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ARTICLE

Access to Abortion for Rape Victims in Armed Conflicts: A Feminist Perspective

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Abstract

Adopting a feminist perspective, this article focuses on the protection of women's right to reproductive health during armed conflicts and, in particular, on access to safe abortion services for rape victims. Indeed, although women are disproportionately affected by conflicts, and their sexual and reproductive needs are exacerbated by the spread of sexual and gender-based violence, there is a lack of specific attention on this topic in the literature. The article therefore aims to investigate whether an obligation to provide access to safe abortion services for rape victims can be interpretatively derived from the set of international rules governing armed conflict. To this end, it will start by focusing on abortion as part of the non-discriminatory medical treatment that states must provide to the wounded and sick. It will then address the interpretation of the absolute obligation to treat humanely persons who are taking no active part in the hostilities, and investigate what such treatment entails when it comes to pregnant women who are victims of rape in armed conflicts. Finally, state practice and the practice of the UN Security Council in the framework of the Women, Peace and Security Agenda will be investigated.

Keywords: right to reproductive health; abortion services; rape victims; humane treatment; wounded and sick

1. Introduction

In the context of armed conflicts, the use of gender-based violence and rape has long been dismissed as 'collateral damage' of war: sexual violence, which has always accompanied wartime events, has remained largely invisible, or has even been justified as a private matter, obscuring the prominent role that

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political and military leaders often play in its planning.[1] Instead, it is nowadays widely recognised that conflict-related sexual violence is often used as a 'weapon of war', strategically employed to terrorise and humiliate victims or target a particular ethnic group.[2] Moreover, women are often chosen as objectives of such violence for gendered reasons as symbolic bearers of their culture or because of their reproductive capacities, which then become a resource to be commandeered for political or ideological purposes.[3] Through the indiscriminate recourse to war rape, women's bodies thus end up themselves becoming a battleground between the parties.[4]

Ongoing conflicts are no exception. The United Nations (UN) Special Representative of the Secretary-General on Sexual Violence in Conflict, Pramila Patten, denounced the extreme brutality of the conflict in Ethiopia's Tigray region and, more recently, the pervasiveness of the use of sexual violence in Ukraine, arguing that 'women's rights don't end when war begins'.[5] On 6 July 2023, the UN Secretary-General reported 2,455 incidents of conflict-related sexual violence verified by the United Nations in 2022 alone: the victims were women in 94 per cent of the cases and girls in about 30 per cent.[6] Although high, these numbers do not reflect the actual scale and spread of these events globally. Indeed, it was estimated that for every confirmed case, between 10 and 20 are undocumented and unaddressed.[7] Therefore, the true magnitude of the phenomenon could reach approximately fifty thousand incidents of conflict-related sexual violence in a single year.

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[1] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Criminal Law' (2000) 46 *McGill Law Journal* 217, 222.

[2] Sara E Davies and Jacqui True, 'Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In' (2015) 46 *Security Dialogue* 495; Rashida Manjoo and Calleigh McRaith, 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas' (2011) 44 *Cornell International Law Journal* 11; Dara Kay Cohen, 'Explaining Rape during Civil War: Cross-National Evidence (1980–2009)' (2013) 107 *American Political Science Review* 461. For more on the fact that conflict-related sexual violence is an international crime see Anne-Marie de Brouwer and others, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2020).

[3] See Radhika Coomaraswamy, 'Sexual Violence during Wartime' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff 2005) 53, 54–55.

[4] Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Simon and Schuster 1975) 38 ('Rape by a conquering soldier destroys all remaining illusions of power and property for men of the defeated side'). For an in-depth examination of the causes that explain the increasing use of conflict-related sexual violence see Carlo Koos, 'Sexual Violence in Armed Conflicts: Research Progress and Remaining Gaps' (2017) 38 *Third World Quarterly* 1935.

[5] UN News, 'Ukraine War: UN Signs Framework to Assist Survivors of Sexual Violence', 3 May 2022, https://news.un.org/en/story/2022/05/1117442.

[6] Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, Report of the UN Secretary General on Conflict-Related Sexual Violence (6 July 2023), UN Doc S/2023/413.

[7] Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, 'Remarks of Pramila Patten at UNGA 76 Side-Event "Preventing & Addressing CRSV as a Tool of War", Co-hosted by the Office for Global Women's Issues, US Department of State, Search for Common Ground, Georgetown Institute for Women, Peace and Security, 29 September 2021', https://www.un.org/sexualviolenceinconflict/statement/remarks-of-srsg-patten-at-unga76-side-event-preventing-addressing-crsv-as-a-tool-of-war-co-hosted-by-the-office-for-global-womens-issues-us-department-of-state-search-f.

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Starting from Pramila Patten's words and adopting a feminist perspective, this article aims to analyse an under-researched aspect: the protection of women's right to reproductive health during armed conflicts and, in particular, access to safe abortion services for rape victims in the light of international humanitarian law (IHL) and, to a lesser extent, international human rights law (IHRL). Although women are disproportionately affected by conflicts, and their sexual and reproductive needs are exacerbated by the spread of sexual and gender-based violence, there is a lack of specific attention in the academic literature regarding access to safe abortion services.[8] However, in armed conflicts, it is precisely such services – even for victims of war rape – that are predominantly denied, as argued by the Global Justice Center, which has been campaigning since 2005 to promote gender equality, even during conflict, with a focus on women's sexual and reproductive health (SRH).[9] Therefore, the groundbreaking work carried out by this international organisation inevitably constitutes the starting point for any reflection on the topic, including the present analysis.

Moreover, that access to safe abortion services is still a controversial and sensitive issue is evidenced by the fact that in 2019 the United States applied pressure to remove any direct reference to these services from the final text of Resolution 2467(2019) of the Security Council of the United Nations (UNSC),[10] as we will analyse below. Indeed, as Sara De Vido pointed out, 'not only the words "sexual and reproductive rights" but also the less strong expression "access to sexual and reproductive services" are difficult to use'[11] in binding or non-binding legal instruments at the international level.

However, as several studies have shown, the lack of access to this service results in an increase in the use of unsafe abortions and, thus, in maternal mortality.[12] The consequence is that violation of the sexual autonomy of

[8] Exceptions are Gloria Gaggioli, 'Is There a "Right to Abortion" for Women and Girls Who Become Pregnant as a Result of Rape? A Humanitarian and Legal Issue' in *Vulnerabilities in Armed Conflicts: Selected Issues – Proceedings of the 14th Bruges Colloquium* (14th Bruges Colloquium, 17–18 October 2013, College of Europe) 83 (who denies the existence of an obligation on states to provide access to abortion services under IHL in conflict situations); and Juliana Laguna Trujillo, 'A Legal Obligation under International Law to Guarantee Access to Abortion Services in Contexts of Armed Conflict? An Analysis of the Case of Colombia' (2020) 102 *International Review of the Red Cross* 851 (analysing the Colombian scenario).

[9] See, inter alia, Global Justice Center, 'Shifting Good Policy to Practice: Armed Conflict, Humanitarian Aid, and Reproductive Rights', June 2019, https://wordpress-537312-2488108.cloudwaysapps.com/temp-uploads/2099/07/20190625_Abortion_ShiftingGoodPolicyToPractice_Factsheet.pdf; Global Justice Center, 'Updating State National Action Plans to Ensure the International Humanitarian Rights of Women and Girls Raped in Armed Conflict', June 2014, https://wordpress-537312-2488108.cloudwaysapps.com/temp-uploads/2016/07/Model-NAP.pdf.

[10] UNSC Res 2467 (23 April 2019), UN Doc S/RES/2467.

[11] Sara De Vido, 'Violence against Women's Health through the Law of the UN Security Council: A Critical International Feminist Law Analysis of Resolutions 2467 (2019) and 2493 (2019) within the WPS Agenda' (2020) 74 *QIL, Zoom-in* 3, 4.

[12] Jenny Hedström and Tobias Herder, 'Women's Sexual and Reproductive Health in War and Conflict: Are We Seeing the Full Picture?' (2023) 16 *Global Health Action* 1, 1–2; Primus Che Chi and others, 'Perceptions of the Effects of Armed Conflict on Maternal and Reproductive Health

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rape victims is frequently accompanied by violation of their reproductive autonomy, the ability to determine freely whether and in what circumstances to reproduce.[13] Furthermore, the full exercise of this right is a necessary condition for the enjoyment of all other human rights (starting with the rights to health and bodily autonomy), respect for human dignity, and the accomplishment of effective gender equality.[14] This is even more true in armed conflict situations, which further reinforce women's systemic disadvantages in everyday life. Indeed, pervasive gender discrimination can be considered the result of centuries of patriarchal, colonial and racialised legal and policy frameworks which have normalised chronic female subordination. If the legal protection of women is often insufficient, in times of armed conflicts these structural and pre-existing inequalities – determined by factors such as patriarchal oppression, entrenched gender stereotypes, and taboos – are compounded by exceptional circumstances that make access to abortion services even more difficult.

Among the numerous barriers that hinder access to such services, the collapse or weakening of state infrastructure and national health services as a result of conflict must be included. In addition, safety concerns, the lack of medical personnel and viable routes, fear of stigmatisation for termination of pregnancy and of retaliation in the event of a rape denunciation – often necessary in a request for access to abortion – must be considered.[15] The presence of restrictive national laws on abortion represents another critical obstacle. Just think that, as evidenced by a UN Report, only 61 per cent of states allow a victim of rape to terminate the resulting pregnancy legally. In this respect there are considerable regional differences: 89 per cent of European and North American countries allow abortion in this situation, compared with only 38 per cent of countries in Northern Africa and Western Asia.[16] Finally, there has been traditional reluctance by humanitarian organisations to provide such necessary medical treatment. The reasons given are numerous and range from the alleged difficulty of providing such services in humanitarian settings and the illegality of abortion in the contexts in which they operate, to the restrictions donors impose on the use of funds.[17]

As has been pointed out, the use of sexual violence during conflicts tends to explode, making the issue of access to abortion very significant, given the large

Services and Outcomes in Burundi and Northern Uganda: A Qualitative Study' (2015) 15 *BMC International Health and Human Rights* 1, 6–7.

