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President Barack Obama
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

10 April 2013

Dear President Obama,

I am writing to you as an expert in international humanitarian law ("IHL") regarding the abortion ban currently attached to US humanitarian aid for woman and girl victims of rape in armed conflict. This abortion ban violates the rights of woman and girl victims of war rape to non-discriminatory, comprehensive and humane medical care under IHL.

My qualifications include almost forty years of work on international humanitarian and human rights law, including as former Head of the International Committee of the Red Cross's ("ICRC") Legal Division, and author of numerous books and articles on IHL and related international law regimes.

I was co-author of the ten-year (1995-2005) ICRC study on the customary rules of international humanitarian law.[1] This study is cited as legal authority by national and international courts, including the Supreme Courts of the United States[2] and Israel,[3] and the International Criminal Tribunal for the former Yugoslavia,[4] as well as in United Nations reports[5] and by governments.[6]

Women and girls impregnated by rape in armed conflict are entitled to protection and care under IHL. This includes the right of all wounded and sick to the medical care required by their condition, and a right to be free from any cruel treatment.

Common Article 3 of the four 1949 Geneva Conventions sets out the minimum protection to this effect for all conflicts, including non-international ones: "Persons taking no active part in the hostilities, including . . . those placed *hors de combat* by sickness, wounds… or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria," and shall be protected

from "cruel treatment and torture."[7] It adds that "[t]he wounded and sick shall be collected and cared for."[8] The ICRC Commentary to this provision specifies that the care to be given to the wounded and sick (that applies here to both military personnel and civilians) "reaffirms, in generalized form, the fundamental principle underlying the original Geneva Convention of 1864" and that "[i]t expresses a categorical imperative which cannot be restricted."[9] Article 12 of Geneva Convention I provides that the wounded and sick "shall be respected and protected in all circumstances" and that they "shall not wilfully be left without medical assistance and care."[10] The ICRC Commentary to this provision specifies that "the wounded and sick must be given such medical care as their condition requires. This fundamental principle has remained unchanged since 1864."[11]

In the case of international armed conflicts, the care to be given to wounded and sick military personnel is covered by Article 12 of Geneva Convention I, and to civilians by Article 16 of Geneva Convention IV, which specifies that "[t]he wounded and sick…and expectant mothers, shall be the object of particular protection and respect."[12] More detail has been added to this provision by Additional Protocol I ("API"), which repeats the requirement of Geneva Convention I that medical care must be given in accordance with the needs of the patients.[13] This applies equally to civilian and military wounded and sick, defined as persons in need of medical assistance due to, inter alia, trauma or physical or mental disorder.[14]

There can be no doubt that persons who are raped fall into the category of "wounded and sick," due to the severe mental, and often also physical, trauma suffered. Although the Additional Protocols to the Geneva Conventions are not yet ratified by the United States, the basic requirement to give the necessary medical care to the wounded and sick reflects long-standing customary law.[15] The ICRC customary international humanitarian law study reflects this point for both international and non-international conflicts: "The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones."[16]

Exclusion of one medical service, abortion, from the comprehensive medical care provided to the "wounded and sick" in armed conflict, where such service is needed by only one gender, is not only a violation of their right to medical care, but also a violation of the prohibition on "adverse distinction" found in common Article 3, the Additional Protocols to the Geneva Conventions, and customary international law.[17] While women are accorded unique substantive protections under IHL, the definition of non-discrimination (or "non-adverse distinction") under IHL is the same as that in major human rights treaties, including CEDAW, and precludes using biological differences between males and females as a rationale for less favourable treatment of females.[18] IHL treaties do not spell out the types of medical treatments that should be given, but only require that they be those necessary for the condition of the patient, without any adverse distinction. As "distinctions on the basis of sex are . . . prohibited only to the extent that they are unfavourable or adverse,"[19] favourable distinctions are permissible, and indeed required, to ensure the best possible treatment for each person. Thus, under both IHL and human rights law, non-discrimination signifies that the outcome for each gender must be the same, not that the treatment must be identical. Therefore, as rape can result in additional consequences for women and girls compared to men and boys, most notably pregnancy, these additional consequences necessitate distinct medical care, including the option of abortion.

