FROM THE VIOLENCE OF THE AGGRESSOR STATE TO THE VIOLENCE OF THE HOSTING STATE? UKRAINIAN RAPED WOMEN, POLISH LAW ON ABORTION AND THE EU PROTECTION OF THIRD-COUNTRY WOMEN'S AND GIRLS' SEXUAL AND REPRODUCTIVE RIGHTS

¿DE LA VIOLENCIA DEL ESTADO AGRESOR A LA VIOLENCIA DEL ESTADO DE ACOGIDA? LAS MUJERES VIOLADAS EN UCRANIA, LA LEY POLACA SOBRE EL ABORTO Y LA PROTECCIÓN DE LOS DERECHOS SEXUALES Y REPRODUCTIVOS DE LAS MUJERES Y NIÑAS DE TERCEROS PAÍSES EN LA UE

Actualidad Jurídica Iberoamericana Nº 19, noviembre 2023, ISSN: 2386-4567, pp. 194-229

Marco EVOLA

ARTICLE RECEIVED: 30 de junio de 2023
ARTICLE APPROVED: 15 septiembre de 2023

ABSTRACT: The paper starts from the difficulties raped Ukrainian women and girls face in acceding to termination of pregnancy in Poland and focuses on the protection of women's sexual and reproductive rights that international human rights law and international humanitarian law provide. The obligations the jurisprudence of the ECHR and the quasi-jurisprudence of UN treaty bodies have identified curtail states' discretion also when they implement EU law. The European Union has not raised the standards of protection guaranteed by the international instruments on human rights as a consequence of its limited competence in the area of health, the economic rationale lying behind its policy on non-discrimination on grounds of sex and the wide margin of discretion it secures to Member States in the area of migration.

KEY WORDS: Rape; violence against women; sexual and reproductive rights; termination of pregnancy; gender discrimination; temporary protection; European common asylum system.

RESUMEN: *El documento parte de las dificultades a las que se enfrentan las mujeres y niñas ucranianas violadas para acceder a la interrupción del embarazo en Polonia y se centra en la protección de los derechos sexuales y reproductivos de las mujeres que ofrecen el derecho internacional de los derechos humanos y el derecho internacional humanitario. Las obligaciones que la jurisprudencia del TEDH y la cuasi jurisprudencia de los órganos de tratados de la ONU han identificado restringen la discrecionalidad de los Estados también cuando aplican la legislación de la UE. La Unión Europea no ha elevado los niveles de protección garantizados por los instrumentos internacionales de derechos humanos como consecuencia de su limitada competencia en el ámbito de la salud, la lógica económica que subyace a su política de no discriminación por razón de sexo y el amplio margen de discrecionalidad que garantiza a los Estados miembros en el ámbito de la migración.*

PALABRAS CLAVE: *Violación; violencia contra la mujer; derechos sexuales y reproductivos; interrupción del embarazo; discriminación de género; protección temporal; sistema europeo común de asilo.*

SUMMARY.- I. INTRODUCTION.- II. ABORTION IN POLAND: LAW AND PRACTICE.- III. THE INTERNATIONAL SYSTEM OF PROTECTION OF WOMEN'S RIGHTS AND LIMITS TO STATES' PRACTICE HINDERING ABORTION.- IV. ACCESS TO SAFE ABORTION AND INTERNATIONAL HUMANITARIAN LAW.- V. THE PROTECTION OF WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH IN THE EUROPEAN COMMON ASYLUM SYSTEM.- VI. FINAL REMARKS.

I. INTRODUCTION.

Rape and sexual violence have always been one of the main features of wars. The Special Rapporteur on violence against women observed that rape is increasingly used as a weapon of war.[1] In the same vein the Committee on the elimination of discrimination against women in General Recommendation 30 pointed out that irrespective of the character of the armed conflict, women and girls are subjected to various forms of violence including sexual violence and forced impregnation, and added that the use of sexual violence on women and girls is "a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group", and added that this form of sexual violence "persists even after the cessation of hostilities."[2]

Recent data confirm that women and girls are the main victims of rape and sexual violence in international and non-international conflicts.[3] This phenomenon is part of the war on women[4] and has not been eradicated notwithstanding the improvement of the international system of protection of human rights in armed conflicts which is witnessed by the experiences of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the enactment of specific rules within the framework of the Statute of

1 Economic and Social Council: *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women*, UN Doc. E/CN.4/1999/68/add. 4, 23 June 1999, para. 16.

2 Committee on the Elimination of Discrimination against Women: *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, 13 November 2013, para. 35; United Nations Security Council: *Resolution 1820(2008)*, Adopted by the Security Council at its 5916th meeting, on 19 June 2008, S/RES/1820 (2008), 19 June 2008.

3 United Nations Security Council: *Women and girls who become pregnant as a result of sexual violence in conflict and children born of sexual violence in conflict. Report of the Secretary General*, Un Doc. S/2022/77, 31 January 2022.

4 MacKinnon, C.A.: "Women's September 11th: Rethinking the International Law of Conflicts", *Harvard Journal of International Law*, 2006, vol. 47(1), pp. 1-31; *Idem*, "Rape, Genocide and Women's Human Rights", *Harvard Women's Law Journal*, 1994, vol. 17, pp. 5-16.

• Marco Evola
Associate Professor of European Union Law, Department of Law, Economics and Communications, LUMSA (Italia). E-mail: m.evola@lumsa.it

the International Criminal Court[5] with the aim of protecting women against sexual violence.[6] The laws the Statute of the ICC contain flow from the international community's recognition of sexual and gender-based crimes as serious crimes nationally and internationally,[7] but the failure to halt the recourse to "rape as the ultimate violent and degrading act of sexual violence"[8] makes it clear that there is a need for further laws to reshape male/female power relations.[9]

The war in Ukraine embodies the latest case of such a use of violence against women since many Ukrainian women and girls have been raped by Russian soldiers.[10]

Rape and sexual violence violate women's sexual and reproductive rights[11] for they have an impact on their physical and psychological integrity. The Special Rapporteur on violence against women stated that "whatever the motive, rape may have a devastating effect on a woman's reproductive health. Often, the physical and psychological harm caused by rape temporarily or permanently affects women's sexual and reproductive autonomy and has lasting reproductive health consequences for the victims."[12]

However, rape and sexual violence are not the only breach of the sexual and reproductive rights of Ukrainian women and girls, since they are victims of further violence in the hosting countries to which they fled.

On the 25th of April 2022 the French newspaper *Liberation* raised the attention of public opinion on the difficulties raped Ukrainian women and girls encounter in accessing abortion in Poland in order to terminate unwanted pregnancy.[13]

The restriction on and the prohibition of access to abortion are a form of violence against women giving rise to gender discrimination. The Special Rapporteur on violence against women argued that "acts deliberately restraining

5 On these reforms see Chinkin, C.: "Feminist Reflections on International Criminal Law", in *International Criminal Law and the Current Development of Public International Law* (edited by A. Zimmermann), Duncker and Humblot, Berlin, 2003, pp. 125-160.

6 See art 7 and 8 of the Statute of the International Criminal Court.

7 International Criminal Court: *Policy Paper on Sexual and Gender-Based Crimes*, 2014, para. 1.

8 *Ibidem*, para. 16.

9 Gardam, J: "A New Frontline for Feminism and International Humanitarian Law", in *The Ashgate Research Companion to Feminist Legal Theory* (edited by M. Davies, V. E. Munro), Ashgate Publishing Limited, Farnham, 2013, p. 217 and p. 224 ff.

10 Statement by Michelle Bachelet, UN High Commissioner for Human Rights: *Oral update on the situation of human rights in Ukraine*, 49th Session of the Human Rights Council, 30 March 2022, available at https://www.ohchr.org/en/statements/2022/03/update-human-rights-council-ukraine.

11 De vido, S.: *Violence Against Women's Health in International Law*, Manchester University Press, Manchester, 2020, argues that rape is part of a wider phenomenon of violence against women health.

12 Economic and Social Council: *Report of the Special*, paras. 20-21.

13 Liberation, *Des Ukrainiennes victimes de viol se heurtent à la loi anti-IVG polonaise*, 25 April 2022.

women from using contraception or from having an abortion constitute violence against women by subjecting women to excessive pregnancies and childbearing against their will, resulting in increased and preventable risks of maternal mortality and morbidity."[14] The unavailability of safe abortion exposes women's health and life to risk since they are forced to resort to life-threatening procedures. In developing this approach, the Special Rapporteur significantly observed that a "State's inaction or failure to meet minimum core obligations can result in further violence against women. Government failure to take positive measures to ensure access to appropriate health-care services that enable women to safely deliver their infants as well as to safely abort unwanted pregnancies may constitute a violation of a woman's right to life, in addition to the violation of her reproductive rights. Along the same lines, government failure to provide conditions that enable women to control their fertility and childbearing, as well as to bring voluntary pregnancies to term, constitutes a violation of a woman's right to security of the person."[15]

The same relationship between denial of access to abortion and gender-based violence has been highlighted in the Committee on the elimination of discrimination against women in General Recommendation 35, in which it is stated that "violations of women's sexual and reproductive health and rights, such as (…) criminalization of abortion, denial or delay of safe abortion and/or post abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender based violence."[16]

The substantial disapplication of the Polish norms establishing access to abortion in case of rape originates from the lack of information on the proceedings, the exercise of the right to conscientious objection by health workers, and inadequate assistance of pregnant women before and after abortion. All of these phenomena often drive women to make recourse to illegal abortion. The Polish legal arrangements on abortion and the application of the rules have been subject to severe criticism by the human rights treaty bodies because they fall below the international standards of protection of women's sexual and reproductive health.

Raped Ukrainian women and girls who have moved to Poland seem therefore to be trapped between the violence of the aggressor State and the violence of the hosting country, the latter originating from the laws on abortion, which are

14 Economic and Social Council: *Report of the Special*, para. 57.

15 Economic and Social Council: *Report of the Special*, para. 66.

16 Committee on the Elimination of Discrimination against Women: *General Recommendation 35 on Gender-based Violence Against Women, Updating General Recommendation No. 19*, CEDAW/C/GC/35, 26 June 2017, para. 18.

among the strictest in Europe, and the practice that has been developed pursuant to those rules.

