Everyone's International Law-bound Duty to End FGM*

It is the obligation of the sovereign State to ensure that public and private actors refrain from female genital mutilation (FGM), including all spheres of governance, whether central or local institutions and their personnel, including any subnational public actor or private service provider. This duty derives from the State's treaty-bound obligation to respect, protect and fulfill the human right to the highest attainable standard of reproductive health. It is up to the treaty-bound State to take the corresponding preventive *and* remedial actions to ensure the freedom of women and girls from FGM.

Moreover, the relevant international treaties and their authoritative monitoring-and-interpretation mechanisms clarify that States ratifying either or both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and/or the Convention on the Elimination of All Forms of Discrimination against Women are required to respect, protect and fulfill the universal and interdependent human rights of women. Within that principle, international law affirms that States are obliged to implement special measures that uphold the rights of women in vulnerable and/or threatening situations, in particular refugees and others facing discrimination and/or persecution. Case law also affirms a pattern of recognition that FGM constitutes a form of persecution and its continuing practice grounds well-founded fear of such persecution.

The Duty of Everyone, Everywhere

These norms also form an integrated system within which States are obliged to harmonize their domestic laws and practices with the corresponding treaty obligations. As provided in the Vienna Convention on the Law of Treaties, a State party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[1]

Such solemn obligations apply equally to all public institutions, including all spheres of governance, such as national programmes, local authorities and, where they exist, local governments.[2] Notably, for example, the International Covenant on Civil and Political Rights (ICCPR) and ICESCR each stipulate that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."[3]

Likewise, general principles of international law also apply to States in their integrity, whether federated or unitary in form. The International Law Commission has confirmed that

> …the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.[4]

Human rights treaty obligations are binding on "every State Party as a whole," as the UN Human Rights Committee further explains:

> All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally…may not point to…another branch of government as a means of seeking to relieve the State Party from responsibility for an action incompatible with the provisions of the Covenant.[5]

The Committee on Economic, Social and Cultural Rights (CESCR), which is responsible for monitoring and interpreting States' compliance with their covenanted obligations, has long emphasized the importance of the State "to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights."[6]

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In order to *protect* the human right to health, States bear specific obligations that include, among others,

> to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.[7]

The CESCR goes on to advise that:

> "States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services."[8]

Among their obligations, treaty-bound States also must report regularly in their performance of these treaty obligations. For example, the Committee on the Elimination of All Forms of Discrimination against Women (CEDaW), which monitors and interprets the implementation of the International Convention on the Elimination of All Forms of Discrimination against Women, explicitly instructs that States' reports "should include information on positive measures taken to curb violations of women's rights by third parties and to protect their health and the measures they have taken to ensure the provision of such services."[9]

Thus, the State is further obliged to ensure that nongovernmental parties, including private health service providers, nongovernmental organizations (NGOs) and community-based organizations (CBOs)—whether of a domestic and of extraterritorial character—similarly comply with these minimal requirements.

In connection with the human right to the highest attainable standard of physical and mental health, ICESCR requires States parties to undertake steps toward everyone's full realization of this right. The implementation of obligations to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.[10] The treaty requires that States, at a minimum, remove legal and other obstacles that prevent men and women from accessing and benefiting from health care on an equal basis. This requires States and their successive governments to address and rectify "the ways in which gender roles affect access to determinants of health, such as water and food; the removal of legal restrictions on reproductive health provisions; *the prohibition of female genital mutilation*; and the provision of adequate training for health-care workers to deal with women's health issues"[11] (emphasis added).

Most recently, CESCR specified the State's obligation to:

> undertake preventive, promotional and remedial action to shield all individuals from the harmful practices and norms and gender-based violence that deny them their full sexual and reproductive health, such as *female genital mutilation*, child and forced marriage and domestic and sexual violence including marital rape, among others. States parties must put in place laws, policies and programmes to prevent, address and remediate violations of all individuals' right to autonomous decision-making on matters regarding their sexual and reproductive health, free from violence, coercion and discrimination[12] (emphasis added).

On the subject of the State treaty party's "core obligations," the Committee finds that the State (and its successive governments and public institutions) are treaty bound to:

> enact and enforce the legal prohibition of harmful practices and gender-based violence, including *female genital mutilation*, child and forced marriages and domestic and sexual violence including marital rape, while ensuring privacy, confidentiality and free, informed and responsible decision making, without coercion, discrimination or fear of violence, on individual's sexual and reproductive needs and behaviours;…[13] (emphasis added).

The State violates the obligation to protect when it, or any of its parts, fails to take preventive steps:

> to prevent third parties from undermining the enjoyment of the right to sexual and reproductive health. This violation includes the failure to prohibit and prevent all forms of violence and coercion committed by private individuals and entities, including domestic violence, rape including marital rape, and sexual assault, abuse and harassment.[14]

CESCR further explains that these duties prevail during conflict, in all of post-conflict and transition situations, as well as during peace time. In particular, the State must actively denounce and/or thwart "harmful practices such as *female genital mutilation*," just as the Covenant requires the State to prevent "medically unnecessary, irreversible and involuntary surgery and treatment..."[15] (emphasis added).

