RESOLUTION 2122: THE "ABORTED" DEBATE

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I. INTRODUCTION

The core theme of this article is the recently adopted United Nations Security Council Resolution 2122 on Women and Peace and Security.[1] Resolution 2122 is the latest in the United Nations' ("UN") series of thematic resolutions on Women and Peace and Security. This resolution has garnered great interest being the first of its kind where reproductive justice and access to abortion has been impliedly built in and unanimously adopted by member states. Within the United States, women's human rights advocates have expressed hope that Resolution 2122 will prompt modifications in the archaic Helms' Amendment.

This article criticizes the above presumptions and advances the argument that Resolution 2122, though landmark, when viewed from the prism of prior United Nations Security Council ("UNSC") resolutions, is more regressive than many concurrently existing international instruments. Many of these may be constructed to allow abortion in cases beyond wartime rape, which is what Resolution 2122 currently allows. This article contends that among pre-existing ambiguous law and Resolution 2122, which makes a very restrictive case for access to abortion, the former advances the position of women more effectively. In identifying problems, this article does not intend to make a case for a universal right of abortion on demand; rather it advances the primacy of reproductive justice as a holistic concept. It also argues that, at the very minimum, international legal instruments should stop paying homage to

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1. S.C. Res. 2122, U.N. Doc. S/RES/2122 (Oct. 18, 2013).

national legal restrictions. Instead, international frameworks should start advocating a risk/need-based criteria for access to abortion services in times of conflict, whether or not otherwise mandated by the domestic laws of the states. It rejects the war-rape or similar event based criteria for granting access to abortion on the grounds that such criteria merely further androcentric, paternalistic legal attitudes which perpetuate victimization of women.[2] In order to do so, the article borrows heavily from feminist jurisprudence and approaches to international law.

While a major part of this article centers on a critique of Resolution 2122 itself, it is intended to serve a larger purpose. Section II attempts to highlight the multifarious ways in which women's reproductive rights and choices are compromised on account of conflict. Women continue to suffer from reproductive impairment in ways the law, thus far, has failed to take into account, particularly when women take up the role of combatants. This section will be followed by a brief overview of existing human rights, humanitarian law, and international criminal law regimes in Section III. In this section, this article advances the argument that most legal instruments ignore reproductive rights on account of the strictly paternalistic nature of international law that relegates women's concerns to a subsidiary position.[3] The aim is to provide the reader an idea of the existing protections in the field of reproductive justice as well as highlight the gaps in law, pitfalls in enforcement, and barriers to effective realization of rights. This helps in contextualizing the provisions of Resolution 2122 better when discussed subsequently in Section IV. That section begins with an acknowledgement of the positive contributions of Resolution 2122—primarily the discontinuance of the subsidiary to national law exception found in most instruments dealing with reproductive rights.

After articulating the positive gains, the article proceeds in Section V to highlight the many ways in which Resolution 2122 misses an opportunity to promote reproductive justice for conflict stricken women. This section concludes with an analysis of the language of Resolution 2122 with three broad approaches advanced by feminist scholars to adjudge whether Resolution 2122 sheds the patriarchal cloak and truly embraces

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2. *Cf.* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 291, 390–91 (1999).

3. *Cf. id.* at 389.

reproductive justice in a holistic way.

In the last section, this article considers reformative models proposed by feminist scholars that future UNSC thematic resolutions on Women and Peace and Security might consider adopting. It explores the (a) *equality model*, which states that the way to redress harms to women, is to subject all civilians to improved protection or to ensure better enforcement of the already existing rules;[4] and (b) *the equal but different model*, which holds that new and special laws are required to re-contextualize gender and bring a gendered interpretation in international dialogues.[5] Though Resolution 2122 leans towards the latter at present, the ideal would be to effect a compromise between the two schools in the future so as to ensure not only that laws are re-contextualized and that what is achieved is not merely formalistic, but instead, functional equality. The article concludes with a recognition of the contribution made by the UNSC in bringing about transformative change in the lives of women. The article also seeks to encourage women's human rights advocates to stake a claim to a larger piece of the pie and not be satisfied by the minor, though significant, allowances made by Resolution 2122.

II. HOW CONFLICT AFFECTS WOMEN'S REPRODUCTIVE FREEDOM

Women's reproductive freedom is compromised in many ways, depending on the capacities in which they experience conflict, whether as civilians or combatants. For women in combat roles, their treatment and status within the military evidences an inferior position in society,[6] and it comes as no surprise therefore that their special needs, including ensuring reproductive justice, are so often overlooked. The laws of armed conflict have largely ignored the reproductive health needs of

4. *See* Fernando R. Teson, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647, 652–54 (1993).

5. *See generally* U.N. Econ. & Soc. Council, Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44, ¶ 95, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998) [hereinafter U.N. ESCOR].

6. *See* U.N. Div. for the Advancement of Women, Dep't of Econ. & Soc. Affairs, *Gender-Based Persecution, Rep. of the Expert Grp. Meeting*, ¶ 52, U.N. Doc. EGM/GBP/1997/Report (Dec. 6, 1999).

women combatants in captivity or otherwise.[7] While women are increasingly serving in combat roles, by and large, women's experience of war continues to be understood as synonymous to the experiences of the civilian populace.[8] This is amply demonstrated in many statements, including that of Patrick Cammaert, former Deputy Force Commander of the UN Mission in the Democratic Republic of the Congo, who stated that "it has probably become more dangerous to be a woman than a soldier in an armed conflict."[9] This statement presumes that the two roles are mutually exclusive and it is in the civilian role that law protects women, albeit in a paternalistic fashion. Be it civilian women or combatant, conflict affects their reproductive capacities in several ways, often suffered in the shadow of legal oversight, some of which are set out below.

A. VULNERABILITY

Vulnerability stemming from being a woman can cause adverse consequences in conflict.[10] While vulnerability itself is a universal human phenomenon, it has a deeply gendered association that equates it with "victimhood, deprivation, dependency, and pathology."[11] "[W]omen's reproductive capacity makes them particularly vulnerable to shortages in food, medicine, reliable birth control and medical treatment."[12] Effects of prohibited weapons of mass destruction have been known to cause pregnancy complications and sterility amongst

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7. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art.14, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 148 [hereinafter Third Geneva Convention] (falling silent on the issue of reproductive health beyond short-term treatment of women that are pregnant, have become pregnant, or have children already).

8. *See* Nadine Puechguirbal, *The Cost of Ignoring Gender in Conflict and Post-Conflict Situations: A Feminist Perspective*, AMSTERDAM L.F., Winter 2012, at 8.

9. U.N. SCOR, 63rd Sess., 5916th mtg. at 9, U.N. Doc. S/PV.5916 (June 19, 2008) (explaining the long-term brutality that survivors experience).

10. *See generally* Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1 (2000) (discussing the effects of armed conflict on women).

11. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008) (discussing the public perception of vulnerability).

12. Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INT'L & COMP. L.Q. 55, 61 (1997).

women,[13] on account of their biologically vulnerable status. In addition, war deepens already existing inequalities[14] and makes survival of women and children particularly challenging in situations of complex humanitarian emergency.[15] Solely by virtue of being considered subordinate to men, with scant regard for the value of their lives, women are at risk of being overlooked and their reproductive rights and concerns considered unimportant.[16] For example, in Somalia, when relief agencies consulted heads of households, which are in most cases are men, for prioritizing the distribution of aid,[17] women's access to such relief was automatically dependent on the discretion of such male familial heads.[18] Reproductive health concerns are therefore unlikely in such situations to assume high priority.[19]

B. SOCIO-ECONOMIC FACTORS

Women in conflict and post conflict societies are faced with a plethora of problems including deterioration in public health infrastructure in their country, reduction of government spending on health, and lack of access to medical services due to displacement or otherwise.[20] On the economic front, women

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13. *See, e.g.*, Christine Gosden & Derek Gardener, *ABC of Conflict and Disaster: Weapons of Mass Destruction—Threats and Responses*, BMJ, Aug. 2005, at 400 (explaining the long-term effects of weapons of mass destruction).

14. *See, e.g.*, Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, ¶¶ 6, 26, 30, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995) [hereinafter *Beijing Platform*] (highlighting inequality by emphasizing the great number of women living in poverty).

15. *See generally* Naeema Al Gasseer et al., *Status of Women and Infants in Complex Humanitarian Emergencies*, J. MIDWIFERY & WOMEN'S HEALTH, Jul.–Aug. 2004, at 7.

16. *See* Charlesworth, *supra* note 2, at 385 (discussing needs specific to women that go unnoticed).

17. *Id.*

18. *See* Fionnuala Ni Aolain, *Women, Vulnerability, and Humanitarian Emergencies*, 18 MICH. J. GENDER & L. 1, 10–11 (2011).

19. *See* THERESE MCGINN ET AL., REPRODUCTIVE HEALTH FOR CONFLICT-AFFECTED PEOPLE: POLICES, RESEARCH AND PROGRAMMES 10–12 (Humanitarian Practice Network, 2004) (illustrating how the lack of health options available to women may lead to a higher death rate for maternal causes in certain circumstances).

20. *See* U.N. Secretary-General, *Report of the Secretary-General on Women and Peace and Security*, ¶ 10, SCOR, U.N. Doc. S/2013/525 (Sept. 4, 2013) [hereinafter *Ban Ki-moon Report*] ("[G]reater attention needs to be paid to the full range of human rights violations experienced by women, including the gender-specific impacts of forced displacement, family separation,

constitute the great majority of the informal, unskilled, unpaid domestic labor force in most countries, which explains why women are more affected by the socio-economic dimensions of conflict.[21] This 'extra-domestic' labor is unaccounted for and unrecognized in most societies.[22]

Changes in social perception also affect reproductive health of women and impair free choice. For instance, during the Sri Lankan conflict a regression in the acceptable marriageable age for women was observed, with familial pressure on early marriages to ensure male protection to guard female honor.[23] This of course does not necessarily pre-empt the occurrence of forced marriages ordered by armed groups or marriages contracted to combat situations of poverty.[24] The shame or loss of honor of the woman or her husband linked to sexual violence, rape and pregnancy arising thereof often deter women from exercising their reproductive choices.[25] Emphasis on honor holds by way of natural corollary an implication that those surviving rape, forced pregnancy, and sexual mutilation are rendered dishonorable.[26] This leads women to keep silent

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withholding of humanitarian assistance and loss of land, property and livelihood.").

21. *See, e.g.*, WORLD HEALTH ORG., WOMEN AND HEALTH: TODAY'S EVIDENCE TOMORROW'S AGENDA 9–11 (2009) (explaining reasons for the socioeconomic differences between men and women and the resulting impact on overall health).

22. *See, e.g.*, Margot Wilson-Moore, *Women's Work in Homestead Gardens: Substance, Patriarchy, and Status in Northwest Bangladesh*, 18 URB. ANTHROPOLOGY 281, 288–90, 293–94, (1989) (describing the invisibility of the work women do, and both the direct and indirect contributions they make).

23. *See* Yasmin Tambiah, *Sexuality and Women's Rights in Armed Conflict in Sri Lanka*, 12 REPROD. HEALTH MATTERS, May 2004, at 78, 80.

24. *See, e.g.*, Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, ¶¶ 62–65, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013) [hereinafter *Recommendation No. 30*] (detailing effects on marriage and family relations in conflict and post-conflict contexts).

25. *See* Ruth Rubio-Marín, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, 19 WM. & MARY J. WOMEN & L. 69, 75 (2012) ("Patriarchal societies generally attach a preeminent value to women's chastity and reproductive capacity, seeing women's reproduction as a way of guaranteeing the survival of both community and culture. A woman who is sexually violated, impregnated by enemies, or kidnapped into sexual and domestic enslavement is therefore often regarded as 'disgracing family honor, being unclean or contaminated, [or] being a seductress.' . . . . The moral condemnation is shifted from the perpetrator onto the victim. Alternatively, the perception of victimization is displaced from the victim onto her partner or wider community, whose honor is deemed spoiled.")

26. *See* Karima Bennoune, *Do We Need New International Law to Protect*

and not seek accessible healthcare.

