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<sup>120</sup> Albertyan, ‘The Sambia Tribe (of Papa New Guinea)’, [website], <https://www.ipce.info/library/web-article/sambia-tribe-papua-new-guinea>, (accessed 5 March 2018)

<sup>121</sup> D. Kogacioglu, ‘the Tradition Effect: Framing Honor Crimes in Turkey’, *A Journal of Feminist Cultural Studies*, 15:2, Brown University, 2004, p.118

women are encouraged to commit suicide in order to avoid punishment,<sup>122</sup> numerous International, national and regional bodies see these crimes, as provoked by tradition, culture, or ‘codes of honor’.<sup>123</sup>

### 3.1 Case Study

The practices that were chosen for analysis are gender directed, and are also some of the most hurtful practices performed worldwide. It is important to enunciate that most of the girls that undertake these practices are aged between 7-14 years old.<sup>124</sup> As previously stated, these practices are performed with the intention of establishing gender norms in a certain community and/or society, in such way that boys and girls learn what may be expected from them as adults of their gender, and how they should behave as such.<sup>125</sup>

By focusing on FGM, Child marriage and Dowry practices, this thesis is mainly focusing on practices that are increasingly gaining the international community’s attention, for its severe human rights violations according to international human rights standards. Also, taking into account the work that has been taking place, concerning gender equality and violence against women, it seems more than relevant that the international community tries to tackle practices that in any way might promote this kind of behavior.

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<sup>122</sup> UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), ‘Harmful Traditional Practices against Women and Legislation’, EGM/GPLHP/2009/EP.07 p.2

<sup>123</sup> D. Kogacioglu, ‘the Tradition Effect: Framing Honor Crimes in Turkey’, *A Journal of Feminist Cultural Studies*, 15:2, Brown University, 2004, p.120

<sup>124</sup> UN Office of the High Commissioner for Human Rights, ‘Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children’, (August 1995) And UN Division for the Advancement of Women, Expert Group Meeting on good practices in legislation to address harmful practices against women (11 May 2009), ‘Harmful Traditional Practices against Women and Legislation’, EGM/GPLHP/2009/EP.07, p.2

<sup>125</sup> B. Ahmed, ‘Confronting a Sexual Rite of Passage in Malawi’, *The Atlantic*, [website], 2014, <https://www.theatlantic.com/international/archive/2014/01/confronting-a-sexual-rite-of-passage-in-malawi/283196/>, (accessed 5 March 2018)

### 3.1.1 Female Genital Mutilation

This term was adopted by the World's Health Organization in 1994, to describe all the forms of the operation.<sup>126</sup> This practice involves the surgical removal of part or of all of the most sensitive female organs. This custom is part of ritual of passage for some communities, thus marking the coming of age of little girls. It is believed, that by undertaking the mutilation, that girls will be sexually controlled, but above all, that it will ensure girls' virginity before marriage and chastity thereafter.<sup>127</sup> In the year of 2000 it was estimated that every year two thousand girls under the age of 11 had performed the procedure.<sup>128</sup>

The operation has several implications on the health of women, and it can cause severe psychological problems. This is performed on children of the age of 7 to 10 as well as adolescents and women, which have not been circumcised as girls. FGM has various types of being performed on women, some more aggressive than others, those being: 1) Circumcision or Sunna circumcision – refers to the removal of the prepuce and the tip of the clitoris; 2) Excision or Clitoridectomy- concerns the full removal of the clitoris, and often the labia minora; 3) Infibulation – refers to the removal of the labia minora and removal of the clitoris, combined with the sealing of the two sides, through stitching and natural fusion of scar tissue. The girls are left with a small hole to urinate and for menstruation to pass, which is no bigger than a tip of a match's head. This makes the daily and biological functions very hard for the girl, such as urinating, it becomes very painful. This type of FGM is without any doubt the most known severe one; 4) Introcision – this practice is only performed in Australia, and it refers to the enlargement of the vagina by

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<sup>126</sup> N. M. Nour, 'Child Marriage; a Silent Health and Human Rights Issue', *Rev Obstet Gynecol*, 2(1), 2009, [website], <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672998/>, (accessed 1 July 2018)

<sup>127</sup> UN Office of the High Commissioner for Human Rights, 'Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children', (August 1995), p.3-8

<sup>128</sup> N. M. Nour, 'Child Marriage; a Silent Health and Human Rights Issue', *Rev Obstet Gynecol*, 2(1), 2009, [website], <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672998/>, (accessed 1 July 2018)



tearing downward with three fingers bound with opossum string. This is then followed by compulsory sexual intercourse with a number of young men.<sup>129</sup>

Immediate complications, that may follow any of the mutilation types can be, “severe pain, urinary retention, hemorrhage and infection.”<sup>130</sup> Every single one of these operations takes from 10 minutes to 20 minutes to execute, and no anesthesia is administrated. Girls are held down by elder women in order for them to contain the pain and undergo the practice. “(...) many still see this tradition as an effective and acceptable method of controlling women’s attitudes toward sex and sexuality and of ensuring their virginity and suitability for marriage”.<sup>131</sup> Women/girls that go through this, do it in the name of culture, and in order to keep tradition alive in their communities, others are forced to do it for the same reason, and others will do it will fear of exclusion from their own community, to clarify, not to risk being seen as an outsider, unclean, impure, and last but not least, not a woman.<sup>132</sup> Moreover, as an emphasis to what has been just mentioned, “Cultural identity is very important in many African families. The ritual of FGM is a pathway to full social acceptability. Without it women are in danger of losing their right to participate in community life, something that will eventually affect the male head of the family. Mutilation is credited with healing powers. Although there is evidence of girls and women who have suffered serious immediate or long term complication from the performance of FGM, it is believed that it cures from conditions like hysteria, depression or nymphomania.”<sup>133</sup>

For the purpose of what has been discussed and explained throughout this segment, and leaning on previous studies on the matter, it is possible to express the human rights

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<sup>129</sup> UN Office of the High Commissioner for Human Rights, ‘Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children’, (August 1995) , p.3-8

<sup>130</sup> N. M. Nour, ‘Child Marriage; a Silent Health and Human Rights Issue’, *Rev Obstet Gynecol*, 2(1), 2009, [website], <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672998/>, (accessed 1 July 2018)

<sup>131</sup> Ibid

<sup>132</sup> UN Office of the High Commissioner for Human Rights, ‘Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children’, (August 1995), p.3-8

<sup>133</sup> M. Kontoyannis and C. Katsetos, ‘Female Genital Mutilation’, *Health Science Journal*, Vol.4, Issue 1, 2010, p. 33

violations connected to this practice. Even though, the violations are executed in the name of cultural tradition, the universal right to take part in cultural life does not allow one's right to interfere with another's fundamental right or freedom.

