

**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**

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1. *Introduction*

Gender-based violence against women (GBVAW) is no wartime exception. The 'continuum of violence' framework grasps 'the complexity of gender-based violence, its structural, socio-economic root causes and the links between gender-based violence in "war" and "peace"'.<sup>1</sup> Conflicts exacerbate, do not create *ex novo*, already existing patterns of discrimination rooted in societies. During, but also after, any kind of conflict, women and girls are constantly and disproportionately sexually, physically and psychologically abused, abducted and sold as 'chattel'.<sup>2</sup> The survivors face enormous difficulties to be reintegrated in their community of origin, are left without access to justice or reparation,<sup>3</sup> with no

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<sup>1</sup> There is a 'natural bias towards constructing and maintaining an artificial war/peace paradigm'. C Chinkin, J Neenan, 'International Law and the Continuum of Gender-based Violence' (2017) LSE Women, Peace and Security Working Paper Series <<https://blogs.lse.ac.uk/wps/2017/04/06/international-law-and-the-continuum-of-gbv/>>.

<sup>2</sup> This expression was used by the International Independent Commission of Inquiry for Syria with regard to the Yazidi women in the report of 2016 UN Doc A/HRC/32/CRP.2 para 54.

<sup>3</sup> See, in that sense, the contribution of women's tribunals to listen to the voices of unheard victims of violence during conflicts. Cfr G Simm, 'Peoples' Tribunals, Women's Courts and International Crimes of Sexual Violence' in A Byrnes, G Simm (eds) *Peoples' Tribunals and International Law* (CUP 2018) 61 ff; S De Vido, 'Women's Tribunals to Counter. Impunity and Forgetfulness: Why Are They Relevant for International Law?' (2017) 33 *Deportate, esuli, profughe* 145 ff.



or very limited access to reproductive health services. As it was argued, ‘while women and girls experience many of the same harms as men and boys in conflict and crisis, they also have sexual and reproductive health needs which are often unmet in, and exacerbated by, crisis situations’.<sup>4</sup> Data confirm that conflicts and crises affect women’s sexual and reproductive rights, increasing unsafe abortions and maternal mortality.<sup>5</sup> Despite the evident impact of war on women’s health and reproductive health, these rights, still today, after years of feminist groups’ struggles, encounter many obstacles in being included in binding legal instruments and/or resolutions of the UN Security Council (SC). Not only the words ‘sexual and reproductive rights’ are difficult to use but also the less strong expression ‘access to sexual and reproductive services’. Having this in mind, the purpose of this research is to analyse UN SC Resolution 2467 (2019)<sup>6</sup> and the subsequent Resolution 2493 (2019)<sup>7</sup> from an international feminist law perspective in light of the women’s right to reproductive health, twenty years after the adoption of UN SC Resolution 1325 (2000).<sup>8</sup> This article argues that international law might be the ultimate cause of violence against women’s health through resolutions adopted by a strictly inter-governmental ‘male’<sup>9</sup> body such as the UN SC that fails to appreciate the gender-based discrimination rooted in society – prior, during and after conflicts – and, by focusing on a notion of military rather than human<sup>10</sup> security, misses the opportunity to address the violation of women’s right to sexual and reproductive health. The article starts with the contextualisation of the two resolutions within the Women, Peace and Security (WPS) agenda, and will then delve into the negotiation and

<sup>4</sup> F Bloomer, C Pierson, S Estrada Claudio, *Reimagining Global Abortion Politics* (Bristol UP 2019) 80.

<sup>5</sup> F Bloomer, C Pierson, S Estrada Claudio (n 4) 81. See CEDAW, ‘General Recommendation No 30 on women in conflict prevention, conflict and post-conflict situations’ UN Doc CEDAW/C/GC/30 (1 November 2013) para 50.

<sup>6</sup> UN Doc S/RES/2467 (2019) adopted on 23 April 2019.

<sup>7</sup> UN Doc S/RES/2493 (2019) adopted on 29 October 2019.

<sup>8</sup> UN Doc S/RES/1325 (2000) adopted on 31 October 2000.

<sup>9</sup> C Enloe, *The Morning After: Sexual Politics at the End of the Cold War* (University of California Press 1993) 259. ‘Male’ is meant as social construction, not as biological attribute. See in that sense, H Wright, ‘Masculinities Perspectives: Advancing a Radical Women, Peace and Security Agenda?’ (2019) *International Feminist J of Politics* 11-12.

<sup>10</sup> ‘One that views peace, security, equality, human rights, and development as inter-related’ in the definition provided by C Bunch, ‘A Feminist Human Rights Lens’ (2004) 16 *Peace Rev* 29, 30.



voting procedures that led to their adoption. It will then stress how the texts of Resolutions 2467 (2019) and 2493 (2019) have been watered-down under political pressure of some of the permanent members of the UN SC and how access to sexual and reproductive health services was *willingly* excluded from the final text. This silence weighs more than the (though important) achievements of the two resolutions; it shows the perpetuation of discrimination against women and how provisions on health policies, with the declared aim to protect female victims/survivors of violence, reproduce the male structure of the UN SC (the militarisation and its composition, among others). The article eventually contends that the WPS Agenda, despite the weak outcomes within the UN SC, has at least spurred the action of other less 'militarised' UN bodies, which have directly or indirectly contributed to the recognition of the women's right to sexual and reproductive health, hence dismantling the patriarchal structure from within the system and using international law itself as instrument.

## 2. *Resolutions 2467 and 2493 (2019) in the framework of the UN WPS Agenda*

The two resolutions under analysis fall under the UN WPS agenda, which was inaugurated twenty years ago by UN SC Resolution 1325 (2000), and has been characterised by ten resolutions so far.<sup>11</sup> Following Resolution 1325 (2000), four of them have mainly focused on advancing the women's participation pillar – namely 1889 (2009), 2122 (2013), 2242 (2015), and 2493 (2019) – and five on conflict-related sexual violence (1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013), and 2467 (2019)). These resolutions belong to the category of thematic (non-binding) resolutions of the UN SC, such as the ones on civilians and armed conflicts,

<sup>11</sup> UN Doc S/RES/1820 (2008) adopted on 19 June 2008, UN Doc S/RES/1888 (2009) adopted on 30 September 2009, UN Doc S/RES/1889 (2009) adopted on 5 October 2009, UN Doc S/RES/1960 (2010) adopted on 16 December 2010, UN Doc S/RES/2106 (2013) adopted on 24 June 2013, UN Doc S/RES 2122 (2013) adopted on 18 October 2013, UN Doc S/RES/2242 (2015) adopted on 13 October 2015, UN Doc S/RES/2467 (2019) adopted on 23 April 2019.



children and armed conflicts, and on terrorism,<sup>12</sup> which represent ‘the discretionary powers of the SC, in the sense that as long as they contribute to the development of international law they generate a cascade effect whose repercussions equally affect acts of member states implementing SC resolutions and the SC alike’.<sup>13</sup>

<sup>12</sup> With regard to children, see, eg, BV Nylund, ‘From Standard-Setting to Implementation: The Security Council’s Thematic Focus on Children and Armed Conflict’ (2011) 5 Human Rights & International L Discourse 101; SM Field, ‘UN Security Council Resolutions Concerning Children Affected by Armed Conflict: In Whose “Best Interest”?’ (2013) 21 Intl J of Children’s Rights 127.