Another regrettable consequence of conflict is the impact that changing social and legal structures, separation from family, and power relationships has on adolescents and children, making them extremely susceptible to sexual abuse and exploitation.[27] Such susceptibility is acutely visible among displaced female children, such as those in the conflicts of El Salvador, Ethiopia and Uganda, one-third of all child soldiers were female.[28] Not surprisingly therefore, in all these conflicts there were reports of rape and unsafe abortions.[29] Additionally, deliberate and widespread use of rape as a weapon of warfare to force the targeted community into submission, such as was employed in the Democratic Republic of Congo, Darfur and Rwanda has been well documented to cause long-term trauma and physical injuries amongst victims.[30] This, coupled with the stress of living in desperate conditions, causes long-term impairment of reproductive capacities.[31] Clearly, survival under such circumstances is not conducive to exercise of any form of reproductive autonomy.

C. ACCESSIBILITY

Amidst all the limitations on exercising their reproductive choices, the one that is arguably of greatest consequence to women caught in conflict, post conflict society rebuilding, or in a state of displacement, is the lack of access to contraception

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Women in Armed Conflict?, 38 CASE W. RES. J. INT'L L. 363, 384 (2006–07) ("The emphasis on honor is especially offensive since it may imply that a woman survivor of wartime rape or other sexual violence is dishonored, a powerful notion fraught with terrible real world consequences for the woman and her family.")

27. *See* Julia Matthews & Sheri Ritsema, *Addressing the Reproductive Health Needs of Conflict-Affected Young People*, 19 FORCED MIGRATION REV. 6, 6 (2004) ("Refugee adolescents face additional difficulties that put their reproductive health (RH) at risk.").

28. *See, e.g.*, *id.* at 6–8 (analyzing the challenges facing refuge adolescents).

29. *See, e.g.*, *Maxwell's Story: How a Former Child Soldier Became a Reproductive Health Advocate*, IPAS (Apr. 8, 2010), http://www.ipas.org/en/News/2010/April/Maxwells-story--How-a-former-child-soldier-became-a-reproductive-health-advocate.aspx.

30. *See, e.g.,* Sally Hargreaves, *Rape as a War Crime: Putting Policy into Practice*, 357 THE LANCET 737, 737 (2001) (discussing rape in the context of war).

31. *See id.*

and safe abortion.[32] Displaced women find themselves vulnerable to rape, unwanted pregnancy, unsafe deliveries and sexually transmitted diseases.[33] It is a harsh reality that women embroiled in conflict face a higher risk of maternal mortality than women in stable societies.[34] The average maternal mortality rate in Afghanistan after two decades of conflict is estimated to be between 1,600 and 2,200 deaths per 100,000 live births, ranging from around 418 deaths in Kabul to around 6,507 in Badakshan.[35]

Empirical research indicates that displaced persons/refugees and women otherwise involved in conflict are not always willing or able to undertake the responsibilities of parenthood under the extreme adverse situation they find themselves in following strife.[36] Alternatively, some others go through pregnancy with the desire to replace the children they lost in conflict.[37] For those desiring to opt out of the childbearing process, options are limited. In internally displaced persons ("IDP") camps in Northern Uganda women using some form of contraception legally permitted by the government prior to conflict found themselves unable to access it during their camp stay.[38] This left the women with no alternatives besides abstinence or unsafe abortions.[39] Displaced women also risk finding themselves in countries where abortion remains illegal.[40] Humanitarian assistance and aid is

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32. *See, e.g.*, *Ban Ki-moon Report*, *supra* note 20, ¶ 11 (advocating access to emergency contraception and safe abortion).

33. *See, e.g.*, Tambiah, *supra* note 23, at 83.

34. *See Ban Ki-moon Report*, *supra* note 20, at 22 box 19 ("In conflict and post-conflict settings, the rate of maternal mortality tends to be approximately 50 per cent higher than the global average.").

35. *See* Linda A. Bartlett et al., *Where Giving Birth Is a Forecast of Death: Maternal Mortality in Four Districts of Afghanistan, 1999-2002*, 365 LANCET 864, 867, 868 tbl.3 (2005).

36. *See, e.g.*, Therese McGinn, *Reproductive Health of War-Affected Populations: What Do We Know?*, 26 INT'L FAM. PLAN. PERSP. 174, 174 (2000) (highlighting the different approaches to fertility in different cultures and socioeconomic circumstances).

37. *Id.*

38. *See, e.g.*, Judy Austin et al., *Reproductive Health: A Right for Refugees and Internally Displaced Persons*, 16 REPROD. HEALTH MATTERS 10, 14 (2008).

39. *Id.*

40. *See generally* Press Release, Third Comm., Several Aspects of Sexual, Reproductive Health — Providing Information, Using Contraception, Abortion — Should be 'Decriminalized', Third Comm. Told, U.N. Press Release GA/SHC/4018 (Oct. 24, 2011), *available at* http://www.un.org/press/en/2011/gashc4018.doc.htm.

not available for abortion care, even if the pregnancy is a result of rape and humanitarian agencies are often precluded from extending aid for the purposes of abortion.[41] Despite these manifold consequences, the existing legal regime ranging from persuasive 'soft laws' to binding treaty provisions, fall short of implementing the aspirational aims they encompass.

III. THE MASCULINE WORLD WOMEN INHABIT: REPRODUCTIVE RIGHTS UNDER EXTANT LAWS

International law by its very nature and structure is paternalistic, concerned with maintaining the status quo of male dominance.[42] Reproductive rights are not of concern to men, resulting in them being allocated to a sphere of unimportance and neglect for decades.[43] Explanations of the assignment of values to reproductive rights can be found in the discourse of the public-private dichotomy as well as the nature/culture divide, with women being identified as the former and men as the latter.[44] This section sets out the provisions enumerated under certain human rights, humanitarian law and international criminal law instruments. Its aim is to provide a summary of the already existing protections in the field of reproductive justice as well as highlight the gaps in law, pitfalls in enforcement and barriers to effective realization of the rights. This will help in contextualizing the provisions of Resolution 2122 better when discussed in subsequent sections.[45]

A. THE HUMAN RIGHTS REGIME

While some war-time events are common to both women and men, though their experiences of such events are not similarly shared, scholars and human rights advocates have gradually come to recognize the other distinct experiences of women caught up in armed conflict which inevitably challenge the pre-established roles of the female in the domestic sphere

41. *See generally id.*

42. Charlesworth et al., *supra* note 2, at 1–2.

43. *See generally* Deborah L. Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U. CIN. L. REV. 521 (1987–88).

44. *See generally* Bartlett et al., *supra* note 35.

45. S.C. Res. 2122, *supra* note 1.

and particularly affect their right to sexual and reproductive choices.[46] However, human rights discourse has found it particularly hard to grapple with and respond to the controversial subject of reproductive freedom, bodily integrity and sexual autonomy, specifically the control of sexual and reproductive behavior and its link to gender constructs.[47] Additionally most human rights monitoring bodies established with the intent of protecting and realizing women's human rights suffer from institutional and geographical separation from the mainstream, making their recommendations empty rhetoric only.[48]

1. Policy centric instruments

Despite this lack of gender specific perspectives, it is pertinent nevertheless to examine whether the current laws provide a degree of protection to women whose reproductive functions are being compromised on account of conflict. At the 1993 Vienna Declaration and Program of Action ("Vienna Declaration"), adopted by the UN World Conference on Human Rights, it was agreed that violation of the human rights of women constitute fundamental infractions to the core human rights and humanitarian law principles and that they require a "particularly effective response."[49]

The first attempt at developing this response was in 1994, at the International Conference on Population and Development ("ICPD") where a full and detailed outline of reproductive freedom for all persons (including refugees and IDPs) was adopted.[50] The consensus document in fact called for universal access to reproductive health services including family planning and sexual health.[51] Further, the 1995 Fourth

46. *Ban Ki-moon Report*, *supra* note 20, ¶ 11.

47. *Id.*

48. *See* Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11 (1981) (discussing the use of recommendations).

49. Vienna Declaration and Programme of Action, art. 38, UN Doc. A/CONF.157/24 (Part 1) (Oct. 13, 1993).

50. *See* International Conference on Population and Development, Cairo, Egypt, Sep. 5–13, 1993, *Programme of Action of the International Conference on Population and Development*, U.N. Doc. A/CONF .171/13/Rev.1 (1993). The components of reproductive rights were set out in the ICPD Program of Action ¶ 7.2 & 7.3.

51. Adrienne Germain & Rachel Kyte, *The Cairo Consensus: The Right*

World Conference for Women ("Beijing Platform") recognizes women's human right to "have control over and decide freely and responsibly on matters relating to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence."[52] While this appears to tilt the balance in favor of liberality, the conference documents tread carefully around the issue of abortion. Rather than calling upon governments to legalize abortions in certain restricted circumstances, such as breakdown of public health infrastructure post-conflict, the conference documents draw the line at advocating for abortion *when legal* under domestic laws. The Beijing Platform has also been criticized for endorsing the 'circumscribed idea of womanhood' as synonymous to motherhood. However, it must be said that they view unsafe abortions as a public health concern and call for post abortion care for women.[53] The greatest service of the conference documents is delineating human rights from religious beliefs and highlighting the absolute enforceability of the former while simultaneously rejecting conscientious objection.[54]

Despite this indication of growing international consensus favoring reproductive autonomy, many refugees, IDPs and women caught in conflict continue to exist without reaping the benefits of such legal protection, which results primarily because the simplest reproductive health interventions, such as distribution of contraception, remains mired in ideological controversies. Needless to say, the objections intensify when it concerns the issue of abortion. For example, the *Reproductive Health in Refugee Situations: An Inter-Agency Field Manual* developed by the Inter-Agency Working Group on Refugee Reproductive Health[55] on the principles of the ICPD Program of

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Agenda for the Right Time (International Women's Health Coalition, New York, N.Y.), 1995, at 5

52. Beijing Platform, *supra* note14, ¶ 96.

53. *See* Beijing Platform, *supra* note 14, ¶ 109(i); *see generally* Mehilka Hoodbhoy et al., *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya*, 29 FORDHAM INT'L L.J. 1 (2005) (noting Kenya's legal obligations set forth in the Beijing Platform, the Mexico City Policy's impacts, and a loss of American aid to countries who provide information about abortion).

54. *See generally* Beijing Platform, *supra* note 14, ¶ 224.

55. A second group titled Reproductive Health Response in Conflict Consortium was also formed with the aim of achieving the goal of access to reproductive health care through collaborative advocacy. *See Increasing Access to Quality Reproductive Health for Refugees and Internally Displaced People Worldwide*, RHRC CONSORTIUM, http://www.rhrc.org (last visited Feb. 2,

Action and the Beijing Platform skirts the controversial issues by mentioning disbursement of emergency contraception only in the context of sexual violence and sets out the right to post abortion care while avoiding any talk of abortion.[56] The politicized nature of the subject has led states to refrain from defining and delineating what constitutes "sexual health" and its intersection with "reproductive health". Further, the rise in conservative politics has ensured that the discussion on abortion and sexuality has been de-prioritized in favor of the developmental agenda and promotion of economic growth.

International agencies, including the United Nations High Commissioner for Refugees ("UNHCR"), refuse to provide succor to IDPs mainly because of the legal void they exist under but also due to government reluctance to grant relief workers access, financial considerations. In fact, donor funding has led to fragmentation of the holistic notion of reproductive rights,[57] with each organization or private donor espousing only a particular aspect of reproductive rights, rarely extending to funding for abortion procedures. The need to maintain uniform standards among care givers prompted the formulation of the Sphere Minimum Standards,[58] although there remains ambiguity concerning a universal approach for all appropriate service and care standards.[59] Evaluations of the working of these policy instruments have shown variable results. The services provided within such documents are more likely to trickle down to refugees in stable camp settings rather than IDPs or those in new emergencies. Even those groups who have access are more likely to have access to antenatal care rather than clinical family planning services.

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56. UNHCR, Reproductive Health in Refugee Situations: An Inter-Agency Field Manual, 40-42 (1999).

57. *See generally* Germain & Kyte, *supra* note 51, at 9.