It is essential to note that pregnancy from war rape—coupled with the other "horrors of war" to which women and girls are subjected[20]—aggravates the serious, sometimes life-threatening, injuries from the rapes themselves. The use of rape in armed conflict is characterized by a particular degree of viciousness, including gang rape and mutilation with instruments. Studies have shown that "[u]nwanted pregnancy through rape (and gang rape increases the risk of pregnancy) and the conditions imposed by war (malnutrition, anemia, malaria, exposure, stress, infection, disease), increase the risks defined by th[e] baseline maternal mortality rate."[21] As one example, in the DRC, a high baseline maternal mortality rate[22] is compounded by the vulnerable nature of a large proportion of the individuals raped in conflict. According to one study, for instance, one third of DRC rape victims are girls under age 18 and three-quarters of all DRC rape victims are subjected to gang rape.[23] Studies have shown that "[a]lthough the risks of childbirth are real for any Congolese woman, they are significantly higher for young girls whose bodies are not mature enough for labor and delivery and for women who have serious pelvic injuries and scarring from the physical damage often caused by gang rape."[24]

In this light, the denial of abortion to women and girls impregnated by war rape additionally violates common Article 3's prohibition on torture and cruel treatment. According to various human rights bodies, including the Committee against Torture, denial of abortion to women and girls made pregnant by rape can constitute an act of torture or cruel, inhuman and degrading treatment due to its grave physical, psychological and social consequences.[25] This proposition was most recently confirmed in March 2013 by the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Juan Mendez, who agreed that the option of abortion must exist in circumstances of rape as part of the effort to "ensure that the torture protection framework is applied in a gender-inclusive manner."[26]

Despite IHL's clear requirements, as well as the indisputable health- and life-risking consequences of forced childbirth on one hand and unsafe abortion on the other, raped women and girls in conflict zones are routinely denied the option of abortion. As a result, each of these women and girls faces the cruel choice of carrying to term a potentially life-threatening pregnancy and raising her rapist's child, undergoing an unsafe abortion, or ending her own life. US humanitarian aid policy presently bears a high degree of responsibility for this illegal, and thoroughly inhuman, situation.

While parties to a conflict have the primary obligation to provide war victims with medical care, all parties to the Geneva Conventions must "respect" and "ensure respect" for IHL[27] in all circumstances, including in their provision of humanitarian aid. Accordingly, the United States has an obligation to ensure that its humanitarian aid is delivered in ways that fully comply with IHL's requirements: to treat women and girls impregnated by war rape without discrimination, to provide them with the complete medical care required by their condition and to not subject them to cruel treatment. Furthermore, the U.S. must ensure that the States it supports with humanitarian aid comply with these requirements. In order for the U.S. to "respect" and "ensure respect" for IHL, it needs to remove the abortion prohibition from its humanitarian aid for women and girls made pregnant by war rape. Only in this way will the U.S. ensure that they receive the non-discriminatory, humane and comprehensive medical treatment to which they are entitled.

I greatly admire your efforts to ensure that US treatment of detainees, including at Guantanamo, fully complies with common Article 3 of the Geneva Conventions. In keeping with this spirit, I repectfully request that the same commitment be applied to the US treatment of woman and girl war rape victims.

Thanking you in advance,

Yours sincerely,

Louise Doswald-Beck
Professor of International Law (retired October 2012).

Cc:
John Kerry, Secretary of State
Harold Koh, Legal Advisor, U.S. Department of State
Catherine M. Russell, Ambassador-at-Large for Global Women's Issues
Valerie Jarrett, Chair, White House Council on Women and Girls
Tina Tchen, Executive Director, White House Council on Women and Girls