<sup>13</sup> R Deplano, *The Strategic Use of International Law by the United Nations Security Council* (Springer 2015) 49. The legal basis of this resolution has not been analysed in detail, the main argument being: it is not expressly under Chapter VII, hence it ‘comes implicitly under Chapter VI’ (C Chinkin, M Rees, ‘Commentary on Security Council Resolution 2467’ (2019) <[www.wilpf.org/un-security-council-resolution-2467-reasons-for-optimism/](http://www.wilpf.org/un-security-council-resolution-2467-reasons-for-optimism/)> 4. Other authors have confirmed that thematic resolutions fall under this latter chapter (CC True-Frost, ‘The Security Council and Norm Consumption (2007) 40 Intl L and Politics 115, 174: ‘non-Chapter VII human security’ thematic resolutions; and, though we do not agree on the legal argument referring to the binding nature of Resolution 1325 (2000), K Appiagyei-Atua, ‘United Nations Security Council Resolution 1325 on Women, Peace, and Security — Is it Binding?’ (2011) 18 Human Rights Brief 2 ff.). Nonetheless, Chapter VI is expressly devoted to the peaceful resolution of disputes between States and how the UN SC can play a role in settling them. It does not seem that locating the resolution within this chapter of the UN Charter is legally sound. If the WPS resolutions are not binding, one might argue what legal basis they have, if any, in the Charter. Despite thematic resolutions not being in the explicit mandate of the SC, an author argued that they ‘cannot be regarded as *ultra vires*’, since they aim at contributing to the ‘crystallization or development of international law’ and ‘the substantive law recalled in thematic resolutions – especially those on women, children and civilians – automatically becomes a formal limit to SC action’ (Deplano (n 13) 49. See also MI Papa, *I rapporti tra la Corte internazionale di giustizia e il Consiglio di sicurezza* (CEDAM 2006) 412, who considered thematic resolutions as legitimate though merely programmatic. An author argued that these resolutions represent ‘declarations’ of the UN SC, which identify standards to guide its activity in the field of security. He also contended that this ‘preventive action having normative character’ cannot fall under Chapter VII of the UN Charter, but constitutes ‘*de lege ferenda* an autonomous steering power of the SC’, aimed at representing ‘a limit (more of sociological rather than legal nature) to the activity of Member States and the Security Council alike’ (R Cadin, *I presupposti dell’azione del Consiglio di Sicurezza nell’articolo 39 della Carta delle Nazioni Unite* (Giuffrè 2008) 307). On the ‘borders’ between Chapter VI and VII of the Charter, see B Conforti, C Focarelli, *Le Nazioni Unite* (11th edn, Wolters Kluwer Cedam 2017) 251. The political nature of thematic resolutions is also confirmed by the CEDAW Committee itself, which in its General Recommendation No 30 defined the resolutions as a ‘crucial political frameworks’ (General Recommendation No 30 (n 5) 25). See also C O’Rourke, A Swaine,



Resolution 1325(2000) was advocated by women's associations, through the UN Development Fund for Women, and a group of States,<sup>14</sup> and was considered a major breakthrough from a classic State-oriented approach to a more human-oriented international law.<sup>15</sup> It is undeniable that it represented a significant development in bringing the reality of conflicts for women to the UN SC. On a positive side, the resolution promoted gender mainstreaming in all aspects of conflict prevention, management and resolution, and responded to 'some of the concerns about the Security Council's legitimacy raised earlier by feminists'.<sup>16</sup> For the first time, the UN SC 'formally recognize[d] women not merely as participants but also as *indispensable* participants in conflict resolution and peace negotiations, opening new opportunities for women's entry into these traditionally "male" spaces'.<sup>17</sup> On the negative side, however, the resolution has been invoked as 'feminist pretext' by 'Western powers [...] to present-day political realities, as they perceive them, of "new" wars, "failed states" and "terror"'.<sup>18</sup> The resolution was indeed used 'to wage war, not to prevent it'.<sup>19</sup> This fact contradicts the outcome of the Hague International Congress of Women of 1915, never mentioned in the preambles of UN SC WPS Agenda resolutions indeed, whose report

'CEDAW and the Security Council: Enhancing Women's Rights in Conflict' (2018) 67 ICLQ 167, 194.

<sup>14</sup> S Naraghi Anderlini, 'Civil Society is Leader in Adoption 1325 Resolution' in SE Davies, J True (eds) *The Oxford Handbook of Women, Peace, and Security* (OUP 2019) 38 ff., stressing the role played by civil society.

<sup>15</sup> C Chinkin, 'Adoption of 1325 Resolution', in SE Davies, J True (n 14) 26 ff. As early as 1992, Chinkin supported a gendered perspective to the international use of force, considering the 'invisibility' of women in this matter: C Chinkin, 'A Gendered Perspective to the International Use of Force' (1992) 12 Australian YB Intl L 279 ff.

<sup>16</sup> C Chinkin, 'Adoption' (n 15), and D Otto, 'The Security Council's Alliance of Gender Legitimacy: The Symbolic Capital of Resolution 1325' in H Charlesworth, J-M Coicaud (eds) *Fault Lines of International Legitimacy* (CUP 2019) 239, 258. According to Davies and True, WPS is a transformative agenda, which exemplifies the feminist pragmatist method, amplifying the voices of women in armed conflicts' ('WPS a Transformative Agenda' in SE Davies, J True (n 14) 3, 5).

<sup>17</sup> D Otto (n 16) 259. See also TL Tryggestad, 'Trick or Treat? The UN and Implementation of Security Council Resolution 1325 on Women, Peace, and Security' (2009) 15 Global Governance 539.

<sup>18</sup> D Otto, 'Beyond Stories of Victory and Danger: Resisting Feminism's Amenability to Serving Security Council Politics' in G Heathcote, D Otto (eds) *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave Macmillan 2014) 157, 161.

<sup>19</sup> F Ruby, 'Security Council Resolution 1325: A Tool for Conflict Prevention?' in G Heathcote, D Otto (n 18) 173 ff, 179 with specific regard to Iraq.



stressed, in a period in which the peaceful resolution of disputes had yet to be consolidated as international custom, the need for equal participation of women, peace, universal disarmament and prevention of the adverse effects of war on women.<sup>20</sup> UN SC Resolution 1325 only vaguely mentioned the equal participation of women in the preamble and not in the operative paragraph; it limited disarmament to the role of former combatants and shifted the focus from preventing war, which was at the core of feminist struggle, to ‘making war safer for women’. As Dianne Otto clearly posited, the ‘larger goal of making resort to armed force impossible has been lost in the panic about sexual violence and the focus of *jus in bello*’.<sup>21</sup> Furthermore, as Gina Heathcote stressed, the UN SC’s persistent ‘identification of women in post-conflict and transitional communities as sexually vulnerable, rather than as active community participants, fails to disrupt out-of-date understandings of post-conflict spaces, of gender and of sexuality’.<sup>22</sup> The focus on sexual violence in conflict, which is extremely important, perpetuates the idea of women in need of protection and leaves aside other forms of violence perpetrated before, during and after conflict: ‘for women conflict violence continues beyond the signing of a peace agreement’.<sup>23</sup> As it was argued, the WPS agenda considers military force ‘as a potential mechanism for halting widespread and systematic sexual violence’, and this despite the ‘history of feminist

<sup>20</sup> The report is available at <<https://archive.org/details/Internatcongrewwom00interich/page/n2/mode/2up>>.

<sup>21</sup> D Otto, ‘*Women, Peace and Security: A Critical Analysis of the Security Council’s Vision*’ (2016) LSE Centre for Women, Peace and Security Working Paper Series <<https://blogs.lse.ac.uk/wps/2017/01/09/women-peace-and-security-a-critical-analysis-of-the-security-councils-vision/>>. See also D Otto, ‘A Sign of ‘Weakness’? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325’ (2006) 13 *Michigan J of Gender and L* 113 ff.

<sup>22</sup> G Heathcote, ‘Robust Peacekeeping, Gender and the Protection of Civilians’, in H Charlesworth, J Farrall (eds) *Strengthening the Rule of Law through the UN Security Council* (Routledge 2016) 150, 157.

<sup>23</sup> F Ní Aoláin, N Valji, ‘Scholarly Debates and Contested Meanings of WPS’ in SE Davies and J True (n 14) 53 ff, 56. UN SC Resolution 1820 states that ‘civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group’. On the ‘oversimplification’ of sexual violence in ‘resolutions, as well as in the international criminal responses to sexual violence that the Security Council resolutions call for’ see K Engle, ‘The Grip of Sexual Violence: Reading UN Security Council Resolutions on Human Security’ in G Heathcote, D Otto (n 18) 23, 24.



scholarship highlighting the need for preventative strategies, the social and cultural causes of violence against women, and the role military force plays in perpetuating negative gender relations that create risks to women within communities'.<sup>24</sup>

3. *Resolutions 2467 and 2493 of 2019: Voting procedures and States' objections to the inclusion to sexual and reproductive health*

In UN SC Resolution 2467 (2019), it is not what is missing but rather what was *willingly* removed from the original draft to raise more than one concern. The draft presented by Germany was based on a survivor-centred approach, incorporating the language used by the CEDAW Committee's General Recommendation No 35.<sup>25</sup> The initial draft proposed a mechanism (eg a working group) on sexual violence in conflict and on sexual and reproductive health and on the rights of victims of sexual violence. It also expressed concern about the lack of funding 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'.<sup>26</sup> Both proposals were rejected, despite not being completely new, and having been proposed by the UN Secretary General (SG) in his

<sup>24</sup> G Heathcote, 'Feminist Perspectives on the Law on the Use of Force' in M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 114, 128. See also, for a more complete analysis, G Heathcote, *The Law on the Use of Force: A Feminist Analysis* (Routledge 2012). Even though it is not possible to develop this aspect here, the resolutions completely miss the connection between women-environment and conflicts. See, in that sense, K Yoshida, 'The Nature of Women, Peace and Security: Where is the Environment in WPS and where is WPS In Environmental Peacebuilding?' (2019) 22 LSE Women, Peace and Security Working Paper Series <<https://www.lse.ac.uk/women-peace-security/assets/documents/2020/WPS22Yoshida.pdf>>.