This paper will focus on this second form of violence against women, which encompasses several legal items of utmost importance

Migrants' legal status falls within the scope of EU laws on migration. The case of Ukrainian women urges scholars to assess the way in which the EU legal system protects women's sexual and reproductive rights. This assessment has to take into consideration the guarantees international human rights law and international humanitarian law provide to safeguard women's sexual and reproductive health.[17]

The framework that the Conference in Cairo in 1994[18] and the Conference in Beijing in 1995[19] outlined clarified that rules on abortion may affect women's reproductive self-determination, sexual freedom and role in society. The laws on women's health and reproductive health are therefore part of a larger system of control over women's bodies which is strictly connected to those patriarchal stereotypes identifying the women's role with childbearing,[20] maternity and childrearing.[21] The Working Group on the issue of discrimination against women in law and in practice, established at UN level, has highlighted this bundle of interests and prejudices lying behind women's health and reproductive health regulations pointing out that "women's bodies are instrumentalized for cultural, political and economic purposes rooted in patriarchal traditions. Instrumentalization occurs within and beyond the health sector and is deeply embedded in multiple forms

17 Gebhard, J,Trimiño Mora, D.: "Reproductive Rights, International Regulation", in *Max Planck Encyclopedia of Public International Law* (edited by R. Wolfrum), Oxford University Press, Oxford, 2017; Cook R.J., Dickens B.M., Fathalla M.F. (eds.): *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, Oxford University Press, Oxford, 2003; Cook R.J.: *Women's Health and Human Rights*, World Health Organization, Geneva, 1994.

18 The Programme of Action adopted at the International Conference on Population and Development held in Cairo, on 5–13 September 1994 pointed out that reproductive health entails the capability of individuals to reproduce and their freedom "to decide if, when and how often to do so." (para. 7.2.) In this perspective the Programme of Action highlighted two rights that are embedded in the freedom mentioned: a) the right of men and women "to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law;" b) the "right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant." (para. 7.2.) Couples and individuals are entitled to "decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health." (para. 7.3)

19 The Declaration and Platform for Action that was adopted at the Fourth World Conference on Women held in Beijing on 4/15 September 1995 identified the content of the human rights reproductive rights comprise. The first right is the right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so. The second right is the right to attain the highest standard of sexual and reproductive health. The third right is the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents (para. 95). The Platform made it clear that women's health is determined by the social, political and economic context in which their lives take place, as by biology (para. 89).

20 MacKinnon, C A..: "Reflections on Sex Equality under Law", *Yale Law Journal*, 1991, vol. 100, p. 1281 and p. 1308.

21 Nelson, E.: *Law, Policy and Reproductive Autonomy*, Bloomsbury, Oxford, Portland, 2013, p. 66.

of social and political control over women. It aims at perpetuating taboos and stigmas concerning women's bodies and their traditional roles in society, especially in relation to their sexuality and to reproduction."[22]

The moulding of abortion can therefore contribute to counteracting violence against women, to dismantling an ideological apparatus which has nurtured the conception of the woman's body and to reshaping a system of power relationships which is traditionally entrenched in the regulation of reproductive health.[23]

The jurisprudence of regional human rights courts and the quasi-jurisprudence of the UN treaty bodies has clarified that laws on abortion and the practice that has been put into place in their application could violate sexual and reproductive rights of women, amounting to a breach of the right to health (art. 12 ICCPR, art. 12 CEDAW), or the right to private life (see art. 17 ICCPR, art. 8 ECHR, art. 11 ACHR) or the prohibition of torture or ill-treatment (art. 7 ICCPR, art. 3 ECHR).

The case of raped Ukrainian women and girls in Poland is therefore a litmus test of the standards of protection of the sexual and reproductive rights of women. Assessment of the obligations stemming from international protection of human rights and EU rules is of interest in an era in which there is a risk of backsliding in the protection of their sexual and reproductive rights, a process which is witnessed by the restrictive measures that were enacted during the Covid-19 pandemic[24] and the recent judgement the US Supreme Court delivered in *Dobbs v Jackson*.[25]

A further reason for interest is to be found in the intersectional nature of the discrimination Ukrainian women are experiencing during their stay in Poland as a consequence of their being women and forced migrants.[26] The Committee on the

22 United Nations General Assembly, *Report of the Working Group on the issue of discrimination against women in law and in practice*, A/HRC/32/44, 8 April 2016, para. 18.

23 For a general overview on the debate on the relationship between the conception of women body, the guarantee of their sexual and reproductive rights and women's role in politics and society see De Vido S.: "Gender Inequalities and Violence Against Women's Health During the COVID-19 Pandemic: an International Law Perspective", *BioLaw Journal*, 2020, n. 3, p. 77. and p. 79 ff.

24 Tramontana E.: "Women's Rights and Gender Equality During the COVID-19 Pandemic", *Questions of International Law*, 2021, n. 87, p. 5, p. 20 ff.; Moreau, C., Shankar, M., Glasier, A., Cameron, S., Genzel-Danielsson, K.: "Abortion regulation in Europe in the era of COVID-19: a spectrum of policy responses", *BMJ Sexual Reproductive Health*, 2021, n. 47, p. 1 and p.2 ff.; De Vido S.: "Gender Inequalities", p. 88 ff.

25 Supreme Court of the United States, *Dobbs, State Health Officer of the Mississippi Department of Health et al. V. Jackson Women's Health Organization et al.*, 597 U.S. (20229 judgment of 25 June 2022. On this judgment see Potenzano, R.-Smorto, G.: "Abortion in the U.S. after Dobbs v. Jackson Women's Health Organization. A comparative perspective", in this Volume; Poli, L.: "La sentenza della Corte Suprema statunitense in *Dobbs v Jackson*: un *judicial restraint* che viola i diritti fondamentali delle donne", *Diritti umani e diritto internazionale*, 2022, vol. 16, p. 659 ff.; De Vido S.: "Blessed be the Fruit. Un'analisi di genere della sentenza *Dobbs* della Corte Suprema statunitense alla luce del diritto internazionale dei diritti umani", *SIDIBLOG*, 2022, available at http://www.sidiblog.org/2022/07/25/blessed-be-the-fruit-unanalisi-di-genere-della-sentenza-dobbs-della-corte-suprema-statunitense-alla-luce-del-diritto-internazionale-dei-diritti-umani/.

26 On the role intersectionality has in the protection of women's sexual and reproductive rights see De Vido S.: "*Violence Against Women's*", *passim*.

elimination of discrimination against women stressed the inextricability between discrimination against women and other factors affecting their lives, listing among these factors asylum seeking, being a refugee, being internally displaced and migrant status.[27]

II. ABORTION IN POLAND: LAW AND PRACTICE.

Polish law on abortion is one of the strictest in Europe. The legal arrangement of abortion as it stands today is the final result not only of the political choices the legislator has taken, but of the judgment the Polish Constitutional Tribunal delivered in 2020 (K1/2020).[28] To better understand the rationale lying behind the set of rules regulating abortion it is necessary to start from the law which was in force before the judgments of the Constitutional Tribunal and assess the effects of the latter on the requirements women have to fulfill to have access to abortion. The end of communism had an impact on the issue at stake. During the communist era an open system was enacted to enable women to put an end to childbearing for the laws comprised social reasons as a legitimate ground for terminating pregnancy. The restoration of democracy was followed by an ample debate on abortion which ended in a political compromise with the 1993 Act on Family Planning, Protection of the Human Embryo and the Conditions for the Admissibility of Pregnancy Termination.[29]

The approach which was adopted is marked by a general prohibition of abortion, a stance deriving from the combination of the rules of the 1993 Act on Family Planning and the laws the 1997 Criminal Code[30] contains. Pursuant to the Act on Family Planning, abortion was permitted in three cases. The first of these cases occurs in those situations in which pregnancy poses a threat to a woman's life. The second case arises when pregnancies are the outcome of a crime such as rape or incest. In this second case abortion is permitted in the first 12 weeks of pregnancy. Abortion is also allowed in those cases in which there is a high probability of a severe and irreversible foetal impairment or when the foetus is found to be afflicted with an incurable and life-threatening disease. The impairment has to be proved on the basis of pre-natal tests or other medical proceedings. However, abortion is admissible only prior to the foetus becoming viable outside a pregnant woman's body.

27 Committee on the Elimination of Discrimination against Women: "*General Recommendation No. 35*", para. 12. On intersectionality see Atrey, S.: *Intersectional Discrimination*, Oxford University Press, Oxford, 2019.

28 Constitutional Tribunal, judgment of 22 October 2020, K1/20.

29 The law has been published in Journal of Laws of 1993, N. 17, item 78. On the history of Polish laws on abortion see Bucholc. M.: "Abortion Law and Human Rights in Poland. The Closing of the Jurisprudential Horizon, *Hague Journal on the Rule of Law*, 2022, vol. 14 n.1, p. 73, p. 80 ff.; Gliszczyńska-Grabias, A., Sadurski, W.: "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)", *European Constitutional Law Review*, 2021, vol. 17, p. 130 and p.132 ff.

30 The Criminal Code was published in *Journal of Laws* of 1997, issue 88, item 553.

The narrowing of the legal avenues for abortion also derives from the decision the Polish legislator took to make use of criminal law in the field of abortion. Pregnant women who avail themselves of abortion without fulfilling the required criteria do not incur criminal liability, but art. 152 of the Criminal Code establishes up to threee years for those who terminated pregnancyin violation of the law or rendered assistance to a pregnant woman in terminating pregnancy or persuadedher to do so in violation of the law. The same article also provides for deprivation of liberty for a term of between six months and eight years in those casesin which the prohibited activities are committed after the foetus became viable outside the body of the pregnant woman.[31]

The judgment the Constitutional Tribunal delivered in 2020 shrank the area of legal abortion for it stated that abortion performed in case of foetal impairment was unconstitutional.