[13] Rosemary Grey, 'Reproductive Crimes in International Criminal Law' in Indira Rosenthal, Valerie Oosterveld and Susana SàCouto (eds), *Gender and International Criminal Law* (Oxford University Press 2022) 231, 235.

[14] Center for Reproductive Rights (CRR) and International Federation of Gynecology and Obstetrics (FIGO), 'Submission with the OHCHR to Help Inform its Report pursuant to Human Rights Council Resolution 45/29', 2021, 6, https://www.ohchr.org/sites/default/files/2022-02/Center-for-Reproductive-Rights-and-the-International-Federation-of-Gynecology-and-Obstetrics.pdf.

[15] Gaggioli (n 8) 86–87.

[16] UN Department of Economic and Social Affairs, *World Population Policies 2017: Abortion Laws and Policies – A Global Assessment* (UN 2020) 9, 13.

[17] Therese McGinn and Sara E Casey, 'Why Don't Humanitarian Organizations Provide Safe Abortion Services?' (2016) 10 *Conflict and Health* 1.

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number of women and girls who may need this service and the consequences that lack of access may entail. Therefore, this article aims to investigate whether an obligation to provide access to safe abortion services for rape victims can be interpretatively derived from the set of international rules governing armed conflict. However, it is necessary to start with some introductory considerations that are useful for delimiting the scope of the analysis and clarifying the methodology and the approach used.

2. Preliminary issues

2.1. The scope of the analysis

The scale of the humanitarian challenge posed by the situation of women in contemporary conflicts does not find a simple answer in international law. After the long and heavy silence of international law on women's status and rights in armed conflicts,[18] today we are witnessing a proliferation of legal norms and obligations through the interaction of three different regimes: IHL, IHRL, and international criminal law (ICL). Furthermore, the UNSC has been the site of some of the most significant developments concerning women's rights in armed conflicts, which have been integrated into its agenda since Resolution 1325 (2000) on Women, Peace and Security (WPS).[19] This fragmentation – a transversal phenomenon affecting international law in general – creates the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices, as noted by the International Law Commission (ILC).[20] Such problems, however relevant, are beyond the scope of this analysis.[21]

However, the need to overcome fragmentation explains why the spectrum of the investigation will cover not only IHL but also IHRL to verify whether rape victims are holders of reproductive rights in conflict situations.[22] After all, the applicability of IHRL in times of armed conflict has been confirmed

[18] Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *International and Comparative Law Quarterly* 55.

[19] UNSC Res 1325 (31 October 2000), UN Doc S/RES/1325. On the fragmentation of international law regarding women's rights in warfare see Catherine O'Rourke, *Women's Rights in Armed Conflict under International Law* (Cambridge University Press 2020).

[20] International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006), UN Doc A/CN.4/L.682, 14.

[21] For the effects of this fragmentation on the effectiveness of the protection of women's rights in armed conflicts see Hilary Charlesworth and Christine Chinkin, 'An Alien's Review of Women and Armed Conflict', 1 May 2015, RegNet Research Paper No. 2015/73, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600757.

[22] This will be done by adopting (as the next section illustrates) the interpretative tool of systemic integration. On the relationship between IHL and IHRL see Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law' in Jens David (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016) 78.

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by the jurisprudence of the International Court of Justice (ICJ)[23] and is undisputed today.[24] Indeed, as Gerald Draper argued, IHL should not be interpreted 'as an alternative to the law of peace, the old and classic positioning, but seen as an exceptional and derogating regime from that of human rights, contained, controlled and fashioned by the latter at every point possible'.[25] While it is true that for a long time IHL has held a dominant position over IHRL, it is only an integrated approach between the two regimes that can potentially improve the status of victims of armed conflict. Moreover, the underlying rationale for both should be the same – that is, of a humanitarian nature[26] – and the two bodies of law share a common value in that they seek to protect human life and dignity.[27]

Furthermore, it will not be possible to trace back all the main developments regarding the safeguard of SRH achieved within IHRL since the 1990s, thanks to the feminist commitment and the work of various human rights monitoring bodies.[28] However, an element that is worth underlining and that will also emerge in the analysis is that the most significant advances in this field are disproportionately contained within soft law documents.[29] Indeed, soft law instruments, such as general comments and recommendations, have been essential tools for advancing feminist articulations of women's human rights.[30] Many achievements in this field are a result of the work of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and other independent UN bodies. However, as is well known, the legal status of

[23] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, [25]; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [106]–[111]; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168, [215]–[220].

[24] UN Human Rights Committee (HRC), CCPR General Comment No 29: Article 4: Derogations during a State of Emergency (31 August 2001), UN Doc CCPR/C/21/Rev.1/Add.11; UN HRC, General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004), UN Doc CCPR/C/21/Rev.1/Add.13; UN Office of the High Commissioner for Human Rights (OHCHR), International Legal Protections of Human Rights in Armed Conflict (November 2011), UN Doc HR/PUB/11/01.

[25] Gerald IAD Draper, 'The Relationship between the Human Rights Regime and the Law of Armed Conflict' (1971) *Israel Yearbook of Human Rights* 191, 198.

[26] Judith G Gardam and Michelle J Jarvis, *Women, Armed Conflict and International Law* (Brill 2001) 254.

[27] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310, 312; Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 *International Review of the Red Cross* 501, 521.

[28] See, eg, Rebecca Smith, 'Gender and Justice in International Human Rights Law: The Need for an Intersectional Feminist Approach to Advance Sexual and Reproductive Health and Rights' in Elaine Wood (ed), *Gender Justice and the Law: Theoretical Practices of Intersectional Identity* (Dickinson University Press 2021) 115, 127.

[29] Catherine O'Rourke, 'Feminist Strategy in International Law: Understanding Its Legal, Normative and Political Dimensions' (2017) 28 *European Journal of International Law* 1019, 1026–27.

[30] O'Rourke (n 19) 50 ff.

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the 'overwhelmingly soft nature of feminist-informed developments' has been strongly criticised by feminist scholars.[31]

This applies also to abortion. Indeed, it should be noted that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is the only binding regional human rights treaty that recognises abortion as a human right in certain circumstances,[32] including cases of rape.[33] Otherwise, the right to abortion is not an enumerated right, and 'at the international level, it is hard to argue that abortion is a stand-alone right'.[34] Yet, as will be seen in the following sections, several UN treaty bodies have established that the lack of access to safe abortion services may, depending on the circumstances (including almost always cases of rape), lead to violations of women's human rights of various kinds, such as the right to health,[35] the right to be free from cruel, inhuman or degrading treatment,[36] the right to physical integrity,[37] and the right to privacy.[38]

Finally, the analysis will examine whether the obligation to provide safe abortion services can also be derived from IHL, and not only from IHRL. Thus, the article will test IHL to see whether, when analysed through a gendered lens – as is further explained in the next section – such an obligation for states can be interpretatively inferred. Indeed, there are at least three reasons that militate in favour of this attempt besides the purely reconstructive purpose.

The first of these is that the Geneva Conventions (GCs) have been almost universally ratified.[39] Therefore, to derive the right of access to abortion from IHL would provide a more solid conventional basis than deriving it

[31] Hilary Charlesworth, 'The Unbearable Lightness of Customary International Law' (1998) 92 *American Society of International Law Proceedings* 44, 46.

[32] To protect the reproductive rights of women, states parties are under an obligation to authorise abortion 'in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus': African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (entered into force 25 November 2005) (Maputo Protocol), art 14(2)(c).

[33] See Charles Ngwena, 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783, 811 ('[The Maputo Protocol] has risked sacrilege by not only enumerating abortion as a fundamental right in its substantive provisions, but by also providing a template of abortion law, however rudimentary').

[34] For an in-depth analysis see Sara De Vido, *Violence Against Women's Health in International Law* (Manchester University Press 2020) 59.

[35] cf Section 3. See also Ludovica Poli, 'Aborto e diritti umani fondamentali: Corte europea dei diritti umani e treaty bodies a confronto' (2017) 11 *Diritti umani e diritto internazionale* 189.

[36] cf Section 4. See, eg, Human Rights Committee, Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 2324/2013 (31 March 2016), UN Doc CCPR/C/116/D/2324/2013, para 7 (*Mellet v Ireland*).

[37] See, eg, Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1 February 2013), UN Doc A/HRC/22/53, para 47.

[38] HRC, Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 1608/2007 (29 March 2011), UN Doc CCPR/C/101/D/1608/2007, para 9.3 (*LMR v Argentina*).

[39] The four Geneva Conventions have been ratified by 196 states (https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/state-parties), and the First Additional Protocol by 174 (https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties).

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from international human rights treaties, which, although widely ratified, can count on a lower ratification rate. This is relevant because, as has already been argued and as will be better explained in the following sections, the obligation of states to provide safe abortion services following rape has been interpretively derived by UN human rights treaty monitoring bodies, the interpretation of which certainly does not bind states that are not party to those human rights agreements.[40] By way of illustration, it should be recalled that the United States – which, in an almost isolated and 'anachronistic'[41] manner, continues to maintain that in armed conflicts 'where humanitarian law is applicable, it operates to exclude human rights law'[42] – has not ratified many of the human rights treaties that will be relevant to the analysis, starting with the International Covenant on Economic, Social and Cultural Rights (ICESCR)[43] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention).[44]

Moreover, there is also an idealist afflatus. Indeed, it follows from Common Article 1 of the 1949 GCs that states parties, irrespective of whether they participate in a specific armed conflict, are obliged not only to respect but also to ensure compliance with the Convention by the other contracting parties.[45] Obviously, it is an obligation of means and not of result, to be performed with due diligence.[46] The interests protected by the Conventions are so crucial to the human person as to ensure that its provisions are universally respected – that is, creating obligations *erga omnes partes*.[47] Thus, deriving the obligation to provide safe abortion services in conflict situations also from IHL and not

[40] See Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies before Domestic Courts' (2018) 67 *International and Comparative Law Quarterly* 201. Though the monitoring bodies have derived the right to abortion from customary norms – such as the right to be free from cruel, inhuman or degrading treatment – the same cannot be said of the status of the right to abortion in international law.