In this particular practice, several rights are being challenged, those being, the right to health and the right to life; these rights are deeply connected in this case, taking into account that this practice is performed in highly unhygienic ways, as it also can have some adverse effects on the girl's reproductive, (which endangers the girls' right to found a family), urological, mental health and others. All of these surgical implications may cause the girl's death, either sudden, or slow with a lot of suffering, by the loss of a great deal of blood.<sup>134</sup> Moreover, this practice also interferes with the girl's right to found a family, her freedom from discrimination, from violence and inhuman treatment, as well as, her freedom of thought belief and opinion.<sup>135</sup> Bering in mind, the violence that this act entails, and the grotesque manner of how it is performed on the girl, we easily understand the lack of freedom from violence, and inhuman treatment. Additionally, considering that it is a child undergoing the ritual, it was not her choice, therefore her opinion was not taken into account, in order to put her through such violent act; it was her guardians' or her parents desire for the girl to complete the ritual in order to be fully accepted inside the community. Overall, as it has been noted, the severe risks that this practice holds should be carefully analyzed in order to prevent further human rights violations in the name of culture, this way preventing as well cultural discrimination against the practitioners' communities.

### 3.1.2 Child Marriage/ Early marriage or child brides

"The honor attached to early marriage has traditionally been linked to its most central purpose: the assurance of virginity at the time of marriage. In addition, early marriage is a

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<sup>134</sup> C.A.A.Packer, *Using Human Rights to Change Tradition – Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa*, New York, Oxford, Intersentia, 2002, p. 59

<sup>135</sup> Ibid

way of preventing girls from initiating intimate relations with unfamiliar men.”<sup>136</sup> This practice, which according to UNICEF’s latest report on child marriage currently encompasses 650 million women and girls<sup>137</sup>; is agreed upon and consummated before the girl reaches the adult age (18 years-old), and taking into account her early age, she will not have her sexual organs yet mature, which will then have a great impact on her health.

Child marriage is highly relatable to forced marriage, bearing in mind that the girl’s consent on whom she gets married with, and her free-will on being betrothed. In the majority of the cases, this type of marriage has great consequences for the girl. As well as, it also reinforces the dominance of a superior power, not only because she is not yet a grown woman, which is accordingly to common knowledge able to make her own decisions, but also because she at the same time is a woman, and she should be submissive and respect every order that she is given without the possibility to complain. According to one of the books from the series of ‘Focus on Gender’ published by Oxfam, “Involving a girl in a marriage without her consent can have dramatic effects on her entire life, and in all her future prospects to become an equal decision maker in the home. The lack of her consent gives a signal to her husband and to society as a whole, that her opinion is unimportant.”<sup>138</sup>

Apart from the impacts already mentioned, there are others that deserve some attention, for instance, most of the girls that are married at such an early age experience severe acts of domestic violence and rape. Paying particular attention to the rape cases, it is important to highlight that even if a woman or girl is married, the use of the word ‘rape’ is correct, if the woman does not consent the act of sexual intercourse. If this is the case, forcing the girl to perform the act may have great setbacks in the girl’s physical and mental health. Moreover, it can also result into undesired pregnancies and the illegal termination of pregnancies that has a great impact on the girl’s health, once it has serious implications on their reproductive

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<sup>136</sup> R. Masika (ed.), ‘Gender, Trafficking and Slavery’, Oxfam, 2002, p.43

<sup>137</sup> UNICEF, ‘Child Marriage – Latest Trends and Future Prospects’, [website], 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>, (accessed 2 July 2018) , pp 3

<sup>138</sup> R. Masika (ed.), ‘Gender, Trafficking and Slavery’, Oxfam, 2002, p.46

health. Moreover, the inadequate or even lack of pregnancy follow-up and antenatal care can lead to a high risk delivery, and possibly to the death of the expecting young mother.<sup>139</sup> As an illustration, according to Oxfam's book; "In Egypt, 29 per cent of married adolescents have been beaten by their husbands and, of these, 41 per cent have been beaten during pregnancy. In Jordan, 26 per cent of reported cases of domestic violence were committed against wives under 18. The dangerous effects of early pregnancy and childbirth are widely accepted to include increased risk of dying and increased risk of premature labor and severe complications during delivery. Pregnancy-related deaths are the leading cause of mortality for 15-19-year-old girls (married or unmarried) worldwide. Those under age 15 are five times more likely to die than women in their twenties."<sup>140</sup>

All in all, it is possible to say that child marriage by denying children the right to consent to marriage, violates their rights and commits a crime according to several international declarations, as it is the case of UDHR, CEDAW and CRC, for example.<sup>141</sup> By the same token the 'Pan-American Forum against the Sexual Exploitation of Children' that took place in 2001, with delegates of 65 countries, showed receptive to idea of child marriage being considered as a particular type of commercial sexual exploitation.<sup>142</sup> Not to mention, that these girls are not given the choice of divorce, and even if they are, "a girl may find herself trapped within a marriage because she sees no other means of survival. Loss of adolescence, forced sexual relations and the denial of freedom and personal development have profound psychological and emotional consequences"<sup>143</sup>. With this in mind, these girls end up being education deprived, which consequently, contributes to the 'feminization of poverty'<sup>144</sup> Furthermore, taking into account the risks formerly mentioned, on the accounts

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<sup>139</sup> C.A.A.Packer, *Using Human Rights to Change Tradition – Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa*, New York, Oxford, Intersentia, 2002 and UN Office of the High Commissioner for Human Rights, 'Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children', (August 1995), p. 8 and 9

<sup>140</sup> R. Masika (ed.), 'Gender, Trafficking and Slavery', Oxfam, 2002, p.47

<sup>141</sup> Ibid (p.46)

<sup>142</sup> Ibid (p. 44)

<sup>143</sup> Ibid (p.47)

<sup>144</sup> Ibid (p.48)

of early pregnancies and forced sexual intercourse, the girl's right to health and life are also compromised, once that, early pregnancies may endanger the unborn child and the mother's live, as forced sexual intercourse or rape by the marriage partner may have serious health implications for the woman.<sup>145</sup>



**Figure 1** - Charter from 'Together with girls - strengthen in numbers', 2017, website<sup>146</sup>

Moreover, this also deprives the girl of freely founding a family, at her own time and desire.