Notwithstanding raped Ukrainian women and girls fall within the scope of legal termination of pregnancy, the reasoning of the Constitutional Tribunal is of the utmost interest in understanding the political and cultural environment within which the laws on abortion are to be applied. The judges stressed the crucial value of human dignity and the connection between rule of law in a democratic state and protection of human dignity. However, in so doing the Constitutional Tribunal took into consideration the human dignity of those who are defined as human beings in their pre-natal phase, without paying any attention to the human dignity and rights of women, although they are the other category of subjects involved in abortion.[32] In this perspective it is useful to recall that the ECHR in *Vo v France* stated that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention" and added that "if the unborn do have a 'right' in 'life', it is implicitly limited by the mother's right and interests."[33] The approach of the Constitutional Tribunal is made clear in this statement: "the protection of motherhood cannot only mean the protection of the interests of a pregnant woman and mother. The use of a noun by constitutional provisions indicates a specific relationship between a woman and a child, including a child who has just been conceived. The entire relationship (…) has the character of a constitutional value, thus encompassing the life of the foetus, without which the maternity relationship would be interrupted. Therefore, the protection of motherhood cannot be understood as protection

31 Art. 152 of the Polish Criminal Code reads as follow: '§ 1. Whoever, with the consent of the woman, terminates her pregnancy in violation of the law shall be subject to the penalty of deprivation of liberty for up to three years. § 2. The same punishment shall be imposed on anyone who renders assistance to a pregnant woman in terminating her pregnancy in violation of the law or persuades her to do so. § 3. Whoever commits the act referred to in § 1 or § 2 above after the foetus becomes viable outside the pregnant woman's body shall be subject to the penalty of deprivation of liberty for a term of between six months and eight years'.

32 See the dissenting opinion of Judge Pszczókowski.

33 European Court of Human Rights [Grand Chamber]: *Vo v France*, application n. 53924/00, judgment of 8 July 2004, para. 80.

realized only from the point of view of the interests of the mother/pregnant woman."[34] The outcome the Constitutional Tribunal achieved is in striking contrast with international human rights law since the latter does not establish an absolute right to life of the foetus.[35] Moreover, as has been rightly observed, the constitutional protection of motherhood does not allow a consideration of any rights of the pregnant woman to be effectively weighed against the protection of human life in the prenatal phase and motherhood as a relation existing from the moment of conception.[36]

The conceptual apparatus of the ruling can be found in the idea, which is widespread in Polish society, that women's social function is procreation and their role in society coincides with motherhood.

The statute on termination of pregnancy after the ruling of the Constitutional Tribunal is fraught with those prejudices that have affected the conception of women's health and have framed their subjection to men in society. This political and cultural environment is the background of the extensive practice in the Polish healthcare system, which has *de facto* failed to apply the legal provisions on abortion. In the periodical review the human rights treaty bodies have highlighted the existence of several reasons for conflict between the protection of women's rights and the working of the system

A reason for concern has been identified in the high number of clandestine abortions as a result of the strict legal requirements the rules impose,[37] putting women's life and health at risk. Women are compelled to travel long distances or to move abroad to terminate their pregnancies because of the many procedural and practical obstacles they face in acceding to healthcare services.[38] Further problems arise from "the extensive use, or abuse, by medical personnel of the conscientious objection clause,"[39] because it makes legal abortion unavailable in entire institutions and in most of the regions of the country.[40] The lack of regulation

34 Constitutional Tribunal: K 1/20, Sec. 3.3.1 citing the previous judgment K 26/96 Sec. 3.

35 POLI, L.: "Aborto e diritti umani fondamentali: Corte europea dei diritti umani e *treaty bodies* a confronto", *Diritti umani e diritto internazionale*, 2017, vol. 11 n. 1, p. 189 and p. 195. After the judgment of the Constitutional Tribunal many applications have been brought before the ECHR. European Court of Human Rights: *Group of abortion rights cases against Poland declared inadmissible*, Press Release ECHR 173 (2023), 8 June 2023, available at: https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%22abortion%20in%20poland%22]} communicating the declaration of inadmissibility of several applications and adding that there are around 1000 applications concerning restrictions on abortion rights due to foetal abnormalities in Poland, received by the Court since 2021, which are still ongoing.

36 Bucholc. M.: "Abortion Law", p. 92.

37 Committee on the Elimination of Discrimination against Women: *Concluding observations on the combined seventh and eighth periodic reports of Poland*, CEDAW C/POL/CO 7-8, 14 November 2014, para.36.

38 Human Rights Committee: *Concluding observations on the seventh periodic report of Poland*, CCPR/C/POL/CO/7, 23 November 2016, para. 23.

39 Committee on the Elimination of Discrimination against Women: *Concluding observations on the combined seventh and eighth periodic reports of Poland*, para. 36.

40 Human Rights Committee: "*Concluding observations*": para. 23.

on the exercise of the right to conscientious objection entails that there is no duty, in case of refusal to perform legal abortion, to refer the interested women to another service.[41] In evaluating the Polish situation the Committee against torture observed that "denial of procedure will result in physical and mental suffering so severe in pain and intensity as to amount to torture" adding that "an excessive period of 30 days is given to the Medical Committee in which to issue a decision, which may also be attributed to actions or omissions by State agencies or other entities that engage the responsibility of the State party under the Convention."[42]

The laws do not afford timely review of an appeal against a refusal to allow an abortion.[43]

The uncertainties surrounding the medical proceedings particularly affect protection of the right to health of disabled women. The Committee that the Convention on the rights of persons with disabilities established expressed its concern because of "the barriers faced by women with disabilities when they seek to gain access to services for safe abortion, owing to the lack of information available on and services relating to their sexual and reproductive health rights."[44]

The patterns the human rights treaty bodies have scrutinised are the same patterns with which raped Ukrainian women are confronted. The concerns the UN treaty bodies expressed in the statements mentioned are strictly connected with the obligations that derive from the universal and regional systems of protection of human rights, to which we have to turn our attention.

III. The International System of Protection of Women's Rights and the Limits to States' Practices Hindering Abortion.

There is no stand-alone right to abortion in international law.[45] Only the Maputo Protocol envisages an express provision on abortion.[46] However, the jurisprudence of regional human rights courts and the quasi-jurisprudence of the UN treaty bodies have shaped a protection of sexual and reproductive rights of women, identifying a series of obligations incumbent upon states either when

41 Committee on Economic, Social and Cultural Rights: *Concluding observations on the sixth periodic report of Poland*, E/C.12/POL/CO/6, 26 November 2016, para. 46.

42 Committee against Torture: *Concluding observations on the seventh periodic report of Poland*, CAT/C/POL/CO/7, 29 August 2019, para. 33.

43 Human Rights Committee: "*Concluding observations*": para. 23.

44 Committee on the Rights of Persons with Disabilities: *Concluding observations on the initial report of Poland*, CRPD/C/POL/CO/1, 29 October 2018, para. 43.

45 De Vido S.: "Gender Inequalities", p. 88 and literature cited.

46 Art. 24 para. 2 letter c of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (so-called Maputo Protocol) which entered into force on 25th November 2005 establishes that the States Parties shall take appropriate measures to "Protect the reproductive rights of women by authorising medical 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."

domestic law prohibits abortion or accession to termination of pregnancy is established but practice gives rise to obstacles to exercise of the right.

The paper is to focus on the second group of obligations for Ukrainian raped women fulfilling the conditions Polish laws imposes upon performing abortion, but are prevented from accessing the procedure because of the practice that was described above. Furthermore, the paper is to take into account the only jurisprudence of the ECHR among the regional courts.

Many of the obligations incumbent upon states have been identified in both the case law of the ECHR and the quasi-jurisprudence of UN treaty bodies. This convergence is of interest since there are important differences in the way in which the former and the latter deal with access to termination of pregnancy.[47]

One of these differences refers to the margin of appreciation which is given to states in evaluating their compliance with the right to respect for private life. The Court of Strasbourg leaves States a wide margin of discretion in regulating termination of pregnancy.[48] The Court argues that not only negative obligations are inherent in respect for private life, but also positive obligations are encompassed. Hence the ECHR anchors its assessment to fulfillment of these positive obligations. In so doing the Court observes that the concept of respect is not clear-cut so that "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts, the State enjoys a certain margin of appreciation."[49]

Despite the reference to positive obligations, the UN treaty bodies do not accord an extensive margin of appreciation to States in complying with the positive obligations that are entrenched in respect for private life.

A further difference refers to the application of the principle of equality.

The UN treaty bodies have established a strong link between substantial equality and the protection of women's health. The latter is embedded in the former because the consideration of the special needs of women's health is a condition necessary for the protection of all of the rights they are entitled to. The Committee on the Elimination of discrimination against women pointed out that "measures to eliminate discrimination against women are considered to be inappropriate if a health-care system lacks services to prevent, detect and treat

47 On these differences see POLI, L.: "Aborto e diritti".

48 Ní Ghráinne, B., McMahon, A.: "Access to Abortion in Cases of Fatal Foetal Abnormality: a New Direction for the European Court of Human Rights?", *Human Rights Law Review*, 2019, vol. 19 n. 3, p. 561.

49 European Court of Human Rights: *Tysiqc v Poland*, application n. 5410/03, judgment of 20 March 2007, Para. 111; [Grand Chamber]: *A, B and, C v Ireland*, application no. 25579/05, judgment of 16 December 2010, para. 249; *R.R. v Poland*, application 27617/04, judgment of 26 May 2011, para. 187.

illnesses specific to women."[50] In the same vein, in General Comment 24 on the right to sexual and reproductive health the Committee on Economic, Social and Cultural Rights argued that "substantive equality requires that the distinct sexual and reproductive health needs of particular groups, as well as any barriers that particular groups may face, be addressed."[51] As a consequence states' failure to mould the health care system in a gender-sensitive manner in order to address women's health needs is in breach of both the right to health and the right to equality.[52]

Unlike the UN treaty bodies, the ECHR has avoided establishing whether or not the prohibition of discrimination on grounds of sex has been violated once it is found that the respondent state acted in breach of one of the provisions of the Convention.[53]

Anchoring the system of protection of women's sexual and reproductive rights to gender equality led the UN treaty bodies to shed light on the connection between legal arrangements and gender stereotypes. As a consequence, those bodies have stressed the positive obligations incumbent upon states to eradicate those prejudices from which obstacles to abortion originated.