[41] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 79.

[42] Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 93.

[43] International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[44] Convention on the Elimination of All Forms of Discrimination Against Women (entered into force 3 September 1981) 1249 UNTS 13 (CEDAW Convention).

[45] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I), Common art 1 ('Respect for the Convention: The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances').

[46] Paolo Benvenuti, 'Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligations of Third States to Ensure Respect of IHL' (1989–90) *Yearbook of the International Institute of Humanitarian Law* 27.

[47] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 23) [157] ('In the Court's view, these rules [of humanitarian law applicable in armed conflict] incorporate obligations which are essentially of an *erga omnes* character'); ICTY, *The Prosecutor v Kupreškić et al.*, Judgment, IT-95-16, Trial Chamber, 14 January 2000, para 519 ('Norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather … they lay down obligations towards the international community as a whole'). See also International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention:*

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only from IHRL may have this further implication. In the face of a violation of the GCs by one party to the conflict, the other contracting parties should do whatever is reasonably within their power – in particular, by using their influence over the party that commits the violation – to prevent and end it by ensuring compliance with the Conventions.[48] In the case at hand, this obligation could be implemented through various channels, such as diplomatic action or public denunciation.[49]

Finally, as will be further discussed,[50] state practice is also beginning to emerge to support the appropriateness of deriving this obligation from IHL.

2.2. Methodology

With regard to the interpretation technique, the rules set out in the 1969 Vienna Convention on the Law of Treaties, in particular Article 31, will be used as they are generally considered to reflect customary international law.[51] Therefore, the starting point will always be the normative data obtainable from the ordinary meaning of the words in the text, also taking into account the context, the object and the purpose of the treaty.[52] In addition, the criterion crystallised in Article 31(3)(c) will be particularly relevant, mostly in the interpretation of IHL rules. This paragraph provides that a treaty shall be interpreted in the light of 'any relevant rules of international law applicable in the relations between the parties'. This practice was inaugurated by the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), which interpreted IHL fundamental guarantees – such as the prohibitions of torture, cruel or inhumane treatment – through IHRL.[53] More recently, the International Committee of the Red Cross (ICRC) has also recognised that IHRL – where relevant and in relation to shared concepts – can be used to interpret the GCs on the basis of the principle of systemic integration.[54] This

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Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Cambridge University Press 2016) paras 153 ff.

[48] On the content of this obligation see Birgit Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 *German Yearbook of International Law* 498.

[49] Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82 *International Review of the Red Cross* 67, 77.

[50] cf Section 5.

[51] ICJ, *Kasikili/Sedudu Island (Botswana v Namibia)*, Judgment [1999] ICJ Rep 1045, [18]–[20]; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Rep 43, [160].

[52] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31(1) ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose').

[53] ICTY, *The Prosecutor v Milorad Krnojelac*, Judgment, IT-97-25-T, Trial Chamber, 15 March 2002, para 181; ICTY, *The Prosecutor v Anto Furundžija*, Judgment, IT-95-17-1-T, Trial Chamber, 10 December 1998, paras 143 ff.

[54] ICRC (n 47) paras 39–41.

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hermeneutical operation can raise critical issues, which cannot be addressed here.[55]

The supplementary means of interpretation provided in Article 32 of the Vienna Convention will also be considered where relevant. They do not constitute an alternative, autonomous method for interpretation but will be used in order to confirm the meaning resulting from the application of Article 31.[56] To this end, the concept of subsequent practice under Article 32, as interpreted by the ILC, will be used.[57]

Moreover, the article adopts a feminist approach[58] because, for several reasons, this perspective seems to be the most appropriate for the type of analysis to be conducted. For example, such an approach allows us to unveil the power dynamics that influence the creation and implementation of international law and continue to operate to this day, unearthing the patriarchal structures of its institutions and gender bias.[59] Such dynamics will become evident, for instance, in relation to the inclusion of rights to SRH in the UNSC WPS Agenda.[60] Indeed, international law and, in particular, IHL can be considered as 'a reflection of masculine assumptions',[61] unable to take into account forms of gender-based discrimination and systemic inequalities that are too often overlooked. On the contrary, a feminist approach allows us to identify norms that apparently 'can be formally gender-neutral but gendered in conception and gender-biased in practice',[62] highlighting possible gaps in the protection of women's rights in conflict situations. In order to take into account the gendered dimension of conflicts and the differential impact they have on women and, therefore, to better protect and make visible their specific needs – including access to safe abortion services – a 'reconceptualisation and revision of IHL'[63] in a feminist key is necessary.

[55] See, eg, Raphaël van Steenberghe, 'The Impacts of Human Rights Law on the Regulation of Armed Conflict: A Coherency-based Approach to Dealing with both the "Interpretation" and "Application" Processes' (2022) 104 *International Review of the Red Cross* 1345.

[56] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 301 ff.

[57] ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries, Conclusion 4: Definition of Subsequent Agreement and Subsequent Practice (30 April–1 June and 2 July–10 August 2018), UN Doc A/73/10, 2.

[58] See Dianne Otto, 'Feminist Approaches to International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 488.

[59] Hilary Charlesworth, 'Feminist Critiques of International Law and Their Critics' (1995) 13 *Third World Legal Studies* 1.

[60] UNSC Res 1325 (n 19); cf Section 6.

[61] Gardam and Jarvis (n 26) 93.

[62] Aaron Xavier Fellmeth, 'Questioning Civilian Immunity' (2008) 43 *Texas International Law Journal* 453, 477.

[63] Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peacebuilding* (UNIFEM 2002). In relation to IHRL see also Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486.

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A gendered feature of IHL that has a distinctive impact on women civilians is its narrow scope of application aimed at protecting women almost exclusively from harm inflicted by the enemy. As Michelle Jarvis and Judith Gardam have highlighted, 'the protections applicable to prisoners of war and civilians reflect this narrow scope, applying respectively to persons in the power of the enemy and in the hands of a party or occupying power of which they are not national'.[64] Instead, in the present case the obligation to provide access to safe abortion services will be derived from IHL rules concerning the protection of the wounded and sick – and those arising from Common Article 3 – which are applicable to *all* persons not taking part in hostilities, to whichever party they belong.[65] In such circumstances, all states parties to the conflict 'have, first and foremost, the responsibility for protecting and assisting the populations under their control and should organize and carry out necessary relief actions'.[66] It is the only way to consider that, in times of war, women are more exposed to violence, even from members of their own community and state.[67]

Traditionally, feminist criticism has stressed the inability of the IHL regime to move beyond a 'male norm' when addressing the impact of armed conflict upon women and to address the underlying inequalities in social structures that predated the conflict.[68] While broadly agreeing with this position, the thesis that is developed in this analysis is that, by examining the existing

[64] Michelle Jarvis and Judith Gardam, 'Gendered Framework of IHL and Development of ICL' in Rosenthal, Oosterveld and SàCouto (n 13) 47, 55.

[65] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) 232 ('Nationality or the fact that a person belongs to enemy forces is irrelevant. It is widely accepted that a party is obliged to respect, protect and care for "*its own*" wounded sick and shipwrecked' (emphasis added)). Indeed, if initially this type of protection was reserved only for wounded and sick members of the armed forces, as Sassòli held, 'under Protocol I, however, military and civilian wounded, sick and shipwrecked benefit from the same regime': ibid 233.

[66] 'Protection of Victims of Armed Conflict through Respect of International Humanitarian Law', 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Final Goal 1.1, para 1(g).

[67] In this scenario the obligation to provide safe abortion services is assumed to impose a burden on the state with regard to women residing on its territory, regardless of whether they have been raped by its own armed forces or those of the other party to the conflict. Moreover, it is worth underlying that the GCs 'address acts and omissions, including with regard to the wounded and sick, only where there is a nexus with the conflict': Annyssa Bellal, 'Who is Wounded and Sick?' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Convention: A Commentary* (Oxford University Press 2015) 757, 762, para 19; see also Sassòli (n 65) 203. On the need to derive the obligation not only from the IHRL framework but also from IHL see Section 2.1. On the requirements for rape victims to be considered wounded and sick within the meaning of the Geneva Convention and, as such, entitled to access to abortion services see Section 3. In the event of international conflict, in the absence of effective control over the territory of the other party to the conflict, the state will not be able to guarantee access to abortion services for women raped by its soldiers. However, it will not have to prevent humanitarian organisations from providing access to these services (cf Section 3).

[68] Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' (2010) 92 *International Review of the Red Cross* 31, 36.

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rules from a gender perspective, the obligation of the parties to the conflict to provide access to safe abortion services for victims of rape in conflict situations can be interpretatively derived. Therefore, failure to comply with this obligation entails a violation of IHL, giving rise to international state responsibility. This applies even in cases where the domestic legislation of the state in question prohibits abortion. Indeed, in conflict situations, IHL rules supersede national laws, which cannot exempt a state from an international obligation.[69] As we shall see, this position is now supported by several Western countries and the European Parliament and Commission, who consider that access to abortion for rape victims in conflict situations must be guaranteed 'despite being in breach of national law by parties to the conflict'[70] as, otherwise, this would constitute a violation of IHL.

To this end, the article will use a tripartite structure. First, it will focus on abortion as part of the necessary, appropriate and non-discriminatory medical treatment that states must provide for the wounded and sick. Subsequently, it will address the interpretation of the absolute obligation to treat humanely persons who are taking no active part in the hostilities, and investigate what such treatment entails when it comes to women victims of rape in armed conflicts. In both cases, references will be made to IHL and IHRL to demonstrate how a combined reading of these two branches of international law allows for a guarantee of complementary and mutually reinforcing protection in situations of armed conflict, and for the imposition of stringent obligations on states parties regarding access to SRH services. Finally, state practice and the practice of the UNSC in the framework of the WPS Agenda will be examined.

