Conclusion: the prognosis

Prognosis: what we achieved – the dimensions intersect

The prognosis is the final step in Hippocratic medicine. It consists in 'the prediction of the outcome of the disease, as well as its fluctuations and transmutations.'[1] In my book, the prognosis will include some final thoughts on the main findings of the analysis. Predictions are not part of a lawyer's work, but it is possible to reflect on the impact that law, in particular international human rights law, has on the eradication of VAWH.

The paradigm composed of *anamnesis*, diagnosis, treatment *and* prognosis has provided a sufficient descriptive framework for systematising my argument and has encouraged a reflection which has led me to the elaboration of a new concept in international law around which to construe states' obligations.

I started my analysis from the conviction that VAW always relates to the right to health and the right to reproductive health. I contended that the relationship is not merely a causal one, however, in the sense that VAW causes a violation of the rights to health and to reproductive health (what I called the horizontal dimension, characterised by interpersonal violence). I also argued that state laws and policies in the field of health cause or contribute to causing VAW (my vertical dimension). I found confirmation of this bi-dimensional relationship in the *anamnesis*, through the investigation of judgments and decisions of regional human rights and domestic courts, and the views of UN treaty bodies. The idea of VAWH, which I constructed in the diagnosis, has proved to be capable of grasping the intersections between VAW on one hand, and the rights to health and to reproductive health on the other. The idea is not aimed at replacing that of VAW, but rather at enriching it by encompassing a further, vertical, dimension, which is not sufficiently explored under the generally accepted definition of VAW. Despite the efforts of the CEDAW Committee in GR No. 35, which theorised the existence of an international custom prohibiting all forms of gender-based violence against women, the notion of VAW is generally conceived as mainly enshrining forms of interpersonal violence. One only has to look at the list of behaviours that states are required to criminalise under the Council of Europe Istanbul Convention to find confirmation of that.[2] I regard denial of access to abortion, denial of access

to emergency contraception, obstetric violence and involuntary sterilisation as forms of VAWH in their vertical dimension, because they are the product of policies or laws in the field of health. I also characterise the notion of VAWH as having an additional element: the limitation of women's autonomy. This element has proved particularly useful in reflecting on the prohibition of FGM/C and in broadening my view in order to include genital cosmetic surgery in the analysis.

The descriptive function of the concept of VAWH is not limited, but capable of embracing two dimensions of violence. It was indeed fundamental when I came to reconceptualise states' obligations. In the treatment, therefore, I placed both the horizontal and the vertical dimensions beneath the same 'umbrella' in terms of obligations, without departing from the well-established categories of international law. I reflected on which categorisation of states' obligations could be more useful for my paradigm. To this end, I chose the tripartite structure composed of positive obligations of result, of due diligence and to progressively take steps. I demonstrated how all three types of obligation are present in both dimensions. The decisions I have analysed demonstrated a trend towards the affirmation of a positive obligation to provide access to health services, which is especially relevant for, but not limited to, the vertical dimension. The difference between the two dimensions does not lie in the 'type' of the obligations, but rather the fact that obligations 'specialise' along one or other of the explored dimensions.

When talking about interpersonal violence, one of the most relevant aspects of state obligations stressed by courts and UN bodies alike is investigation. Needless to say, this aspect is fundamental. Nonetheless, since interpersonal violence severely affects women's rights to health and to reproductive health, the response of the authorities must be to provide services that are capable of supporting the victim/survivor of interpersonal violence. This response must be efficient, timely, gender-sensitive and avoid forms of secondary victimisation. In the vertical dimension, it was tempting to say simply that the state ought to be prevented from interfering in women's autonomy. The network characterising this dimension, however, is composed of obligations of result (to repeal laws that criminalise abortion, to enact laws relating to maternal health, to adopt measures to guarantee the provision of health services), obligations of due diligence in actual cases (to respond to cases of malpractice in the health sector causing VAWH, to efficiently investigate episodes of violence) and obligations to progressively take steps, which embrace, in a longer perspective, obligations both of means and of result (drawing up documents for health personnel explaining what is meant by women's rights to health and to reproductive health). In both dimensions lack of interference is not enough, because what is needed is to eradicate the root causes of violence, to disrupt the patterns of discrimination at societal and state level, and to subvert the dominant patriarchal nature of the state and the health sector. Using republican theory, this would mean 'freedom as non-domination,' rather than a mere 'freedom from interference.' In Pettit's words, 'freedom as non-domination comes about only by design: only because there are legal and social arrangements in place which ensure that the other people who are about cannot interfere with

you on an arbitrary basis.'[3] Despite being neglected by feminist scholarship,[4] a modern view of freedom as non-domination can be useful in the eradication of VAW, and, in my case, of VAWH: 'the ideal for women is precisely that of being secured against arbitrary interference: being given freedom in the sense in which it connotes, not just an absence of interference, but an absence of domination.'[5] It means to emphasise positive rather than negative legal obligations, where positive obligations also aim at dismantling the 'unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.'[6]