Provided that, children have no decision making power until they reach the adult age, their parents or guardians are allowed to make decisions for the child at their best interest. However, this is highly debatable, once that, harmful traditions and practices are not in a child's best interest, but rather on the communities'. Thereby, the child's freedom of thought, belief and opinion is taken away by their family members for the communities' welfare. Additionally, the girls that are confined to these kinds of marriages are in very vulnerable position; that is to say, that frequently these girls are exposed to domestic violence and gender-based discrimination from their partners and in-laws, in order to turn

<sup>145</sup> C.A.A.Packer, *Using Human Rights to Change Tradition – Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa*, New York, Oxford, Intersentia, 2002, p. 59

<sup>146</sup> Together For Girls – Strengthen in Numbers, 'The Issue', [website], 2017, <https://www.togetherforgirls.org/the-issue/>, (accessed 3 July 2018)

the girl into a submissive and household wife that fears every wrong word that she might take.

To summarize, without the careful analysis of these practices and the human rights violations it might entail, these practices' will never be properly regulated, which will leaves girls that are exposed to this, in a very dangerous position, that might at some point cost them their lives.



**Figure 2** - Charter from the UNICEF's 'Child Marriage - Latest trends and Future prospects'; 2018, pp. 3<sup>147</sup>

### 3.1.3 Dowry practice

Deeply connected to child marriage, this practice consists on exchanging a child bride for either of money or for goods. Usually it is the husband's family, or the husband himself that pays the dowry to his in-laws, but in countries like India, the girls' families are the ones who pay the dowry to the family that will welcome a new daughter into their homes. As an illustration, some academics from the Aga Khan University stated that; "Dowry can be payed but he husband or by the girls family. Sometimes, women are even married within their own family as a means to keep money within the family"<sup>148</sup>. The bride is usually aged

<sup>147</sup> UNICEF, 'Child Marriage – Latest Trends and Future Prospects', [website], 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>, (accessed 2 July 2018) , p.3

<sup>148</sup> T. S. Ali; G. Árnadóttir and A. Kulane, 'Dowry practices and their negative consequences from a female perspective in Karachi, Pakistan —a qualitative study', *Health*, Vol.5, No.7A4, 84-91, 2013, p.87

between 11 to 13 years-old, according to the traditional values a girl is believed to be more valuable in certain communities if she is a virgin, in some cases circumcised, which is why she is chosen at such a young age, because it is less likely that they have had sexual intercourse before, and in most cases, virginity is verified by female relatives before the wedding comes through.

The reasons that families have to justify dowry payments are diverse, some invoke culture, others believe that the dowry when paid by the bride's parents might function as an insurance, "(...) as the husband is expected to repay the dowry to his wife. A trend of dowry "inflation" has been described in India and other countries in recent years. Due to this inflation, the financial burden of dowry is increasing and can negatively affect families' desire for having a female child. Families with daughters often feel obliged to provide dowries with their daughters to protect their wellbeing in the new family, to defend them from hardship and violence from the hands of the in-laws."<sup>149</sup> Most of the dowry practices can be found in rural and poor areas, and dowry payments are seen as an escape from financial issues, first they ensure they their daughter has financial safety, and second the daughter moves out, which makes one less person living in the house, by that meaning 'one mouth less to feed'. Thus, girls are believed to be costly, having to provide for; food, clothes, education, etc. and when they eventually leave their parents' house to move in with their husbands' family and with it still brings a dowry, the girls families takes advantage of that. It is also important to highlight, that the younger the girl, the higher the dowry, which makes parents give their children away very soon.<sup>150</sup> Ironically, the dowry received on the marriage of a daughter is quite often used to pay for the dowry of a son's future bride.<sup>151</sup>

With the dowry payment, follows an agreement, in the case that that the agreement is not met, the girls will experience severe punishment and her family will not receive the payment, the punishments are diverse, but the most common ones are mental and physical

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<sup>149</sup>Ibid (p. 84)

<sup>150</sup> N. M. Nour, 'Child Marriage; a Silent Health and Human Rights Issue', *Rev Obstet Gynecol*, 2(1), 2009, [website], <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672998/>, (accessed 1 July 2018)

<sup>151</sup> R. Masika (ed.), 'Gender, Trafficking and Slavery', Oxfam, 2002, p.44

torture, starvation, rape, and being burnt alive.<sup>152</sup> These killings of girls in the name of the dowry's agreement are closely connected to 'honor' crimes, once that, the killing of the bride is done in the name of saving the family's honor.<sup>153</sup>

This practice has severe consequences on women's/girls lives. Most of dowry cases have a great psychological and physical impact on the bride. Taking into account the young age of the girl, and the above mentioned, tendency to conceive before the girl's body is fully prepared to give birth, it is possible that she will have aches and pains for the rest of her life; or that she, the baby or both will not be able to survive to labor. Moreover, dowry stimulates domestic violence, academics believe that; "Oppression in the form of not having any control over financial contributions to the marriage creates great psychological strain on the wife. Physical and mental violence can cause the wife serious psychological problems and even require hospitalization. Lack of dowry, or parents-in-law dissatisfaction with the amount of dowry, can be a reason for them to be violent against their daughter-in-law and in extreme cases causing her death by burning and try to stage it as suicide."<sup>154</sup> In addition, the excessive violence and insults towards the girl, might lead her to commit suicide, or attempt to.<sup>155</sup> These practices also affect women's status, their right to education and fully develop as human beings.<sup>156</sup>