<sup>25</sup> See CEDAW, 'General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19' UN Doc CEDAW/C/GC/35 (26 July 2017). For the analysis of the Recommendation, see S De Vido 'The Prohibition of Violence Against Women as Customary International Law? Remarks on the General Recommendation No. 35 (CEDAW)' (2018) 12 *Diritti umani e diritto internazionale* 379 ff.

<sup>26</sup> See the debate available here <<https://www.whatsinblue.org/2019/05/in-hindsight-negotiations-on-resolution-2467-on-sexual-violence-in-conflict.php>>.



reports of 2019.<sup>27</sup> The details of the negotiations, the part ‘in blue’ that was the object of discussion until the voting time will not be thoroughly discussed here.<sup>28</sup> Let us only mention that three permanent members of the UN SC, namely the US, China and Russian Federation, strongly objected crucial aspects of the proposal, including the recognition of sexual and reproductive rights. The German proposal was harshly watered down to avoid the US veto. China and Russia eventually abstained after presenting an alternative draft. In terms of international politics, the negotiations tell us a lot. After the adoption of the resolution, Belgium, France, South Africa, Spain and the United Kingdom spoke about the relevance of sexual and reproductive health and the rights for survivors. The UN SC at the time of the adoption of Resolution 2467 (2019) was composed by 15 men and 0 women. Surely men can promote feminist purposes (the commitment by the German representative is significant),<sup>29</sup> but how can a body entirely composed of men decide about women and their reproductive functions? And how is it possible that women are the ones that participate as external members, part of civil society? Civil society is clearly fundamental, but the existence of a ‘men’s club’, to which women might (or not) be invited, perpetuates the public/private divide which has been gradually disrupted in the 90s as a consequence of the evolution and the affirmation of women’s rights as human rights, even though it persists in many environments.<sup>30</sup>

<sup>27</sup> See below, para 5.1.

<sup>28</sup> See the detailed report of the negotiations presented by WILPF <[www.peacewomen.org/security-council/security-council-open-debate-sexual-violence-conflict-april-2019](http://www.peacewomen.org/security-council/security-council-open-debate-sexual-violence-conflict-april-2019)>.

<sup>29</sup> Mr Maas (Germany) as president, Belgium Mr Kenes, China, Mr Ma Zhaoxu; Côte d’Ivoire Mr Ipo; Dominican Republic Mr Singer Weisinger; Equatorial Guinea Mr Nguema Ndong; France Mr Delattre; Indonesia Mr Syihab; Kuwait Mr Alotaibi; Peru Mr Meza-Cuadra; Poland Mr Radomski; Russian Federation Mr Nebenzia; South Africa Mr Nkosi; United Kingdom of Great Britain and Northern Ireland Lord Ahmad; United States of America Mr Cohen.

<sup>30</sup> On the public/private distinction, see, *inter alia*, C Pateman, ‘Critiques of the Public Private Dichotomy’ in SI Benn, GF Gaus (eds) *Public and Private in Social Life* (St Martin’s Press 1983) 281; B Meyersfeld, *Domestic Violence in International Law* (Hart 2010) 100; H Charlesworth, C Chinkin, S Wright, ‘Feminist Approaches to International Law’ (1991) 85 AJIL 613, 615; R Gavison, ‘Feminism and the Public/Private Distinction’ (1992) 45 Stanford L Rev 1 ff; C Romany, ‘State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’, in RJ Cook (ed), *Human Rights of Women. National and International Perspectives* (University of Pennsylvania Press 1994) 85; K Engle, ‘International Human Rights and Feminism:





The composition of the UN Security Council changed at the time of the adoption of Resolution 2493 (2019): it was composed of seven women out of fifteen<sup>31</sup>. Nonetheless, despite being unanimously adopted, the resolution still failed to include sexual and reproductive rights in its preamble and operative paragraphs. The text, drafted by Armenia, Australia, Canada, Denmark, Georgia, Indonesia, Ireland, Jordan, Liberia, Morocco, North Macedonia, Norway, Philippines, Portugal, Republic of Korea, San Marino, South Africa, Switzerland, Tunisia, Turkey, United Arab Emirates, and Uruguay, mainly focused on women's participation, highlighting the 'equality' in the participation. The adopted text mirrors the draft, without substantial changes appearing overnight. Nonetheless, during the discussions within the Council, the representatives of the States sitting at the UN SC were the ones who made the strongest affirmations. Karen Pierce (UK), for example, argued in favour of the need to include sexual and reproductive health services as a vital part of public services for women in all countries and to ensure that women can play a truly equal role in nation-building; Anne Gueguen (France) expressed regret that the resolution had omitted references to women's pivotal sexual and reproductive health and rights. It should be said, for the sake of completeness, that the woman representing the US, Kelly Craft, explicitly denied sexual and reproductive rights by saying that the United Nations should not put itself in a position in which it promotes the right to abortion and supported the military part of the resolution in terms of increasing number of women in peacekeeping operations.<sup>32</sup>

When Discourses Meet' (1991-2) 13 Michigan J Intl L 5, 17; D Sullivan, 'The Public/Private Distinction in International Human Rights Law', in J Peters, A Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 103; E Wicks, *The State and the Body* (Hart 2016) 16 ff.

<sup>31</sup> Mr Matjila/Mrs Pandor/Ms Mapisa-Nqakula, South Africa, as president; Mr Pecsteen de Buytswerve, Belgium; Mr Zhang Jun, China; Mr Moriko, Côte d'Ivoire; Mr Trullols Yabra, Dominican Republic; Mrs Mele Colifa, Equatorial Guinea; Mrs Gueguen/Mr De Rivière, France; Ms Müntefering, Germany; Mr Djani, Indonesia; Mr Alotaibi, Peru; Mr Duclos, Kuwait; Ms Wronecka, Poland; Mr Kuzmin, Russian Federation; Ms Pierce, United Kingdom of Great Britain and Northern Ireland; Mrs Craft, United States of America. See UN Doc S/PV.8649 (29 October 2019) with the minutes of the meeting and the declarations by the representatives of the States.

<sup>32</sup> UN Doc S/PV.8649 (n 31) 3. She declared that: 'we cannot accept references to sexual and reproductive health or any references to safe termination of pregnancy or language that would promote abortion or suggest a right to abortion. The United States has



If we compare WPS resolutions with other (always non-binding) thematic resolutions, it is striking to see how the debate for the adoption of ‘children and armed conflict’ or ‘civilians and armed conflicts’ resolutions has not been blocked by any of the five permanent members of the UN SC, which have proved to be very supportive of the (general) commitments included in the operative texts.<sup>33</sup> Hence, for example, with regard to the adoption of Resolution 2427 (2018), the US – not even party to the UN Convention on the Rights of the Child – declared that ‘we support the adoption of Resolution 2427 (2018), and we urge our colleagues to do more to save new generations from being lost to the pain and trauma of armed conflict’, and the Russian Federation endorsed ‘the comprehensive set of provisions whose implementation will strengthen cooperation in this area’.<sup>34</sup> Some representatives also mentioned the specific need to protect girls during armed conflict.<sup>35</sup> Great support was also granted to Resolution 2475 (2019), which specifically addressed the protection of persons with disability during armed conflict, and was adopted by unanimity.<sup>36</sup> In the resolutions on civilians and armed conflicts, it should be noted that women and children are mentioned together in an ‘undifferentiated “vulnerable group”’, where ‘women are represented as dependent and defenseless victims needing military protection rather than as equal partners in dispute resolution, which exposes the gender conservatism of the Security Council’s emerging social agenda’.<sup>37</sup> The affirmation of the subordinate and vulnerable position of women in armed conflicts has not raised much criticism within the UN SC.

stated clearly on many occasions, that we do not recognize abortion as a method of family planning nor do we support it in our women’s global assistance initiatives’.