58. *See* THE SPHERE PROJECT: HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN HUMANITARIAN RESPONSE 4 (Phil Greaney et al. eds., 2011), *available at* http://www.sphereproject.org/ (explaining how The Sphere Project is a voluntary initiative that brings a wide range of humanitarian agencies toward a common goal which is to improve the quality of humanitarian assistance and the accountability of humanitarian actors to their constituents, donors, and affected populations).

59. This work is being further developed by the UN's Humanitarian Response Review since 2005, with the WHO playing a lead role in identifying best practices and fostering inclusion at the local level.

2. Treaty based provisions

Besides the policy instruments set out above, the reproductive rights of women are encompassed by the major UN human rights treaties, including the Convention on the Elimination of All Sorts of Discrimination Against Women of 1979 ("CEDAW") and the International Covenant on Economic, Social, and Cultural Rights of 1966 ("ICESCR"). Refugees are additionally entitled to the protection under the Convention on the Status of Refugees ("Refugee Convention") of 1951 and its 1967 Protocol.[60] Article 24(1)(b) of the Refugee Convention requires contracting countries to extend to refugees with "lawful status" the same benefits they extend to their nationals, specifically matters of maternal health.[61] Even if refugees cannot meet the "lawful stay" criterion or receive protection or coverage under the Refugee Convention, they are entitled to the minimum guarantees that foreigners are otherwise afforded by the concerned state [as per Article 7(1)] and the UNHCR works to ensure the same."[62] This is of scarce comfort, as restrictive domestic laws, religious impediments, or lack of access can impair access to safe termination of pregnancy and contraception. Lack of geographic accessibility can also render these provisions meaningless, as demonstrated in Colombia, where isolated communities have led to many women being deprived of services, despite being citizens.[63] A reading of the provisions of the Refugee Convention would, on the contrary, support the view that this agreement provides protection to women as mothers, rather than to women seeking to prevent motherhood.[64] Lawmakers appear to believe that the object and purpose of maternal health and reproductive choice has been attained if they succeed in providing women access to

60. ***See generally*** **Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S.. 137, *available at* http://www.unhcr.org/pages/49da0e466.html; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, *available at* http://www.unhcr.org/pages/49da0e466.html.**

61. Convention Relating to the Status of Refugees, *supra* note 60, at art. 24(1)(b).

62. Francoise Girard & Wilhelmina Waldman, *Ensuring the Reproductive Rights of Refugees and Internally Displaced Persons: Legal and Policy Issues*, 26 INT'L FAMILY PLANNING PERSPECTIVES 4 (2000).

63. Austin et al., *supra* note 38**Error! Bookmark not defined.**, at 13.

64. *See generally* Convention Relating to the Status of Refugees, *supra* note 60.

medical services to ensure safe delivery. The law attaches no importance to the autonomy of women to decide, without guilt or penalty, whether to terminate the pregnancy on account of altered circumstances, during or post-conflict. The Syrian conflict seems to support this hypothesis—Syrian women who find themselves displaced by the conflict in neighboring countries are subject to strict domestic anti-abortion laws.[65] In fact, however, gender-based harm alone is not sufficient to warrant grant of refugee status and often times women's narratives may not fit the traditional definition of persecution.[66]

In contrast to the Refugee Convention, international human rights treaties may be more widely extended to all populations in need. In fact, Article 12 and 10(2) of ICESCR guarantees reproductive health to all women, though couched in terms of "special protection."[67] The treaty monitoring body for the ICESCR has, in its General Comment on Article 12(2), construed several provisions furthering the right to reproductive health services, the right to prevent control and treat diseases, and the right to health facilities and health education, etc.[68] The Convention on the Rights of the Child, 1989 ("CRC") may also facilitate adolescent access to information on sexual and reproductive health matters.[69] These treaty provisions, however, repeat the patriarchal approach of promoting motherhood and refusal to admit the right of abortion within the ambit of reproductive health and a woman's autonomy over her body. Only the CEDAW Committee partially deviates from this general trend. It

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65. Anu Kumar, *Women in Syria Need More Than Guided Missiles*, HUFFINGTON POST (Sep. 13, 2013, 5:05 PM), http://www.huffingtonpost.com/anu-kumar/women-in-syria-need-more-_b_3922160.html (noting that Turkey is the only country in this region that has a relaxed abortion framework).

66. *See* Rodger Haines, *Gender-Related Persecution, in* REFUGEE PROTECTION IN INTERNATIONAL LAW 319, 320 (Erika Feller, Volker Türk, & Frances Nicholson eds., 2003).

67. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, *available at* http://www.un-documents.net/icescr.htm.

68. *See* Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health*, 22nd Sess., ¶ 8, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter Comm. on Econ., Soc., and Cultural Rights].

69. ***Cf.*** **Convention on the Rights of the Child, art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3.**

mandates that signatories address the specific health needs of women and mandates women's decision-making autonomy in matters of childbearing by virtue of Articles 12 and 16(1)(e).[70] The CEDAW Committee in its General Recommendation on Article 12 stated that access to health care includes reproductive healthcare of all women and girls irrespective of status of residency or considerations of nationality. The CEDAW Committee further refers to abortion outright when it includes laws that criminalize and penalize medical procedures required only by women.[71] It also prohibits selective denial of reproductive health procedures to women or any "conscientious objection" to the same without referral to alternate means of accessing such procedures.[72] Through its General Recommendation 30, the CEDAW Committee has further bridged the divide between peacetime *vis a vis* access to reproductive rights in times of conflict.[73]

Discussing the equality between men and women, the Human Rights Committee ("HRC"), in its General Comment 28, called upon states to not subject women to unwanted pregnancies or clandestine, unsafe abortion procedures.[74] Once again however, specific mention has been made of access to abortion for women who have become pregnant as a result of rape, thus perpetuating the status/event based classification within a broader, more permissive framework. It is also easy for state parties to circumvent the diktat of the General Comment by citing culturally harmful practices such as sex selection as a justification for prohibition on access to abortion.[75]

The HRC also showed great support for therapeutic abortions in the advisory opinion of *KL v. Peru*.[76] The outcome of the two challenges to Irish abortion laws by the Centere for

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70. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979).

71. *See* Comm. on the Elimination of Discrimination Against Women, Rep. on its 20th Sess., Jan. 19–Feb. 5, 1999, at 9, U.N. Doc. A/54/38 (May 4, 1999).

72. *Id.* at 6.

73. *See* Comm. on the Elimination of Discrimination Against Women, *supra note* 24.

74. Human Rights Comm., *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 68th Sess., at ¶¶ 10–11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

75. *Id.* at ¶ 5.

76. *See* Human Rights Comm., Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/ 2003 (Nov. 22, 2005).

Reproductive Rights will additionally be crucial to determining the HRC's stand on a woman's right to terminate non-viable pregnancies without facing restrictive laws denying access by requiring her to travel abroad.[77]

The recent Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003 (the "Maputo Protocol") specifies abortion as a right in its article on reproductive health,[78] as well as referring to member states' obligation to incorporate a gender-specific policy, legislation, development plans, and activities.[79] The inclusion of these provisions and others pertaining to abolition of female genital mutilation, provisions on marriage and divorce has attracted the ire of several Catholic countries and has resulted in heavy reservations and non-ratifications.[80] Even amidst ratifying states, accountability and enforcement has been a serious obstacle.[81]

While the above enumeration of treaty provisions might give the impression of the existence of a solid network of interdependent and interconnected rights, albeit patriarchal in focus and approach, the reality remains that poor enforcement, non-ratification, and non-regulation of non-state parties and non-binding nature of the opinion of treaty monitoring bodies results in a weakening of this body of human rights law.[82] Most

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77. *See Center for Reproductive Rights Brings Second Case Against Ireland Abortion Laws Before the United Nations*, CENTER FOR REPRODUCTIVE RIGHTS (Mar. 13, 2014), http://reproductiverights.org/en/press-room/CRR-brings-second-Ireland-case [hereinafter Center for Reproductive Rights].

78. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14, Sept. 13, 2000, CAB/LEG/66.6, *available at* http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf [hereinafter Maputo Protocol]. Subsection (2)(c) of this article requires member states to "protect the reproductive rights of women by authorizing 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 fetus." *Id.*

79. *See id.*

80. *See, e.g.*, Rachel Scheier, *Rights Treaty in Uganda Snags on 'African Values,'* WENEWS, Jun 2. 2008, http://womensenews.org/story/080602/rights-treaty-in-uganda-snags-african-values.

81. *See* Agnes Odhiambo & Gauri Van Gulik, *Put a Spotlight on African Women's Reproductive Rights*, HUMAN RIGHTS WATCH (May 20, 2013), http://www.hrw.org/news/2013/05/20/put-spotlight-african-women-s-reproductive-rights.

82. *See, e.g.*, *id*; Center for Reproductive Rights, *supra* note 77; Scheier, *supra* note 80.

human rights instruments which contain rights protecting women's reproductive autonomy also contain rights protecting freedom of manifestation of religious belief as well preservation of family life.[83] Often this causes tension between rights without a mechanism for reconciliation.[84] Also, intense conflict often results in the suspension of some of these rights, except those that are non-derogable, at a time when they are required the most or states may be unwilling/unable to enforce them. There is sufficient evidence today that women experience conflict different from men.[85] This necessitates special rules and regulations and the existing peacetime framework of rights fall short of catering to conflict situations.[86] Though undeniably the human rights regime has made more advances in identifying women's special needs in comparison to humanitarian law[87], it still needs to shift focus from sexual violence,[88] or other forms of violence,[89] to varied experiences of women during armed conflict.

B. LAWS OF ARMED CONFLICT

Women's reproductive choices and the events that restrict them during conduct of hostilities are governed by

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83. *See generally* Anne O' Rourke et al., *Abortion and Conscientious Objection: The New Battleground*, 38 MONASH U.L. REV. 87, 88 (2012).

84. *See* Shelly Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L. L. 241, 258 (1988–89).

85. *See Beijing Platform*, *supra* note 14, ¶ 135.

86. *See generally* Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 248 (1994) (questioning whether rape as a tool of ethnic cleansing is unique, worse than, or not comparable to other forms of rape in war or peace).

87. *See generally* Christine Chinkin, *Feminist Interventions into International Law*, 19 ADEL. L. REV. 13, 15–18 (1997).

88. *See* International Comm. of the Red Cross, *Aide-Memoire*, ¶ 2, Dec. 3, 1992 *available at* http://digitalcase.case.edu:9000/fedora/get/ksl:mps17-FaxBrehnan199303300/mps17-FaxBrehnan199303300.pdf. (last visited Sep. 18, 2014). It must be conceded however, that increasingly sexual violence and specially rape is being recognized as very serious violation of international humanitarian law. *See, e.g.*, *id.*

89. The Moputo Protocol defines "violence against women" to include all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time or during situations of armed conflict or war. Moputo Protocol, *supra* note 78, at art.1(j).

international humanitarian law.[90] Feminist scholars have time and again lamented the gendered hierarchy propagated by the laws of armed conflict wherein rules dealing with or affecting women are couched in the language of protection rather than prohibition.[91] Furthermore, the breach of the rules pertaining to women has not been given the status of 'grave breaches' under the Geneva conventions. Progressive construction by the International Committee of the Red Cross ("ICRC") has however resulted in inclusion of offences such as rape within the phrase "wilfully causing great suffering or serious injury to body or health" appearing in the grave breaches section.[92] The protections under humanitarian law are applicable to varying degrees depending on the nature of the conflict.

1. International armed conflict

The issue of reproductive health has not been specifically addressed under the Geneva Conventions, despite there being several provisions related to health in the third and fourth conventions. The fourth convention, specifying duties and responsibilities of an occupying power, entitles expectant women and maternity cases to special assistance (Article 16-22) and all women to protection against rape and indecent assault

90. International humanitarian law is the *lex specialis,* governing the rights of women in conflict situations. *See generally What Is International Humanitarian Law?*, ICRC, https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (July 2004).

91. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 76, June 8, 1977, 1125 U.N.T.S. 3.