CEDaW recommends specific "appropriate and effective" measures for States parties to take in eradicating the practice of female circumcision, including by way of:

> **(a)** The collection and dissemination by universities, medical or nursing associations, national women's organizations or other bodies of basic data about such traditional practices;
>
> The support of women's organizations at the national and local levels working for the elimination of female circumcision and other practices harmful to women;
>
> The encouragement of politicians, professionals, religious and community leaders at all levels including the media and the arts to cooperate in influencing attitudes towards the eradication of female circumcision;
>
> The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision;
>
> **(b)** That States parties include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel including traditional birth attendants to explain the harmful effects of female circumcision;
>
> **(c)** That States parties invite assistance, information and advice from the appropriate organizations of the United Nations system to support and assist efforts being deployed to eliminate harmful traditional practices;
>
> **(d)** That States parties include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision.[16]

In order to avoid the violation of a bundle of human rights, the World Health Assembly also has identified the need for States "to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, *female genital mutilation*, preferential feeding and care of male children"[17] (emphasis added).

In the case where the State's representatives, or agents, or parties registered and based in the State operate in other jurisdictions, those parties fall under the same regulation. The territorial State then bears an extraterritorial obligation to respect, protect and, in some cases, fulfill the human rights that protect against FGM. Thus, these domestic and extraterritorial dimensions of obligation are simultaneous with and complementary to the individual and collective obligations of States that they discharge through international cooperation.

Violation and Liability:

In addition to direct acts of commission, the absence of such adequate measures to prevent or remedy FGM may result in a State's violation of a treaty. Even in the case where the State's subnational entities or third parties directly cause the unavoidable harm due to FGM, the duty-bound State remains liable as the ultimate duty bearer for the harm caused and its remedy. CESCR further explains that:

> Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others [such as] the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices...[18]

As elucidated by CESCR, a State may well be liable for violations by its own commission, as in an action of its agent or representative. However, the treaty-bound State also may be liable for a violation by *omission* when it fails to take all necessary measures to safeguard persons from infringements of a human right by third parties within their jurisdiction, regardless of where the offending party operates.

Conclusion:

International law and world order require States to harmonize a system of women's rights, comprising respect, protection and fulfillment of the human right to the highest attainable standard of physical and mental health, as well as its constituent elements of reproductive health, physical autonomy and security of person. While the integral State and its public institutions categorically bear the primary obligation to uphold these rights, these duties are also diffuse. The applicable treaty law and local-implementation require the State to ensure that private actors, natural and legal persons also comply accordingly. The norms for combatting FGM apply, in particular, require prioritizing efforts to protect the most vulnerable of women, including those who have fled from the practice FGM as a form of persecution.

Endnotes:

[1] Vienna Convention on the Law of Treaties (1969), Article 27. United Kingdom ratified the Vienna Convention on 25 June 1971.

[2] "Local Government v. Local Authority," *Land Times*, No. 12 (June 2015), at: http://landtimes.landpedia.org/termpage.php?newsid=o2pk.

[3] International Covenant on Civil and Political Rights (1966), Article 50; International Covenant on Economic, Social and Cultural Rights (1966), Article 28. UK ratified both Covenants on 20 August 76. [Hereinafter, ICCPR and ICESCR.)

[4] Draft articles on Responsibility of States for internationally wrongful acts, A/56/10 (2001), at: http://www.un.org/documents/ga/docs/56/a5610.pdf; and Commentaries, at: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf.

[5] Human Rights Committee (HRC), General Comment No. 31: "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2004), para. 4, at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq/hW/TpKi2tPhZsbEJw/GeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3d%3d; also Vienna Convention, op. cit.

[6] The Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Twenty-second Session, E/C.12/2000/4, 11 August 2000, para. 21, at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en.

[7] Ibid., para. 35.

[8] Ibid.

[9] The Committee on the Elimination of Discrimination against Women (CEDaW), General recommendation No. 24: Article 12 of the Convention (women and health), Twentieth session, A/54/38/Rev.1, chap. I., 1999. UK ratified CEDaW on 7 May 1986.

[10] Article 3 of ICESCR.

[11] General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), Thirty-fourth session, E/C.12/2005/4, 11 August 2005, para. 29, citing also CESCR, General Comment No. 14. paras. 18–21.

[12] General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 4 March 2016, para. 29, at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en.

[13] Ibid., para. 49(d).

[14] Ibid., para. 59.

[15] Ibid., para. 59. The Committee specifies this final point in connection with such acts performed on intersex infants or children.

[16] CEDaW, General recommendation No. 14: Female circumcision, Ninth session, A/45/38 and Corrigendum, 2 February 1990.

[17] World Health Assembly resolution WHA47.10, 1994, entitled "Maternal and child health and family planning: traditional practices harmful to the health of women and children," cited in ibid, para. 18.

[18] CESCR, General Comment No. 14, op. cit., para. 51.