This stance is perfectly entrenched in the views the Committee on the elimination of discrimination against women delivered in *L.C. v Peru*.[54] The case concerned a 13-year-old girl who was a victim of repeated sexual abuse and became pregnant. The girl attempted suicide and the surgical treatment she needed was refused because of her pregnancy. Furthermore, her application for therapeutic abortion was rejected because the hospital argued that the minor's life was not at risk. The Committee moved from states' obligation to provide affordable health care services on a basis of equality of men and women and found that the respondent state acted in breach of the right to health art. 12 of CEDAW lays down. Furthermore, the Committee considered the cultural and social reasons which were decisive in determining the hospital's medical choices, starting therefore from the assessment of the specific case to the evaluation of a societal organization and the role prejudices might play in affecting the rights of individuals and the entire social group they belong to. In this respect the Committee stated that Peru acted in breach of its obligation under art. 5 pointing out that "the

50 Committee on the Elimination of Discrimination against Women: *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, Un Doc. A/54/38/Rev. 1, chap. I, 1999, para. 11.

51 Committee on Economic Social and Cultural Rights: *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, Un Doc. E/C.12/GC/22, 2 May 2016, para. 24.

52 Tramontana E.: "Women's Rights, p. 21.

53 European Court of Human Rights: *Tysiqc v Poland*, para. 144; Grand Chamber: *A, B and, C v Ireland*, para. 270.

54 Committee on the Elimination of Discrimination against Women: *L.C. v. Peru*, communication 22/2009, views of 4 November 2011, Un. Doc. CEDAW/C/50/D/22/2009.

decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother."[55]

In the same vein the Human Rights Committee in General Comment 36 on the right to life upheld that States should prevent the stigmatization of women and girls who have undergone abortion.[56]

Notwithstanding the different margin of appreciation the ECHR and the UN treaty bodies guaranteed to states, their practice has identified a series of obligations, mainly positive obligations,[57] which curtail exercise of states' prerogatives in this field. Violation of the obligations at stake might amount to the breach of the right to private life, torture or other inhuman or degrading treatment, the right to health and the right to non-discrimination on the grounds of sex.

The first obligation is to guarantee safe and affordable abortion through decriminalization of termination of pregnancy and removal of those obstacles which drive women and girls to clandestine abortion, thus putting at risk their health and life. The Human Rights Committee, in General Comment 36, after having observed that states cannot apply criminal law to women and girls who underwent abortion, stated that "states' parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly."[58]

The same approach was taken by the Parliamentary Assembly of the Council of Europe which expressed its concerns on the conditions states impose restricting access to safe abortion and invited them to decriminalise abortion and to guarantee effective access to safe and legalised abortion.[59] Decriminalization also has to cover medical personnel. In *L.C. v Peru* the Committee on the elimination of

55 Committee on the Elimination of Discrimination against Women: *L.C. v. Peru*, para. 8.15. The Committee also recommended adoption of measures including "education and training programmes to encourage health providers to change their attitudes and behaviour in relation to adolescent women seeking reproductive health services and respond to specific health needs related to sexual violence." (para. 12).

56 Human Rights Committee: *General Comment No. 36. Article 6: right to life*, Un. Doc. CCPR/C/GC/36, 3 September 2019, para. 8. The same Committee in *Amanda Jane Mellet v Ireland*, communication 2324/2013, views of 17 November 2016, Un Doc. CCPR/C/116/D/2324/2013, para. 7.11 noted "the author's claim that the State party's criminalization of abortion subjected her to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination."

57 On positive obligations see Pisillo Mazzeschi, R.: "Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme", *Recueil des Cours de l'Academie de Droit International de la Haye*, 2008, vol. 333, p. 175. On the content of states' positive obligations in the field of women's health and reproductive health protection see. De vido, S.: *Violence Against Women's*, p. 179 ff.

58 Human Rights Committee: *General Comment No. 36*, para. 8.

59 Council of Europe, Parliamentary Assembly: *Access to safe and legal abortion in Europe*, Resolution 1697(2008), 16 April 2008, paras. 2, 3 and 7.

discrimination against women held that states are obliged to afford the necessary legal security for health professionals that perform abortion.[60] Similarly the Human Rights Committee in *Mellet v Ireland* observed that the Convention imposes the obligation to "take measures to ensure that health-care providers are in a position to supply full information on safe abortion services without fearing they will be subjected to criminal sanctions."[61] In *R.R. v Poland* the ECHR observed that the existence of laws providing for the criminal liability of doctors can have a chilling effect on them and stated that the law establishing the lawfulness of abortion should be formulated in order to alleviate the said effects.[62]

In developing the duty to make abortion safe the UN treaty bodies have affirmed states' obligation to enable women to undergo termination of pregnancy in cases of unwanted pregnancy resulting from rape. The Human Rights Committee in General Comment 36 stated that "states parties must provide safe, legal and effective access to abortion (…) 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 or incest."[63] In the same vein the Committee on the elimination of discrimination against women in General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations recommended that states parties to the Convention "allocate adequate resources and adopt effective measures to ensure that victims of gender-based violence, in particular sexual violence, have access to comprehensive medical treatment, mental health care and psychosocial support."[64] This first recommendation is corroborated by the further recommendation to allocate resources with the aim of addressing the distinct needs of women and girls who undergo sexual violence, including "the impact of sexual violence on their reproductive health."[65] This latest specification encompasses access to safe abortion which is one of the ways in which facing the consequences that rape might produce on reproductive health. This reading is confirmed by the further recommendation to "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, (…) emergency obstetric care; *safe abortion services*; *post-abortion care*."[66] In the views delivered in the case *L.C. v Peru* the Committee on the elimination of discrimination

60 Committee on the Elimination of Discrimination against Women: *L.C. v. Peru*, para. 8.17.

61 Human Rights Committee: *Amanda Jane Mellet v Ireland*, para. 9.

62 European Court of Human Rights: *Tysiqc v. Poland*, para. 116; Grand Chamber, *A, B and C v. Ireland*, para. 254; *R.R. v Poland*, para. 193.

63 Human Rights Committee: *General Comment No. 36*, para. 8.

64 Committee on the Elimination of Discrimination against Women: General Recommendation 30, para. 38.

65 *Ibidem*.

66 Committee on the Elimination of Discrimination against Women: General Recommendation 30, para. 52. Italics by the author.

against women recommended that the state revise its legislation with a view to decriminalizing abortion when pregnancy results from rape or sexual abuse.[67] This recommendation was based on the consideration that the state's failure to recognize the right to abortion on grounds of rape and sexual violence contributed to the violation of the author's rights.[68]

The ECHR has never stated that the Convention enshrines a right to abortion. However in *P. and S. v Poland* case it stressed the "situation of great vulnerability"[69] of the first applicant who became pregnant as a consequence of rape and found that the several violations of the procedural obligations which the respondent state incurred gave rise to a violation of article 3 of the Convention.[70]

The aim of securing safe abortion lies behind a further obligation incumbent upon states. If a legal system allows abortion there is a duty to establish a procedural framework which renders concrete the exercise of the rights women have been entrusted with. The ECHR stated that "once the State (…) adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion."[71]

Moreover, the Court specified the content of this obligation arguing that it encompasses "the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures."[72]

The obligation to lay down an appropriate legal framework has been deduced by the Committee on the elimination of discrimination against women in the views on *L.C. v Peru* in which it pointed out that "since the State party has legalized therapeutic abortion, it must establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion (…)."[73] The duty to establish a procedure to enable women to exercise the right to abortion is also highlighted in the views the Human Rights Committee adopted in the *Mellet v Ireland* case in which it stated that the Irish State was under the duty to reform

67 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 12 (b) (iii).

68 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.18.

69 European Court of Human Rights: *P. and S. v Poland*, para. 162.

70 European Court of Human Rights: *P. and S. v Poland*, paras. 153-169.

71 European Court of Human Rights: *R.R. v Poland*, para. 200; *Tysiqc v Poland*, paras. 116/124; *P. and S. v. Poland*, application 57375/08, judgment of 30 October 2012, para. 99.

72 European Court of Human Rights: *P. and S. v Poland*, para. 96; *Tysiqc v Poland*, para. 110; Grand Chamber, *A, B and C v Ireland*, para. 245; *R.R. v Poland*, para. 184.

73 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

existing law, including the Constitution, in order to ensure "effective, timely and accessible procedures for pregnancy termination".[74]

This obligation to set up a legal and procedural framework to make the entitlement to abortion not a theoretical provision but a concrete right is framed in a multifarious bundle of obligations concurring to define the features necessary to guarantee women's freedom of choice.

In drafting the relevant law legislators are bound by the duty to "ensure clarity of the pregnant women's legal position"[75] and the necessary legal security.[76] This duty is accompanied by an obligation to create a system of information and a prohibition on giving false information. In this perspective the Human Rights Committee in *Mellet v Ireland* observed that the Covenant obliges states to ensure that health-care providers are in a position to supply full information on safe abortion[77] and in General Comment 36 argued that States are called on to "ensure access for women and men, and especially girls and boys, to quality and evidence-based information and education on sexual and reproductive health."[78] In the case of *P and S v Poland* the ECHR highlighted that "effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy."[79]

The procedure has to be shaped with the aim of taking into adequate account the different interests which are embedded in the decision as well as the obligations arising from the protection of human rights.[80] In this perspective the ECHR pointed out that the decision-making process has to be fair and afford adequate protection to the safeguarded interests. In particulars there is the need for involving individuals in the decision-making process "to a degree sufficient to provide her or him with the requisite protection of their interests."[81] In applying these principles to the procedural arrangements that states have enacted in the field of abortion the ECHR stated that "the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have

74 Human Rights Committee: *Amanda Jane Mellet v Ireland*, para. 9.

75 European Court of Human Rights: *Tysiąc v Poland*, para. 116; *R.R. v Poland*, para. 193.

76 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

77 Human Rights Committee: *Amanda Jane Mellet v Ireland*, para. 9.

78 Human Rights Committee: *General Comment 36*, para. 8.

79 European Court of Human Rights: *P. and S. v Poland*, para. 111.

80 European Court of Human Rights: *P. and S. v Poland*, para. 99; Grand Chamber: *A., B., and C v Poland*, para 249; *R.R. v Poland*, para. 187.