92. *See* Theodor Meron, *Rape as a Crime Under International Humanitarian Law (Editorial Comment)*, 87 AM. J. INT'L. L. 424, 426 (1993) ("The ICRC declared that the grave breach of 'wilfully causing great suffering or serious injury to body or health' (Article 147 of the fourth Geneva Convention) covers rape."); *also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art.147 [hereinafter Fourth Geneva Convention]. Similar interpretation may be relied upon while reading Common Article 3 applicable to non-international armed conflicts and the prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment; . . . " *See* Third Geneva Convention, *supra* note 7, at art.3. This might be construed as including violence against women. *See id.* In fact Common Article 3 provisions have been used to advocate against denial of abortion to women in times of conflict. *See id.*

(Article 27).[93] Once again, the law stops short of acknowledging that events of war make the lack of ability to control procreation or childbirth particularly hazardous for women. Thus, while Article 59 of the fourth convention requires the power occupying a territory to accept relief from the ICRC or other relief agencies or power in case it finds itself unable to provide such services to the populace under occupation, such relief services rarely translate into the right to distribute contraception or perform abortion procedure, even for war rape survivors.[94] This selective denial of abortion to female war rape survivors while simultaneously providing male survivors and rape victims the full range of medical care required by their condition has been considered by the former head of the ICRC Legal Division, Professor Louise Doswald-Beck as amounting to unlawful discrimination or torture or cruel treatment under Common Article 3 of the Geneva Conventions.[95]

Some vague provisions, such as Article 12 of the First and Second Geneva Convention, which stipulate that "women shall be treated with all consideration due to their sex," might have been used to further the reproductive rights of women.[96] However, the clarifications in the commentary circumscribe the scope of such consideration to that required to be extended to weaker beings in order to protect their modesty and respect. Likewise, Article 14 of the Third Geneva Convention offers as points for consideration in protection of women prisoners of war the attributes of "weakness" "honor and modesty" and "pregnancy and childbirth."[97] Even in the calculation of

93. Fourth Geneva Convention, *supra* note 92, arts. 16–22, 27.

94. GLOBAL JUSTICE CTR., THE RIGHT TO AN ABORTION FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT 3 (2011), *available at* http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34 (highlighting the systematic omission by states and internationally funded humanitarian organizations to provide abortion services to women and girls raped in armed conflict).

95. GLOBAL JUSTICE CTR., UN SECURITY COUNCIL TAKES A HISTORIC STAND SUPPORTING ABORTION ACCESS FOR WOMEN RAPED IN WAR 1 (2013), *available* at http://globaljusticecenter.net/index.php/news-and-events/news1/press-releases/400-un-security-council-takes-a-historic-stand-supporting-abortion-access-for-women-raped-in-war.

96. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 12 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, art. 12 [hereinafter Second Geneva Convention].

97. COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT

collateral damage and proportionality analysis, women are overlooked, as commanders are not required to assess the long term impact of attack on reproductive health of the female population, or the extent of displacement likely to occur as a result of aggression.[98]

2. Non-international armed conflict

The laws of armed conflict are nebulous when it comes to the domain of non-international armed conflicts or UN peacekeeping operations.[99] In fact, "the international/internal dichotomy has a gendered dimension because it underpins a detailed legal regime protecting combatants in international conflicts, almost invariably men, and a more general regime offering considerably weaker and more contentious protection to the civilian population, encompassing mostly women."[100] The contentious association of supposedly male attributes such as active aggression, tenacity, ambition, competition and so-called feminine attributes of passive and responsive compassion, obedience etc. with normalcy and perpetuation of gender stereotypes is perhaps the greatest failing of international humanitarian law. Given the changing nature of armed conflict and vast proliferation of civil wars in recent decades, the disputed application of the law coupled with the double standard of enforcement proves problematic as patterns of human rights deprivations do not change across internal/international conflicts. This is additionally

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OF PRISONERS OF WAR art. 14, ¶ 2(2), at 147–48 (Jean S. Pictet ed., A.P. de Henry trans., 1960).

98. *See* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 406–10 (1993).

99. *See* Judith Gardam & Hilary Charlesworth, *Protection of Women in Armed Conflict*, 22 HUM. RTS. Q. 148, 157 (2000) ("The International Committee of the Red Cross (ICRC) has consistently argued for a broad approach to the applicable law and regards all the provisions of IHL as applicable when UN contingents resort to force, whether through peacekeeping or peace enforcement forces."); *also* International Conference for the Protection of War Victims, *Report on the Protection of War Victims*, *reprinted in* 296 INT'L REV. RED CROSS 391, 428–29 (1993) ("[T]he limits imposed on [action taken to 'ensure respect' for international humanitarian law] are those of general international law, and that international humanitarian law could not possibly provide a State not involved in the conflict with a pretext for intervening militarily or for deploying forceful measures outside the framework provided for by the United Nations Charter.").

100. Charlesworth, *supra* note 2, at 389..

troublesome since many practitioners and academics regard legal principles inessential during armed conflict or repose confidence in human rights law rather than armed conflict.[101]

To sum up, the focus of laws of war has largely been on criminalizing certain bodily harm and violence perpetrated on women,[102] perpetuating the concept of women as victims of war and circumscribing the need for protection by linking it in many cases to actual or potential motherhood.[103] The forty-three provisions in the Geneva Conventions designed to protect women, do so only in the context of their relationship with others. In fact, nineteen of those provisions are designed to protect children.[104] This co-mingling of the rights of the woman and unborn child has been criticized as 'instrumentalizing' women's bodies as insurers of the future generation[105]. This is again reinforced in the understanding of rape as a crime only when contextualized and couched in the language of sexual violence- the law simply does not recognize right of victims of ceremonial rape or survival rape the same way it seeks to protect punitive rape. When not in the context of rape, violence against women is penalized in the context of widespread, systematic and large scale attack *threatening the existence of the community*. For instance, the Statute of the International Criminal Court for the Former Yugoslavia ("ICTY") incorporates rape only as a crime against humanity. However,

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101. *See, e.g.*, Gardam & Charlesworth, *supra* note 99, at 157 ("The United Nations, by contrast, continues to maintain its longstanding view that it is bound by the 'fundamental principles and rules of international humanitarian law.").

102. Article 27(2) of the Fourth Geneva Convention supports this analysis. The provision very clearly identifies rape as an attack against the honor of the woman. The object appears to be punishing men for disobeying the mandates of military discipline and code of honor rather than focusing on the harm caused to the woman. *See generally* Fourth Geneva Convention, *supra* note 92, art. 27(2).

103. *See, e.g.*, Beijing Platform, *supra* note 14, ¶¶ 93, 268.

104. *See, e.g.*, MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 470 (1982).

105. U.N. Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Addendum: Mission to Bangladesh, Nepal and India on the Issue of Trafficking of Women and Girls, delivered to the U.N. Comm'n on Human Rights*, ¶ 25, U.N. Doc. E/CN.4/2001/73/Add.2 (Feb. 6, 2001) (stating that it is important to maintain conceptual clarity in separating the regimes that operate for women from those that operate for children, and that women are adults and should be treated as such in laws, policies and programs).

prosecutorial policy of charging offenders with war crimes has remedied this deficiency to a certain extent.[106] Even within this limited context, there is overwhelming international pressure to water down the definition of such offences and the liability they attract.

The problem of contextualizing international humanitarian law in a way that it addresses women's experiences is obstructed not merely by the gender differences that it ignores but also by the fact that the laws of war attempts to distinguish between combatant and non-combatant, with the former function receiving greater focus regulation wise and the latter receiving focus from the perspective of need for protection[107]. As men are more commonly associated with combatant status, this perpetuates the gender differences without overtly appearing to do so- thus conferring upon women a double disability.[108] Also, since the rules of armed conflict originated with the intent to regulate conflicts in the Western world, attempting to extend them to conflicts worldwide makes the exercise of making such laws gender specific more difficult.[109]

C. INTERNATIONAL CRIMINAL LAW

The idea of individual criminal accountability at the international level has been well received by feminists who favor international enforcement mechanisms as more 'hospitable' to women's needs than domestic mechanisms. Vociferous lobbying by women's rights groups has ensured that several gender specific provisions have been incorporated in the Statute of the International Criminal Court and to varying degrees by other international and ad-hoc tribunals.[110] This

106. *See* Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, UN Doc. E/CN.4/1998/54 (Feb. 29, 2000).

107. *See generally* Mala Tabory, *The Status of Women in Humanitarian Law*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY 941 (Yoram Dinstein ed., 1988).

108. Gardam & Jarvis, *supra* note 10, at 6.

109. *See* Christophe Swinarski, *Regional Perspectives on International Humanitarian Law*, *in* SHELTERS FROM THE STORM: DEVELOPMENTS IN INTERNATIONAL HUMANITARIAN LAW 323 (William Malley ed., 1995).

110. *See generally* Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2009) (assessing the ideological and political investments that feminists brought to the statutes of international criminal tribunals and the ICC).

development, according to many, forestalls the need for formal amendment of the deficiencies in the laws of armed conflict. However as most humanitarian law principles are customary, formal amendments are rarely at issue. A more prudent approach would be to ensure that future evolution of such customary principles occur through the spectrum of gender inclusivity. It must further be borne in mind that international criminal law is much more limited in its scope and coverage than humanitarian law, which continues to remain a touchstone governing conduct of hostilities. Certainly international law is a long way away from criminalizing agents/perpetrators that impede free exercise of reproductive choices by women.

Both humanitarian and human rights law needs to reinforce the understanding that acquisition of a formal right does not automatically translate into solution of discriminatory practices. This is especially true for rights applicable only to women such as reproductive rights or right to choose an abortion. An understanding of competing rights interests is also essential in order to ensure that discrepancies and conflicts within bodies of laws are rooted out. Occasionally achieving rights realization in one area leads to deprivation in other, e.g. the difficulties in reconciling right of conscientious objection and reproductive freedom.

Having set out the extant protections under the various legal regimes and the inconsistencies and loopholes within them, which have made reproductive justice illusory for women, this article shall now proceed to examine the recent Resolution 2122, which has been heralded as a "groundbreaking resolution supporting abortion services for girls and women raped in armed conflict."[111] This next section attempts to detail the aims and ambitions of Resolution 2122 and analyze what progressive contribution, if any, it makes to the field of reproductive justice. It applies feminist methods of interpreting international law to adjudge whether Resolution 2122 sheds the patriarchal cloak and truly embraces reproductive justice in a holistic way.

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111. *See* GLOBAL JUSTICE CTR., *supra* note 94**Error! Bookmark not defined.**. *See generally* S.C. Res. 2122, *supra* note [1].

IV. RESOLUTION 2122: USHERING IN CHANGE

The unanimously adopted Resolution 2122 attempts to ensure workability of Resolution 1325 and promotes women's engagement in and occupation of leadership positions in conflict resolution and peace building.[112] Resolution 2122 is aimed at substantially strengthening measures for women's participation in "conflict prevention, resolution and peacebuilding," and building women's "engagement in all levels of decision-making."[113] It also recognizes several factors that contribute to vulnerability of women during conflict and post-conflict situations such as unequal citizenship rights, gender biased application of asylum laws, and forced displacement. Resolution 2122 reaffirms that "women's and girls' empowerment and gender equality are critical to efforts to maintain international peace and security," and expresses continuing concern about "persistent implementation deficits in the women, peace and security agenda, including in: protection from human rights abuses and violations; opportunities for women to exercise leadership; resources provided to address their needs and which will help them exercise their rights; . . . ".[114] Resolution 2122 expresses, while simultaneously seeking to address, many of the pressing concerns of the feminist and human rights advocates lobbying for gender specific legal provisions that account for women's special needs in times of conflict and post conflict social vacuum. It furthers the agenda of building institutional resistance to militarization by fostering inclusiveness, gender sensitivity and greater bargaining power to women during negotiations for peace and post conflict society regeneration with the object of encouraging demilitarization.[115]

Of all the forward looking statements manifested in Resolution 2122 however, reproductive rights activists are particularly jubilant that Resolution 2122 *notes*, for the first time, the need "for access to the full range of sexual and

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112. *See* S.C. Res. 2122, *supra* note 1; S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

113. S.C. Res. 2122, *supra* note 1.

114. *Id.*

115. *See generally* Gwyn Kirk, *Contesting Militarization*, *in* SECURITY DISARMED: CRITICAL PERSPECTIVES ON GENDER, RACE AND MILITARIZATION 30, 65 (Barbara Sutton, Sandra Morgen and Julie Novkov eds., 2008) (discussing ways to contest militarization, but not referencing S.C. Res. 2122 specifically).

reproductive health services, including regarding pregnancies resulting from rape, without discrimination, . . . " for women in conflict and post conflict re-building.[116] The statement is, in large part, the outcome of the September 4, 2013 "Report of the Secretary-General on women and peace and security," wherein he stressed the need to address "all physical, mental and sexual and reproductive health consequences of violence against women, including through provision of emergency contraception and safe abortion where permitted by national law." [117] The UN Women Executive Director declared that Resolution 2122 is an "extraordinary addition to our ever-evolving global norms, and pushes the normative envelope with new language on the need for the full range of sexual and reproductive health care services for women . . . ."[118] Thus, while gains had not been as consistent or sustained as envisioned in the goals set at the Secretary-General's Seven-Point Action Plan on Gender-Responsive Peacebuilding,[119] Resolution 2122 ushers in hope of "a 'new generation' of gender-responsive mediation practice."[120] It is hoped that Resolution 2122 will prompt humanitarian aid donors, such as the United States, to create exceptions to the Helms Amendment which currently restricts the use of aid for abortion related services.[121]

Resolution 2122 seems to be making a conscious effort towards shedding the patriarchal approach viewing women as victims in the context of reproductive rights. It reveals the Security Council's commitment to reducing women's vulnerabilities in armed conflict situations and addressing

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116. S.C. Res. 2122, *supra* note 1.