Susan Moller Okin, links dowry practice with slavery, which is universally seen as a gross human rights violation. Although this practice was never connected to slavery, if we look at it closely we can identify some signs of slavery present in this practice, such as trading the girl for money and/or goods, and turning her in too a house confined person, which lives to please and serve the family and the husband. However, in some parts of the world this would be considered as culturally appropriate, and it is more than within the limits of

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<sup>152</sup> UN Office of the High Commissioner for Human Rights, 'Fact Sheet no.23, Harmful Traditional Practices Affecting the Health of Women and Children', (August 1995), p.8 and 9

<sup>153</sup> D. Kogacioglu, 'the Tradition Effect: Framing Honor Crimes in Turkey', *A Journal of Feminist Cultural Studies*, 15:2, Brown University, 2004, p.119

<sup>154</sup> T. S. Ali; G. Árnadóttir and A. Kulane, 'Dowry practices and their negative consequences from a female perspective in Karachi, Pakistan —a qualitative study', *Health*, Vol.5, No.7A4, 84-91, 2013, p.88

<sup>155</sup> Ibid

<sup>156</sup> Ibid (p.91)



normal.<sup>157</sup> Despite all the negative connotation that this practice entails “(...) it also seems that change is being brought on slowly, following the country’s development and increasing educational level of the younger generation. Awareness of dowry issues needs to be raised and steps need to be taken to speed up this process of change by empowering women and ensuring equality”<sup>158</sup>.

Ultimately, even though dowry has a lot of negative consequences attached to it, the participants seem to have good intentions when ‘giving away’ their daughters or when receiving girls into their homes, their tradition is focused on the well-being of the children, even though that does not occur.<sup>159</sup> For that reason, the education of people and especially women, about their universal rights and freedoms is of utmost importance, in order to prevent that this kind of practices continues to be performed.

Similarly, to what has been stated on regards of human rights violations considering child marriage, dowry practices also endangers the brides right to health and life, not only for the same reasons of early marriage, those being early pregnancies, but also because, with dowry practices come attached dowry murders. Which means that, if a dowry agreement is not fulfilled the in-laws or the bride’s family might murder the girl in the name of their family’s honor. Moreover, the rates of suicide in these types of paring are extremely high due to the domestic violence and discrimination that the girls are exposed to, for the same or similar reason, as girls are also subjected to this kind of treatment on early marriages. Notwithstanding the deprivation of their right to education, right to freely choose their spouses and found a family, the fact that a girls freedom from slavery is taken away by being sold to another family, or by her parents paying another family to accept her into

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<sup>157</sup> S. M. Okin, ‘Feminism, Women’s Human Rights and Cultural Differences’, *Hypatia*, Vol. 13, no.2, Spring, 1995, p.35

<sup>158</sup> T. S. Ali; G. Árnadóttir and A. Kulane, ‘Dowry practices and their negative consequences from a female perspective in Karachi, Pakistan —a qualitative study’, *Health*, Vol.5, No.7A4, 84-91, 2013, p.91

<sup>159</sup> Ibid (p.89)

their homes, is one of the worst human rights violations of all times, and that should be carefully analyzed by the international community.<sup>160</sup>

All things considered, the careful analysis of this practice and respective human rights violations entails a great importance, in order to not only save girls' lives, but also to prevent the continuous violations of one of the most protect freedoms in human rights history.

### 3.2 Gender Dimension

Globalization and social change has brought little change in the field of gender equality, discrimination and violence against women. Most of the acts that still stand are practiced in the name of religion, culture, tradition, or all. Since in many communities' women are not yet seen as human beings, or as full-term members of a family, because they are destined to marry into other families or communities, which turn women into second-class citizens that are not entitled to enjoy human rights.<sup>161</sup> Taking that into account is now possible to understand the highly gendered affiliation with the practices that have been discussed in throughout this thesis. A grand part of the world is accepting when it comes to the violation of the rights of women and children. Situations like rape, domestic violence, FGM, forced marriage (child marriage and dowry practices), are some of the things that society tends to turn their heads on and not confront it. It was not until 1948, with the draft of the Universal Declaration of Human Rights, that women's rights were recognized as essential, even though there was no clear legislation or treaty that specified it. The lack of this document, or statement, was one of the causes for decades, of discrimination and violence against women, in such a way that, these kinds of behaviors became so deeply embedded in society and in some communities that the task to eliminate this prejudice and violent acts became

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<sup>160</sup> S. M. Okin, 'Feminism, Women's Human Rights and Cultural Differences', *Hypatia*, Vol. 13, no.2, Spring, 1995, p.35

<sup>161</sup> A.A.An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa*, Zed Books, *Mediating Culture and Human Rights for Women in Africa: A framework for community level*, Chapter , F. Butegwa, 2002, p.113

more and more difficult.<sup>162</sup> The drafting and adoption of the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, were a great addition to international law, but because the implementation of the conventions may differ from country to country, according to the limitations that they may impose, since they are given a margin of appreciation to the covenants.<sup>163</sup> By this we do not mean that, the signatory parts are able to revoke every article, law or point, as they please, there are several steps to impose a limitation on any part of the international legislation, and ultimately those limitations need to be approved.<sup>164</sup>

Even though these practices have been taking place for decades, and with that affecting women and children all around the world by depriving them for their basic human rights, in this case rights like, the right to health, right to education, right to freely choose a spouse, etc.<sup>165</sup> it was not until 1993 that gender-based violence was assumed as one of the grossest violations of human rights worldwide.<sup>166</sup> Not even with the adoption of CEDAW in 1979<sup>167</sup>, and the adoption of the CRC in 1989<sup>168</sup>, there was a clear statement by the international community on gender-based violence. Even so, the adoption of any kind of legislation on the matter was of great importance, to the extent that women would gain some legal protection; not only internationally but also, nationally and regionally. The implementation of the provisions laid down on the conventions would then help prevent the public and

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<sup>162</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.39

<sup>163</sup> Ibid

<sup>164</sup> Ibid

<sup>165</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 December 1981) UNGA Res 34/180 (CEDAW) and Convention on the Right of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 (CRC)