My paradigm led me to conceptualise states' obligations in both dimensions and can be used to transfer aspects of one dimension to the other. For example, a femicide watch to collect aggregated data on gender-related killings of women, which was proposed by the SR on VAW Dubravka Šimonović, could be considered as a model for the collection of data in both the horizontal and the vertical dimension. In the latter, for instance, it would be useful to monitor cases of involuntary sterilisation and raise awareness of situations characterised by silence for decades. Furthermore, the paradigm can respond to the challenge posed by some countries that, on one hand, condemn DV and have taken steps to prevent and suppress it, but on the other hand are reluctant to recognise women's reproductive autonomy. What I mean can be explained using an example that dates back to 2016 in Italy. On 31 August, the then Italian Minister of Health launched a campaign called 'Fertility Day', in which women were encouraged in dubious advertisements to become mothers 'while they are still young' and warned that the biological clock can run quickly. Italian women have perceived it as an aggression, an interference in their private lives, a shocking way to blame women for not bearing children.[7] The government has stayed aloof from the minister, who in turn said that she would have changed the campaign. At the same time, the government professed to be worried about VAW and its consequences on women and committed to take further actions to counter it. The missing step here is the link between VAW and health: violence not only implies violation of the rights to health and sexual and reproductive rights, but also can be provoked by health policies which strongly and arbitrarily interfere with women's reproductive autonomy and reproduce patterns of discrimination.[8] Not being aware of that connection means perpetuating discrimination against women, and the unequal power relations between women and men.

The analysis also confirmed the approach that I adopted with regard to VAW: the absence of the element of intent in its definition. It was interesting to find 'patterns of discrimination' which I found in this book to encompass forms of 'tolerance' of violence by the state, state 'policies' in the health field and 'societal' patterns of discrimination which require a response in the long term.

The reconceptualisation of states' obligations as I conceived it in these pages can inspire the jurisprudence of regional human rights courts and the quasi-jurisprudence of UN treaty bodies, and, at the same time, reinforce the interpretation of existing legal instruments on VAW. It would also support the gradual

consolidation of the prohibition of VAW as an international custom, confirming the proposal of the CEDAW Committee in GR No. 35 of 2017.

Women's rights to health and to reproductive health have underpinned the assessment: even though often not applied directly, these rights have played a role in determining the consequences of violence (horizontal dimension), the causes of violence (vertical dimension), state responsibility, how to decide reparations and the general measures states must adopt. This way, the content of the right to health and of the right to reproductive health has been clarified, reinforced and seen from a gender-based perspective. The rights to health and to reproductive health can play a pivotal role in defining, for example, the 'immediacy of the risk' in cases of DV, and the forms of support a victim of DV must receive, but also in identifying and 'gendering' reparations in order to consider women's specific needs and to respond to all forms of VAWH as conceived in this book.

Prognosis: what we did not achieve – international law as a cause of violence?

Even so, my analysis can be criticised because, despite the framework provided in these pages, VAWH can be said to persist in all societies. What is the point in elaborating new legal frameworks if they do not work, if they do not bring change for many women in the world? States have adopted contradictory behaviours in recent years: on one hand criminalising obstetric violence, on the other hand restricting women's access to abortion or putting into question women's autonomy.[9] Other governments have launched strategies against DV, advertising in populist ways the utmost commitment to fighting such a scourge for society, and at the same time emphasised episodes of DV only when they are committed by refugees or immigrants, 'others'. 'Let us save the women and the children only' was said by one politician in the first days of January 2019, about a ship that had not been allowed to enter any European port, perpetuating the male structure of a state that 'allows' pity to save the vulnerable, the weak, (women and children) and considers men as 'others', 'beasts' that could hurt society.

My paradigm can be challenged by those who have raised doubts about the potential of human rights and international law. 'Human rights remedies, even when successful, treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself,' posited David Kennedy, where he stressed the contradictions of human rights movements and their 'dark sides.'[10] He also pointed out that the result of initiatives which aim at reframing emancipatory objectives in human rights terms is 'more often growth for the field – more conferences, documents, legal analysis, opposition and response – than decrease in violence against women, poverty, mass slaughter and so forth.'[11] Viewed in this light, my paradigm and my reconceptualisation of states' obligations will not help reduce VAWH. Furthermore, as Chinkin and Wright argued in 1993 with regard to the right to food – which shares with the right to

health its (weak) position among social, economic and cultural rights – there is a gap 'between legal provisions and realities of life for women,' and that 'the primacy accorded to the protection of individual rights does not correspond to the reality of most women's experience.'[12] We might acknowledge that states do ratify treaties without implementing them. The Council of Europe Istanbul Convention has been ratified by states that have strongly violated human rights. Does this mean that its existence is a paradox? That international human rights law is not effective? As international lawyers, we know how the system works, and as feminist lawyers we know how weak, to the point of sometimes being non-existent, are gender issues in international and human rights law. The state has been revealed to be a 'male' actor throughout my analysis. Nonetheless, my analysis has focused on international law, has relied on the international law on state responsibility, in the belief that we cannot challenge a system by looking at it from the outside, but can do so better when we know it from within.