3. Abortion as necessary and non-discriminatory medical treatment

3.1. The protection granted by IHL to the wounded and sick

As Liesbeth Lijnzaad noted, 'it would be unrealistic to expect the protection during armed conflict to be fully taking into account gender issues when this has not been realized in society even during peace'.[71] At first glance, IHL seems to confirm this assumption, as it does not expressly refer to access to safe abortion services and appears silent on the issue. However, the interpretation of some IHL provisions can be helpful for the advancement of these

[69] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentary (2001), Supplement No. 10, UN Doc A/56/10 ('Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law': art 3(1)). VCLT (n 52) art 27 ('A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46').

[70] House of Lords, Publications and Records, 'Rape in Armed Conflict: Question for Short Debate', Baroness Northover, representing the Government, 9 January 2013, col 209, https://publications.parliament.uk/pa/ld201213/ldhansrd/text/130109-0002.htm#13010975000273 ('Therefore, an abortion may be offered despite being in breach of national law by parties to the conflict or humanitarian organisations providing medical care and assistance').

[71] Liesbeth Lijnzaad, 'Book Review of Women, Armed Conflict and International Law' (2005) *Netherlands International Law Review* 496, 500.

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women's rights in armed conflicts, in some circumstances even regardless of the content of national law, as has been noted.

First of all, the notion of 'wounded and sick' and the resulting obligations under IHL should be considered. Indeed, Article 10 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I) provides:

> All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.[72]

A mirror provision is provided in the Second Additional Protocol (AP II) relating to the Protection of Victims of Non-International Armed Conflicts.[73] For non-international armed conflicts, the protection granted to the wounded and sick by Common Article 3 to the four Geneva Conventions is also relevant.

In IHL treaties there is no definition of these terms, the meaning of which is left to common sense and good faith.[74] The rationale was to avoid any restrictive interpretation or abuse.[75] The only criteria necessary to be categorised as wounded or sick are (i) the need for medical care, and (ii) abstention from any act of hostility.[76] So, to fall within this category, the fulfilment of any qualitative requisite regarding the severity of the medical condition is not required. The definition is not restricted to individuals who necessitate immediate medical care in the sense of emergency medical treatment, but includes those who need other curative or rehabilitative treatment,[77] and even those who are neither wounded nor sick in the usual sense of these words,[78] such as children or pregnant women. Indeed, it is the same Article 8(a) of AP I that, in clarifying the terminology used, specifies that the terms 'wounded' and 'sick' include

[72] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 10. This article has been identified as a codification of customary international law. For international armed conflicts, see also Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 16.

[73] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II), art 7.

[74] Leslie G Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 1993) 208.

[75] Jean Pictet, *Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 134.

[76] Jann Kleffner, 'Protection of the Wounded, Sick and Shipwrecked' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2008) 325, 328–29.

[77] Amrei Müller, 'States' Obligations to Mitigate the Direct and Indirect Health Consequences of Non-International Armed Conflicts: Complementarity of IHL and the Right to Health' (2013) 95 *International Review of the Red Cross* 129, 137–38.

[78] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Brill 1987), art 8(a), paras 305–306.

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'maternity cases' and 'expectant mothers'.[79] A similar equation between the status of the wounded and sick and that of expectant mothers is also found in Article 16 of GC IV.[80] Indeed, this legal regime aims to address the specific vulnerability in conflict situations deriving from the need for medical treatment or assistance.[81]

If these terms cover pregnant women, a fortiori, women who are pregnant as victims of rape in armed conflict cannot be excluded from this category. In these cases there is a clear need for medical assistance as a result of, inter alia, physical or psychological disorders resulting from sexual violence. Indeed, it should not be underestimated that rape as a weapon of war is often accompanied by extreme cruelty – gang rapes or the use of instruments are common – which can cause significant and often irreversible injuries to the victims. Furthermore, the resulting unwanted pregnancies and the hygienic-sanitary conditions connected with the war often lead to high maternal mortality rates.[82] Finally, forcing a woman to carry an unwanted pregnancy to term frequently causes a severe adverse impact on her mental health, a consequence that should not be underestimated.

Therefore, as Annyssa Bellal stated, 'nothing seems to prevent interpreting the Conventions as including rape victims in the category of the wounded and sick'.[83] If it can be argued that victims of rape are on an equal footing with the wounded and sick within the meaning of the Geneva Conventions[84] and, as such, are entitled to medical care, it may be questioned whether states have an obligation to ensure access to SRH services. Although the harm caused by sexual violence in armed conflict is multidimensional, physical and psychological, this article exclusively addresses the obligation to provide access to abortion.

Examining Article 10(2) of AP I,[85] two further preliminary considerations relating to state obligations can be elaborated. First, the term 'in all circumstances' ensures that military necessity cannot be invoked to justify non-

[79] AP I (n 72) art 8 ('Terminology: a) 'These terms ["wounded and sick"] also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility').

[80] GC IV (n 72) art 16 ('The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect').

[81] ICRC (n 47) para 1342.

[82] Henrik Urdal and Chi Primus Che, 'War and Gender Inequalities in Health: The Impact of Armed Conflict on Fertility and Maternal Mortality' (2013) 39 *International Interactions* 489.

[83] Bellal (n 67) 762 para 21. For a similar position see Akila Radhakrishnan, Elena Sarver and Grant Shubin, 'Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers' (2017) 25 *Reproductive Health Matters* 40; Jarvis and Gardam (n 64) 57.

[84] For example, Louise Doswald-Beck argued: 'There can be no doubt that persons who are raped fall into the category of "wounded and sick", due to severe mental, and often physical trauma suffered': Louise Doswald-Beck, 'Open Letter to President Obama', 10 April 2013 (as quoted in Alice Priddy, 'Tackling Impunity for Sexual Violence' in Annyssa Bellal (ed), *The War Report-Armed Conflicts in 2014* (Oxford University Press 2015) 682 fn 19).

[85] AP I (n 72) art 10(2) ('*In all circumstances* they [the wounded, sick and shipwrecked] shall be treated humanely and shall receive, to *the fullest extent practicable and with the least possible delay*, the medical care and attention required by their condition' (emphasis added)).

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compliance with the obligation to provide adequate medical care for the wounded and sick.[86] Second, the expression 'to the fullest extent practicable and with the least possible delay' unquestionably requires that the parties to the conflict act in good faith and make their best efforts to provide the required medical assistance as quickly as possible (taking account of the particular circumstances).[87] Indeed, it must be emphasised that the obligation to care for the wounded and sick by providing adequate medical assistance is an obligation of means. It is, therefore, an obligation that is subject to the best that can be achieved in the prevailing safe situation and with the available capacity, and must be performed with due diligence.[88] Not all states have the same resources, and it may not be possible for a state to provide all the wounded and sick with the medical care their condition requires.[89]

Moreover, this obligation must be exercised in compliance with another cardinal principle of IHL: the prohibition of adverse distinctions based on sex in the provision of medical care.[90] Thus, this branch of law does not allow for distinctions other than those based on medical grounds. It is not enough for a rule to be formally neutral with regard to gender by prohibiting, as in this case, discrimination based on sex. For formal equality not to turn into a denial of justice, IHL must be 'reinterpreted, expanded or rewritten to better address the need of female civilians'[91] in such a way as not to reinforce endemic discrimination against women. Therefore, for this to happen, the differential impact that rape in armed conflicts has on men and women must be recognised. After all, the ban of adverse distinctions prohibits discrimination, not differentiated treatment.[92] Being wounded as a result of rape can involve exposure to different risks, different stigmatisation and the need for different medical treatment, depending on whether the victim is a man or a woman.[93]

86 Kleffner (n 76) 331.

87 ICRC (n 78) para 4645.

88 Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *International Review of the Red Cross* 401, 412; Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9.

89 Federal Political Department Bern, 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts', Geneva 1974–1977, Vol XI, 76–77; ICRC (n 47) para 1382 ('In addition, the medical personnel of a Party which has significant resources at its disposal can be expected and will therefore be required to do more than the medical personnel of a Party which has limited means').

90 See AP I (n 72) art 10(2); AP II (n 73) art 7(2) ('There shall be no distinction among them founded on any grounds other than medical ones'); Common Article 3 of the four GCs ('Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without *any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria*' (emphasis added)).

91 Valerie Oosterveld, 'Feminist Debates on Civilian Women and International Humanitarian Law' (2009) 27 *Windsor Yearbook of Access to Justice* 385, 390.

92 Charlotte Lindsey, *Women Facing War* (ICRC 2001) 20.

93 Gabor Rona and Robert J McGuire, 'The Principle of Non-Discrimination' in Clapham, Gaeta and Sassòli (n 67) 191 para 54; Radhakrishnan, Sarver and Shubin (n 83) 43.

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The intrinsically unequal consequences of rape require that female victims be guaranteed access to SRH services, including abortion if they request it, as part of the full range of medically appropriate and necessary care adapted to their specific and additional needs. Obviously, the wishes and conditions of female victims and the safety and security of the humanitarian staff, as well as other contextual factors, will have to be considered.

In conclusion, states parties have an obligation to ensure that medical assistance provided to victims of rape in armed conflict is non-discriminatory. After all, this assumption finds confirmation even if one resorts to a teleological interpretation and considers the purpose and the object of the GCs, pursuant to Article 31(1) of the Vienna Convention. The terms 'object' and 'purpose' are often used as 'a combined whole',[94] which refers to the *raison d'être* of the treaty itself.[95] As the ICRC has ascertained, one of the overall objects and purposes of the GCs is to guarantee respect and protection for the wounded and sick precisely because 'the balance between humanitarian considerations, on the one hand, and military necessity, on the other, is a hallmark of IHL'.[96] Well, if it is accepted that victims of rape in armed conflict are wounded as per the GCs, and that, as such, they are entitled to non-discriminatory access to the medical treatment their condition requires, the interpretation that the provision of abortion services falls within the medical treatment that states are obliged to provide is the only one that guarantees the effectiveness of the treaty's terms. Indeed, in the light of the purpose and the object of a treaty, the interpretation that allows the treaty to have an appropriate effect should always be privileged.[97]

3.2. The complementary protection offered by IHRL: Core obligations and the non-discriminatory principle

Under IHL, as we have seen, victims of rape in armed conflict can be considered wounded and sick within the meaning of the GCs and, as such, states parties to the conflict have an obligation to provide them with medical care that is appropriate for their condition, and that is non-discriminatory. This includes access to safe abortion services. At this point it is useful to broaden the scope of the analysis to IHRL – which complements the protection afforded by IHL – and, in particular, to the right to health. The human right to health

[94] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 427.