<sup>166</sup> S. M. Okin, 'Feminism, Women's Human Rights and Cultural Differences', *Hypatia*, Vol. 13, no.2, Spring, 1995, p.33

<sup>167</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 December 1981) UNGA Res 34/180 (CEDAW)

<sup>168</sup> Convention on the Right of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 (CRC)

violations, which are perpetrated by family members with the intention of transmitting fear and power to the victims.<sup>169</sup>

In 1994, the Organization of the American States drafted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, where in its preamble the participating states agree to the following: “Affirming that violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms; (...) Concerned that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men;”<sup>170</sup> Moreover some scholars believe that there is no rule to address gender issue, but there are “(...) standard and inalienable rights for human beings”<sup>171</sup>

Regarding the previously discussed practices, it worthwhile discussing the impact that culture, religion and tradition has on the arguments that explain women’s unequal situation, which is why the full recognition, proper legislation and judgement of these cases should be considered, as not only a women’s rights violation, but also as a human rights violation.<sup>172</sup> Families play an active role on breaching these fundamental rights, mostly because the practices that are being discussed concern children, and it is believed that they do not have the ability to rightly choose or change beliefs.<sup>173</sup> For instance, if a girl as to undergo a virginity test and it is proved that she is no longer a virgin; her family will make the girl suffer not only from public humiliation, but also from physical punishment.<sup>174</sup> This test is

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<sup>169</sup> S. M. Okin, ‘Feminism, Women’s Human Rights and Cultural Differences’, *Hypatia*, Vol. 13, no.2, Spring, 1995, p.35

<sup>170</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) (adopted 9 June 1994), preamble

<sup>171</sup> Johns Hopkins Bloomberg School of Public Health –Global Health Now, ‘Gender Inequality is not Cultural is Universal’, [website], 2015, <https://www.globalhealthnow.org/2015-07/gender-inequality-not-cultural-its-universal>, (accessed 15 February 2018)

<sup>172</sup> S. M. Okin, ‘Feminism, Women’s Human Rights and Cultural Differences’, *Hypatia*, Vol. 13, no.2, Spring, 1995, p.37

<sup>173</sup> S. M. Okin, ‘Feminism, Women’s Human Rights and Cultural Differences’, *Hypatia*, Vol. 13, no.2, Spring, 1995, p.37 and 41

<sup>174</sup> D. Kogacioglu, ‘the Tradition Effect: Framing Honor Crimes in Turkey’, *A Journal of Feminist Cultural Studies*, 15:2, Brown University, 2004, p.125

very usual in dowry marriages, and it is possible for the girl to be killed if she is not complying with the contract formerly agreed.

Even though most of the practices are directed to women and girls, Oxfam reminds us that, “It is important to bear in mind that boys are also subjected to child prostitution and child marriages, and that they too need the same kinds of protection. However, (...) the social construction of women's and girls' roles, responsibilities, and relations mean that they typically have less control over their lives, and fewer life choices and options.”<sup>175</sup> Additionally, taking into account that girls are the most injured parties, according to Joyce Banda and Priscilla Atansah; “When girls are socialized in the framework of certain cultural practices to lower their eyes, to have sex, and learn to please men, their rights to education and personal dignity go out the window at an early age. This is a disadvantage boys do not have, and it is one that establishes inequality long before the girl child becomes an adolescent.”<sup>176</sup> By taking away these girls’ rights to be equality treated, and free from any kind of discrimination, these practices’ tells us that these cultural events are not the only occurrences that shall be examined; “For data collection and legislation to make a difference in the curtailment of harmful cultural practices against young girls, we need to change the smallest discriminatory norms at a large scale.”<sup>177</sup> Martha Nussbaum agrees and argues that, we should begin by conceptualizing the human being and the human functioning when thinking about women’s equality in developing countries. The use of the concept human being is essential, in her point of view to help women claim for justice.<sup>178</sup>

Under those circumstances, women and girls that go through such events, or live in discriminatory societies need support in order to escape or survive to the conditions that

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<sup>175</sup> R. Masika (ed.), ‘Gender, Trafficking and Slavery’, Oxfam, 2002, p. 49

<sup>176</sup> J. Banda and P. Atansah, ‘An Agenda for Harmful Cultural Practices and Girl’s Empowerment’, *Center for Global Development*, [website], 2016, <https://www.cgdev.org/publication/agenda-harmful-cultural-practices-and-girls-empowerment>, (1 July 2018)

<sup>177</sup> Ibid

<sup>178</sup> M. Nussbaum and J. Glover, *Women, Culture and Development*, Clarendon press, Oxford, *Human Capabilities, Female Human Beings*, M. Nussbaum, Part II, 1995, p. 62

they live in. Susan Okin alleges that, “Women who are struggling against culturally or religiously sanctioned violations of women’s rights most commonly say that they need, above all, three things. One that is essential is to be carefully listened to; to have the opportunity to engage in deliberation that can lead to the recognition of unmet needs and unrecognized rights and to the development of strategies for change. Another is financial support; for many women’s organizations formed for resistance form within have few and meager sources of funding. The third is the kind of intellectual and political support from western feminist, and from the international community, that does not assault other cultures, but takes care to acknowledge their many valuable or neutral aspects while it criticizes those aspects that are harmful to women and girls.”<sup>179</sup>

To sum up, even though the intention behind the practices is to not comprise a girl’s condition but rather to reinforce “(...) values of the group and the community, others are also used as a way of securing a means of livelihood (...)”<sup>180</sup>; they do stimulate discriminatory and violent acts against women. Therefore, there is the growing need to tackle such acts either by legislation or education. Some researchers believe that education on the matter has excellent effects, taking into account that it causes changes on the girl’s mindset. According to Center for Global Development “This mindset is one that begins from the day a girl is born and manifests most strongly in socialization at the household level—ultimately justifying harmful rituals and underinvestment in the girl child.”<sup>181</sup> Therefore, the proper curriculum and education might promote social change and adjustments within the household; coupled with the rights legislation, the closer we are of thriving against harmful practices.