81 European Court of Human Rights: *P. and S. v Poland*, para. 99.

her views considered. The competent body or person should also issue written grounds for its decision."[82]

In *L.M.R. v Argentina* the Human Rights Committee found an unlawful interference in the private life of the author of the communication because of the intervention of the judiciary in an issue which could have been resolved between the patient and the physician, thus highlighting the state's failure to enact an adequate procedure.[83] Allowing the voices of the women who are involved in the procedure to be heard is also one of features proceedings must possess pursuant to the CEDAW provisions. The Committee on the elimination of discrimination against women in *L.C. v Peru* pointed out that "it is essential for this legal framework to include a mechanism for rapid decision making, with a view to limiting to the extent possible risks to the health of the pregnant mother, that her opinion be taken into account, that the decision be well founded and that there is a right to appeal." [84]

The obligation to ensure effective access to abortion under the conditions established by law comprises the further duty to create an accessible alternative if the medical staff exercises the right to conscientious objection, guaranteeing that a sufficient number of doctors are available to perform abortion. On this point the Committee on the elimination of discrimination against women argued that "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers."[85] The Human Rights Committee adopted a similar approach in General Comment 36 pointing out that the exercise of the right to conscientious objection is one the barriers that states are obliged to remove to secure access to abortion.[86] The same obligation derives from the case law of the ECHR which pointed out that the health care system has to be organized in such a way to ensure that the exercise of freedom of conscience does not prevent patients from obtaining access to those services to which they are entitled pursuant to the laws in force.[87]

Furthermore, the ECHR added that States are obliged to put in place a mechanism to express the refusal to perform an abortion which also comprises "elements allowing

82 European Court of Human Rights: *P. and S. v Poland*, para. 99; *R.R. v Poland*, para. 191; *Tysiqc v. Poland*, para. 117.

83 Human Rights Committee: *L.M.R. v Argentina*, communication 1608/2007, views of 28 April 2011, Un Doc. CCPR/C/101/D/1608/2007, para. 9.3.

84 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

85 Committee on the Elimination of Discrimination against Women: *CEDAW General Recommendation 24*, para. 11.

86 Human Rights Committee: *General Comment 36*, para. 8.

87 European Court of Human Rights: *P. and S. v Poland*, para. 106; *R.R. v. Poland*, para. 206.

the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory for such refusals to be made in writing and included in the patient's medical record and, above all, by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service."[88]

States also abide by the obligation to shape the procedure in order to guarantee pre-abortion as well as post-abortion services. These services must comprise counselling, psychological support and medical care. The Human Rights Committee in General Comment 36 observed that "states parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances."[89] The same Committee in the views adopted in *Mellet v Ireland* found that the author of the communication was victim of discrimination as a consequence of the state's failure to provide her with adequate assistance, observing that "the author, as a pregnant woman in a highly vulnerable position after learning that her much-wanted pregnancy was not viable, (…) had her physical and mental anguish exacerbated by not being able to continue receiving medical care and health insurance coverage for her treatment from the Irish health-care system; (…) and the State party's refusal to provide her with the necessary and appropriate post-abortion and bereavement care."[90] The violation of this right could amount to a breach of fundamental rights. In *R.R. v Poland* the Court argued that the delay in carrying out the tests provided for by law and in communicating their results to the applicant amounted to a humiliation of the woman in breach of art. 3 of the ECHR.[91]

CEDAW also imposes upon states the obligation to provide post-abortion services.[92]

A latest point which is worth mentioning relates to the obligation to provide judicial remedies in order to prevent women from being at the exclusive mercy of medical personnel. In *Tysiac v Poland* the Court found that Polish law set up no judicial remedies to solve disagreements between patients and doctors or between doctors. This legal arrangement gave rise to prolonged uncertainty causing severe distress and anguish to the applicant.[93]

88 European Court of Human Rights: *P. and S. v Poland*, para. 107. On this problem see also European Committee of Social Rights: *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, complaint 91/2013, Report to the Committee of Ministers, 12 October 2015, paras. 166-177.

89 Human Rights Committee: *General Comment 36*, para. 8.

90 Human Rights Committee: *Amanda Jane Mellet v Ireland*, paras. 7.4 and 7.11. See also Human Rights Committee: *L.M.R. v Argentina*, para. 6.5.

91 European Court of Human Rights: *R.R. v Poland*, para. paras. 153-162.

92 Committee on the Elimination of Discrimination against Women: *General Recommendation 35*, para. 18.

93 European Court of Human Rights: *Tysiąc v Poland*, para. 124.

The Committee on the elimination of discrimination against women adopted the same approach and affirmed that States are under the due process obligation which entails that the procedure has to encompass a right to appeal.[94] In *L.C. v Peru* the Committee found the *amparo* procedure was not a suitable judicial remedy for it was too long and unsatisfactory.[95]

Since Ukrainian women have been victims of rape during an armed conflict it is of interest to consider if and how abortion is considered within the framework of international humanitarian law.

IV. ACCESS TO SAFE ABORTION AND INTERNATIONAL HUMANITARIAN LAW.

All States Parties to the four Geneva Conventions are obliged to respect and ensure respect for the provisions of the Conventions pursuant to art. 1 of each of them. As a consequence international humanitarian law can be a source of obligations for the states to which Ukrainians moved.

The four Geneva Conventions lay down no specific rules on the protection of the reproductive health of women, but contain provisions protecting pregnant women which are based on their assimilation to wounded and sick persons with the aim of protecting maternity rather than women and their individuality as such.[96] This legal arrangement has given rise to doubts on whether or not access to safe abortion is part and parcel of the medical treatment states have to secure to women and girls in case of rape, notwithstanding the Statute of the ICC comprises rape among the war crimes (art. 8 para. 2 of the Statute).[97]

Practice on the matter is marked by ambiguity. The most striking example of the uncertainty surrounding termination of pregnancy is to be found in the Security

94 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

95 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.4.

96 See Marconi. R.: "Tutela dei diritti sessuali e riproduttivi nell'attuale conflitto in Ucraina: l'accesso all'interruzione di gravidanza", *Diritti umani e diritto internazionale*, 2022, vol. 16 n. 3, p. 682, p. 683; Venturini, G.: "Diritto internazionale umanitario e diritto di genere", in *La tutela dei diritti umani e il diritto internazionale*, (a cura di A. Di Stefano e R. Sapienza), Editoriale Scientifica, Napoli, 2012, p. 98 ff; Gardam, J.: "Women and the Law of Armed Conflict. Why the Silence?", *International and Comparative Law Quarterly*, 1997, vol. 47 n. 1, p. 55 ff.

97 Gaggioli, G.: "Is There a "Right to Abortion" for Women and Girls Who Become Pregnant as a result of Rape? A Humanitarian and Legal Issue", *Vulnerabilities in Armed Conflicts. Slected Issues*, 14th Bruges Colloquium, 17-18 October 2013, available at https://www.icrc.org/en/doc/resources/documents/statement/2013/sexual-violence-abortion-statement.htm, argues that IHL does not envisage a right to abortion.

Council Resolution 2467/2019[98] which is one of the thematic resolutions the UN Security Council has adopted in the area of "Women, Peace and Security".[99]

The text of the Resolution makes no mention of the sexual and reproductive health of women as a consequence of the fierce opposition many members including the United States made in order to prevent abortion from being considered part of the medical treatment to secure to women who had undergone rape.[100] Despite this, the text contains several provisions which seem to allow termination of pregnancy within the wider framework of health care of women who are victims of sexual violence. The Resolution anchors states' activity to the principle of non-discrimination,[101] and recognises the different and specific needs of women and girls who became pregnant as a consequence of sexual violence.[102] In so doing the Resolution makes an express reference to "those who choose to become mothers" thus leaving room to argue that freedom of choice has to be secured to women and girls wishing to put a halt to unwanted pregnancy.[103]

A contribution to a better understanding of international humanitarian law comes from international human rights law as a consequence of the relationship of complementarity between the two systems.[104] The Committee on the elimination of discrimination against women made an express hint to that relationship in General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, stating that the protection of women's rights is secured by an international law regime consisting of "complementary protection" under the Convention and international humanitarian, refugee and criminal law.[105] In this vein the Committee added that "the Convention and international humanitarian

98 United Nations Security Council: *Resolution 2467/2019*, UN Doc.S/RES/2467(2019), 23 April 2019. For a Comment see Chinkin, C., Rees, M.: *Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict*, Centre for Women's Peace and Security, London School of Economics and Political Science, 2019, available at http://eprints.lse.ac.uk/103210/1/Chinkin_commentary_on_Security_Council_Resolution_2467_published.pdf.

99 United Nations Security Council: *Resolution 1325/2000*, Un Doc. S/RES/1325 (2000), 31 October 2000.

100 For a critical approach see De Vido, S.: "Violence against women's health through the law of the UN Security Council. A critical international feminist law analysis of Resolution 2467 (2019) and 2403 (2019) within the WPS agenda", *Questions of International Law*, 2019, n. 74, p. 3, p. 9.

101 United Nations Security Council: *Resolution 2467/2019,* para. 16.

102 United Nations Security Council: *Resolution 2467/2019,* para. 18

103 States' practice is not unanimous on the legal item at stake. The United States forbid investing their humanitarian aids with the aim of using abortion as an instrument of family planning or in order to motivate or coerce persons to practice termination of pregnancy. The opposite stance has been adopted by the United Kingdom, whose humanitarian policy is based on the idea that prohibition to access abortion is in breach of the principle of non-discrimination on grounds of sex. On this practice see Marconi. R.: "Tutela dei diritti", p. 684 ff.

104 On the complementarity theory see Citroni, G., Scovazzi, T.: "La tutela internazionale dei diritti umani", in *Corso di diritto internazionale* (a cura di T. Scovazzi), Giuffrè Editore, Milano, 2013, p. 30 ff. Meron, T.: *Human Rights in International Strife: Their International Protection*, Cambridge University Press, Cambridge, 1987, p. 28 argues that international human rights law and international humanitarian law have to be applied cumulatively. On the relationship between the two laws see Ronzitti, N.: *Diritto internazionale dei conflitti armati*, III ed., G. Giappichelli Editore, Torino, 2006, p. 149.