117. *See Ban Ki-moon Report*, *supra* note 20.

118. *Statement of UN Women Executive Director Phumzile Mlambo-Ngcuka on adoption of Security Council Resolution 2122*, UN WOMEN (Oct. 18, 2013), http://www.unwomen.org/en/news/stories/2013/10/ed-statement-on-sc-resolution-on-women-and-peacebuilding.

119. *See* U.N. Secretary-General, *Women's Participation in Peacebuilding: Rep. of the Secretary-General*, ¶ 27–52A/65/354–S/2010/466 (Sep. 7, 2010) [hereinafter *Report on Women's Participation in Peacebuilding*].

120. *Security Council Adopts Resolution 2122 (2013), Aiming to Strengthen Women's Role in All Stages of Conflict Prevention, Resolution*, RELIEF WEB 2 (Oct. 20, 2013), http://reliefweb.int/report/world/security-council-adopts-resolution-2122-2013-aiming-strengthen-womens-role-all-stages.

121. Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, 16 GUTTMACHER POL'Y REV. 3, 9 (2013). The Helms Amendment formed Section 104(f) of the Foreign Assistance Act of 1961. Its current, amended, from Se tion 2151b(f) of Title 22 of the United States Code. *See* 22 U.S.C. § 2151b(f).

sexual and gender based discriminations in times of conflict.[122] During negotiations, caution was advised against viewing women merely as victims of abuse rather than leaders of change as "viewing them exclusively through that lens because it constituted another form of gender discrimination."[123] The Resolution attempts to address several shortcomings and strengthen several core areas highlighted in its predecessor Resolution 1325 whose transformative aims continue to be debated.[124] Particularly, it diverts the focus from protecting women as vulnerable victims of sexualized violence to creating a space for a "broader range of conflict-related gender-based harms to be recognized, documented and addressed."[125] Undeniably, Resolution 2122 attempts to move away from the strictly patriarchal understanding of women as cultural objects or as bodies on and through which war can be waged through acts such as rape[126] to an understanding of rape as something that affects and shapes women's experiences directly. Where earlier instruments stopped short of advocating for reproductive justice for women war rape victims and merely called for prosecution of offenders, Resolution 2122 attempts to confer upon women greater agency to decide their destinies. Definitely, it is more expansive than many recently negotiated instruments, such as the Arms Trade Treaty, which merely exhorts arms exporting states to account for the risks of the conventional arms in the commission or facilitation of "serious acts of gender violence or serious acts of violence against women and children."[127] *Most significantly,* Resolution 2122 does not circumscribe its provision on reproductive justice by

122. *See generally* U.N. SCOR, 7044th mtg., U.N. Doc. S/PV.7044 (Oct. 18, 2013) [hereinafter Statements by the Delegates].

123. Press Release, Security Council, Security Council Adopts Resolution 2122 (2013), Aiming to Strengthen Women's Role in All Stages of Conflict Prevention, Resolution; Senior Officials Brief on Progress, Challenges to Implementing Landmark Text, U.N. Press Release SC/11149 2 (Oct. 18, 2013).

124. *See generally* Bartlett et al., *supra* note 35.

125. Aisling Swaine, *Substantive New Normative Provisions on Women and Armed Conflict Concurrently Adopted by the United Nations Security Council and the CEDAW Committee*, 18 AM. SOC'Y INT'L L. 5, 8 (2014), *available at* http://www.asil.org/insights/volume/18/issue/5/substantive-new-normative-provisions-women-and-armed-conflict.

126. Maria Eriksson, DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW?, Raul Wallenberg Institute Human Rights Library, Volume 38 (155).

127. The Arms Trade Treaty art. 7(4), Dec. 24, 2014, 13 U.N.T.S 27217, *available at* https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf.

making it subservient to national legal provisions. "Guatemala, . . . expressly noted . . . that because [Resolution 2122] itself did not include language specifically contextualizing this provision in line with national legislation, they were prevented from cosponsoring it."[128]

However, despite the above, a perusal of Resolution 2122 and a report of the deliberations reveal that the focus is predominantly about fostering women's leadership roles in the peacemaking process[129] and not about reproductive rights. The provision featuring reproductive and sexual choices of women raped in conflict appears in the preamble to Resolution 2122 and it is preceded by the word "notes" rather than "reaffirms" or "recognizes,"[130] indicating an absence of forcefulness and enforceability. Of all the countries whose statements were recorded during the 7044th meeting deliberating the adoption of Resolution 2122, only Switzerland, Slovenia, and the Netherlands expressly recognized the importance of access to safe abortion for women and girls who are victims of rape.[131] It is amply clear that the majority of countries relegated this provision to a position of obscurity. In addition, Resolution 2122 makes little new inroad to advancing women's reproductive and sexual health. In the subsequent section, this article extrapolates the various ways in which Resolution 2122 failed to advance women's access to choice.

V. RESOLUTION 2122: A MISSED OPPORTUNITY

Resolution 2122 is commendable for being the first UNSC resolution that recognizes the need to specifically set out rights addressing women's reproductive health in conflict and post conflict situations. Rights available to women in times of 'peace' cannot be effectively accessed by communities ravaged by armed conflict without a workable nexus between humanitarian responses mobilized by international

128. Swaine, *supra* 125, at 10.

129. *See* Statements by the Delegates, *supra* note 122, at 4–6.

130. S.C. Res. 2122, *supra* note 1, at 2.

131. Statement by the Delegates, *supra* note 122, at 41–42, 45–46, 64 (stating that of the three counties, only Switzerland specifically used the word "abortion" and reiterated a woman's right to have control over her own body, free from coercion). Slovenia welcomed the reference to the "need for access to a full range of sexual and reproductive health services." *Id.* at 45. Tthe Netherlands spoke of access to services for the safe termination of pregnancies resulting from rape. *Id.* at 64.

humanitarian law and the understanding of the non-derogable nature of human rights standards in times of conflict. This must be further buttressed by explicitly tailoring the right to reproductive health available in times of 'peace' to the special circumstances and events women find themselves confronting during conflict and ensuring that the right evolves accordingly, all of which Resolution 2122 attempts to do. However, the rhetoric of Resolution 2122 seems non-committal to the cause of reproductive justice, particularly in light of the fact that the issue of sexual and reproductive health of women has been addressed more substantively by several other UN bodies.[132] The UN Commission on the Status of Women in its fifty-seventh session highlighted the need to ensure the prioritization and effective redress of all forms of violence against women in conflict and post conflict situations through several means, including "affordable and accessible health-care services, including sexual and reproductive health."[133] It unambiguously states that women and girls' health concerns can be addressed by ensuring access to mental health support, emergency contraception, safe abortion (where permitted by national law), post-exposure prophylaxis for HIV infection, and more.[134]

One might argue that the language of Resolution 2122 serves to remove the requirement that abortion procedures be legally permitted under national law in order to be accessible. However, it seems to do more to cripple the right to access abortion and other health services by limiting it to war rape victims.[135] Nevertheless, it seems to assert that this category of women, ravaged and victimized by conflict deserve a category of entitlement more privileged and special. Moreover, it perpetuates the same event-based criteria as opposed to a need based one that feminist scholars consistently object to. It vests lawmakers with the power to espouse the cause of one class of women over another and assign greater relief to some and chooses to categorize women as victims of armed conflict rather than stakeholders in the process, thereby going against its fundamental premise. In contrast, the language adopted by the CEDAW Committee in General Recommendation 30 calls upon member states to ensure that access to sexual and reproductive

132. *See generally* Commission on the Status of Women, *supra* note 105.
133. *Id.* at 7.
134. *Id.* at 14–16.
135. *See generally* S.C. Res. 2122, *supra* note 1, at 2.

health is inclusive within the unqualified right to access safe abortion services as well as post abortion care.[136] Furthermore, it specifically states that refugees and displaced women be granted equal right of access and participation in distribution of supplies.[137]

The facially apparent shortcomings discussed above warrant a more thorough examination of Resolution 2122. In the subsequent paragraphs, this article discusses the myriad ways in which Resolution 2122 not only fails to advance, but actually interferes with women's enjoyment of reproductive rights.

A. THE NEED TO RE-CONTEXTUALIZE CONFLICT

Resolution 2122 in typical paternalistic fashion fails to take into account that "conflict and attacks are themselves contingent and controversial."[138] Indeed, the blurry line between conflict, post-conflict, and "peace" has proved problematic for women in the past. In general, 'peace' has been understood as cessation of 'official' hostilities by male belligerents.[139] This has rendered violence perpetrated against women post official declaration of peace invisible for failing to rise to the threshold of "conflict". For instance, Cynthia Enloe has researched the conditions prevailing in several military bases where women are coerced into prostitution post formal cessation of hostilities.[140] The sexual abuses perpetrated by UN peacekeepers themselves have also been well documented, which exposes the "unreality of the conflict/peace dichotomy"[141] wherein persons entrusted with enforcing 'peace' are the perpetrators of violence.[142] In fact, the need to address problems of sex discrimination even during 'peacetime' if war time exploitations are to be avoided, is gaining increasing

136. *Accord* Comm. on the Elimination of Discrimination Against Women, *supra* 24, at 14.

137. *Id.* at 14–16.

138. Charlesworth, *supra* note 2, at 389.

139. *See* Lori Handrahan, *Conflict, Gender, Ethnicity and Post-Conflict Reconstruction*, 35 SECURITY DIALOGUE 4, 429–430 (2004).

140. *See* CYNTHIS ENLOE, THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR 118–20 (1993).

141. Charlesworth, *supra* note 2, at 390.

142. *See, e.g.,* Anne Oxford, *The Politics of Collective Security*, 17 MICH. J. INT'L L. 373, 377–79 (1996).

recognition.[143]

Resolution 2122 does not specify the exact temporal and spatial limits of 'conflict' and 'post conflict' situations *vis a vis* peacetime, and thus does not clarify under what circumstances women are entitled to the broad range of sexual and reproductive health services Resolution 2122 envisages. Further, as demarcated by Christine Bell, post conflict peace negotiations take place across three phases: pre-negotiation agreements, substantive / framework agreements, and implementation agreements[144] Each phase brings with it unique complications for women. While the pre-negotiation agreement, and the substantive / framework agreement phase,[145] focuses on the public political-legal spheres and synonymously the visible forms of gender violence and reproductive harm, it ignores the private violence occurring within the sphere of the home.[146] The actual peace treaty rarely translates into trade-offs for the women in the implementation phase and the prevailing sentiment that war is over results in major reduction in funding and closing up of fund channels.[147] This may make the aims of Resolution 2122 unachievable in the post-conflict situation it articulates so blithely. Thus the movement to end disparity in status during times of stability is a sine qua non to achieving reforms in law that affect women's experiences during war time.