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<sup>179</sup> S. M. Okin, ‘Feminism, Women’s Human Rights and Cultural Differences’, *Hypatia*, Vol. 13, no.2, Spring, 1995, p.48

<sup>180</sup> N. Wadesango, ‘Violation of Women’s Rights by Harmful Traditional Practices’, *Anthropologist*, 13(2): 121-129, 2011, p 128

<sup>181</sup> J. Banda and P. Atansah, ‘An Agenda for Harmful Cultural Practices and Girl’s Empowerment’, *Center for Global Development*, [website], 2016, <https://www.cgdev.org/publication/agenda-harmful-cultural-practices-and-girls-empowerment>, (1 July 2018)

### 3.3 Summary

In this section some particular cases of harmful practices are shown, more specifically: FGM, Child Marriage and Dowry practices. All the practices that were chose for careful analyses are gender directed, and they are performed on girls that are aged between 7-14 years-old.

Even though, the most discussed practices concern the violation of rights of women and children (girls), one male ritual is also briefly discussed in order to prove that these actions are not only dangerous for girls, as they are also dangerous for boys, therefore affecting the rights of every children.

Moreover, when closely analyzing the chosen practices it is possible to perceive that most of the violations attached to these acts concern the heath of these groups, a right that has to be guaranteed by the state, despite the of resources. Additionally, the gender dimension attached to these rituals, has a great impact on a girl's possibility to one day enjoy equality in front of a man, or in the eyes of the whole society.

Nevertheless, while putting the girls through these practices, parents or guardians, believe that they are making the right choice regarding the life of their daughters. However, this way, even though harmful thoughts are not attached to the practices, rights are still being breached and these girl's lives are still being put at risk.

Thereby, taking into account that most of the problem with tackling these problems is the proper legislation and monitoring, the next chapter will focus no possible approaches to tackle this international issue.





## Chapter IV – Possible Approaches

Accordingly to what has been discussed and analyzed throughout this thesis, this chapter focuses on the possibility of identifying a long term settlement for Harmful Cultural Practices, not only legally, but also by fully understanding when a practice begins to be harmful to the human being.

In order to distinguish a practice from harmful and non-harmful, is necessary to understand where the practitioners stand, and what the research experts believe to be the most respectful and honorable way to approach such topic with the communities that are engaged in such practices. Susan Moller Okin believed that “it is also, surely possible to become a good critic of some harms done within a culture by taking the anthropologist’s route – going from outside to inside, where, if through and careful in one’s listening and learning, one can become very knowledgeable about a culture without either becoming co-opted by it or losing the capacity to be critical of some aspects of it”<sup>182</sup>. By adopting the suggestion made by this author it is possible to establish a trusting dialogue, without offending sensibilities, in the end, it all lays on cultural sensitivity, as another scholar argues; “It is true that cultural sensitivity is the key to effective dialogue on gender issues. Promoting certain universal rights and ending practices that are harmful to the health of the individual can become confused with terms like feminist imperialism. But ‘culture’ should not be protected when it is harmful to the health of the individual and its community”<sup>183</sup>. Nevertheless, this author does not believe that culture is worth saving when it is injurious to human beings; however it does not exclude the idea that respecting the others’ culture is the

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<sup>182</sup> S. M. Okin, ‘Feminism, Women’s Human Rights and Cultural Differences’, *Hypatia*, Vol. 13, no.2, Spring, 1995, p.47

<sup>183</sup> Johns Hopkins Bloomberg School of Public Health –Global Health Now, ‘Gender Inequality is not Cultural is Universal’, [website], 2015, <https://www.globalhealthnow.org/2015-07/gender-inequality-not-cultural-its-universal>, (accessed 15 February 2018)

only and fastest way to be heard and to end harmful practices, or to change the communities' point of view on universal human rights.

The great difficulty of properly defining and understanding when a practice becomes harmful has to do with the fact that the practitioners believe that, by continuing the tradition they are not only helping the child, as they are helping the community. Moreover, religious and cultural norms may have legitimate power, as explained by Florence Butegwa “a religious norm in conflict with a human rights norm may be legitimate from the point of view of freedom of religion which itself is a fundamental right (...) A cultural norm may similarly be defended, at least by its adherents”<sup>184</sup> (...) “A cultural norm will have legitimacy within its own context.”<sup>185</sup> Additionally, and as An-Na'im describes it “the essence of cultural traditions reflects the continuity and interdependence of the total human experience”<sup>186</sup>, which means that even when trying to revoke practices, we have to take into account that cultural traditions, harmful and non-harmful, are what makes us into a community, and enables us to share experiences and human experience, which is why most of the communities that advocate pro harmful practices, do not see them as injurious, instead they see them as unifying customs of the society they are inserted in. Thus, in order to get across these communities with the idea of universal human rights, it is important to promote the full respect for human rights, by that we mean that the respect for other's culture and beliefs should be respected, despite the negative consequences it may have, but when it comes to tackling Harmful Cultural Practices, “(...) it is necessary not only to combat the causes, but also the factors leading to it”<sup>187</sup>

The biggest challenge that we may come across when advocating for universal human rights may be the “efforts to identify existing cultural support for human rights, and to

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<sup>184</sup> A.A.An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa*, Zed Books, *Mediating Culture and Human Rights for Women in Africa: A framework for community level*, Chapter , F. Butegwa, 2002, p.117-123

<sup>185</sup> Ibid

<sup>186</sup> A.A.An-Na'im, *Human Rights in Africa: Cross-cultural Perspectives*, Brookings Institution, *Problems of Universal Cultural Legitimacy for Human Rights*, Chapter 13, A.A.An-Na'im, 1990, p.352

<sup>187</sup> Ibid ( p. 332)

resolve conflicts and tensions between human rights standards and cultural norms and values, assume some agreement on what universal human rights are”<sup>188</sup>. However, Richard Schwartz believes that “every society can learn from other societies more effective ways to implement human rights. While honoring the diversity of cultures we can also build toward common principles that all can support”<sup>189</sup>, being that every community has their own set of rights, even if they are not called human rights, somehow every human being born into every community is born with a set of rights and freedoms, that may or may not differ according to cultural patterns and beliefs. For this reason, if closely and carefully studied, we may find cultural provisions that meet some human rights clauses, which may give legitimacy to the universality of human rights. That is to say, that those in power of those communities will “(...) accept accountability for the implementation or enforcement of the right”<sup>190</sup>