105 Committee on the Elimination of Discrimination against Women: *General Recommendation 30*, para, 19.

law apply concurrently and their different protections are complementary, not mutually exclusive." [106] In developing this approach the same Committee identified a series of duties arising from the Convention in the field of treatment of displaced persons, refugees and asylum seekers. After having highlighted the precarious conditions of diplaced women and female refugees and asylum seekers in conflict and post-conflict situations, the Committee recommended states to protect women and girls by securing "free and immediate access to medical services(…); provide access to female health-care providers and services, such as reproductive health care and appropriate counselling."[107] Read in the light of the obligation to provide access to safe abortion in those cases in which carrying aunwanted pregnancy causes substantial pain or suffering to the pregnant women or girls who underwent rape (see *supra* para. 3) this latest recommendation clearly encompasses access to termination of pregnancy.

But the relationship of complementarity also entails that the safeguards international human rights law establishes play a role in defining the content of those rules of international humanitarian law which are not clear-cut. The obligation to provide adequate healthcare to pregnant women has to be construed taking into consideration the UN treaty bodies' practice on states' obligation to enable women who were victims of rape resulting in an unwanted pregnancy to access safe abortion.

This reading seems to be supported by the most recent practice in the field of international humanitarian law. The Framework on cooperation between the Government of Ukraine and the UN on prevention and response to conflict-related sexual violence of 3 May 2022[108] provides an engagement to enhance the Ukrainian health care system in order to ensure access of the survivors of sexual violence to sexual and reproductive health services. Scholars argued that the reference to these services witnesses the intention of the Ukrainian government to guarantee higher standards of protection of women sexual and reproductive rights through the enactment of laws enablig women who were raped during the conflict to terminate pregnancy.[109]

A further obligation of the international human rights law which is of relevance in identifying the content of states obligation pursuant to international humanitarian law is the duty to establish procedures enabling women and girls to exercise the right to abortion once it has been establised by the domestic legal system. In this

106 Committee on the Elimination of Discrimination against Women: *General Recommendation 30*, para. 20.

107 Committee on the Elimination of Discrimination against Women: *General Recommendation 30*, para. 57.

108 Government of Ukraine: *Framework of Cooperation between the Government of Ukraine and the United Nations on the Prevention and Response to Conflict-related Sexual Violence*, 3 May 2022, available at: https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/05/20220503-FoC_Ukraine_SIGNED.pdf.

109 Marconi. R.: "Tutela dei diritti", p.688-689.

perspective it has to be recalled that the case law of the ECHR and the views of the UN treaty bodies clarified that practice hampering the exercise of the right to abortion might cause anguish, suffering and feelings of fear in victims of rape who fuflil the legal conditions for terminating pregancy, giving rise to a breach of the said prohibition.

There is no doubt that preventing women who were victims of rape in an armed conflict from terminating an unwanted pregnancy by denying in practice access to the procedure might determine an high level of pain reaching the threshold of torture or other inhuman and degrading treatment.

In regulating the patterns of termination of pregnancy states have to comply with the other obligations that have been divined from the international human rights law with reference to the shaping of proceedings.

V. THE PROTECTION OF WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH IN THE COMMON EUROPEAN ASYLUM SYSTEM.

The provisions of EU law regulating health care in the field of the common asylum policy have to be construed against the legal framework arising from international human rights law and international humanitarian law.

The Council, by a unanimous decision which was taken on the 4th of March 2022, [110] decided to make use of the laws on temporary protection[111] to face the mass influx from Ukraine and to protect the rights of Ukrainian displaced persons. As a consequence Ukrainians' access to health and reproductive services falls within the scope of EU law. The paper will not only focus on Directive 2001/55 on temporary protection law, but also on Directive 2011/95,[112] the so-called Asylum Qualification Directive, and Directive 2013/33,[113] the so-called Asylum Reception Conditions which are part of the Common European Asylum System.

110 Council of the European Union, Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4 March 2022, p. 1.

111 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7 August 2001, p. 12.

112 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20 December 2011, p. 9.

113 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29 June 2013, p. 96.

Two reasons support the choice to widen the scope of the assessment to cover laws of the Common European Asylum System (hereinafter CEAS) in addition to the rules on temporary protection. The first reason is that Ukrainian women could apply for protection within the framework of CEAS, thus shifting from temporary protection to a different kind of protection. The second reason is the need to clarify the rationale lying behind the policies the EU has been carrying out in this field of migration law through the assessment of the legal arrangement on asylum as a whole.

A further caveat is necessary. Interpretation of the directives mentioned has to be carried out in the light of the EU system of protection of human rights, of international human rights law and international humanitarian law.[114]

The directives we are going to examine clarify that Member States still abide by international obligations they have contracted in entering into international treaties protecting human rights (see recital 16 of the Preamble and art. 3 of Directive 2001/55 and recitals 23 and 24 of Directive 2011/95).

It is necessary to add that the Court of justice argued that the context of asylum law is "essentially humanitarian"[115] so that the interpretation of the laws on asylum has to be consistent with international humanitarian law.[116]

Moreover, Member States implementing EU law are obliged to respect the general principles of EU law, as well as the human rights the Charter of Fundamental Rights of the Union enshrines. As a consequence Member States are bound by the prohibition of discrimination on grounds of sex, which is a general principle of EU law[117] and the content of a specific provision of the Charter (art. 21), as well as by the obligations which are embedded in the provisions of the Charter prohibiting torture or inhuman or degrading treatment (art. 4), laying down the right to private life (art. 7) and the right to health (art. 35).

The rights the said laws of the Charter enshrine correspond to those of the ECHR and of the other human rights treaties which have been applied in the jurisprudence of the ECHR and the quasi-jurisprudence of the UN treaty bodies on protection of women's sexual and reproductive rights.

114 On the relationship between secondary laws of the Union in the field of asylum and the international protection of human rights see Thym, D.: " Legal Framework for EU Asylum Policy", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 1129, p. 1162.

115 Court of justice, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, case C-472/13, judgment of 26 February 2015, ECLI:EU:C:2015:117, para. 32.

116 On this point see Dörig. H.: "Asylum Qualification Directive 2011/95 EU", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 1229, p. 1236.

117 Court of Justice, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, case 149/77, judgment of 15 June 1978, Reports 1978p. 1365, paras. 26-27.

Pursuant to art. 52 para. 3 of the Charter, the meaning and scope of the rights it provides for, which correspond to those the ECHR guarantees, shall be the same as those laid down by that Convention.

Furthermore, enactment of the Charter cannot entail a lowering of the international standards of protection of human rights for the provisions of the Charter cannot restrict or adversely affect the human rights that are protected by international law and international agreements to which the Union or the Member States are parties (art. 53).

By virtue of this legal arrangement states' obligations in the field of the protection of women's sexual and reproductive rights emerging from the practice of human rights treaty bodies set the limits to the discretionary powers of EU Member States in the implementation of the Union's directives and are to be taken into account in examining the provisions the directives lay down.

Directive 2001/55 on temporary protection pursues the aim of establishing a uniform status defining minimum standards for ensuring the protection of third-country nationals or stateless persons as beneficiaries of international protection (art. 1). In so doing the Directive defines the content of the protection which is guaranteed to those enjoying temporary protection. The Preamble clarifies that the obligations it imposes upon Member States should offer an adequate level of protection (recital 15 of the Preamble).

Access to healthcare is the object of the provision art. 13 of Directive 2011/95 lays down obliging Member States to provide necessary medical care for persons enjoying temporary protection which includes at least emergency care and essential treatment of illness (para. 2).

Para. 4 of the same article contains a specific provision addressing persons enjoying temporary protection who have special needs, a group comprising persons who have undergone rape. The rule imposes upon Member States the obligation to provide necessary medical and other assistance.

Four remarks are prompted by these provisions.

Firstly, the Directive makes no reference to the sexual and reproductive health of women, but considers protection of health in general terms.

The second remark is strictly connected to the previous one and relates to the lack of distinction between men and women in access to health care which is considered in a universal manner, thus reflecting the traditional male conception

of women's health and the care for it.[118] This approach does not take into account the differences in healthcare needs originating from being victims of rape or sexual violence.

The third observation refers to the wide margins of discretion the Directive leaves to Member States in implementing its provisions since art. 13 neither defines the standards countries are called on to guarantee in providing medical care pursuant to para.2, nor clarifies the necessary medical assistance that has to be offered to those in special need of protection by virtue of para.4 of the same article .[119] In the light of the room for manoeuvring the Directive gives Member States in implementing its provisions, there is no doubt that no obligation on termination of pregnancy arises from its rules.

This is not surprising since the distribution of competences between the Union and its Members States in the field of public health gives the former a limited role to play in the matter. States maintain the competence to decide on the definition of the level of medical care and the organization of the related services. Art. 168 para. 7 TFEU establishes that "Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care." The same rationale underlies the protection of the right to health the Charter of fundamental rights envisages for art. 35, leaving it to Member States to establish the conditions for accessing healthcare and benefitting from medical treatment.

Furthermore, the EU policy on migration and asylum has always achieved a low level of harmonization between the Member States because of the enactment of laws which leave States a wide margin of discretion in facing the challenges entrenched in migratory flows.[120]

However, the discretion Directive 2001/55 accords to Member States is not unlimited because of the constraints embedded in the obligations that the jurisprudence of the ECHR and the quasi-jurisprudence of the UN treaty bodies have identified ensuring the protection of women's health. Those obligations, therefore, define the content of the necessary medical treatment pursuant to art. 13 para. 4 calling on Member States to secure safe abortion for women and

118 On this conception see Putnam, R.A.: "Why not a Feminist Theory of Justice?", in *Women, Culture, and Development: A Study of Human Capabilities* (eds.: M.C. Nussbaum, J. Glover), Oxford University Press, Oxford, 1995, p. 298, p. 313.

119 On the discretion which is left to Member States see Skordas, A.: "Temporary Protection Directive 2001/55/EC", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p.1177, p. 1205.