In contrast, the CEDAW Committee in its General Recommendation 30 clarifies the broad range of conflict-like circumstances under which it operates.[148] This reflects a shift

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143. *See generally* Charlesworth, *supra* note 2.

144. CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 56–63 (2008).

145. The pre-negotiation agreement and substantive / framework agreement phases are characterized by domination by belligerents and military men and women rarely participate in the discussion and decision making process.

146. Charlesworth, *supra* note 2, at 382–88 (discussing the private / public distinction).

147. *See* Fionnuala D. Ní Aolain, *Advancing Women's Rights in Conflict and Post Conflict Situations*, 104 AM. SOC. INT'L. L. PROC. 568, 570 (2010).

148. *See Recommendation No. 30*, *supra* note 24, at 2 ("The general recommendation covers the application of the Convention to conflict prevention, international and non-international armed conflicts, situations of foreign occupation, as well as other forms of occupation and the post-conflict phase. In addition, the recommendation covers other situations of concern, such as internal disturbances, protracted and low-intensity civil strife, political strife, ethnic and communal violence, states of emergency and suppression of mass uprisings, war against terrorism and organized crime,

towards the feminist demand to classify conflict-like situations as "humanitarian emergencies." It also displays sensitivity to and awareness of the changing nature of conflict itself, from traditional face-offs between opposing military forces involving conventional weapons to "low-intensity" conflicts deliberately targeting the civilian population, of which women comprise a considerable majority. It further states that the "phases of conflict and post-conflict have at times been divided as they can encompass different challenges and opportunities for addressing the human rights of women and girls" and makes clear the CEDAW Committee's awareness of the cyclical nature of transition of societies from conflict to post-conflict situations.[149]

However, neither instrument recognizes the violence that continues against women in the post-conflict breakdown of law and order,[150] and the need to distinguish both these categories from women's human rights in times of so called peace. Thus, in direct contradiction to these artificially contrived differences between conflict and non-conflict situations which these texts perpetuate, scholars advocate for an understanding of violence perpetrated against women as a continuum.[151] Also, there is a need to understand the complex interaction of "ordinary" domestic violence with conflict exacerbated communal tensions or other institutional or informal violence spurred by conflict,[152] and to address both when attempting to create a reproductive rights paradigm applicable to conflict ridden societies. Acknowledging a multi-layered concept of violence, where pre-existing violence escalates and explodes onto a superstructure of intense violence engineered by the conflict and consisting of honor killings, forced pregnancy, rape, sexual abuse is vital for the success of these aspirational aims set out in the instruments.

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that may not necessarily be classified as armed conflict under international humanitarian law and which result in serious violations of women's rights . . . .").

149. *See Recommendation No. 30*, *supra* note 24, at 2.

150. *See generally* S.C. Res. 2122 *supra* note 1; *Recommendation No. 30*, *supra* note 24.

151. *See* Margaret Urban Walker, *Gender and Violence in Focus: A Background for Gender Justice*, in THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 28–33 (Ruth Rubio Marin ed., 2009).

152. *See* Aolain, *supra* note 18, at 11–14.

B. INCONSISTENCY WITH CEDAW

The General Recommendation 30 of the CEDAW Committee calls for expansive reforms and progressive measures to achieve protection of women's human rights at all times, while "advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peace building, peacemaking, and reconstruction processes . . . ."[153] The Committee recognizes that the various thematic resolutions of the Security Council operate in the same area of removing obstructions to women and ensuring equality in the context of conflict, peace and security. It therefore "reiterates the need for a concerted and integrated approach that places the implementation of the Security Council agenda on women, peace and security into the broader framework of the implementation of the Convention and its Optional Protocol."[154] Given that the provision of the Resolution 2122 is more restrictive than the provision of General Recommendation 30, it is possible that states encounter a real difficulty when attempting to reconcile and integrate the two instruments. If reproductive freedom and access is to be explicated as available only to war rape victims, the legitimacy of the CEDAW provisions which make it available to all women affected by conflict and post conflict chaos is questionable. This possible shift to a more restrictive regime is thus very discouraging. In fact this narrower tailoring of the idea of reproductive rights would allow less supportive states to postpone legislations or policy favoring reproductive rights for all women on basis of need.

C. MASCULINITY AND ITS IMPACT ON WOMEN

While, undeniably, the aim of Resolution 2122 is to bring women's roles and contributions in conflict and post-conflict societies to the forefront, it does great disservice to the women it seeks to protect by ignoring the masculine nature of humanitarian interventions and the emergence of masculine trends in times of armed conflict.[155] Resolution 2122 recognizes

153. *Recommendation No. 30*, *supra* note 24, at 2.
154. *Id.* at 7.
155. *See generally* Naomi Cahn & Fionnuala Ni Aolain, *Gender,*

that women's vulnerability is exacerbated in conflict and they are placed at an increased risk of sexual and gendered violence. However, it does not attempt to understand the placement of men both within the domestic context as well as those international players with a stake in the crisis in "creation, perpetration and institutionalization of violence,"[156] as crucial to predicting the trends in crisis solving and redressing victim harm. In today's post-modern conflict, understanding and addressing disparities involves not only woman victims but also men in power.[157] However, Resolution 2122 fails to do so.

Furthermore, hyper-masculinity plays an inflated role in humanitarian crises,[158] whether through causal connection or precipitation. Many women's human rights advocates are calling for a deeper analysis of the phenomenon. [159] This is especially relevant in the attempts to re-characterize women's experiences during and post conclusion of hostilities. Additionally, the rebuttal of the presumption that masculinity is "neutralized" in times of humanitarian emergencies is of utmost importance in order to explain the increased subjugation of women in conflict stricken societies, where men might substitute loss of power in the external/public sphere with increased exercise of power over women. Given Resolution 2122's focus on redistributing power to women, especially in the public sphere, as well as granting women more space in decision making and leadership functions, ignoring trends in hyper-masculinity that might potentially inhibit such participation makes Resolution 2122 appear incomplete and hastily pieced together.

Lastly, the effect of projection of masculinity on women in times of conflict has generated considerable interest in recent times, and warrants inclusion in future UNSC thematic resolutions on Women, Peace and Security. Women's increased militarization and adoption of androcentric attitudes has led to

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Masculinities and Transition in Conflicted Societies, 44 NEW ENG. L. REV. 1 (2010) (discussing "hyper" masculinity in conflict and peacebuilding).

156. *See id.* at 5.

157. *See* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 793 (2000).

158. *See, e.g.*, Statements by the Delegates, *supra* note 122, at 15–17. Hyper-masculinity is understood to be "a masculinity in which the strictures against femininity and homosexuality are especially intense and in which physical strength and aggressiveness are paramount. *See* Harris, *supra* note 157, at 793 (quoted in Cahn & Aolain, *supra* note 155, at 5).

159. *See, e.g.*, Statements by the Delegates, *supra* note 122, at 15–17.

their assumption of non-traditional roles, which is what the resolutions seek to promote.[160] However by adopting masculine norms by deliberately shunning all that is feminine, most women have found themselves caught in a prism of a different kind of victimhood and have retained patriarchal gender hierarchies.[161] This new kind of victimhood, different from the victimhood women suffer as civilians, needs to be recognized and redressed, possibly through the periodic review and reporting of the progress of Resolution 2122.

D. CULTURAL AND GEOGRAPHIC DIFFERENCES

When Resolution 2122 states the need "for access to the full range of sexual and reproductive health services" it does not take into account the cultural and geographic barriers existing worldwide that might render implementation illusory.[162] Not even during the debate were the realities of conflicting cultural practices deliberated upon and no one commented on the palpable possibility that for some state parties the implementation of the provision will prove more difficult than others. For instance, several commentators have noticed that the African Charter on Human and People's Rights from 1981 (the African Charter) has made rights of women more unattainable by emphasizing the community needs, which constitutes a very important aspect of African way of life.[163] During deliberations, several delegates highlighted the recurrence of widespread and systematic conflicts in the African continent,[164] but expressed no qualms about the provisions of the African Charter that serve to devalue the very experiences of women that Resolution 2122 seeks to address. Notably, Article 17(3) of the African Charter states that "[t]he

160. *See* Noya Rimalt, *Women in the Sphere of Masculinity: The Double-Edged Sword of Women's Integration in the Military*, 14 DUKE J. GENDER L. & POL'Y. 1097, 1098 (2007).

161. *Id.* at 1113–15.

162. *See* S.C. Res. 2122, *supra* note 1, at 2.

163. *See, e.g.*, Christof Heyns, *African Regional Human Rights System: The African* Charter, 108 PENN ST. L. REV. 679, 688–689 (2003–2004). *See generally* African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 [hereinafter African Charter].

164. *See, e.g.*, Statements by the Delegates, *supra* note 122, at 7–9 (statement by Ms. Balipou, highlighting the gravity of the two decade long crisis in the Central African Republic which has spiraled "out of control" into a full blown conflict situation causing immeasurable harm to women).

promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."[165] Article 18 entrusts the family with custody of those morals and values, describing it as "the natural unit and basis of society."[166] The same article requires that discrimination against women be eliminated but juxtaposes the same with protection of "familial" and "traditional" values situating state parties to both instruments in a precarious position indeed.[167] This is not to suggest that UN instruments view the family as a source of oppression.[168] Rather, it is to suggest that they recognize the obstacles it may present in realization of reproductive autonomy for women at the individual level and by necessary implication, women as a class.

Likewise, countries use local practices such as sex selection to deny extension of abortion rights to women.[169] Resolution 2122 does nothing to de-link the two phenomena, precisely because of the narrow window of war rape victims through which it approaches the issue. While it is not expected that Resolution 2122 would account for country-specific cultural practices that might act as hindrance to women's reproductive freedom in conflict and post conflict hiatus, it does need to be acknowledged that this cultural relativism operates as a deterrent to states looking to implement the UNSC Women and Peace and Security Agenda. It fails to acknowledge that both *de jure* and *de facto* discrimination against women are repeatedly justified by governments on the basis of culture, religion or ethnicity. When relativism completely wipes out the notion of universality and indivisibility of rights it serves "to obscure violations committed against women, to perpetuate an ideological resistance to the notion of women's human rights and to inhibit a unified response from the international community."[170] It is not enough therefore that Resolution 2122

165. African Charter, *supra* note 163, at art. 17.

166. *See id.* at art. 18.

167. *See id.*

168. In fact, Black Asian feminists have cautioned against viewing the family as a source of oppression. *See* Valerie Amos & Pratibha Parmar, *Challenging Imperial Feminism*, 17 FEM. REV. 3, 15 (1984) (illustrating the difference among feminists from different cultural and ethnical backgrounds).

169. *See generally* Fred Arnold, Sunita Kishor & T.K. Roy, *Sex Selective Abortions in India*, 28 POPULATION & DEV. REV. 759, 762–63 (discussing sex selective abortions in India).

170. *See* ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS, PROMOTING AND PROTECTING THE HUMAN RIGHTS OF WOMEN AND GIRLS: A

obliterates the requirement that abortion be carried out only when permitted under national law, the resolution should extrapolate more on how divergent national interests may be reconciled in such a manner that women's reproductive health concerns do not take second place when balanced against other competing interests.

E. RESOLUTION 2122 AND THE HELMS AMENDMENT

The adoption of Resolution 2122 led to widespread advocacy efforts demanding the United States government to clarify or repeal the Helm's Amendment to the Foreign Assistance Act passed in 1973,[171] which forbids foreign aid recipients from using United States funding to perform abortions "as a method of family planning" or "to motivate or coerce any person to practice abortions."[172] Spearheaded by the Centre for Health and Gender Equity, an advocacy group, and Human Rights Watch, the campaigns focus on making foreign humanitarian aid available for victims of war rape, relying on Resolution 2122.[173] The Helms Amendment, an outdated enactment, forbids utilization of United States aid to "pay for the performance of abortion as a method of family planning," but does not prohibit U.S. foreign assistance in cases of rape, incest, or life endangerment.[174] Despite the distinction, lack of

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171. *See* Sera Sippel, *Women, Abortion and Helms: Executive Action to Break Barriers*, THE WORLD POST (Jan. 15, 2014), *available at* http://www.huffingtonpost.com/serra-sippel/women-abortion-and-helms_b_4604176.html.