[95] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep 15, 23.

[96] ICRC (n 47) paras 30–32.

[97] ILC, 'Reports of the ILC on the Second Part of Its 17th Session and on its 18th Session' (1966) *Yearbook of the International Law Commission* 169, 219 para 6 ('When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted'). See also Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2015) 161 ff.

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is recognised in numerous international instruments,[98] including Article 12 of the ICESCR. It does not contain a public emergency clause. So, in principle, it is applicable in times of armed conflict – as confirmed by the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,[99] the UN High Commissioner for Human Rights,[100] the Committee on Economic, Social and Cultural Rights (CESCR),[101] the ICJ,[102] and many authors[103] – and is held by 'everyone' under the jurisdiction of states that have ratified the ICESCR.[104] However, it is worth mentioning that Article 4 contains a general limitation clause: states may impose restrictions on rights, but these restrictions must comply with the requirements specified in the provision.[105] In this context, the most relevant requirement is compatibility with 'the nature of the right' in question: limitations that infringe minimum core obligations are prohibited.[106]

[98] Universal Declaration of Human Rights, UNGA Res 217A(III) (10 December 1948), UN Doc A/810, art 25(1); International Convention on the Elimination of All Forms of Racial Discrimination (entered into force 4 January 1969) 660 UNTS 195, art 5(e)(iv); CEDAW Convention (n 44) art 11(1)(f), art 12; Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3, art 24.

[99] Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (9 August 2013), UN Doc A/68/297, para 13 ('As at other times, States have the obligation to respect, protect and fulfil the right to health in conflict. This includes situations where States occupy or otherwise exercise effective control over foreign territory, where the full spectrum of obligations under the right to health applies').

[100] UN High Commissioner for Human Rights, Protection of Economic, Social and Cultural Rights in Conflict (2015), UN Doc E/2015/59, paras 33–38.

[101] CESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12) (11 August 2000), UN Doc E/C.12/2000/4; and Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel (31 August 2001), UN Doc E/C.12/1/Add.69, para 12 ('The Committee reminds the State party that even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law').

[102] *Legal Consequences of the Construction of a Wall* (n 23) [106]–[111] ('More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict').

[103] See, eg, Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflicts' (2005) 87 *International Review of Red Cross* 737, 751; Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Review* 557, 594–97; Katherine HA Footer and Leonard S Rubenstein, 'A Human Rights Approach to Health Care in Conflict' (2013) 95 *International Review of the Red Cross* 167.

[104] ICESCR (n 43) art 12(1) ('The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health').

[105] ibid art 4 ('The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society').

[106] Lisa Forman and others, 'Conceptualizing Minimum Core Obligations under the Right to Health: How Should We Define and Implement the "Morality of the Depths"?' (2016) 20 *The International Journal of Human Rights* 531.

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The core rights and obligations doctrine dates back to the 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, in which it was proposed that states parties are 'obligated regardless of their level of economic development to ensure respect for minimum subsistence rights for all'.[107] This doctrine was further developed by Philip Alston, Rapporteur of the CESCR, according to which each right must give rise to an absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of its obligations.[108] Finally, in 1990, for the first time, the CESCR highlighted that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.[109] Conversely, the Covenant would lose its *raison d'être*. The Committee interpreted this set of obligations as implying immediate effect, immunity from the excuse of 'insufficient resources', not being retrogressive, and being directly applicable.[110]

Taking into consideration the Programme of Action of the International Conference on Population and Development[111] and the Alma-Ata Declaration,[112] the CESCR identified the minimum obligations concerning the right to health in its General Comment No 14. For this analysis, it is interesting to underline that these core obligations include 'the non-discriminatory access to essential primary health care facilities, goods and services, especially for vulnerable or marginalised groups and the guarantee of reproductive, maternal (prenatal as well as post-natal) and child health care',[113] which is considered an obligation of comparable priority.

Essential primary health care must also include family planning and comprehensive abortion care if it is to be considered effective in protecting maternal and reproductive health, as the CESCR specified. Indeed, in 2016, in its General Comment No 22 on the right to sexual and reproductive health, the Committee returned to the concept of core obligations, arguing that states should be guided by international human rights instruments and jurisprudence, international guidelines and protocols established by UN agencies.[114]

[107] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (2–6 June 1986), UN Doc E/CN.4/1987/17, para 25.

[108] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156.

[109] CESCR, General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant) (14 December 1990), UN Doc E/1991/23, para 10.

[110] De Vido (n 34) 189; Martin Scheinin, 'Core Rights and Obligations' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 527, 538.

[111] Report of the International Conference on Population and Development (5–13 September 1994), UN Doc A/CONF.171/13/Rev.1, Ch I, Resolution 1, Annex, Chs VII and VIII.

[112] World Health Organization (WHO), 'The Declaration of Alma-Ata: International Conference on Primary Health Care' (1978) WHO/EURO:1978-3938-4397-61471.

[113] General Comment No 14 (n 101) paras 43–44.

[114] CESCR, General Comment No 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2 May 2016), UN Doc E/C.12/GC/22, para 49.

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In the list of core obligations in this sector, points (a), (c) and (e) are particularly relevant. They are, respectively:

- the elimination of laws and practices that criminalise or obstruct a particular group's access to SRH services;
- the guarantee of universal and equitable access to affordable, acceptable and quality services; and
- the prevention of unsafe abortion and *the provision of abortion* and post-abortion care for those in need.[115]

Core obligations continue to exist in situations of conflict because they are non-derogable.[116] However, during an armed conflict there 'may be limits to a state's ability to fulfil all of these core obligations'.[117] As the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health has stated, 'in the absence of their own capacity, states should request assistance from other states, civil society and humanitarian organizations, especially to fulfil their core obligations'.[118] It follows that if access to abortion services for those in need constitutes a core obligation, in order for a state to be able to attribute its failure to provide such services to a lack of available resources, it must demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[119] In any event, states have an obligation not to prevent humanitarian organisations from providing essential medical care,[120] which includes abortion services in conflict situations.

Moreover, it is worth remembering that on several occasions both the CESCR and the CEDAW Committee have explicitly recognised that the rights to SRH are an integral part of the right to health protected by their respective Conventions and must be guaranteed by states in conflict situations.[121] For example, to prevent unsafe abortions, states are required to guarantee all individuals access to affordable, safe and effective contraceptives, liberalise restrictive abortion laws, and guarantee access by women and girls to *safe abortion services* and quality post-abortion care[122] in conflict situations.

[115] ibid.

[116] CESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights (10 May 2001), UN Doc E/C.12/2001/10, para 18; General Comment No 14 (n 101) para 47.

[117] Footer and Rubenstein (n 103) 184.

[118] Special Rapporteur (n 99) para 16 ('States should not obstruct humanitarian organizations and practitioners of traditional and community-based medicine from providing health-care services').

[119] See in this respect General Comment No 3 (n 109) para 10; CESCR, An Evaluation of the Obligation To Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant (10 May 2007), UN Doc. E/C.12/2007/1, para 6

[120] Special Rapporteur (n 99) para 16 ('States should not obstruct humanitarian organizations and practitioners of traditional and community-based medicine from providing health-care services').

[121] General Comment No 22 (n 114) para 1; CEDAW Committee, General Recommendation No 24: Article 12 of the Convention (Women and Health) (1999), UN Doc A/54/38/Rev.1, paras 1 and 16.

[122] General Comment No 22 (n 114) para 28 (emphasis added).

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Furthermore, it is interesting to note that the prohibition of adverse distinction on the basis of sex in IHL finds its counterpart in the principle of non-discrimination in IHRL. For the rights to SRH to be exercised in a non-discriminatory way, it is necessary that the needs of women, which are intrinsically different from those of men, are taken into consideration by providing appropriate services. Therefore, as the CEDAW Committee argued, it is discriminatory for a state to refuse to provide legally for the performance of certain reproductive health services that only women need.[123] Indeed, as reiterated in *LC v Peru*, states have the obligation under Article 12 'to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning'.[124]

Finally, in its General Recommendation No 30 on women in conflict situations, taking into account the differential impact of sexual violence on women's reproductive health, the CEDAW Committee urged states parties to ensure, at the minimum, access to 'sexual and reproductive health and rights information during conflicts; psychosocial support; family planning services, including emergency contraception; maternal health services, prevention of vertical transmission and emergency obstetric care; *safe abortion services* and *post-abortion care*'.[125] Indeed, the right of women to make free and non-coercive decisions regarding their own body and reproductive capacity risks being violated if complete and non-discriminatory health services are not provided and, therefore, if the termination of pregnancy is not allowed for victims of rape.

4. Denial of abortion as a violation of the obligation to treat humanely persons taking no active part in the hostilities

Another relevant provision that comes to the fore in relation to rape victims in armed conflict and which seems to confirm the obligation of the parties to provide safe abortion is the obligation to treat humanely persons who are taking no active part in the hostilities with which the prohibition of cruel treatment and torture is connected. For example, Common Article 3 of the GCs – which defines the minimum protection to be accorded in all conflicts, including those of a non-international nature – provides that '[p]ersons taking no active part in the hostilities … shall in all circumstances *be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'.[126] As Jean Pictet recognised, this

[123] CEDAW Committee, General Recommendation No 24 (n 121) para 11.

[124] CEDAW Committee, *LC v Peru* (17 October 2011), Communication No 22/2009, UN Doc CEDAW/C/50/D/22/2009, para 8.11; see Charlotte Bates, 'Abortion and a Right to Health in International Law: L.C. v Peru' (2013) 2 *Cambridge Journal of International and Comparative Law* 640, 646.

[125] CEDAW Committee, General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations (18 October 2013), UN Doc CEDAW/C/GC/30 para 52(c) (emphasis added).

[126] GC IV (n 72) art 3 (emphasis added).