Under these circumstances, it is extremely difficult to clearly draw a line between harmful cultural practices and human rights, more specifically, children and women’s rights. Given that the communities responsible for the practices see them as legitimate, the only way to fully separate harmful practices from non-harmful, would be either to open dialogue with the communities’ chief in order to agree upon a set of provisions that both sides see as essential ‘rights’ and/or ‘freedoms’; or the creation of a legal document regarding only these practices, where monitoring is established in order to eradicate or control these injurious customs. In simplistic way, we could say that a harmful practice is detected when it interferes with other rights; however, it is not that simple. As it was previously mentioned the problem is not whether or not the international community finds it harmful or not, the problem is that the customs are so deeply embedded in the societies where the rituals are performed, that it becomes harder to establish a dialogue where it is possible to make the other party understand that a human rights violation has been committed.

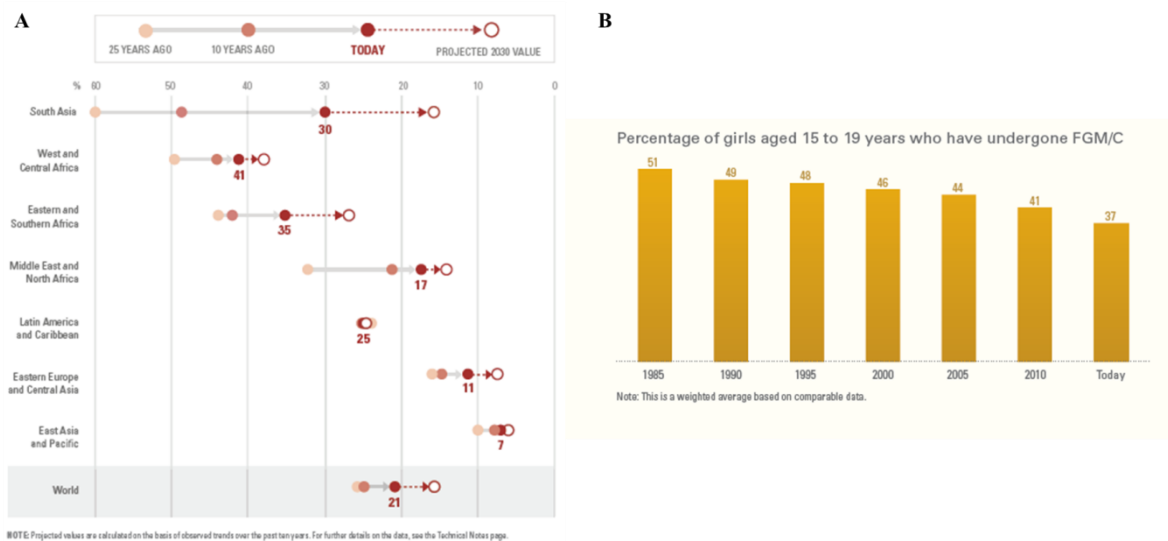
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<sup>188</sup> Ibid (p.354 and 355)

<sup>189</sup> A.A.An-Na’im, *Human Rights in Africa: Cross-cultural Perspectives*, Brookings Institution, *Human Rights in an Evolving World of Culture*, Chapter 14, R.D. Schwartz, 1990, p. 382

<sup>190</sup> A.A.An-Na’im, *Human Rights in Africa: Cross-cultural Perspectives*, Brookings Institution, *Problems of Universal Cultural Legitimacy for Human Rights*, Chapter 13, A.A.An-Na’im, 1990, p.332

Presently, and according to UNICEF's statistics the percentage of the mentioned harmful cultural practices have been descending, but despite de efforts made to eradicate these practices by 2030, in order to accomplish 'The Sustainable Development Goals', it will not be accomplished.<sup>191</sup>



**Figure 3** – A) Chart from UNICEF's 'Child Marriage - Latest trends and future prospects'; 2018; B) Chart from UNICEF's brochure on 'Female Genital Mutilation/ cutting: a global concern'; 2016,<sup>192</sup>

Consequently, the solution that seems to be more plausible is the drafting and adoption of a convention fully dedicated to these issues. Even though there are several provisions on the matter spread out by several covenants, conventions, charters and declarations, there is no such thing a convention that regulates at an international level these practices. In the event that the drafting of such document is possible, it should be taken into account that it is

<sup>191</sup> UNICEF, 'Child Marriage – Latest Trends and Future Prospects', [website], 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>, (accessed 2 July 2018), p.2

<sup>192</sup> UNICEF, 'Child Marriage – Latest Trends and Future Prospects', [website], 2018, <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>, (accessed 2 July 2018) , p.4 and figure 4; UNICEF, 'Female Genital Mutilation/Cutting: A global Concern', [website], 2016, <https://data.unicef.org/topic/child-protection/female-genital-mutilation/>, (accessed 2 July 2018), p.1

necessary to clarify the meaning of concepts like culture, cultural, cultural rights and harmful cultural practices, in order to avoid the misuse and misunderstanding of the concepts. Moreover, it should have provisions regarding the respect for these practices and for the ones who practice them, in order to prevent any kind of discrimination against the communities, as well as the respect by the remaining cultures (with non-harmful practices). It is equally important to lie down that every provision shall respect the Universal Declaration of Human Rights and its clauses just as the covenants and conventions that followed, thus, not undermining any of the paramount human rights legislation. Under those circumstances I would suggest that the preamble of such convention would focus on those clarifications, so that the first part would be fully dedicated to the drafting of provisions together with a complete definition of harmful cultural practices, which would undeniably belong to article 1 of the document. Additionally, the drafting of an article dedicated to the revision of school curricula, in order to prevent the teaching of norms that are characteristic of patriarchal society, should be considered. Equally important, should be the governments step to educate the older population on human rights, so that step by step violence and discrimination against women is completely eradicated, or at least controlled.