172. The Helms Amendment, in its current form, provides: "(1) None of the funds made available to carry out subchapter I of this chapter may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions. (2) None of the funds made available to carry out subchapter I of this chapter may be used to pay for the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations. (3) None of the funds made available to carry out subchapter I of this chapter may be used to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning." 22 U.S.C. § 2151b(f).

173. *See* Center for Health and Gender Equity, *New Campaign Calls on Obama Administration to Support Access to Safe, Voluntary Abortion Services for Women and Girls Raped in Crisis or Conflict* (Dec. 11, 2013), available at http://www.genderhealth.org/files/uploads/Break_the_Barriers_News_Release.pdf, last visited on March 23, 2014.

174. *See* 22 U.S.C. § 2151b(f).

clarity around the implementation of Helms has served as a barrier to post-rape care in conflict and crisis. This is notwithstanding the several initiatives of the Obama administration since 2011, including the issuance of an executive order, the U.S. National Action Plan on Women, Peace and Security, which sought to "protect women from sexual and gender-based violence and to ensure equal access to relief and recovery assistance."[175]

While such advocacy efforts are commendable, they also serve as a double-edged sword. The aim of the movement is to get the United States government to retract from the over-interpretative stance that it has taken with regard to the Helms Amendment restriction. However, the Helms Amendment in reality has always provided for relaxation to the funding restriction beyond rape to cases of incest and life-endangerment.[176] On the contrary, it is Resolution 2122 which suffers from the fault of under-inclusiveness by extending reproductive and sexual health care only to victims of rape. Fault is apparent in the distribution analysis undertaken by these advocacy groups on account of war rape being the crisis or variable upon which reformist agenda is being hinged rather than life endangerment or similar need based criteria.[177] This approach might win short term victories, but in the long term will lead to great losses in bringing the reproductive rights agenda to fruition. By drawing the international communities' attention to the war rape criteria, the life risk exception is being rendered obsolete. The Helms Amendment has disproportionate impact on the lives of impoverished women in comparison to men,[178] and this cannot be addressed in totality by brandishing Resolution 2122, which perpetuates the paternalistic attitudes of male policy makers to women's human rights.

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175. *See* United States National Action Plan on Women, Peace and Security, THE WHITE HOUSE, December 2011, *available at* http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf.

176. *See generally* Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, 16.3 GUTTMACHER POL'Y. REV. 9, 9–13 (2013), *available at* http://www.guttmacher.org/pubs/gpr/16/3/gpr160309.pdf.

177. *See* GLOBAL JUSTICE CTR., *supra* note 94 (observing that foreign aid is used in the treatment of war-rape victims).

178. *See* Jessica Mack, *The Helms Amendment is America's Foreign Policy Skeleton in the Closet*, AL JAZEERA (Apr. 3, 2013), http://www.aljazeera.com/indepth/opinion/2013/04/201343104350559475.html.

F. CONTEXTUALIZING RESOLUTION 2122 WITHIN FEMINIST APPROACHES TO INTERNATIONAL LAW

Having highlighted the areas in which Resolution 2122 falls short of realizing full and fair reproductive justice for women caught in conflict, it would be pertinent to analyze the language of Resolution 2122 in the context of feminist jurisprudence to assess its conformity with common feminist approaches to international law. This section identifies three broad approaches advanced by feminist scholars and attempts to draw parallels with the approach embodied in Resolution 2122.

Feminist scholars who critique the content of the human rights instruments remark that the limited participation of women in all stages of the formal peace negotiation process acts as a stumbling block to meaningful inclusion of women's human rights in the post conflict society.[179] By virtue of their exclusion from the formal decision making process, women are "unable to draw attention to the particular difficulties they experience in conflict situations and, moreover, are powerless to recommend any preventive action."[180] Women excluded from the decision prompting the commencement of as well as signaling the end of hostilities cannot rightly be required to live with the consequences. This idea has been propagated since 1993, with mention of integration of the human rights of women into UN's system wide activity in the Vienna Declaration and in the Beijing Platform in 1994 which declared its intention to "[i]ncrease the participation of women in conflict resolution at decision-making levels and protect women living in situations of armed and other conflicts or under foreign occupation . . . ."[181]

This approach is clearly echoed in Resolution 2122 as well as its predecessor Resolution 1325, which recognize that civilians, specifically women and children are adversely affected by armed conflict and attempts to end the marginalization of women from the decision making processes

179. *See, e.g.*, *Myanmar: Tackling Impunity for Rape and Women's Entitlement to Bodily Integrity*, 47 Women's World 8, 11–12, (2013), *available at* http://www.isis-wicce.org/sites/default/files/resource-field_document/Women's%20World%20Magazine%202014%20septl.pdf.

180. *See* Judith Gardam, *Women, Human Rights, and International Humanitarian Law*, 324 INT'L REV. RED CROSS 421, 422 (1998).

181. *See* Beijing Platform, *supra* note 14, ¶ 141.

that affect the affairs of the State.[182] In fact Resolution 2122 goes further than its predecessor by focusing not only on women's participation but also on promoting women in leadership positions.[183]

On the other hand, an equally forceful but contrary argument is made out by those who study the marginalization of women from the perspective of the feminist standpoint theory.[184] Since gender based violence and reproductive harms suffered by women occur mostly within the private realm, unresolved questions remain whether effective attempts at inclusion of women in the formal and largely public process would lead to any positive results as far as reclaiming their rights are concerned. The exclusive operation of the law is in the public domain, while the activities of women remain confined to the private sphere. By leaving the private sphere unregulated, the law perpetuates the invisibility of women under the guide of apparent neutrality.[185] The inclination of human rights and humanitarian law is towards criminalizing acts occurring within the public sphere while mostly ignoring the private.[186] In most cases, the violence and discrimination against women initiated during warfare continues well past the formal conclusion of hostilities and are allowed to continue unpunished.[187] This group believes that the problem is magnified on account of the pervasive association of all things private to be of lesser value than acts taking place in the public sphere.[188]

As discussed above, Resolution 2122 is ambiguous as to what constitutes conflict and does not indicate whether violence suffered by women in the private sphere, often beyond

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182. *See* S.C. Res. 2122, *supra* note 1; S.C. Res. 1325, *supra* note 112.

183. S.C. Res. 2122, *supra* note 1 ("*The Security Council*, . . . 1. *Recognizes* the need for consistent implementation of [Resolution 1325] in its own work and *intends* to focus more attention on women's leadership and participation in conflict resolution and peacebuilding, . . . ").

184. *See* Fionnuala Ni Aolain, *Situating Women In Counterterrorism Discourses: Undulating Masculinities And Luminal Femininities*, 93 B.U. L. REV. 1085, 1086 (2013).

185. *See* Gardam, *supra* note 12, at 65.

186. This is evidenced, among other things, in the way torture has been defined in the Convention against Torture. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

187. *See* Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 62 (1993).

188. *Accord* Aolain, *supra* note 184, at 1099–1100.

official declaration of cessation of conflict, falls within its ambit. It seems Resolution 2122 misses the mark when it comes to bridging the public-private dichotomy as it is overtly biased in favor of promoting women's roles in the public sphere.

A third approach, offered as a possible solution to this dichotomy, in which some feminist commentators have recognized the opportunities afforded by conflict to women.[189] Violence has been found to "affect traditional, prewar gender relations . . . ."[190] It may be used to accelerate women's empowerment as they take over traditionally male dominated roles in the aftermath of armed conflict.[191] Conflict is believed to provide "unique opportunities for women to undo highly constrained social expectations and structures as a result of the social flux that results from communal violence. Thus, inter and intra-state violence creates a highly volatile terrain in which great uncertainties, costs, and opportunities arise for women, sometimes paradoxically in tandem.[192] The CEDAW Committee in General Comment 30 has partially recognized this possibility and exhorts states to exploit the strategic advantages following the aftermath of conflict to adopt policies and laws eliminating discrimination and fostering inclusion of women.[193]

Resolution 2122, on the contrary, does not envisage women in the role of perpetrator of violence or persons taking advantage of violence. Rather, it focuses heavily on women's roles as harbingers of peaceful transformation. It condemns violence committed against/directly affecting civilians including women but does not speak of women using the social flux afforded by conflict to undo gender-hierarchies.[194] It does

189. *See generally Report on Women's Participation in Peacebuilding*, *supra* note 119 (detailing actions that should be taken for women to take advantage of opportunities that arise as a result of conflict).

190. Tilman Brück & Marc Vothknecht, *Impact of Violent Conflicts on Women's Economic Opportunities*, *in* WOMEN AND WAR: POWER AND PROTECTION IN THE 21ST CENTURY 85, 86 (Kathleen Kuehnast et al. eds., 2011).

191. *See generally* Janna Thompson, *Women and War*, 14 WOMEN'S STUD. INT'L F. 63, 73 (1991) (explaining how women have been forced to take on new roles and responsibilities because of armed conflict).

192. *See generally Report on Women's Participation in Peacebuilding*, *supra* note 119 (detailing the specific measures that will be taken to help women during and after a conflict).

193. *Cf. Recommendation No. 30*, *supra* note 24, at 8–10.

194. *See* S.C. Res. 2122, *supra* note [1], at 2. The Resolution expresses concern at women's vulnerability during armed conflict and the threats and

however state an "intention to include provisions to facilitate women's full participation and protection in: election preparation and political processes, disarmament, demobilization and reintegration programs, security sector and judicial reforms, and wider post-conflict reconstruction processes."[195] What was crucial for Resolution 2122 to have addressed is that gains made by women during conflict are lost in the reconstruction phase.[196] Additionally, the lawlessness created by conflict may be exploited by men to further discrimination against women[197] and undo the good contemplated in the provisions of Resolution 2122, none of which currently appears to be taken into account.

VI. THE WAY FORWARD FOR FUTURE RESOLUTIONS

This section, in course of discussing possible models for reformation in law and legal instruments, borrows heavily from major feminist schools of thought and explores the contributions of (a) cultural feminism; (b) liberal feminism; (c) radical feminism; and (d) post-modern feminism to chart out recommendations for reform. While all four schools, with their sub-schools operating on different presumptions and advancing diverse realities for women, the interplay between them cannot be ignored and in discussing the two models of reformation of existing law below, the influence and of all four schools, in varying degrees, is irrefutable.

A. THE EQUALITY MODEL

While speaking of women's special needs, it has been said that to redress harms is to improve protections for all citizens or to ensure better enforcement of the already existing rules.

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human rights violations against women during and after conflict. *See id.* It also recognizes that women and girls who are vulnerable or disadvantaged may be targeted and experience increased risk of violence. *See idd.* However, Resolution 2122 does not acknowledge the possibility that women might be perpetrators of violence during conflict. *See id.*

195. *Id.* at 4.

196. *E.g.*, U.N. Secretary-General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, Report of the expert of the Secretary General*, ¶¶ 88–89, U.N. Doc. A/51/306 (Aug. 26, 1996) (by Graca Machel).

197. Gardam & Jarvis, *supra* note 10, at 11–18 (explaining how women's experience of discrimination is intensified during armed conflict).

This model asserts that the remedy may not necessarily lie in re-examining the existing legal redress mechanism through gender lenses as a gendered perspective towards humanitarian and post-war reorganization efforts might promote further isolation of women from mainstream power structures as opposed to fostering inclusion. In fact, scholars such as Professor Fineman have argued that "vulnerability" should be reclaimed for its "potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility," and channelized to combat the vicious cycle in which women inevitably get typecast as victims.[198] Once crisis and human vulnerability is accepted as inevitable, lawmakers will be free to tailor policies addressing structural inequalities and discrimination faced by women.