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principle is the *leitmotiv* of the four GCs,[127] and is not merely a recommendation or a moral appeal but an obligation of the parties to the conflict.[128]

IHL does not define this notion, the meaning of which 'has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as his or her age, social, cultural, religious or political background and past experiences'.[129] The aim is the protection of inherent human dignity. So that no person receives treatment that is less than humane, it is necessary, therefore, to consider the specificities of men and women based on social, economic, cultural and political structures in society, the different ways in which armed conflict affects them, and their different needs following rape.

Furthermore, Article 3 lists a series of prohibitions that are merely specific examples of conduct that indisputably violates the absolute and without-exception obligation to treat humanely persons taking no active part in the hostilities. Among these, it is necessary to emphasise, for the purposes of the analysis, the prohibition of '(a) violence to life and person, in particular … cruel treatment and torture'. To be considered cruel, a treatment must produce severe suffering, which can be of a physical or psychological nature or result in a serious attack on human dignity upon a person taking no active part in the hostilities.[130] In the view of the ICTY, even the deprivation of adequate medical care can constitute this conduct.[131]

Therefore, a combined reading of the obligation to treat humanely persons taking no active part in the hostilities and the related prohibition of cruel treatment seems to mean that it is possible to assert that there is an obligation on all parties to the conflict to provide access to all medical care that is necessary for the reproductive health of rape victims in a non-discriminatory way.[132] Indeed, forcing a woman or, more often, a girl to carry a rape pregnancy to term appears to be in stark contrast to the obligation to treat civilians with humanity: the denial of safe abortion services is obviously a lack of adequate medical assistance which produces severe suffering.[133] It can certainly result in physical and mental pain. Indeed, denying access to safe abortion services after rape, especially in emergency and marginalised situations, increases the maternal mortality rate and often produces permanent physical

[127] Pictet (n 75) 204.

[128] ICRC, *Commentary on the Third Geneva Convention relative to the Treatment of Prisoners of War* (Cambridge University Press 2021) para 586.

[129] ibid para 587.

[130] See, eg, ICTY, *The Prosecutor v Blaškić*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000, paras 154–55.

[131] See ICTY, *The Prosecutor v Mrkšić*, Judgment, IT-95-13/1-T, Trial Chamber, 27 September 2007, para 517.

[132] Laguna Trujillo (n 8) 863.

[133] Denial of access to safe abortion services can amount to a violation of the prohibition of violence to life and person from another perspective. Indeed, this prohibition was to be understood as comprising omissions in certain circumstances. For example, as the ICRC observed, 'letting persons under one's responsibility … continue to suffer from wounds by failing to provide medical care, while having the possibility to do so, is irreconcilable with the requirement of human treatment': ICRC (n 128) para 629.

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injuries.[134] Moreover, the lack of availability of this option is frequently detrimental to women's mental well-being and aggravates the social injuries in terms of stigmatisation faced by rape victims in armed conflict. It is a further form of re-victimisation of women and the infliction of trauma, which can constitute cruel treatment.

Therefore, there is an urgent need to reinterpret this behaviour from a gender perspective that allows us to go beyond its classic androcentric understanding.[135] Some developments in the field of IHRL further strengthen this interpretation. Denial of access to safe abortion services for rape victims can encompass cruel, inhuman or degrading treatment (or even torture in some cases), according to the Committee against Torture (CAT) and the Human Rights Committee (HRC).

So, in *LMR v Argentina*[136] the HRC opined that the severe physical and psychological suffering resulting from the failure of the state to grant a girl access to a safe abortion following rape constituted a violation of Article 7 of the Covenant, which prohibits torture and cruel, inhuman or degrading treatment.[137] Similarly, in its Concluding Observations on Peru, for the first time the CAT Committee stated that restrictions on voluntary abortion, even in cases of rape, put women's physical and mental health at grave risk and constituted cruel and inhuman treatment.[138]

Ronli Sifris – who believes that restrictions on abortion could be qualified as torture under IHRL – points out that the requirement that severe pain or suffering be intentionally inflicted is generally satisfied because these consequences are largely foreseeable.[139] Finally, in its General Comment No 36 on the right to life, the HRC stated:[140]

[134] World Health Organization (WHO), *Abortion Care Guideline* (WHO 2022) xx.

[135] Anamika Misra, 'The Missing Human in Human Rights Law' (2019) 5 *Kent Student Law Review* 2, 3.

[136] *LMR v Argentina* (n 38) para 9; see also HRC, Views adopted by the Committee under Article 5(4) of the Optional Protocol concerning Communication No. 2425/2014 (17 March 2017), UN Doc CCPR/C/119/D/2425/2014, para 7 (*Whelan v Ireland*).

[137] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 7 ('No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation').

[138] CAT Committee, Conclusions and Recommendations on Peru (25 July 2006), UN Doc CAT/C/PER/CO/4, para 23. See also CAT Committee, Conclusions and Recommendations on Chile (14 June 2004), UN Doc CAT/C/CR/32/5, para 6; CAT Committee, Concluding Observations on Nicaragua (10 June 2009), UN Doc CAT/C/NIC/CO/1, para 16; CAT Committee, Concluding Observations on Paraguay (14 December 2011), UN Doc CAT/C/PRY/CO/4-6, para 22; CAT Committee, Concluding Observations on the Second Periodic Report of Ireland (31 August 2017), UN Doc CAT/C/IRL/CO/2, paras 29–30; CAT Committee, Concluding Observations on the Seventh Periodic Report of Greece (3 September 2019), UN Doc CAT/C/GRC/CO/7, paras 24–25.

[139] Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights* (Routledge 2014) 264. Moreover, relating to intent, the CEDAW Committee has specified that the purpose and intent requirement of torture are satisfied when acts or omissions are gender-specific or perpetrated against a person on the basis of sex: CEDAW Committee, General Recommendation No 35 on Gender-based Violence against Women, Updating General Recommendation No 19 (26 July 2017), UN Doc CEDAW/C/GC/35, para 17.

[140] HRC, General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life (3 September 2019), UN Doc CCPR/C/GC/36, para 8 (emphasis added).

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> Restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardise their lives, subject them to *physical or mental pain or suffering which violates article 7*, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, *most notably where the pregnancy is the result of rape.*

This position was also reiterated in 2017 by the CEDAW Committee in its General Recommendation No 35. Indeed, it argued that the denial or the delay of safe abortion are forms of gender-based violence that may amount to torture or cruel, inhuman or degrading treatment, depending on the circumstances.[141] In this respect, a gender-sensitive approach is required to understand the level of pain and suffering experienced by women.[142] Consequently, states must ensure available, accessible, adequate and quality abortion services without discrimination, even in wartime, to comply with the obligation of human treatment, regardless of the content of national law.

5. State practice and UNSC practice

Some states – including Norway, France, the United Kingdom, the Netherlands[143] – have expressed a position similar to that advocated in this analysis in statements regarding the interpretation of Common Article 3 of the GCs. These official statements relating to the meaning of the treaties can be relevant in terms of interpretation.

For a subsequent practice to constitute a means of authentic interpretation, it is necessary to establish the agreement of all the parties to the treaty, as formulated in Article 31(3)(b) of the Vienna Convention.[144] The practice recalled here certainly does not fall within this category. However, as the ILC established in 2018, the subsequent practice of one or more parties may also be relevant as a subsidiary means of interpretation under Article 32.[145] Subsequent

[141] CEDAW Committee, General Recommendation No 35 (n 139) para 18.

[142] ibid 17.

[143] Written Parliamentary Questions and Answers from Frans Timmermans, Minister of Foreign Affairs, and Liliaane Ploumen, Minister of Foreign Trade and Development Aid, regarding questions from Parliament Member Sjoerdsma about safe abortion for raped women in war zones (8 April 2013), https://zoek.officielebekendmakingen.nl/ah-tk-20122013-2019.html ('We agree with the UK that it is a humanitarian law duty to provide medical care, including abortion of victims of rape, if and when there is a medical necessity for this regardless of national laws in countries' (author's translation)).

[144] VCLT (n 52) art 31(3)(b) ('There shall be taken into account, together with the context: b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation').

[145] ILC (n 57) Conclusion 4, 2 ('3 A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty after its conclusion'). In the same sense, ILC, *Yearbook of the ILC* 1964, vol II, UN Doc A/CN.4/168, 204, para 13 ('The practice of individual States in the application of a treaty, on the other hand,

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practice under Article 32 has been recognised and applied by international courts, including the ICJ,[146] as a means of interpretation to which 'recourse may be had' to 'confirm the meaning resulting from the application of Article 31'.[147] In this situation, the positions officially expressed by the above-mentioned states make it possible to confirm the interpretation resulting from the application of the criteria established by Article 31: denying abortion for rape victims can materialise as a violation of Common Article 3 of the GCs and the prohibition of inhumane treatment.[148] For example, the United Kingdom stated:[149]

> [I]n conflict situations where there is a direct conflict between national law and the fundamental obligation on parties to a conflict under Common Article 3 of the Geneva Conventions, the obligation is to comply with Common Article 3. The denial of abortion in a situation that is life threatening or causing unbearable suffering to a victim of armed conflict may therefore contravene Common Article 3. International humanitarian law principles may justify performing an abortion rather than extending what amounts to inhumane treatment in the form of an act of cruel treatment or torture. Therefore, an abortion may be offered despite being in breach of national law by Parties to the conflict or humanitarian organizations providing medical care and assistance.

A similar argument was used to criticise the Helms Amendment of 1973 to the Foreign Assistance Act of 1961, which prohibits US government funds from being used by NGOs for the 'performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions'.[150] In this way, the United States, one of the major donors of humanitarian aid, conditions funding for aid organisations to a 'no abortion clause', thus discriminatively limiting access to comprehensive medical care for female rape victims.[151] In 2011, the UN Human Rights Council Working Group on the Universal Periodic Review urged the US to 'remove blanket abortion restrictions on humanitarian aid' which violated Common Article 3.[152] It should be

may be taken into account only as one of the "further" means of interpretation mentioned in Article 70 [which became Article 32]').

[146] *Kasikili/Sedudu Island* (n 51) [55].

[147] See Stefan Kadelbach, 'The International Law Commission and Role of Subsequent Practice as a Means of Interpretation under Articles 31 and 32 VCLT' (2018) 46 *QIL, Zoom-in* 5, 6.