<sup>33</sup> A comparison between the children and armed conflict resolutions, and the WPS agenda resolutions, in the sense that the former have developed a stronger institutional framework since its inception, in K Lee-Koo, ‘WPS, Children, and Armed Conflict’ in *The Oxford Handbook* (n 14) 611.

<sup>34</sup> UN Doc S/PV.8305 (9 July 2018) 18. In one case only, responding to Ukraine that denounced the violation of Ukrainian children’s rights by ‘Russian-backed terrorists’, the Russian Federation asserted its authority and shifted the focus to the abduction of children by the Islamic State.

<sup>35</sup> For example, Mr Delattre for France.

<sup>36</sup> And this despite the US not being party to the UN Convention on the rights of the persons with disability.

<sup>37</sup> D Otto (n 16) 254.



#### 4. *What Resolutions 2467(2019) and 2493(2019) achieved*

Despite the interesting and fascinating language of diplomacy and negotiations, the article delves into *what is* in the resolution and the legal implications of the *absence* of the rights to sexual and reproductive health therein. Resolution 2467 (2019) reiterates how women and girls disproportionately experience human rights violations in conflict and post-conflict settings and are underrepresented in many formal processes and bodies in the maintenance of peace and security. It stresses gender equality, women's empowerment and the primary responsibility of States for the respect of human rights of the persons within their jurisdiction. It is worth mentioning the reference to the 'continuum of violence' in the preamble, even though this affirmation does not seem to have practical consequences in the operative paragraphs of the text, in terms of consideration, for example, of women's experiences that 'have varied greatly depending upon such factors as national identity, race, age, class, economic circumstances, urban or rural location, family situation, age, employment and health'.<sup>38</sup> The resolution also recognises the need for a survivors-centred approach, the non-discriminatory access to medical and psychosocial care, and the need to be free from torture and cruel, inhuman or degrading treatment or punishment. The latter reference recalls – though only indirectly and probably not in the intention of some of the States participating in the adoption of the resolution – the quasi-jurisprudence of UN treaty bodies and the jurisprudence of regional human rights courts, which concluded how lack of access to some health services, rape and domestic violence amount to a violation of this fundamental non-derogable right.<sup>39</sup> The UN SC then recalls 'with grave concern that the illicit transfer, destabilizing accumulation and misuse of small arms and

<sup>38</sup> C Chinkin, H Charlesworth, *The Boundaries of International Law* (Manchester UP 2000) 251-252. The intersectional impact of armed conflicts on women's lives has been constantly neglected. It will not be addressed here, though it is clear that the access to reproductive services is affected by intersecting systems of oppression on women.

<sup>39</sup> See, in that respect, among others, *Amanda Jane Mellet v Ireland* CCPR/C/116/D/2324/2013 (Human Rights Committee, 2016); *Karen Noelia Llantoy Huamán v Peru* CCPR/C/85/D/1153/2003 (Human Rights Committee, 2005); *Alyne da Silva Pimentel Teixeira (deceased) v Brazil* CEDAW/C/49/D/17/2008 (CEDAW Committee, 2011); *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009); *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017); *Linda Loaiza López Soto and relatives v Venezuela* (Inter-American Court of Human Rights, 26 September 2018).



light weapons fuel armed conflict', and the 'risk of conventional arms or items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children', without however deploring the use of weapons *per se* and without encouraging a general disarmament at the international level. Moving to the operative paragraphs, starting from the pillar *Prevention*, Resolution 2467 (2019) reiterates the demand for the cessation of all acts of sexual violence to the parties to the conflict and the issuance of codes of conduct prohibiting sexual violence (para 1). A preventive function is also played by the application of targeted sanctions against the perpetrators of sexual violence in conflict<sup>40</sup>, whose designation falls under the mandate of the UN existing Sanctions Committees, which are urged to include experts on gender issues among their members (paras 10-11). It further recommends that prevention of sexual violence in conflict and post-conflict situations should be integrated in peace missions (para 13) and in peace agreements (para 30). Violence can be prevented through a specific training, as envisaged in para 24 of the resolution, of troop- and police-contributing contingents and through the exclusion from peacekeeping operations of State actors that are repeatedly listed in the annexes of the UN SG' reports on sexual violence in conflict and children and armed conflict (para 25).<sup>41</sup> Despite the important achievements in terms of prevention, the resolution does not fill the gap between the sexual exploitation and abuse (SEA) policy and the WPS framework within the UN. It does not either mention the 'zero tolerance policy'<sup>42</sup> inaugurated by the UN SG after

<sup>40</sup> See, in that respect, the analysis by S Huvé, 'The Use of UN Sanctions to Address Conflict-Related Sexual Violence' (2018) Georgetown Institute for Women, Peace and Security available at <<https://giwps.georgetown.edu/wp-content/uploads/2018/03/Use-of-UN-Sanctions-to-Address-Conflict-related-Sexual-Violence.pdf>>.

<sup>41</sup> See for example the 2020 Report of the Secretary-General 'Conflict-Related Sexual Violence' UN Doc S/2020/487 (3 June 2020) 27 ff with a list of 'parties credibly suspected of committing or being responsible for patterns of rape or other forms of sexual violence in situations of armed conflict on the agenda of the Security Council'.

<sup>42</sup> Awareness of sexual abuses by peacekeepers arose in the Nineties. The UN SG issued a bulletin establishing a 'zero-tolerance' policy in 2003 (UN SG, 'Special measures for protection from sexual exploitation and sexual abuse' UN Doc ST/SGB/2003/13 (9 October 2003)). However, the number of cases of sexual violence has not decreased. One might ask the reason why peacekeepers commit sexual violence, contradicting their mission. One explanation 'revolves around gendered power dynamics and masculinity' (J-K Westendorf, 'WPS and SEA in Peacekeeping Operations', in SE Davies, J True (n 14) 222, 224). On the activity of the UN and SEA, see, *inter alia*, G Heathcote (n 22) 150 ff;



having received reports of sexual violence committed by peacekeepers during field missions or refer to the pivotal SEA Resolution 2272 (2016)<sup>43</sup> in the preamble. According to Westendorf, SEA in UN peace operations, which has been important to call for States to take greater responsibility for preventing and ensuring accountability for sexual violence, is dealt at UN level as an individualised conduct and discipline issue, without thoroughly addressing the underlying 'structural gender inequalities that shape the choice made by the perpetrators (and, sometimes, victims)'.<sup>44</sup> Connecting SEA policy to WPS agenda would 'address these tensions, by situating it within the WPS's agenda concern for gender, power, and protection issues'.<sup>45</sup> Lastly, Resolution 2467 (2019) encourages Member States to include 'gender analysis and training into national disarmament' (para 27).

*Protection* entails access to justice for survivors of violence, effective remedies, and procedures that must be aimed at avoiding secondary victimisation. These aspects are included in operative paragraphs 14, 15 and 17, even though the words 'secondary victimisation' or 're-victimisation' have not been used ('removing [...] corroboration requirements that discriminate against victims as witnesses and complainants, exclusion or discrediting of victims' testimony by law enforcement procedure'). All Member States are called upon by the UN SC to ensure the care required by the survivors' needs without any discrimination. The resolution notes

D Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies' in V Munro, C Stychin (eds) *Sexuality and the Law* (Routledge 2007) 259 ff; S Whitworth, *Men, Militarism, and UN Peacekeeping: A Gendered Analysis* (Lynne Rienner 2004); O Simić, *Regulation of Sexual Conduct in UN Peacekeeping Operations* (Springer 2012). On issues of responsibility, see R Burke, 'Shaming the State: Sexual Offences by UN Military Peacekeepers and the Rhetoric of Zero Tolerance' in Heathcote, Otto (n 18) 70, 72; M Buscemi, *Illeciti delle Nazioni Unite e tutela dell'individuo* (Editoriale Scientifica 2020) 278 ff. On the normative model of peacekeeping operations, see M Frulli, *Le operazioni di peacekeeping delle Nazioni Unite: continuità di un modello normativo* (Editoriale Scientifica 2012).