120 See De Bruycker, P.: "Le niveau d'harmonisation législative de la politique européenne d'immigration et d'asile", in AA.VV.: *The European Immigration and Asylum Policy; Critical Assessment Five Years After the Amsterdam Treaty* (under the supervision of F. Julien-Laferriere, H. Labayle, Ö Edström), Bruylant, Bruxelles, 2005, p. 45.

girls who undergo rape in armed conflict in order to avoid pain or suffering arising from unwanted pregnancy. Mereover, Member States that have established performance of abortion in case of rape abide by the obligation to establish a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion, thus abstaining from any practice obstructing the exercise of the right.

The fourth remark relates to intersectionality, which has been neglected in the regulation of temporary protection. The Directive does not consider the economic obstacles that can represent an impediment to accessing abortion for women who are forced to leave their country of origin. Furthermore, no weight is given to the health needs of women who are migrants by a set of rules associating women and men in a universal approach towards the protection of health.

The legal arrangement of women's access to health care that Directive 2001/55 establishes has been reproduced within the wider framework of the CEAS so that the the same hallmarks characterize the system as a whole.

The first law contributing to protection of third-country nationals is Directive 2011/95, whose purpose is to establish a uniform status for refugees or for persons eligible for subsidiary protection and to define the content of the protection it guarantees (art. 1).

In opening the chapter relating to this latest issue art. 20 of the Directive imposes upon Member States the duty to take into account the specific situations of vulnerable persons, a category in which those who have been subject to rape are included (para.3). However, the following paragraph of the same provision limits the scope of the obligation referring it only to those people "found to have special needs after an individual evaluation of their case," so that the obligation at stake does not arise if no special needs have been identified in the evaluation of each individual.[121] The two laws set the framework against which the specific provisions on health are to be construed. Art 30 of Directive 2011/95 lays down a general clause in the first paragraph entrusting beneficiaries of international protection with the right to access to healthcare under the same conditions as nationals of the Member State which has granted the protection. The provisions covers both physical and mental health (recital 46 of the Preamble).

Specific rules address persons in special need such as those who have undergone rape. Pursuant to art. 30 para. 2 Member States are bound to provide adequate

121 A further reading has been proposed by Battjes, H.: "Asylum Qualification Directive 2011/95/EU", in: *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 11386, p. 1394 who pointed out that the provision can be read as entailing Member States' obligation to individually evaluate the situations of the categories of vulnerable person para. 3 takes into consideration.

healthcare under the same eligibility conditions as nationals of the Member State that has granted protection. The entitlement that the rule establishes by having recourse to the open-ended concept of adequacy[122] cannot be considered the source of an obligation to provide access to abortion because that law secures Member States a wide margin of discretion in defining the services that are adequate to protecting migrants' health. Once again, the set of legal obligations international human rights law and international humanitarian law provide constrain Member States in the exercise of the said discretion.

The same reading has to be applied to the latest legal discipline of interest that is embodied by Directive 2013/33 on asylum reception conditions, targeting the aim of laying down standards for the reception of applicants for international protection (art. 1). To attain this objective art. 19 of the Directive ensures access to the necessary health care which includes, at least, emergency care treatment of illness and of serious mental disorders.

The provision makes no reference to reproductive health so that it does not envisage termination of pregnancy as an obligation falling within the necessary health care. This reading is supported by the reference the law makes to illness since this formula does not cover unwanted pregnancy.

In its second paragraph art. 19 of Directive 2013/33 provides that Member States have to take into account the specific situation of applicants who have special needs. Victims of rape fall within this category of individuals pursuant to art. 21. The obligation to consider the special needs entails that Member States will shape the treatment of men and women in each individual case exercising the discretionary power the Directive leaves untouched. By virtue of art. 19 States abide by the obligation to provide necessary medical or other assistance to those subjects. The scope of the duty is defined in strict terms by the use of the term "necessary".[123] Termination of pregnancy can be considered a necessary treatment if its denial would result in a breach of the prohibition of torture or of the right to respect for private life

Ultimately, access to health care is envisaged by art. 25 of Directive 2013/33 requiring Member States to ensure "the necessary treatment for the damage caused " to those who were subject to torture, rape or other serious acts of violence. The same provision specifies that the treatment has to comprise in particular appropriate medical and psychological treatment or care. The rule stems from the consideration that the subjects it mentions are in need of specialised

122 Battjes, H.: "Asylum Qualification", p. 1419.

123 Tsourdi, L.: "Asylum Reception Conditions Directive 2013/33/EU", in: *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p.1540 and p. 1613.

assistance, calling on Member States to make available the medical treatment that fits the physical and mental trauma resulting from violence.

At the end of the day EU law on temporary protection and asylum neither enshrines a right to abortion, nor imposes obligation upon Member States which are stricter than those international human rights law and international humanitarian law establish.

VI. FINAL REMARKS.

The assessment of the jurisprudence of the ECHR and the quasi-jurisprudence of UN treaty bodies on termination of pregnancy has contributed to identifying a series of obligations states have to comply with to protect sexual and reproductive rights of women.

Ukrainian women and girls who underwent rape and applied for abortion in Poland can rely on these obligations, and mainly on the state's obligation to guarantee safe abortion for women who are victims of rape to avoid their suffering and pain and to establish a procedural framework enabling pregnant women to effectively exercise their right of access to abortion since they comply with the condition of rape Polish law provides.

However, it is doubtful that the set of positive obligations arising from the said practice enures that the right to abortion is effective.

The difficulties in guaranteeing women's freedom of choice in those states in which abortion is lawful stem from the interests which are at stake.

Women's health is a point of convergence of several factors, all of them concurring in the shaping of the laws regulating sexual and reproductive rights of women.

The traditional conception of medicine and healthcare is the result of cultural and religious processes that denied the existence of gender and gave rise to a universal system of healthcare which *de facto* represents the expression of a male conception of body and political power. The apparent neutrality the objective nature of science evokes has hidden the role of control on women's sexual and reproductive freedom that the conception of medicine and the following shaping of access to healthcare have been playing.

This control is part and parcel of a wider mechanism of male dominance that is grounded on the role women are called on to play in society. The denial of reproductive autonomy perpetuates the prejudice of women as child bearers and

child rearers, a prejudice which is widespread in legal culture as the judgment of the Polish Constitutional Tribunal K 1/20 has shown.

EU law on temporary protection and asylum does not raise the standards of protection of migrant women's health compared to the international system of protection of human rights, therefore not contributing to dismantling the said prejudices and stereotypes.

The limits the Treaties imposed on the EU competences in the field of health make it clear that the European Union can only make a minor contribution to the protection of women's and girls' sexual and reproductive rights and not only of the rights of migrant women and girls.

However, the distribution of competences between the Union and its Member States offers a partial explanation for the said incapability and the case of Ukrainian women in Poland sheds light on a series of further reasons which are embedded in EU non-discrimination law and EU policies on asylum.

Starting from the way in which EU law fights against discrimination on grounds of sex it is worth remembering that the main aim the EU pursues in protecting women against discrimination is guaranteeing fair competition within the common market. The EU still struggles to go beyond this original approach in order to adopt a fully-fledged human rights based policy in the field of non-discrimination.

Furthermore, EU law on non-discrimination has always been grounded on a single-axis perspective.[124] Such a stance prevents the Union from facing the challenges which are entrenched in intersectional discrimination, thus shadowing the special need of women such as migrant women discriminated against not only on grounds of sex, but also on grounds other than sex such as race, migratory status and poverty.

The intertwining between the protection of women's health and their status as migrants leads us to consider the second group of reasons for the limited impact of EU law on the content of protection of women's health.

The EU failed to attain the objective of establishing a common policy on asylum and migration that was launched at the Tampere European Council in 1999.[125] Notwithstanding the periodical reviving of this aim, the laws the EU has adopted have always left Member States a wide margin of discretion in their

124 Fredman, S.: *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, European Commission, European network of legal experts in gender equality and non-discrimination, 2016, p. 30 ff.; Schiek, D., Lawson, A: *European union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, Aldershot, Ashgate, 2011.

125 Tampere European Council: *Presidency Conclusions*, 15 and 16 October 1999, para 10 ff.

implementation. This failure is mainly due to Member States' reluctance to cede to the Union control on migratory flows and the decision on the social assistance to provide to migrants.

Furthermore, the strict approach towards social protection of asylum seekers and refugees that EU law has adopted is functional to the objective of preventing migrants from relying on international protection to circumvent the limits on entry and stay and acceding to social assistance in the hosting country.

Notwithstanding the factors highlighted, the law of the Union could make a certain contribution to the effectiveness of protection of migrant women's sexual and reproductive rights as a result of the primacy of EU law over domestic law. States providing for lawful abortion will incur in an infringement of EU law if they do not make the exercise of that right effective in full compliance with the obligations arising from the fundamental rights the EU protect that are to be interpreted in the light of the jurisprudence of the ECHR and the quasi-jurisprudence and UN treaty bodies.

However, termination of pregnancy is strictly connected with the fundamental principles of domestic legal systems so that national judges could rely on the theory of counterlimits not to apply EU law and to safeguard practice not fulfilling the obligations it imposes.

The recent judgment of the Polish Constitutional Tribunal K 3/21[126] denying the primacy of EU law clarifies the difficulties Ukrainian women and girls will face in challenging the Polish practice hampering exercise of the right to abortion. In this perspective it really seems that these women and girls moved from the violence of Russian aggression to the violence of Polish practice on termination of pregnancy.

But the judgment of the Constitutional Tribunal has more extensive significance because it casts doubts on the concrete capability of EU law to contribute to advancing the protection of migrant women's and girls' reproductive rights in such a sensitive field.

126 Constitutional Tribunal, judgment of 7 October 2021, K3/21. For a comment see: Pace, L.F.: La sentenza della Corte costituzionale polacca del 7 ottobre 2021: tra natura giuridica dell'Unione, l'illegittimità del sindacato *ultra vires* e l'attesa della soluzione della "crisi"tra Bruxelles e Berlino, *BlogDUE*, 28 October 2021, available at https://www.aisdue.eu/la-sentenza-della-corte-costituzionale-polacca-del-7-ottobre-2021-tra-natura-giuridica-dellunione-lillegittimita-del-sindacato-ultra-vires-e-lattesa-della-soluzione-della/; Di Federico. G.: "Il Tribunale costituzionale polacco si pronuncia sul primato (della Costituzione polacca): et nunc quo vadis?", *BlogDUE*, 13 October 2021, available at https://www.aisdue.eu/giacomo-di-federico-il-tribunale-costituzionale-polacco-si-pronuncia-sul-primato-della-costituzione-polacca-et-nunc-quo-vadis/; Jaraczewski J.: "Gazing into the Abyss. The K 3/21 decision of the Polish Constitutional Tribunal, *Verfassungsblog*, 12 October 2021, available at https://verfassungsblog.de/gazing-into-the-abyss/.