[148] It should also be remembered that frequency is not a necessary element for the 'subsequent practice' under Article 32: Robert Kolb, *Interprétation et création du droit international* (Bruylant 2006) 506–07.

[149] House of Lords (n 70) col 209; Department for International Development, 'The UK's Policy Position on Safe and Unsafe Abortion in Developing Countries', 2014, https://www.gov.uk/government/news/abortion-services-in-conflict-situations.

[150] Helms Amendment, H.R. 2506, Section 518–Prohibition on Funding for Abortions and Involuntary Sterilization (from Annual Foreign Operations Appropriations Act as amended).

[151] Rona and McGuire (n 93) para 54.

[152] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America (4 January 2011), UN Doc A/HRC/16/11, para 92.228.

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noted that, on 23 March 2023, the Abortion is Health Care Everywhere Act of 2023 Bill was introduced in Congress; if passed, this will repeal the Helms Amendment.[153]

The European Parliament and the European Commission have also aligned themselves with this position by supporting, on several occasions, the right of women victims of sexual violence to have access to the full range of SRH services, including safe abortions, in humanitarian crises. In fact, IHL ensures this right as part of necessary medical care and supersedes national or local laws in armed conflicts.[154]

Finally, the UNSC practice in the framework of the WPS Agenda must be examined, given the relevance that related resolutions could have as a mechanism to strengthen women's rights in war.[155] They fall into the category of the thematic – and, therefore, non-binding – resolutions of the Security Council and are based on the recognition of an explicit link between the protection of women's rights and the maintenance of international peace and security.[156] These resolutions are solidly grounded in international law, calling 'upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians'.[157] In this respect, they list (particularly in the preambles) the relevant instruments of IHL (the four GCs and the Additional Protocols thereto), refugee law and women's rights, in particular, the repeatedly mentioned CEDAW Convention. It seems that this set of resolutions 'recognizes relevant international humanitarian and human rights law as the standard of legality against which to assess

[153] Abortion is Health Care Everywhere Act of 2023, S.929-118th Congress (2023–2024), https://www.congress.gov/bill/118th-congress/senate-bill/929/text?s=1&r=2&q=%7B%22search%22%3A%5B%22helms%22%5D%7D. The openness registered by the current US President, who revoked the so-called Mexico City Policy in January 2021, should also be noted: Joseph Biden Jr., 'Memorandum on Protecting Women's Health at Home and Abroad', 28 January 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad. This government policy was instituted by President Reagan in 1984 and adopted or repealed by presidential administrations along party lines, with Republicans supporting the policy and Democrats opposing it. It prohibited non-governmental organisations (NGOs) from receiving US assistance from practising safe abortion services even if such activities were financed with non-US funds. See also Congressional Research Service, 'Abortion and Family Planning-related Provisions in U.S. Foreign Assistance Law and Policy', 15 July 2022, https://sgp.fas.org/crs/row/R41360.pdf.

[154] See, eg, European Parliament Resolution of 16 December 2015 on preparing for the World Humanitarian Summit: Challenges and Opportunities for Humanitarian Assistance [2017] OJ C 399/11, 106, para 21; ACP-EU Joint Parliamentary Assembly Resolution of 15 June 2016 on Rape and Violence against Women and Children in Armed Conflicts [2016] OJ C 451/03, paras G–H ('whereas international humanitarian law requires that abortion be treated as necessary medical care for girls and women impregnated by rape in war, which means that war rape victims have a right of access to abortion as part of necessary medical care … whereas international humanitarian law, including the Geneva Conventions and the additional protocols thereto, applies in times of conflict and supersedes national or local law').

[155] Sara E Davies and Jacqui True (eds), *The Oxford Handbook of Women, Peace, and Security* (Oxford University Press 2018).

[156] O'Rourke (n 19) 79–83.

[157] UNSC 1325 (n 19) para 9.

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the legality of actions taken by the parties to an armed conflict',[158] contributing to the development and crystallisation of international law. Precisely for this reason, it is interesting to see what place SRH rights – and, in particular, access to safe abortion services – have found within them.

To date, ten resolutions have been adopted, five of which focus specifically on the issue of sexual violence in conflicts.[159] In this regard, it is worth noting that if, on the one hand, they mark the international recognition of sexual harm inflicted on women during conflict, on the other hand, there is a complete lack of consideration for the conditions and inequalities that produce such harm in the first place.[160] Despite a general focus on sexual violence in conflict, the only resolutions that, for different reasons, have anything to do with women's reproductive rights are UNSC Resolutions 2122 (2013) and 2467 (2019).

The former has been hailed as a significant advance in the protection of women in conflict situations as it notes in its preamble 'the need for access to the *full range of sexual and reproductive health services*, including regarding pregnancies resulting from rape, without discrimination'.[161] In this provision, the influence of the previous Report of the UN Secretary-General on Women and Peace and Security was evident. Indeed, a few months earlier, Ban Ki-moon stressed the necessity to address 'all physical, mental and sexual and reproductive health consequences of violence against women, including through provision of emergency contraception and safe abortion'.[162]

For the first time, Resolution 2122 (2013) attempts to overcome the paternalistic approach that considers women exclusively as victims of abuse, as cultural objects or as bodies in the context of sexual violence and reproductive rights.[163] On the contrary, women victims of rape in armed conflict are represented as agents who are actively called upon to decide their own destiny and reproductive choices for themselves. However, it should be highlighted that this issue is mentioned in the preambular section of the resolution and not

[158] Rossana Deplano, *The Strategic Use of International Law by the United Nations Security Council: An Empirical Study* (Springer 2015) 42; For the legal status of UNSC resolutions see also Christine Chinkin, *Women, Peace and Security and International Law* (Cambridge University Press 2022) 38–71.

[159] UNSC Res 1820 (19 June 2008), UN Doc S/RES/1820; UNSC Res 1888 (30 September 2009), UN Doc S/RES/1888; UNSC Res 1960 (16 December 2010), UN Doc S/RES/1960; UNSC Res 2106 (24 June 2013), UN Doc S/RES/2106; UNSC Res 2467 (n 10).

[160] Fionnuala Ní Aoláin, 'The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016) 89.

[161] UNSC Res 2122 (18 October 2013), UN Doc S/RES/2122, Preamble (emphasis added). For completeness of reconstruction, it must be said that para 19 of Resolution 2106 (2013) also referred to sexual and reproductive health services ('Urges United Nations entities and donors to provide non-discriminatory and comprehensive health services, including *sexual and reproductive health*, psychosocial, legal, and livelihood support and other multi-sectoral services for survivors of sexual violence': UNSC Res 2106 (n 159) para 19 (emphasis added).

[162] Ban Ki-moon, UN Secretary-General, Report of the Secretary-General on Women and Peace and Security (4 September 2013), UN Doc S/2013/525, para 11.

[163] Debdatta Dobe, 'Resolution 2122: The "Aborted" Debate' (2015) 24(2) *Minnesota Journal of International Law* 175, 200.

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in the operational paragraphs, and that the resolution recognises access to the services and not the right.[164]

The adoption of UNSC Resolution 2467 (2019) was more controversial. The original draft was ambitious and was designed to focus on a 'survivor-centred approach' to preventing and responding to sexual violence in conflict. During the negotiation led by Germany, the most controversial issues were the establishment of a mechanism on sexual and reproductive health and on the rights of victims of sexual violence in conflict and, in general, the reference to SRH rights. Indeed, the initial draft noted, with concern, the funding shortfall for services to address conflict-related sexual and gender-based violence, including 'comprehensive sexual and reproductive health care such as access to *emergency contraception*, *safe termination of pregnancy* and HIV prevention and treatment, as well as reintegration support for survivors'.[165] This proposal was opposed, as could be expected, by the United States, China, and Russia. On the other hand, it was supported by France, Belgium, South Africa, the United Kingdom and Germany. Thus, also on this occasion, the traditional divisions on the issue were re-proposed.

Faced with the veto threat from the US, Germany tried to use a compromise formula that referred to the need to guarantee access to non-discriminatory and comprehensive health services, including SRH, for victims of sexual violence. However, because of American pressure, it was not sufficient that the language on sexual and reproductive health be diluted, and the final text ended up making no direct reference to SRH rights.[166] During the explanations of the vote, the intervention of South Africa was significant:[167]

> On the one hand, the text calls for a survivor-centred approach, while on the other hand it is denying survivors essential sexual and reproductive health services when they need them the most. The Council is therefore telling survivors of sexual violence in conflict that consensus is more important than their needs.

In fact, the Security Council continued to be silent on the crucial issue of SRH rights, without which women's rights remain in jeopardy and the most basic needs of the victims of sexual violence worldwide cannot be met.[168]

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[164] Aisling Swaine, 'Substantive New Normative Provisions on Women and Armed Conflict Concurrently Adopted by the United Nations Security Council and the CEDAW Committee', *ASIL Insights*, 18 February 2014, https://www.asil.org/insights/volume/18/issue/5/substantive-new-normative-provisions-women-and-armed-conflict.

[165] Security Council Report, 'In Hindsight: Negotiations on Resolution 2467 on Sexual Violence in Conflict', 2 May 2019, https://www.securitycouncilreport.org/whatsinblue/2019/05/in-hindsight-negotiations-on-resolution-2467-on-sexual-violence-in-conflict.php (emphasis added).

[166] Zarin Hamid and Sarah Werner, 'Security Council Open Debate: Sexual Violence in Conflict', 23 April 2019, http://www.peacewomen.org/security-council/security-council-open-debate-sexual-violence-conflict-april-2019.

[167] Security Council Report (n 165).