<sup>43</sup> UN Doc S/RES/2272 (2016) adopted by the Security Council at its 7643rd meeting, on 11 March 2016. This resolution, in turn, does not refer to the WPS agenda in the preamble. A comment in V Zambrano, 'La Risoluzione 2272 (2016) e la lotta ai casi di sfruttamento e abuso sessuale perpetrati dai peacekeepers: il Consiglio di Sicurezza avalla il potere di rimpatrio del Segretario Generale' (2016) *Ordine internazionale e diritti umani* 380 ff.

<sup>44</sup> J-K Westendorf (n 42) 229-230.

<sup>45</sup> J-K Westendorf (n 42) 231.



the link between sexual violence and HIV infection, and it also encourages the reintegration of survivors within their community of origin (para 16). It recognises the specific needs of women and girls who become pregnant as a result of sexual violence in armed conflicts. Protection is also extended to women formerly associated with armed groups and ex-combatants, in terms of reintegration and access to trauma services (para 27). The emphasis put on violence as tactic used by some parties to the conflict, including terrorist groups, is interesting, though it overshadows the pervasiveness of the use of violence as tactic of war in any kind of armed conflict wherever and whenever occurred, by whomever committed. The resolution then points out that women should have ‘access to national relief and reparations programmes, as well as health care, psychosocial care, safe shelter, livelihood support and legal aid’; for the first time, it recognises the needs of children born as a result of sexual violence in conflict and also acknowledges violence committed against men and boys (para 28). The recognition of the gender specific nature of sexual violence in armed conflict is landmark, but, by referring to the male and female sexes only, the resolution eludes all the abuses perpetrated against LGBTQAI people. Protection for the survivors of sexual violence in conflict is also granted thanks to the acknowledgment, in a UN SC resolution, of GBVAW as a form of persecution for the purpose of recognising refugee status (para 31). This provision is in line with the most recent legal instrument aimed at countering violence against women, including the Council of Europe Istanbul Convention (Article 60).<sup>46</sup>

With regard to *Repression*, States are encouraged to improve their criminal legislation to be able to prosecute sexual violence in conflict and post-conflict situations (para 3 and para 14). The guarantees for the survivors are numerous, including witness protection law, legal aid, specialised police forces and courts. The response to and the elimination of sexual violence in conflict and post-conflict situations must be integrated in peace missions (para 13). *Repression* also entails prosecution at the international level, through the International Criminal Court, which included sexual and gender-related crimes among the most serious offences under

<sup>46</sup> On the Istanbul Convention, see S De Vido, *Donne, violenza e diritto internazionale* (Mimesis 2016); and J Niemi, L Peroni, V Stoyanova (eds) *International Law and Violence against Women: Europe and the Istanbul Convention* (Routledge 2020).



its mandate.<sup>47</sup> Nonetheless, its role has been merely 'acknowledged' by the SC (para 15), word that was chosen as a consequence of the opposition expressed by some countries (the permanent members which have not ratified the Statute) during negotiations.

*Participation* includes the recognition of the work of women's rights bodies, such as the *Informal Expert Group on Women* and UN Women (para 4). Member States are encouraged to ensure the participation of survivors of violence at all stages of transitional justice processes (para 16 d). The recognition of the role of civil society is significant in the resolution, which acknowledges the importance of supporting women-led organisations (paras 19-21). Though not directly, operative para 21 seems to refer to the violation of women's rights' defenders: States are invited to 'condemn acts of discrimination, harassment and violence against civil society'. Participation is also meant as participation in UN peacekeeping operations, where the direct access of women to senior leadership should be ensured (para 22), and as participation in UN missions, including, among others, election preparation and political processes, disarmament, demobilisation and reintegration programmes (para 23). States are also encouraged to promote equal opportunities of women in national police service positions (para 26): the emphasis put on the equality of opportunities is important because it goes beyond a mere increase in the participation of women in security matters.

Monitoring is a key part of the resolution, the SG being vested with this mandate and with the competence to adopt recommendations, and UN mandating bodies being encouraged to establish commissions of inquiry or independent investigative entities (paras 6-8). The UN SC also encourages the efforts to strengthen the monitoring of sexual violence in armed conflict and post-conflict situations, which should be integrated by an efficient gathering of data (para 9). The gathering and analysis of data on GBVAW have been promoted by several UN bodies, including the UN Special Rapporteur on Violence against Women, its Causes and Consequences.<sup>48</sup> Several actors are involved in the implementation of the resolution: the UN and its bodies – in particular the UN SG – and agencies, civil society, regional and sub-regional organisations.

<sup>47</sup> Elements of Crimes, arts 7(1)(g) 1 to 6; 8(2)(b)(xxii) 1 to 6; 8(2)(e)(vi) 1 to 6.

<sup>48</sup> See, for example, her report to the General Assembly UN Doc A/71/398 (23 September 2016).



Compared to the long and detailed Resolution 2467 (2019), Resolution 2493 (2019), which was adopted some months later, is only four pages long in its English version. In the preamble, it recalls how Resolution 1325 (2000) has encountered several obstacles to its full implementation, and the importance of the 20<sup>th</sup> anniversary of the latter to call on Member States to ‘commit to the promotion of women and girls’ empowerment in peace and security processes’. Resolution 2493 also acknowledges the ‘lack of adequate gender-sensitive humanitarian responses and support for women’s leadership roles in these settings [...] and the resulting detrimental impact on the maintenance of international peace and security’. As anticipated, the resolution focuses on women’s ‘equal and meaningful participation’, which is more progressive than the mere ‘increasing participation’ enshrined in Resolution 1325(2000). Two aspects are striking. First, operative para 5 refers to ‘all the rights of women, including civil, political and economic rights’. The UN has always strongly supported the indivisibility of human rights, so what is the point in stressing ‘including’? Including does not technically exclude the other rights, but the emphasis clearly demonstrates the purpose of not referring, not even indirectly, to social rights, such as sexual and reproductive rights, or to cultural rights. Secondly, with regard to human rights defenders (‘those who protect and promote human rights’), States are encouraged ‘to address threats, harassment, violence and hate speech against them’. This can be considered a positive aspect of the resolution, even though the UN SC, as pointed out by the representatives of the UK, Belgium and France, did not go thus far as to recommend ‘how’ to address the issue.

5. *A silence that weighs heavy: the absence of sexual and reproductive rights of women in the text of the resolutions as a form of violence*

Despite the important achievements of the Resolutions, which however include the ritualistic repetition of sentences and vague commitments included in previous texts<sup>49</sup>, what strikes the most is the absence of sexual and reproductive rights – or at least the access – in both the

<sup>49</sup> See, with specific regard to the Universal Periodic Review, H Charlesworth, E Larking (eds) *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014).





preamble and the operative paragraphs of both resolutions but most importantly of Resolution 2467 (2019). This article argues that this silence 'weighs heavy' because it reproduces a system in which women are seen, despite the survivors-centred language, as victims in need of protection and prevents the recognition of their agency through reproductive autonomy. The equal participation that is encouraged is a ritual façade without conceiving it also as a way to acknowledge the role of women in the affirmation of their sexual and reproductive rights and autonomy. It also marks a backlash in the recognition of these rights (or better the access to services aimed at realising these rights), given that Resolution 2122 (2013) of the UN SC contained the following paragraph:

'The importance of Member States and United Nations entities seeking to ensure humanitarian aid and funding includes provision for the full range of medical, legal, psychosocial and livelihood services to women affected by armed conflict and post-conflict situations, and noting the need for access to the *full range of sexual and reproductive health services*, including regarding pregnancies resulting from rape, without discrimination'.