This is also true with respect to a feminist approach to the study of gender violence. Feminist theorists who have contributed to the evolution of gender violence legislation have focused on the heteronormative context in which violence occurs.[199] The traditional focus on gendered notions of violence, while crucial for the purpose of comprehending the cause of marginalization of women, is dismissive of the exploitation or violence men suffer from other men, as well as other categories of violence emanating from this very hierarchical structure of discrimination.[200]

However, reforms based on the equality model have been severely criticized as, "if it is accepted that women experience warfare fundamentally differently from men, irrespective of whether the latter are combatants or civilians, then laws that

198. *See* Fineman, *supra* note 11, at 8. International affairs scholar R. Charli Carpenter has demonstrated how "gender ideologies generate and project perceptions of vulnerability and innocence onto 'women-and-children' while assuming that adult males and older boys are either combatants or potential combatants." Barbara Sutton & Julie Novkov, *Rethinking Security, Confronting Inequality: An Introduction*, *in* SECURITY DISARMED: CRITICAL PERSPECTIVES ON GENDER, RACE, AND MILITARIZATION 16 (Barbara Sutton et al. eds., 2008). This assumption results in humanitarian policies being fashioned in a manner which ignores the needs of the male civilian population.

199. *See generally* Kristen Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity: "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality*, 23 GEN. & SOC'Y 440 (2009) (discussing violence and heteronormativity).

200. *Accord* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995).

take the experiences of men as the norm against which to construct the rules are unjust."[201] As Catharine Mackinnon remarks, "man has become the measure of all things" and by using men's experiences as a standard of equality, we jeopardize recognizing women's experiences that do not conform to notions of masculinity.[202] By way of illustration, while devising an appropriate mechanism for engendering security, a starting point for men would be a presumption of security offset by conflict. In contrast, the starting point for women would be pre-existing insecurity magnified by conflict conditions.[203]

Thus, scholars like Professor Aolain advocate for reversing the inquiry proposed by Professor Fineman. These scholars propose contextualizing women's peculiar experiences as a starting point upon which the experiences and vulnerabilities generated by a particular crisis is then projected.[204] This interplay of past inequalities and marginalization with present harms and vulnerabilities engendered by the crisis will in their opinion better address the compounding of vulnerability in times of conflict.

Secondly, women, as a class that suffers, are not homogenous and identifying a common thread of experiences would prove difficult. The Durban Declaration and Program of Action, which emerged from the 2001 UN World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, commented upon the interplay of racism, racial intolerance, and xenophobia on the discrimination suffered by women.[205] Obviously, the nature of this

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201. Gardam, *supra* note 12, at 59.

202. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 34 (Harvard Univ. Press ed., 1987); *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 241–44 (Harvard Univ. Press ed., 1989) ("The first task of a movement for social change is to face one's situation and name it. The failure to face and criticize the reality of women's condition, a failure of idealism and denial, is a failure of feminism in its liberal forms. The failure to move beyond criticism, a failure of determinism and radical paralysis, is a failure of feminism in its left forms . . . .As sexual inequality is gendered as man and women, gender inequality is sexualized as dominance and subordination . . . .The next step is to recognize that male forms of power over women are affirmatively embodied as individual rights in law.").

203. *See* ANNICK T.R. WIBBEN, FEMINIST SECURITY STUDIES: A NARRATIVE APPROACH 10 (Routledge ed. 2011) (explaining the hopes of some feminists that the 9/11 terrorist attacks might mobilize the women's rights movement).

204. *See, e.g.*, Aolain, *supra* note 18, at 5–6.

205. World Conference Against Racism, Racial Discrimination,

discrimination varies greatly across geographic boundaries. The CEDAW Committee, in General Recommendation 30, documented the disproportionate impacts of conflict on rural women compared to others.[206] Thus, while the experiences of women are certainly different from men,[207] the effect of these experiences also varies greatly across different cultures and traditional roles women assume in their societies.[208] In fact recognizing that 'internationalization of responses' has led to foisting of global stereotypes on women,[209] treaty monitoring bodies are increasingly deferring to culturally relative interpretations of the law, resulting in an obfuscation of the existing masculinities which marginalize women on account of their apparent gender-neutrality.[210]

A third criticism is levelled by feminists who oppose the "silences in international law" and demand de-codification of this silence by drawing attention to the dichotomies used to structure international law. By operating through private/public distinctions, the "symbolic system and culture" of international law is permeated with gendered values, which reinstate gender stereotypes and forfeit neutrality.[211]

In its present form, the UNSC resolutions obviously do not mirror the equality model. It appears that the equality model is simply not feasible in conflict settings and certainly not welcome in the context of thematic resolutions focused on improving the lot of women ensnared in conflict and post-conflict hiatuses. In fact, as discussed in the prior section, Resolution 2122 should attempt to move further away from the equality model in future and make accommodations for cultural diversities which peculiarly affect women, recognize the influence of the private sphere in determining women's experiences, and recognize the asymmetry in the formalistic notions of equality the genders are presumed to enjoy, particularly in the conflict context.

Xenophobia, and Related Intolerance, Durban, S. Afr., Aug. 31–Sept. 8, 2001, *Durban Declaration and Programme of Action*, ¶ 54(a), U.N. Doc. A/CONF.189/12 (Jan. 1, 2002).

206. *See Recommendation No. 30*, *supra* note 24, ¶ 51.

207. *See generally* Copelon, *supra* note 86.

208. *See id.*; Center for Reproductive Rights, *supra* note77.

209. *See* Charlesworth, *supra* note 16, at 384.

210. *Cf. id.* at 385–86.

211. *See generally* Beijing Platform, *supra* note 14.

B. THE EQUAL YET DIFFERENT MODEL

A second approach, the mirror opposite of the equality model, advocates for new, detailed laws designed to address women's special needs. Articulation of this approach is not a novel phenomenon. As far back as 1998, the U.N. Special Rapporteur on Violence Against Women, equipped with a mandate covering situations of armed conflict, recommended revising the Geneva Conventions applicable to international armed conflict to "incorporate developing norms against women during armed conflict."[212] Feminist theorists have also consistently identified existing laws as archaic, patriarchal, and inadequate for protecting women against discrimination.[213]

While theoretically accepting reforms are required which re-contextualize gender, the proponents of this approach diverge at the implementation level, with some advocating formulation of new regulations while others ask for extensive, purposive interpretations of existing law,[214] which account for gender specificity. [215] Disagreement also exists as to what form the proposed reforms should take. For instance, in the debate surrounding gendered revision of laws of war, one is confronted with views ranging from appending an additional protocol dealing with women, to adopting "soft" laws for the purpose of 'surfacing gender' within humanitarian law.[216] The official ICRC position maintains that the current laws of war already protect women in armed conflict sufficiently and that the real issue lies in poor enforcement.[217] The second approach is definitely meritorious, as long as the end result is not formulation of standardized norms which ignore the non-homogenous nature of women's experiences and leave us with a mere triumph of form over substance.[218]

Resolution 2122, as is the case with other UNSC thematic resolutions, leans towards this triumph of form in that it recognizes the vulnerable position of women in society, making

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212. Gardam & Jarvis, *supra* note 10, at 57.

213. *See, e.g.*, Rebecca Salonen, *Current Issues in FMG Controversy: 3. The Male Circumcision Debate*, GODPARENTS NEWS, Aug. 2010, at 1, 1–2.

214. *Cf.* U.N. ESCOR, *supra* note 5, ¶ 95.

215. *See* Helen Durham, *Women, Armed Conflict and International Law*, 84 INT'L REV. RED CROSS 655, 657 (2002).

216. *See* Copelon, *supra* note 86.

217. *See, e.g.*, Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 INT'L REV. RED CROSS 337, 359 (1985).

218. *See* Chinkin, *supra* note 87, at 18.

functional equality difficult to achieve. As Secretary General Ban Ki Moon stated while opening the Resolution 2122 debate, this idea revolves around the concept of gender equality and human rights, while simultaneously recognizing the need to have reforms specific the promotion of women's leadership and recognizing their concerns.[219] The sentiment of member states amply demonstrates this fact. For instance, the need to criminalize all forms of sexual violence as 'sexual terrorism' came up in course of the debate concerning the adoption of Resolution 2122, as well as demands to end the labelling of the killing of women and children as collateral damage.[220] The language of Resolution 2122 itself, though far more cautious, certainly shows an inclination to favor a gendered re-interpretation of the law favoring women.

Future resolutions adopted by the UNSC should strive to formulate strategies that embody the "twin aims of challenging the existing norms and devising a new agenda for theory."[221] These strategies must contest the silences in the law by advocating for urgent reforms while simultaneously reinterpreting the androcentric standards of existing framework. It is crucial that the end result be a re-structuring of international and national law—granting women greater visibility.[222] It will, as Elizabeth Gross puts it, "make clear how dominance has been possible; and to make it no longer viable."[223]

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219. *See* Statements by the Delegates, *supra* note 122, at 3.

220. *Id.* at 18–19, 21–22.

221. Margaret Thornton, *Feminist Jurisprudence: Illusion or Reality?*, 3 AUST'L J.L. & SOC'Y 5, 23 (1986).

222. *See* Arleen B. Dallery, *The Politics of Writing (The) Body: Ecriture Feminine*, *in* GENDER/BODY/ KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING 52, 59–65 (Alison M. Jaggar & Susan R. Bordo eds., 1989). French feminists have long undertaken the task of deconstructing masculine themes appearing in law and have attempted to reinterpret the "whole relationship between the subject and discourse, the subject and the world, the subject and the cosmic, the microcosmic and the macrocosmic." Luce Irigaray, FRENCH FEMINIST THOUGHT: A READER 119 (1987). In contrast, although masculine social and linguistic structures have also concerned Anglo-American feminists, they have generally not approached the issue by developing a new model of discourse.

223. Elizabeth Gross, *What is Feminist Theory?*, *in* FEMINIST CHALLENGES: SOCIAL & POLITICAL THEORY 197 (Carole Pateman & Elizabeth Gross eds., 1989).

VII. CONCLUSION

Skeptics might argue that in light of substantive reproductive health provisions in other international human rights and humanitarian law instruments, the mention of access to reproductive health care services in Resolution 2122 is of no great import and fails to make novel inroads on the path to full reproductive autonomy for women caught in conflict and post-conflict situations. This Article argues that this cynical position is not wholly true.

Considerable progress has been made regarding women and armed con•ict by bodies entrusted with protecting human rights, particularly the UNSC. "Indeed, the process of identifying women's particular experiences and demonstrating the failure of the law to acknowledge them is more advanced in this context than in organizations focusing solely on armed con•ict."[224] The 'Women and Peace and Security' Agenda of the UNSC has become a fertile ground for "feminist curiosity" and has assumed great importance amongst feminists as an instrument for leveraging women's demands and needs. It has generated unprecedented body of work on issues of women's insecurity, the effect of such insecurity on the political order *vis-a-vis* the insecurity of men, and women's oppression in the politics of conflict and militarization. It has led to a tremendous push for "transformative mainstreaming" as opposed to "just add women and mix" approach to post conflict peacebuilding,[225] which was typical of earlier UNSC resolutions.

With every resolution, the UNSC adds new items to the agenda and strengthens deficiencies identified in past actions. Only by critiquing shortcomings can we achieve a more gender sensitive and inclusive need-based criteria in the future resolutions. It is not enough to say that existing rules in other instruments are adequate and that the energies of advocates, academics, and lobbyists must focus solely on better implementation. Society must act in unison to criticize and protest a law, principle, or declaration that fails to give women their due status at the time of its inception and prevent formulation of rules that are essentially paternalistic and define women's experiences from the perspective of men. One

224. Gardam & Charlesworth, *supra* note 99, at 150.

225. Anne Gallagher, *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System,* 19 HUM. RTS. Q. 283, 288 (1997).

cannot expect a resolution aimed at increasing participation of women to survive when it suffers from the same malady of having been defined and conceptualized without reference to women's perspectives.[226] The temptation to give into token responses or half-hearted solutions must be resisted and demands be made for specific directives which adopt a firm stand on reproductive health.[227] Rather than hailing this piecemeal declaration as a victory for reproductive rights, activists should push for greater inclusion and specificity in the next thematic resolution adopted by the UNSC, and ensuring that the declaration is accompanied by training, monitoring, and reporting requirements. This is a perfect time, therefore, to finally break the silence.

226. *Cf.* Bartlett et al., *supra* note 35.
227. *See* WORLD HEALTH ORG., *supra* note 21, at 81.