[168] Even after adoption of the resolution, the US representative, Mrs Craft, reiterated the American anti-abortion position by arguing: 'I must note that we cannot accept references to

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Eventually, as Sara De Vido pointed out, in this resolution 'it is not what is missing but rather what was *willingly* removed from the original draft to raise more than one concern'.[169] Moreover, the author underlined the relevance of the composition of the Security Council at that time. Indeed, the choice regarding the reproductive health of women in situations of conflict has been delegated to a body composed exclusively of men; a further example of how much the arena of international law, despite the efforts made, remains a 'masculine world'.[170] This resolution, by purposely excluding appropriate and necessary medical treatment for some women, effectively perpetuates language that further re-victimises female victims of conflict-related sexual violence and takes a step back in their protection. As Fionnuala Ní Aoláin recognised, Resolution 2467 (2019) represents 'a shameful parody of meaningful international response to the reality, harm, and needs of survivors of sexual violence. It parades a set of platitudes by states, absent a commitment to one of the most essential and practical needs of victims'.[171]

However, the position of other authors – in particular Christine Chinkin and Madeleine Rees – is different.[172] Indeed, they believe that the lack of an explicit reference to SRH services does not lead to an erosion of these rights for rape victims in the framework of the WPS Agenda. They have identified four reasons why Resolution 2467 (2019) would not compromise the right to access the full range of SRH services, including abortion services, without discrimination. The first of these is that the language of Resolution 2122 (2013) remains the agreed language on SRH rights and has not been replaced or removed. Secondly, the reference in the preamble to General Recommendation No 30 was emphasised. Indeed, in this document the CEDAW Committee (as we saw in Section 3.2) recognised the state obligation to guarantee access to SRH services, including safe abortion, in conflict situations. Further reassurance can be found in the Preamble, which reiterates:[173]

sexual and reproductive health or any references to safe termination of pregnancy or language that would promote abortion or suggest a right to abortion': UNSC, 8649th Meeting (29 October 2019), UN Doc S/PV.8649, 3.

169 De Vido (n 11) 9 (emphasis in original).

170 Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 613, 621.

171 Fionnuala Ní Aoláin, 'Gutting the Substance of a Security Council Resolution on Sexual Violence', *Just Security*, 24 April 2019, https://www.justsecurity.org/63750/gutting-the-substance-of-a-security-council-resolution-on-sexual-violence. See also Louise Allen and Laura Shepherd, 'In Pursuing a New Resolution on Sexual Violence Security Council Significantly Undermines Women's Reproductive Rights', *LSE Center for Women, Peace and Security*, 25 April 2019, https://blogs.lse.ac.uk/wps/2019/04/25/in-pursuing-a-new-resolution-on-sexual-violence-security-council-significantly-undermines-womens-reproductive-rights.

172 Christine Chinkin and Madeleine Rees, 'Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict', *Centre for Women, Peace and Security*, 2019, https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/09/report/commentary-on-security-council-resolution-2467/19_0496_WPS_Commentary_Report_online.pdf.

173 UNSC Res 2467 (n 10) Preamble.

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> the need for survivors of sexual violence to receive non-discriminatory access to services such as medical and psychosocial care to the fullest extent practicable and need to be free from torture and cruel, inhuman or degrading treatment, and that violations of the obligations on the treatment of victims can amount to serious violations of international law.

While it must be recognised that this was not the intention of some of the proponents of the text, non-discriminatory access to medical services for victims of rape necessarily includes – as demonstrated above – access to safe abortion services or emergency contraception. Similarly, the reference to the prohibition of torture or inhuman and degrading treatment seems to echo the jurisprudence of the UN bodies for which, in certain circumstances, denial of abortion can constitute a violation of this obligation.[174]

Finally, looking at the operative paragraphs, Paragraph 16 requires the adoption of a survivor-centred approach and that victims of sexual and gender-based violence – including particularly vulnerable groups – receive the care required by their specific needs and without discrimination. Moreover, the reference in Paragraph 18 to the situation of women 'who choose to become mothers' after a rape, for the authors, is an implicit acknowledgement that it is a personal choice and that 'other women choose legitimately not to give birth'.[175]

Therefore, it is possible to favour an interpretation of the text of the resolution, which includes access to safe abortion among the standards that states are obliged to guarantee, without discrimination, as specific treatment for victims of sexual violence.[176] However, at the same time, the disagreement during the negotiations and the expressed willingness to remove any reference to reproductive rights from the final text cannot be ignored. It is a further example of how women's rights, especially those relating to sexual and reproductive health, find it difficult to penetrate the language and activities of bodies with an intergovernmental and, often, patriarchal structure (like the UNSC).[177]

It will be relevant to see what future state practice will be. The ILC held that state practice can take many forms. It can include 'conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference'.[178] In this respect, there is one fact that allows us to look to the future with cautious optimism. Behaviour associated with the WPS resolution fits exactly within this categorisation and includes the conclusion of National Action Plans (NAPs).[179] They are an essential vehicle for the implementation of

[174] cf Section 4.

[175] Chinkin and Rees (n 172) 14–16.

[176] Rachele Marconi, 'Tutela dei diritti sessuali e riproduttivi nell'attuale conflitto in Ucraina: l'accesso all'interruzione di gravidanza' (2022) 16 *Diritti umani e diritto internazionale* 682, 688.

[177] De Vido (n 11) 11.

[178] ILC, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), UN Doc A/73/10, 133.

[179] Chinkin (n 158) 49–50.

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the WPS Agenda, showing how states prioritise the various agenda tasks and providing information on how the WPS activities are governed, funded, and monitored. Of the NAPs adopted so far, as many as 65 directly reference states' commitment to guarantee access to reproductive services in conflict situations and to promote SRH rights.[180] This is a relevant practice,[181] which can be considered widespread and representative: the reference to the SRH of victims of rape in armed conflicts is present in the documents drafted by 65 countries representing different geographical areas of both the global north and south.[182]

6. Final remarks

The gendered hierarchy that continues to permeate contemporary societies not only makes women more vulnerable to the consequences of conflict but also tends to inform the law – mostly IHL – that represents them in a partial and distorted way on the basis of their sexual and reproductive roles.[183] The male-centric organisation of social institutions and the pervasiveness of stereotypes of women as child bearers are reflected by the denial of abortion, even in the case of rape, in numerous states.[184] The consequences of these political choices can be devastating in conflict situations where women are highly exposed to sexual violence and are more vulnerable, given their traditional subordinate position in societies. If it is true that IHL appears to be largely

[180] The German NAP appears to be particularly attentive to this issue: The German Federal Government's Action Plan for the Women, Peace and Security Agenda 2021 to 2024, 29 ('All measures should follow an approach that focuses on survivors and concentrates on survivors' needs. Victims and survivors, whatever the context, must have access to needs-based legal, medical and psychosocial services and economic security, irrespective of their gender identity, sexual orientation and legal status. This includes full access to sexual and reproductive health and rights, including safe abortion and emergency contraception if necessary'). Surprisingly, the US also promoted access to sexual and reproductive health services in emergencies and humanitarian settings in its 2016 NAP.

[181] ILC, Draft Conclusions (n 178) 120, Conclusion 8.1 ('The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent').

[182] WPS NAPs: Europe – Albania (2018), Austria (2012), Belgium (2017), Bulgaria (2020), Cyprus (2021), Denmark (2020), Estonia (2020), Finland (2020), France (2021), Georgia (2018), Germany (2021), Ireland (2019), Italy (2020), Kosovo (2014), Luxembourg (2018), North Macedonia (2012), Norway (2019), Portugal (2019), Slovenia (2018), Sweden (2016), Switzerland (2018), The Netherlands (2021), Ukraine (2020), United Kingdom (2018); the Americas – Argentina (2015), Brazil (2017), Canada (2016), Chile (2015), El Salvador (2017), Mexico (2021), Peru (2021), US (2016); Africa: Burundi (2022), Central African Republic (2019), Côte d'Ivoire (2019), Gabon (2020), Kenya (2020), Liberia (2019), Namibia (2019), Niger (2020), Nigeria (2017), Malawi (2021), Mali (2019), Rwanda (2018), Senegal (2020), Sierra Leone (2019), South Africa (2020), South Sudan (2015), Sudan (2020), Tunisia (2018); Asia – Indonesia (2014), Japan (2019), Kyrgyzstan (2018), Lebanon (2020), Palestine (2020), Philippines (2017), Tajikistan (2014), Timor-Leste (2016), United Arab Emirates (2021), Yemen (2020); Oceania – Australia (2021), Solomon Islands (2017), New Zealand (2015).

[183] Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) 28–29.

[184] Carol Smart, 'The Woman of Legal Discourse' (1992) 1 *Social and Legal Studies* 29, 38.

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inadequate in responding to the specific needs of women in conflict, it is necessary to avoid the risk that international law becomes a triumph of form over substance, as argued by Christine Chinkin.[185]

On the contrary, it is crucial to harness the symbolic force of international law to reshape how women's lives are understood in the international context.[186] If there is still much to do regarding the understanding of the rights and specific needs of women in conflict situations, it is necessary to try to enhance, also from an interpretative point of view, the existing legislation to allow an improvement in conditions for women. For this reason, this article has proposed a reinterpretation of the existing rules through the incorporation of a gender perspective. If we look at IHL and IHRL through gender lenses, it can be concluded that denying access to abortion for rape victims in armed conflicts constitutes a violation that would not find justification.[187] As has been shown, it is a violation in two respects: (i) the obligation to provide adequate medical care for the wounded and sick in a non-discriminatory way, and (ii) the obligation to treat humanely persons taking no active part in the hostilities.

However, the analysis of UNSC thematic resolutions in the framework of the WPS Agenda has shown that there is still much to be done at the international level. As the NGO Working Group on Women's Peace and Security has warned, because of the current attacks on 'core principles of international humanitarian and human rights law, including as they apply to sexual and reproductive rights', the WPS 20th anniversary is not 'a cause for celebration, but a call to action that addresses the gendered impact of conflict and reaffirms the rights of all women and girls living in conflict-affected communities'.[188]

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[185] Christine Chinkin, 'Feminist Interventions into International Law' (1997) 19 *Adelaide Law Review* 13, 18.

[186] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 121.

[187] Priddy (n 84) 678, 682.

[188] Open Letter to Permanent Representatives to the UN: Recommendations on the Security Council Open Debate on Women, Peace and Security (WPS), 24 October 2019, https://www.womenpeacesecurity.org/resource/open-letter-unsc-wps-anniversary-october-2019.

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