Surely this affirmation did not recognise the right, merely the access – and this makes a difference in terms of justiciability – but the reference to pregnancies resulting from rape paved the way for acknowledging access to emergency contraception, maternal health services and safe abortions. With regard to Resolution 2467 (2019) (and similar consideration can be extended *mutatis mutandis* to Resolution 2493 (2019)), Chinkin and Reef contended that access to reproductive services has not been compromised.<sup>50</sup> First, they contend that the previous SC Resolutions 2106 and 2122 (2013) have not been replaced, and that there is a clear human rights language (stemming from the CEDAW Committee's work most significantly) on the right to access on sexual and reproductive health services; that CEDAW Committee General Recommendation No 30 and the Framework of Cooperation between the CEDAW Committee and the Special Representative of the SG on Sexual Violence in Armed Conflict acknowledge access to reproductive services; that the reference in the preamble to 'violations of the obligations on the treatment of

<sup>50</sup> C Chinkin, M Rees (n 13) 15.



victims [which] can amount to serious violations of international law' means that States 'have responsibility to ensure appropriate care' as emerged in the language of human rights courts and UN treaty bodies; and that the reference in the operative paragraphs to non-discrimination and to 'those who choose to become a mother' must be welcomed.<sup>51</sup> However, this argument is supported by mainly referring to non-binding acts – except for the CEDAW, which has not been ratified precisely by the US that watered down the resolution, and to the binding judgments of the European Court of Human Rights, which in limited cases applied Article 3 of the European Convention on Human Rights to cases of lack of access to abortion services.<sup>52</sup> The debates that preceded the adoption tell us that the recognition of the right to access to reproductive services was highly debated, and it was *willingly* excluded from the final text. If, in the most severe circumstances, the violation of the right to access to reproductive services amounts to torture, inhuman or degrading treatment, that is not always the case. As it was argued, 'rehabilitation means making medical and psychological care completely available to survivors, and it is impossible to conceive of medical care without the inclusion of reproductive health services', which are not 'limited to abortion services for women who have experienced sexual violence'.<sup>53</sup> This article agrees in particular with Ní Aoláin, where she states:

'In a decisive setback to ensure adequate responses to victims of sexual violence, the Security Council passed Resolution 2467 yesterday by avoiding any direct references to the reproductive health of victims. The resolution is 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.'<sup>54</sup>

<sup>51</sup> C Chinkin, M Rees (n 13) 15-16.

<sup>52</sup> See, in that sense, *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012).

<sup>53</sup> F Ní Aoláin, 'Gutting the Substance of a Security Council Resolution on Sexual Violence' (2019) Just Security available at <[www.justsecurity.org/63750/gutting-the-substance-of-a-security-council-resolution-on-sexual-violence/](http://www.justsecurity.org/63750/gutting-the-substance-of-a-security-council-resolution-on-sexual-violence/)>.

<sup>54</sup> *ibid.*



The following subparagraphs will explain how, despite the slow affirmation of women's right to sexual and reproductive health,<sup>55</sup> this right has entered the activity of independent UN bodies, which are devoid of the intergovernmental character of the UN SC (5.1). They will eventually propose the argument of how laws and policies in the field of health can cause violence, in this case the law – *rectius*, the silences of the law – of the UN SC (5.2).

5.1. *The right to reproductive health in armed conflicts as acknowledged in the activities of UN bodies*

Conflict-related sexual violence has always been a common feature of conflicts.<sup>56</sup> Sexual violence means, among others, rape, forced prostitution, sexual slavery, forced impregnation, forced marriage, female genital mutilation, and deliberate infection with HIV/AIDS and other sexually transmitted infections or diseases. In case of an unwanted pregnancy deriving from a rape, the free access to medical services, such as emergency contraception, termination of pregnancy, and obstetric health care, is hence fundamental. Access to reproductive health also includes maternal health, the right to fistula operations and the right to ongoing monitoring and choice in reproductive regulation.<sup>57</sup> It is a matter of women's sexual and reproductive autonomy, also of the woman's rights to life and physical and psychological integrity, considering the high rates of maternal mortality and morbidity in conflict zones. Alice Priddy argued that 'any policy that denies access to emergency contraception and termination services, thereby failing to take into account the often inevitable consequences of the rape of females, is prohibited under international law as it equates to discrimination on the grounds of gender, and amounts to cruel, inhuman, or degrading treatment where this forces a

<sup>55</sup> See in that respect, R Cook, *Women's Health and Human Rights* (WHO 1994) 5; A Hendriks, 'Promotion and Protection of Women's Right to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women's Convention Conference on the Interventional Protection of Reproductive Rights: The Right to Health' (1995) 44 *American U L Rev* 1127; E Nelson, *Law, Policy, and Reproductive Autonomy* (Hart 2013) 66.

<sup>56</sup> See S De Vido, 'Collective Memory of Rape: An Analysis from an International Law Perspective' (2016) 43 *Sociologia del diritto* 101 ff and bibliography therein.

<sup>57</sup> F Ní Aoláin (n 53).



female to either undergo a dangerous illegal termination or carry an unwanted pregnancy'.<sup>58</sup> According to the paradigm developed in the book on *Violence Against Women's Health*, laws and policies in the field of health care can cause or contribute to cause gender-based violence, constitute violations of human rights, and impair women's autonomy conceptualised according to a human rights-based approach.<sup>59</sup> Women are entitled of the same rights as the 'wounded and sick' in armed conflicts according to the Geneva Conventions, and where the lack of access to health care services disproportionately affects one gender, this causes a discrimination on the basis of gender which is prohibited by international humanitarian law and customary international law.<sup>60</sup>

Access to reproductive health services in conflict and post-conflict settings has widely entered the language of UN bodies (except, as I anticipated, the UN SC). In this sense, the 'operationalisation' of the WPS agenda falls to 'highly specific agencies and departments'.<sup>61</sup> The CEDAW Committee, in its General Recommendation No 30, recommended that States ensure that sexual and reproductive health care includes:

'access to sexual and reproductive health and rights information; psychosocial support; family planning services, including emergency contraception; maternal health services, including antenatal care, skilled delivery services, prevention of vertical transmission and emergency obstetric care; safe abortion services; post-abortion care; prevention and treatment of HIV/AIDS and other sexually transmitted infections, including post-exposure prophylaxis; and care to treat injuries such as fistula arising from sexual violence, complications of delivery or other reproductive health complications, among others.'<sup>62</sup>

<sup>58</sup> A Priddy, 'Tackling Impunity for Sexual Violence' in A Bellal (ed) *The War Report – Armed Conflicts in 2014* (OUP 2015) 678 ff, 681-682.

<sup>59</sup> S De Vido, *Violence against Women's Health in International Law* (Manchester UP 2020) available at <[www.manchesteropenhive.com/view/9781526124982/9781526124982.xml?rskey=zvLU3l&result=1](http://www.manchesteropenhive.com/view/9781526124982/9781526124982.xml?rskey=zvLU3l&result=1)>.

<sup>60</sup> A Priddy (n 58) 683 also stresses how gender-based violence against men and boys is often a taboo, despite having the same gendered nature: in a society where masculinity is important to have a role, rape can lead to stigma, criminal prosecution under anti-sodomy laws and lack or inaccessible services (which are tailored in the case of reproductive health on women).

<sup>61</sup> F Ní Aoláin, N Valji (n 23) 61.

<sup>62</sup> General Recommendation No 30 (n 5) para 52(c). On the WPS agenda's engagement with women's human rights, in view of GR No 30, see L Peroni, 'Recommendation No 30 and the WPS Agenda' in this Zoom-in.



According to the 2019 report of the UN SG on the WPS agenda, 'over 50 parties to conflict are credibly suspected of having committed or instigated patterns of rape and other forms of sexual violence in situations on the agenda of the Security Council'.<sup>63</sup> UN bodies have been very active in the adoption and assessment of recommendations relating to the WPS Agenda: among the initiatives, the UN established in 2010 a *Civil Society Advisory Group on WPS* (CSAG) to advise the SG and the High-Level Steering Committee of UN; three peace and security reviews have been undertaken in 2015 containing 30 recommendations;<sup>64</sup> the SG prepares every year reports on women, peace and security and on conflict-related sexual violence; he has appointed a Special Representative on Sexual Violence in Conflict since 2009; UN Women was tasked to undertake an independent assessment of the implementation of the recommendations based on how gender equality is prioritised and resourced on the presence of accountability mechanisms to track progress and on how gender matters in the debate.