The rest of the convention, I would argue, that it should be dedicated to establishing norms that prohibits or advocates for the elimination, as well as the monitoring of such practices in order to assure that the international agreed provisions are being followed. Nevertheless, the document while advocating for the prohibition of some practices, should also advocate for the change of practices, with this suggesting that a practice should only be eradicated if there is no possibility of turning the practice into a non-injurious one. Therefore, by establishing this clause, the respect for the others' culture increases, it stimulates inter-cultural and international dialogue and promotes the end of discrimination against these systems' of beliefs. In view of it was suggested, the emergence of a committee and a monitoring system would necessarily needed to be established, on the second part of the document, so that victims can report complaints, and so that the international community

has complete or almost complete knowledge of the happenings in the countries and communities where the practices are performed.

Thus, in spite we are not able to clearly draw a line, according to the factors previously enunciated, between harmful practices and human rights (more specifically women's rights and children rights), the creation of an international document that would legislate the limits to cultural practices, so it does not become invasive for the human being; seems to be the best out of all the solutions we could think of. Surely, that the document itself is not enough, it is necessary to educate the population on the understanding of universal human rights, but in order to successfully reach the communities it is necessary to take the 'inside' approach as Susan Moller Okin suggested. Consequently, the respect for the system of beliefs that entails the practices being studied, is preserved, and there is the possibility to fulfil the goal of spreading the universality message while preventing further human rights violations worldwide.

All in all, the best tools to help trace a line between these practices and human rights, more specifically children and women's rights, are reforming the educational system, and drafting legislation with the right provisions to clarify some common misunderstandings on the matter, and to avoid further human rights violations, either by the perpetrators or by the rest of the world with a judging and discriminatory character. By the same token, Doctor Michael Flood writes that "Law and policy are critical tools too in establishing and disseminating particular strategies of primary prevention. For example, they are necessary in establishing and spreading violence prevention curricula for schools and universities."<sup>193</sup>

#### **4.1 Summary**

In this final chapter, some possible approaches on tackling harmful cultural practices were presented. Though the main presented option rests on legal grounds, this segment also focuses on the possibility to establish dialogue with a certain community, in order to

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<sup>193</sup> Harmful Traditional and Cultural Practices Related to Violence Against Women and Successful Strategies to Eliminate Such Practices – Working with Men pp 13

establish a trustworthy relationship of respect, with the purpose of reaching an agreement on human rights provisions, therefore reinforcing universality.

Bearing in mind, that according to UNICEF, these practices will not be eradicated by 2030, though the numbers of practitioners, and affected people will be lower; the drafting of an international legal document that is fully dedicated to these practices, as suggested, could help eradicate the harmful effect more easily, if the proper implementation is accomplished, coupled with a suitable monitoring, in order to control its enforcement and prevent connected violations. Moreover, educating the population on human rights standards also entails a great importance, taking into account that education and reeducation itself might reduce what triggers human rights violations in society.





## Chapter V- Conclusions

As it was possible to understand, the tension created between culture and human rights arises from the misunderstanding of the concept of universality, and the concepts of culture and its derivatives. When we closely analyze all the concepts it is clear that the intention behind the premises of having a universal set of rules, is not the eradication of cultures that are still closely attached to traditional values; but rather to reach an agreement on how to peacefully live in community by sharing different values.<sup>194</sup> Therefore the problem with harmful cultural practices does not ultimately lay upon the understanding of universality, but rather on the indulgence of cultural values and traditions that boost the practice of these rituals. Even so, the concept of universality takes up an important space, taking into account the human rights violations at stake; universality is one of the values that need to be passed on, taught and carefully explained to the communities, which still do not recognize a universal set of human rights.

Accordingly to what was previously discussed regarding the legal framework of harmful cultural practices, it is noticeable the increasing concern with these practices that endangers a great range of rights, more specifically the rights of women and children. However, even though the interest has been rising, and there is more legislation on the matter than it was some years ago, it is still not quite immediate what kind of breaches and how do these practices interfere with human rights. Therefore, and given that women and children's conventions no longer seem to be enough to tackle the ongoing violations of human rights concerning traditional practices; it is necessary, as it was previously suggested to draft and implement a convention that is fully dedicated to this topic.

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<sup>194</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.37

Moreover, the highly gendered character of these practices made us understand that most of the rituals are not only violent and endangering of the health and life of women and girls, as they also are designed and performed in such way to induce discriminatory behaviors in order to shape the girls' mentality, so they become obedient and submissive. For instance, as it was above described when analyzing the three practices that this research focuses on, most of acts are performed to qualify girls as eligible brides, to prevent abuses and sexual pleasure, and to assure a married future for the girl, which may have great physical and psychological consequences for the young women. The fact that these practices are still taking place, when some legislation prohibits its performance, it can only mean that governmental and non-governmental institutions are not taking every step possible to monitor and control the occurrence of such events. For this reason, the creation of an adjacent committee and monitoring system, to the suggested convention would help to increase the sense of responsibility of the institutions.

One of the most important aspects of the thesis resides on the pressing need to reeducate some communities into understanding the concept of universal human rights, in order to prevent further violent and inhuman acts upon girls. Moreover, it is important never to forget that since the society does not stop changing; there will always be a “developing sense of where responsibilities lie, since the environment in which rights have to be satisfied is constantly changing”<sup>195</sup>. In that sense, a possible convention on harmful cultural practices should be open to changes, or additional protocols in the event of the emergence of a new practice that would no longer fit that framework, due to the evolving character of the world and the society. To sum up, “we need mechanisms that operate at both the international and national levels, and which engage both governmental and non-governmental institutions. Human rights education also has an indispensable role to play.”<sup>196</sup>

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<sup>195</sup> G. Brown (ed.), *The Universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing World*, Global Citizenship Commission Report, Global Institute For Advanced Study NYU, OpenBook Publishers, 2016, p.79

<sup>196</sup> Ibid (p.90)

All things considered, I would like to end by leaving you with a mission and a thought; taking into account, that we are human rights advocates, it is also our job to promote and strive for change, regarding practices with harmful effects, and even if, after reading this thesis you are not yet convinced of the injurious consequences these practices entail, I challenge you to reflect upon the following: What if it happened to you? Or worst, what if it happened to your child? Or to anyone you know? – What would you think and do then? It is worth giving it a careful thought.



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