BIBLIOGRAPHY

ATREY, S.: *Intersectional Discrimination*, Oxford University Press, Oxford, 2019

BACHELET, M., UN HIGH COMMISSIONER FOR HUMAN RIGHTS: *Oral update on the situation of human rights in Ukraine*, 49th Session of the Human Rights Council, 30 March 2022, available at https://www.ohchr.org/en/statements/2022/03/update-human-rights-council-ukraine

BATTJES, H.: "Asylum Qualification Directive 2011/95/EU", in: *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 11386

BUCHOLC. M.: "Abortion Law and Human Rights in Poland. The Closing of the Jurisprudential Horizon, *Hague Journal on the Rule of Law*, 2022, vol. 14 n.1, p. 73

CHINKIN, C.: "Feminist Reflections on International Criminal Law", in *International Criminal Law and the Current Development of Public International Law* (edited by A. Zimmermann), Duncker and Humblot, Berlin, 2003, pp. 125-160

CHINKIN, C., REES, M.: *Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict*, Centre for Women's Peace and Security, London School of Economics and Political Science, 2019, available at http://eprints.lse.ac.uk/103210/1/Chinkin_commentary_on_Security_Council_Resolution_2467_published.pdf

CITRONI, G., SCOVAZZI, T.: "La tutela internazionale dei diritti umani", in *Corso di diritto internazionale* (a cura di T. Scovazzi), Giuffrè Editore, Milano, 2013

COMMITTEE AGAINST TORTURE: *Concluding observations on the seventh periodic report of Poland*, CAT/C/POL/CO/7, 29 August 2019

COMMITTEE ON ECONOMIC SOCIAL AND CULTURAL RIGHTS: *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, Un Doc. E/C.12/GC/22, 2 May 2016

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: *Concluding observations on the sixth periodic report of Poland*, E/C.12/POL/CO/6, 26 November 2016

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN: *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, Un Doc. A/54/38/Rev. 1, chap. I, 1999

Committee on the Elimination of Discrimination against Women: *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, 13 November 2013

Committee on the Elimination of Discrimination against Women: *Concluding observations on the combined seventh and eighth periodic reports of Poland*, CEDAW C/POL/CO 7-8, 14 November 2014

Committee on the Elimination of Discrimination against Women: *General Recommendation 35 on Gender-based Violence Against Women, Updating General Recommendation No. 19*, CEDAW/C/GC/35, 26 June 2017

Committee on the Rights of Persons with Disabilities: *Concluding observations on the initial report of Poland*, CRPD/C/POL/CO/1, 29 October 2018

Cook R.J., Dickens B.M., Fathalla M.F. (eds.): *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, Oxford University Press, Oxford, 2003

Council of Europe, Parliamentary Assembly: *Access to safe and legal abortion in Europe*, Resolution 1697(2008), 16 April 2008

De Bruycker, P.: "Le niveau d'harmonisation législative de la politique européenne d'immigration et d'asile", in AA.VV.: *The European Immigration and Asylum Policy; Critical Assessment Five Years After the Amsterdam Treaty* (under the supervision of F. Julien-Laferriere, H. Labayle, Ö Edström), Bruylant, Bruxelles, 2005

De Vido, S.: "Violence against women's health through the law of the UN Security Council. A critical international feminist law analysis of Resolution 2467 (2019) and 2403 (2019) within the WPS agenda", *Questions of International Law*, 2019, n. 74, p. 3

De vido, S.: *Violence Against Women's Health in International Law*, Manchester University Press, Manchester, 2020

De Vido S.: "Gender Inequalities and Violence Against Women's Health During the COVID-19 Pandemic: an International Law Perspective", *BioLaw Journal*, 2020, n. 3, p. 77

De Vido S.: "Blessed be the Fruit. Un'analisi di genere della sentenza *Dobbs* della Corte Suprema statunitense alla luce del diritto internazionale dei diritti umani", *SIDIBLOG*, 2022, available at http://www.sidiblog.org/2022/07/25/blessed-be-the-fruit-unanalisi-di-genere-della-sentenza-dobbs-della-corte-suprema-statunitense-alla-luce-del-diritto-internazionale-dei-diritti-umani

DÖRIG. H.: "Asylum Qualification Directive 2011/95 EU", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 1229

ECONOMIC AND SOCIAL COUNCIL: *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women*, UN Doc. E/CN.4/1999/68/add. 4, 23 June 1999

FREDMAN, S.: *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, European Commission, European network of legal experts in gender equality and non-discrimination, 2016, p. 30

GAGGIOLI, G.: "Is There a "Right to Abortion" for Women and Girls Who Become Pregnant as a result of Rape? A Humanitarian and Legal Issue", *Vulnerabilities in Armed Conflicts. Slected Issues*, 14th Bruges Colloquium, 17-18 October 2013, available at https://www.icrc.org/en/doc/resources/documents/statement/2013/sexual-violence-abortion-statement.htm

GARDAM, J.: "Women and the Law of Armed Conflict. Why the Silence?", *International and Comparative Law Quarterly*, 1997, vol. 47 n. 1, p. 55

GARDAM, J: "A New Frontline for Feminism and International Humanitarian Law", in *The Ashgate Research Companion to Feminist Legal Theory* (edited by M. Davies, V. E. Munro), Ashgate Publishing Limited, Farnham, 2013, p. 217

GEBHARD, J,TRIMIÑO MORA, D.: "Reproductive Rights, International Regulation", in *Max Planck Encyclopedia of Public International Law* (edited by R. Wolfrum), Oxford University Press, Oxford, 2017

GLISZCZYŃSKA-GRABIAS, A., SADURSKI, W.: "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)", *European Constitutional Law Review*, 2021, vol. 17, p. 130

HUMAN RIGHTS COMMITTEE: *General Comment No. 36. Article 6: right to life*, Un. Doc. CCPR/C/GC/36, 3 September 2019

INTERNATIONAL CRIMINAL COURT: *Policy Paper on Sexual and Gender-Based Crimes*, 2014

MACKINNON, C.A.: "Reflections on Sex Equality under Law", *Yale Law Journal*, 1991, vol. 100, p. 1281

MacKinnon, C.A.: "Rape, Genocide and Women's Human Rights", *Harvard Women's Law Journal*, 1994, vol. 17, p. 5

MacKinnon, C.A.: "Women's September 11th: Rethinking the International Law of Conflicts", *Harvard Journal of International Law*, 2006, vol. 47(1), p. 1

Marconi. R.: "Tutela dei diritti sessuali e riproduttivi nell'attuale conflitto in Ucraina: l'accesso all'interruzione di gravidanza", *Diritti umani e diritto internazionale*, 2022, vol. 16 n. 3, p. 682

Meron, T.: *Human Rights in International Strife: Their International Protection*, Cambridge University Press, Cambridge, 1987

Moreau, C., Shankar, M., Glasier, A., Cameron, S., Genzel-Danielsson, K.: "Abortion regulation in Europe in the era of COVID-19: a spectrum of policy responses", *BMJ Sexual Reproductive Health*, 2021, n. 47, p. 1

Nelson, E.: *Law, Policy and Reproductive Autonomy*, Bloomsbury, Oxford, Portland, 2013

Ní Ghráinne, B., McMahon, A.: "Access to Abortion in Cases of Fatal Foetal Abnormality: a New Direction for the European Court of Human Rights?", *Human Rights Law Review*, 2019, vol. 19 n. 3, p. 561

Pisillo Mazzeschi, R.: "Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme", *Recueil des Cours de l'Academie de Droit International de la Haye*, 2008, vol. 333, p. 175

Poli, L.: "Aborto e diritti umani fondamentali: Corte europea dei diritti umani e *treaty bodies* a confronto", *Diritti umani e diritto internazionale*, 2017, vol. 11 n. 1, p. 189

Poli, L.: "La sentenza della Corte Suprema statunitense in *Dobbs v Jackson*: un *judicial restraint* che viola i diritti fondamentali delle donne", *Diritti umani e diritto internazionale*, 2022, vol. 16, p. 659

Putnam, R.A.: "Why not a Feminist Theory of Justice?", in *Women, Culture, and Development: A Study of Human Capabilities* (eds.: M.C. Nussbaum, J. Glover), Oxford University Press, Oxford, 1995, p. 298

Ronzitti, N.: *Diritto internazionale dei conflitti armati*, III ed., G. Giappichelli Editore, Torino, 2006

Schiek, D., Lawson, A: *European union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, Aldershot, Ashgate, 2011

Skordas, A.: "Temporary Protection Directive 2001/55/EC", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p.1177

Thym, D.: " Legal Framework for EU Asylum Policy", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 1129

Tsourdi, L.: "Asylum Reception Conditions Directive 2013/33/EU", in: *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p.1540

Tramontana E.: "Women's Rights and Gender Equality During the COVID-19 Pandemic", *Questions of International Law*, 2021, n. 87, p. 5

United Nations General Assembly, *Report of the Working Group on the issue of discrimination against women in law and in practice*, A/HRC/32/44, 8 April 2016

United Nations Security Council: *Resolution 1325/2000*, Un Doc. S/RES/1325 (2000), 31 October 2000

United Nations Security Council: *Resolution 2467/2019*, UN Doc.S/RES/2467(2019), 23 April 2019

United Nations Security Council: *Women and girls who become pregnant as a result of sexual violence in conflict and children born of sexual violence in conflict. Report of the Secretary General*, Un Doc. S/2022/77, 31 January 2022

Venturini, G.: "Diritto internazionale umanitario e diritto di genere", in *La tutela dei diritti umani e il diritto internazionale*, (a cura di A. Di Stefano e R. Sapienza), Editoriale Scientifica, Napoli, 2012, p. 98