In the 2019 report, the UN SG stressed the positive outcomes in terms of implementation of the recommendations stemming from the aforementioned reviews, but he was very clear in highlighting the weaknesses in the UN action. In particular, Guterres pointed out that the UN 'was not integrating gender-responsive conflict analysis regularly into its work, including in strategic planning and resource allocation processes', and used four fundamental concepts which are sometimes mentioned – though with no concrete action – in the resolutions of the UN SC: humanitarian action, disarmament, demobilisation and reintegration.<sup>65</sup> The SG reiterated 'the need to secure resourcing for the full range of medical, legal, psychosocial and livelihood services, including [...] sexual and reproductive health information and services, including regarding pregnancies resulting from rape, without discrimination, as noted in Security

<sup>63</sup> 'Report of the Secretary-General on women and peace and security' UN Doc S/2019/800 (9 October 2019) 4.

<sup>64</sup> R Coomaraswamy, *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) 2015); the report of the High-level Independent Panel on Peace Operations (UN Doc A/70/95-S/2015/446); and the report of the Advisory Group of Experts on the Review of the Peacebuilding Architecture (UN Doc A/69/968-S/2015/490).

<sup>65</sup> UN Doc S/2019/800 (n 63) 9-10.



Council Resolution 2122 (2013) and existing obligations in international law'.<sup>66</sup> In his reports on conflict-related sexual violence of 2019 and 2020, he addressed the lack of funding for programmes related to sexual gender-based violence and sexual and reproductive healthcare, and recommended that the survivors could have access to emergency contraception, safe termination pregnancies and HIV prevention.<sup>67</sup>

The language of reproductive rights also entered the prosecution of international crimes. Sexual violence can constitute a war crime, a crime against humanity or an act of genocide, as well as a violation of other prohibitions listed under the Rome Statute of the International Criminal Court.<sup>68</sup>

It could be argued that there is acceptance at the international level that the lack of access to reproductive services, when it causes huge suffering, physical and psychological damages, constitutes a violation of the prohibition of torture. However, what about cases which do not amount to torture, inhuman or degrading treatment? What about access to

<sup>66</sup> *ibid.*

<sup>67</sup> 'Conflict-related sexual violence: Report of the Secretary-General' UN Doc S/2019/280 (29 March 2019) 31, and UN Doc S/2020/487 (n 41) 11.

<sup>68</sup> Elements of Crimes, arts 7(1)(g) 1 to 6; 8(2)(b)(xxii) 1 to 6; 8(2)(e)(vi) 1 to 6. See the Policy Paper on Sexual and Gender-Based Crimes (June 2014) prepared by the Office of the Prosecutor of the International Criminal Court <[www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf)>. It is not the purpose here to delve in detail into this topic. See, *ex multis*, without pretending to exhaust the complexity of the issue, the Special Issue of the International Feminist Journal of Politics 16:4 (2014); L Poli, 'Criminalizing Rape and Sexual Violence as Methods of Warfare' in F Pocar, M Pedrazzi, M Frulli (eds) *War Crimes and the Conduct of Hostilities* (Elgar 2013) 136; M Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime Against Humanity' (2008) 6 J Intl Criminal Justice 1033; S De Vido (n 56); AM Banks, 'Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes' (2005) College of William & Mary Law School William & Mary Law School Scholarship Repository Faculty Publications 305; CE Arrabal Ward, *Wartime Sexual Violence at the International Level: A Legal Perspective* (Brill 2018) 129 ff; M Ellis, 'Breaking the Silence: Rape as an International Crime' (2007) 38 Case Western Reserve J Intl L 225 ff.; C Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Brill 2012); A-M de Brouwer, C Ku, R Römken, L van den Herik (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013); J Gebhard, D Trimiño, 'Reproductive Rights, International Regulation' in Max Planck Encyclopedia of Public International Law (2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2070?rskey=qrBdlX&result=1&prd=MPIL>>.



contraceptives in camps in post-conflict settings, for example? As stated in the report *War, Women and Peace* of 2002, 'women have particular experiences and exposure to circumstances that affect their health', and they also 'have patterns of access to health care that are different from those of children and men'.<sup>69</sup> Women's reproductive health problems during conflicts 'may range from having no sanitary supplies for menstruation to life-threatening pregnancy-related conditions, from lack of birth control to the effects of sexual violence. In the past two decades, women have also had to deal with the deadly spread of HIV/AIDS'.<sup>70</sup> The question turns to why the recognition of the right to access to reproductive health is absent in the law of the SC.

5.2. *When the international law on security contributes to violence against women('s health)*

Reflecting on the structure of the UN SC, its powers and law, it can be said that it combines two elements: on one hand, the promotion of security, mainly meant as military security;<sup>71</sup> on the other hand, a rigorous intergovernmental and unequal (as a consequence of the five permanent members) structure.<sup>72</sup> This article argues that intergovernmental bodies, such as the UN SC, where the representation of women is usually low, mirror a patriarchal structure of the society, which is only formally characterised by international cooperation, but it is instead jeopardised by

<sup>69</sup> E Rehn, E Johnson Sirleaf, 'Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building' vol 1 (Progress of the World's Women 2002) 36.

<sup>70</sup> *ibid* 37.

<sup>71</sup> M Nowak, 'The Three Pillars of the United Nations: Security, Development and Human Rights' in ME Salomon, A Tostensen, W Vandehole (eds) *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007) 31 argued that after the end of the Cold War, a shift from the absence of war to a comprehensive concept of human security has occurred.

<sup>72</sup> See also, however, what happened within the UN GA, which, though absent the inequality of representation, still maintains an intergovernmental structure that has led to the separate vote in Resolution A/RES/74/20 (2019). Only by separate votes – with 8 countries voting against – it could reaffirm its commitment to ensure universal access to sexual and reproductive health rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conference (preamble, para 13).



fixed structure of power that have replicated and reproduced over the years after the Second World War. As highlighted by feminist legal scholarship, ‘power evolves [...] on the basis of the resulting gendered ranking, presenting a “perceived” natural advantage for masculinity’, meaning that using a gender-neutral language does not pursue gender equality, but rather emphasises how ‘systems of international affairs and security are endemically gendered in nature’.<sup>73</sup> If international organisations are male – socially and politically, not biologically speaking – so are the States, which determine the establishment of the more complex structures of the international community. In one of her most outstanding works, the radical feminist MacKinnon argued that:

The state is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender-through its legitimating norms, forms, relation to society, and substantive policies. The state's formal norms recapitulate the male point of view on the level of design.<sup>74</sup>

Chinkin and Charlesworth contended, in line with MacKinnon’s thought, that the ‘paradigm state is constructed as a “male” in international law, with “female” features only in particular contexts’.<sup>75</sup> Accepted security-seeking behaviours of States, the use of force as ultimate basis of sovereignty, the metaphor of the ‘rape’ to describe the vulnerable (female) entity that is invaded,<sup>76</sup> have been used as examples to describe how the ‘sex of the state operates to legitimate understandings of sexual difference that rest on a model of (male) dominance and (female) subservience within states as natural and immutable’.<sup>77</sup> This situation is

<sup>73</sup> A Swaine, ‘Pursuing Gender Security’ in SE Davies, J True (n 14) 765, 766. The author argues that gendering security means to redraw the assumptions that underpin reductive militarized approaches to security, toward one redefined by an understanding of the subtle and non-subtle systems of power that disadvantage some over others.

<sup>74</sup> C Mackinnon, *Toward a Feminist Theory of the State* (Harvard UP 1989) 161-162.

<sup>75</sup> Chinkin, Charlesworth (n 38) 125. See also M Davies, ‘Taking the Inside Out: Sex and Gender in the Legal Subject’ in N Naffine, R Owens (eds) *Sexing the Subject of Law* (Law Book co Ltd 1997) 25.

<sup>76</sup> Chinkin, Charlesworth (n 38) 138 mentioned the invasion of Kuwait by Iraq. A Farmanfarmaian, ‘Sexuality in the Gulf War: Did you Measure Up?’ (1992) 18 *Genders* 1 ff.

<sup>77</sup> Chinkin, Charlesworth (n 38) 164.





mirrored in international institutions. UN's membership and its bureaucracy 'are dominated by men' and institutional practices, even though not directly discriminating against women, 'can effectively inhibit women's participation by relying on norms reflecting male life patterns as benchmarks of eligibility or success'.<sup>78</sup> Disrupting this system entails to challenge the division of labour that confines women and men to different spheres of activity; dismantling, in other words, the public/private divide that has relegated women to a subordinate position to men.