One provocative conclusion can be drawn from the analysis contained in this book: international law, international human rights law more specifically, constitutes in itself a form of VAWH. The reason is not the absence of international legal instruments protecting women's rights – at least not after some very recent developments – but the weakness of its monitoring mechanisms, and the intrinsic limits of law, namely the competence of UN treaty bodies and regional human rights courts, the fact that the human rights to health and to reproductive health cannot be applied because they are missing from the legal instruments establishing the monitoring mechanism. Is this not a form of discrimination against women in itself, considering that redress for violations of women's rights to health and to reproductive health depends on the ratification by states of international human rights law instruments that provide for those rights? In other words, is it not the system itself that has insurmountable limits?

A question then spontaneously follows: 'should we abandon law altogether?'[13] Should we say that the international legal framework is insufficient, gender-biased, useless? My answer is No, and this book has hopefully demonstrated this conclusion. Legal requirements are essential because they define the rules states must abide by. Beth Simmons, in her remarkable book, posited that 'rather than viewing international law as reinforcing patriarchal and other power structures, the evidence suggests that it works against these structures in sometimes surprising ways,' and that 'legal commitments potentially stimulate political change[s] that rearrange the national legislative agenda, bolster civil rights litigation, fuel social and other forms of mobilization.'[14]

Legal provisions, which might bind or not bind, are not enough, though. They must be accompanied by judicial action that interprets the law in a gender-sensitive way. The judiciary is itself biased, full of myths and stereotypes, but it is also the state organ that has contributed over time to the affirmation of women's rights to health and to reproductive health. Another key role is played by groups (feminist groups, but not only them) which are not subjected to the legal obligations stemming from the treaties, but which know the provisions of

international treaties and can work to put pressure on states to convince them to change legislation and to put women's rights to health and to reproductive health at the centre of policies and strategies at national level (and by individuals working to the same end).

An affirmation of states' obligations concerning the two dimensions of violence explored in this book through legal instruments and the interpretations given by the judiciary will not eradicate VAWH, unless combined with action that must start from society. Society is the actor that, through its individuals and groups, has filed complaints with international and regional bodies for the protection of human rights, and with national courts, participated in the elaboration of strategies and codes of conduct, stimulated the adoption of laws and promoted referenda to mark constitutional changes. The Istanbul Convention is very clear when stressing the importance of the involvement of society, including boys and men, in eradicating rooted and resilient stereotypes.

Law can help in making a change, but the international legal order must overcome its 'blindness' – which manifests through 'false dichotomies between categories of rights' – and its focus on 'men's needs and fears,' through 'priorities of rights that put women last rather than first.'[15] If international law is the cause of violence, then we must go back to international law to find in the system itself an answer to the challenge: law as the cause *and* the cure; law that stems from society and in society finds its nourishment and its improvement. Civil society has 'strong incentives to use law … to enhance the legitimacy of [its] claims and the prospects for realizing [its] interests.'[16] Judicial and quasi-judicial bodies have the enormous responsibility to promote an interpretation that, needless to say, conforms with the law, but is capable, as I could show from many cases examined in the *anamnesis*, of taking up the challenge of recent times.

The prognosis is not of complete cure from the disease, but of long convalescence, with eyes wide open against attempts to undermine a fragile 'health' that has been achieved through the complex and not always straightforward development of human rights law and through a mobilisation that comes from society.

Notes

1 Edelstein, 'Hippocratic prognosis', and see Introduction.
2 Except for forced abortion and forced sterilisation, which belong to the vertical dimension, all the other behaviours that are criminalised consist in interpersonal violence.
3 P. Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), p. 122.
4 Pettit (*Republicanism*, p. 48) recalls in his work Mary Astell's words in the seventeenth century: 'if all Men are born free, how is it that all Women are born Slaves?'
5 Pettit, *Republicanism,* p. 139.
6 Istanbul Convention, preamble.
7 The campaign was reported by major international newspapers. See, for example, www.nytimes.com/2016/09/14/world/europe/italy-births-fertility-europe.html.

8 The complex dimensions of the organisation and delivery of healthcare are underestimated. E. Kuhlmann and E. Annandale, 'Introduction,' in Kuhlmann and Annandale (eds), *The Palgrave Handbook of Gender and Healthcare* (Basingstoke: Palgrave Macmillan, 2010), p. 1.
9 In Italy, between the end of 2018 and the beginning of 2019, the law which decriminalised abortion (No. 194/1978, adopted on 22 May 1978) was challenged by the Minister of the Family, who called for greater restriction.
10 D. Kennedy, *The Dark Sides of Virtue* (Princeton, NJ: Princeton University Press, 2004), p. 24.
11 Kennedy, *Dark Sides of Virtue*, p. 24.
12 Chinkin and Wright, 'The hunger trap', pp. 262 and 298.
13 Chinkin and Wright, 'The hunger trap', p. 312.
14 B. Simmons, *Mobilizing for Human Rights* (Cambridge: Cambridge University Press, 2009), p. 7.
15 Chinkin and Wright, 'The right to food', p. 320.
16 Simmons, *Mobilizing*, p. 380.