This pattern of domination is more evident in militarised and inter-governmental bodies. Feminists have argued that 'patriarchal gender norms, combined with other global structures such as capitalism, racism, and coloniality, play a role in causing, or at least normalizing and legitimizing, militarism and war'.<sup>79</sup> Otto contended that, from a procedural point of view, feminists emphasized the 'male-dominated membership of the Security Council' and its lack of transparency; from a substantive point of view, 'the Council's militaristic and state-centered notions of peace and collective security reproduce hierarchical ideas about gender, which explains why many of its actions lead to an increase in the insecurity of women and other nonelite groups'.<sup>80</sup>

This thesis appears as crystal-clear in some provisions of the UN SC Resolution 2467 (2019). It can be considered a huge step forward that the resolution refers to the 'non-discriminatory access to services such as medical and psychological care', to the risks of HIV as a consequence of violence, to the 'reparation programmes including health care'. Nonetheless, merely referring to 'health' is not enough, because of the traditional male-oriented approach to medicine and health.<sup>81</sup> The inclusion of the right to sexual and reproductive health – or at least the access to sexual and reproductive health services – would have been fundamental in order to stress not only that this right is violated before, during and after conflict but also to recognise women's agency expressed as sexual and

<sup>78</sup> Chinkin, Charlesworth (n 38) 174 e 190.

<sup>79</sup> Wright (n 9) 4. See also D Duriesmith, *Masculinity and New War: The Gendered Dynamics of Armed Conflict* (Routledge 2017).

<sup>80</sup> D Otto (n 16) 251. See also D Otto, 'Whose Security? Re-imagining Post-Cold War Peacekeeping from a Feminist Perspective', in RG Patman (ed), *Security in a Post-Cold War World* (Macmillan Press 1999) 81 ff.

<sup>81</sup> See, in this sense, C Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 491, and n 55.



reproductive *autonomy* and as justiciability of the right in front of domestic and regional human rights courts. Autonomy is the capacity of the woman to decide about her health, and her reproductive health more specifically. It is functional to the enjoyment of human rights, specifically the right to sexual and reproductive health but also the rights to life, privacy, freedom from violence. This article does not consider enough that the preamble mentions the previous resolutions, first, because they are not binding – even if they mention CEDAW, they cannot extend treaty obligations to non-State parties – secondly, because nothing prevents the UN SC from changing what it has previously stated. Reading the declarations that accompanied the vote, the intent of States was extremely clear: to *willingly* exclude the right to sexual and reproductive health.

The law of the SC, in the name of (military) security, denies autonomy and is a cause of further violence for several reasons: firstly, because these resolutions are not aimed at reducing war and conflicts but at transforming them into ‘safer’ (sic!) environments; secondly, because the absence of recognition of sexual and reproductive rights prevents women and girls from having access to contraceptives, emergency contraception, adequate maternal health, abortion and post-abortion services, causing, as the jurisprudence of regional human rights courts and the quasi-jurisprudence of UN treaty bodies can demonstrate, violence against women’s health;<sup>82</sup> thirdly, because the decision-making power is top-down, the increasing participation of women and women’s groups not being able to disrupt the subordination of women in societies both in times of peace and in times of war.

#### 6. *Finding the answer within international law: The future of the WPS Agenda*

From what was argued above, it seems at first sight that the UN SC is not the appropriate body to deal with feminist issues because of its inherent patriarchal structure. Even though this is a legitimate concern, as it was argued, the UN SC is ‘a long way from where women survivors and victims of sexual violence experience immediate and long-standing pain, [...] But it is a forum where global policy originates, where states make

<sup>82</sup> De Vido (n 59) ch 1, Anamnesis.



commitments, where norms can be developed'.<sup>83</sup> As Chinkin and Wright contended in 1993 with regard to the right to food, there is a gap 'between legal provisions and realities of life for women'.<sup>84</sup> A question then spontaneously follows: 'should we abandon law [in our case the law of the Security Council] altogether?'<sup>85</sup> Should we say that the international legal framework is insufficient, gender-biased, useless? And that the notion of security promoted by the UN SC merely focuses on the military instead of endorsing a human-rights based approach? Beth Simmons posited that: 'rather than viewing international law as reinforcing patriarchal and other power structures, the evidence suggests that it works against these structures in sometimes surprising ways', and that 'legal commitments potentially stimulate political change that rearrange the national legislative agenda, bolster civil rights litigation, fuel social and other forms of mobilization'.<sup>86</sup> Fionnuala Ní Aoláin argued that women's security in humanitarian crises requires a broad conception of security that encompasses physical, social, economic, and sexual security, and that 'when all these securities are combined in a manner that elevates and affirms the experience and relevance of gender, then gendered security is achieved'.<sup>87</sup>

This article contends that as much as the law of the UN SC is a cause of violence for women's health, it has also paved the way (voluntarily or not) to an evolution of the law to fight against gender-based violence, expressed in open-minded reports by the UN SG, and the forums and groups from civil society that have supported its activity, which have clearly acknowledged the access to reproductive services as a woman's right. A step forward is however needed in the text of UN SC resolutions and in the implementation of the agenda at national level. The two most recent resolutions show a worrying regression in the acknowledgment of women as holders of rights and of women's autonomy. Condemning sexual violence in armed conflict at a global level has surely been pivotal, and it is not possible to deny this outcome because 'there is, at least, an

<sup>83</sup> B Fitzpatrick, *Tactical Rape in War and Conflict. International Recognition and Response* (Bristol UP 2016) 190.

<sup>84</sup> C Chinkin, S Wright, 'The Hunger Trap: Women, Food, and Self-Determination' (1993) *Michigan J Intl L* 262 ff, 298.

<sup>85</sup> C Chinkin, S Wright (n 84) 312.

<sup>86</sup> B Simmons, *Mobilizing for Human Rights* (CUP 2009) 7.

<sup>87</sup> F Ní Aoláin, 'Women, Security, and the Patriarchy of Internationalized Transitional Justice' (2009) 31 *Human Rights Quarterly* 1055 ff, 1065.



accepted standard of rejection of such violations, and no longer any dismissive attitude that rape in conflict is somehow inevitable'.<sup>88</sup> However, as it seems adamant, 'the game of states in these venues falls between the poles of incremental moves forward, or reaffirming existing standards and commitments and refusing to go beyond them'.<sup>89</sup> The future of the WPS Agenda depends on the political will of the members within the UN SC but also on the activity and the actions undertaken outside this framework both within the UN (UN SG, CEDAW, other UN-treaty bodies, the Special Representative on Conflict-Related Sexual Violence) and outside, in the countries that support the WPS agenda and thanks to the work of civil society. It took years to acknowledge sexual violence as an international crime and include it in the Rome Statute of the International Criminal Court,<sup>90</sup> and probably time will come in which we will see the recognition of the right (not access, not status, but right, hence justiciable in front of courts) to women's reproductive health in a UN SC resolution. In the meanwhile, waiting for a change that might require the disruption of the UN SC as a military 'masculine' body, it is up to the action of UN bodies – some of them whose mandate precisely derives from the UN SC itself – and regional courts to work for the protection of women's sexual and reproductive health through the interpretation of the (numerous) existing legal instruments in force. It means, in other words, to rethink what the WPS agenda entails: surely more than a 'technical exercise to checking boxes on the number of women',<sup>91</sup> and the capacity to include wider feminist debates, tensions and dialogues.<sup>92</sup>

<sup>88</sup> B Fitzpatrick (n 83) 207.

<sup>89</sup> AM Miller, MJ Roseman, 'Sexual and Reproductive Rights at the United Nations: Frustration or Fulfilment?' (2011) 19 *Reproductive Health Matters* 102, 113.

<sup>90</sup> See above (n 68). Thanks to the role played by NGOs during the drafting of the text, especially the Women's Caucus for Gender Justice in the ICC, the ICC Statute adopted in Rome in 1998 has specifically included in its text a list of sex crimes and the definition of gender and gender crimes. The ICC has hence learned the lesson from the 'gendered aspects' of the ad hoc tribunals work. See F Ní Aoláin, DF Haynes, N Cahn, *On the Frontlines. Gender, War, and the Post-Conflict Process* (OUP 2011) 160.

<sup>91</sup> F Ní Aoláin, N Valji (n 23) 62.

<sup>92</sup> G Heatchote (n 22) 159.