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[1] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*; *Vol.II: Practice*, Cambridge University Press, 2005 [hereinafter "ICRC Customary IHL Study"]. The study is also on the ICRC Customary IHL Database, available at: http://www.icrc.org/customary-ihl/eng.
[2] *Hamdan v. Rumsfeld,* U. S. Supreme Court, 548 U.S. 632, 643 (2006).
[3] *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2006, HCJ 769/02, paras. 23, 29-30, 33-34, 40-42, 46. Study also referred to by the Colombian Constitutional Court, Sentencia, C-291/07, 25 April 2007.
[4] ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, IT-01-47-AR73.3, 11 March 2005, paras 29–30, 38 and 45–46; *Prosecutor v. Radoslav Braanin*, Appeals Judgment, case No. IT-99-36-A, Annex B, 3 April 2007; *Prosecutor v. Ante Gotovina et al,* , Trial Judgment, Vol. II of II, Case No. IT-06-90-T, 15 April 2011, n. 873. See also e.g. Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), 31 May 2004; Inter-American Court of Human Rights, *Case of the Miguel Castro Castro Prison v. Peru*, Judgment of 25 November 2006, Concurring Opinion of Judge A.A. Cançado Trindade, para. 36.
[5] See e.g. UN Docs: A/HRC/2/8, 29 September 2006, para. 8, n. 3; A/HRC/2/7, 2 October 2006, para. 22, n. 22; A/HRC/4/20/Add.1, 12 March 2007, at 248; A/HRC/10/22, 20 March 2009, paras. 11, 46, 66 and 83,; UN Doc. A/HRC/13/42, 19 February 2010, at 27, n. 63; Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011; Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, UN Doc. A/HRC/17/44, 1 June 2011.
[6] For example, in new military manuals: Colombia, Manual de Derecho Operacional, Comando General de la Fuerzas Armadas, Manual FF.MM 3–41 Público, Primera Edición, 2009; Spain, *Orientaciones. El Derecho de los Conflictos Armados*, Tomo 1, Publicación OR7–004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, Vol. I, § 8.2.b.(1). Also in proceedings before the International Court of Justice in the *Case concerning Jurisdictional Immunities of the State (Germany v. Italy)*, statements by Germany on 26 August 2011, n. 8, and statements by Greece , Verbatim Record of public sitting, 14 September 2011, para. 78; also ICJ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), translation of verbatim record of public sitting*, 25 April 2005, n. 77.
[7] Common Article 3, sub-para. 1, to all four Geneva Conventions of 12 August 1949.
[8] Common Article 3, sub-para. 2, to all four Geneva Conventions of 12 August 1949.
[9] Commentary to Geneva Convention I of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Pictet (ed) 1952, at 56. The first Geneva Convention of 1864 provided a duty to care for all wounded and sick military personnel, irrespective of nationality. It is the basis of subsequent more detailed Geneva Conventions on the same topic, the 1949 version being Geneva Convention I.
[10] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 UNTS 31, Art. 12.

[11] Commentary to Geneva Convention I of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Pictet (ed) 1952, at 137.
[12] Geneva Convention (IV) Relative to the Protection of Civilians [hereinafter "Geneva Convention IV"], (1950) 75 UNTS 287, Art. 16.
[13] In particular, Art. 10, which states that: "In all circumstances they [the wounded and sick] shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones." Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter "Protocol I"], (1979) 1125 UNTS 3, Art. 10. The same is provided for in Additional Protocol (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter "Protocol II"], (1979) 1125 UNTS 609, Art. 7. Additionally, medical personnel must be allowed to give the best possible care in accordance with medical ethics (this rule is codified in API, Art. 16). ICRC Customary IHL Study, Rule 26 (which also applies to non-international conflicts).
[14] Art. 8(a) of API defines "wounded and sick" as "persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases…" Protocol I, Art. 8(a).
[15] The customary nature of Art. 10 of API has been affirmed by the US government in official statement by M. Matheson, U.S. Dept. of State Deputy Legal Advisor at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, reported in 2 AM.U.J.INT'L L & POLICY 415, 419 (1987).
[16] ICRC Customary IHL Study, Rule 110.
[17] See Geneva Convention IV, common Art. 3 ("Persons . . . shall in all circumstances be treated . . . without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."); see also Protocol I, Art. 10 ("There shall be no distinction among them founded on any grounds other than medical ones."); Protocol II, Art. 7; ICRC Customary IHL Study, Rule 88 ("Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited."), Rule 110 ("No distinction may be made among them [the wounded, sick and shipwrecked] founded on any grounds other than medical ones."); Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Art 14. ("Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.").
[18] See, in particular, CEDAW, General Recommendation 24, paras. 11 and 14, and General Recommendation 25, para. 8.
[19] International Committee of the Red Cross, 'Women Facing War: ICRC study on the impact of armed conflict on women' (October 2001) [hereinafter "ICRC Women Facing War Study"], at 20.
[20] See ICRC Women Facing War Study, at 34.
[21] Harvard School of Public Health & Physicians for Human Rights, 'The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan' (October 2004), at 20.
[22] Harvard Humanitarian Initiative & Oxfam International, 'Now the World is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo' (April 2010) [hereinafter "Harvard & Oxfam, 'Now the World is Without Me'"], at 41 (citing a maternal mortality rate in the Eastern DRC of "3,000 deaths per 100,000 live births"). See also: Global Justice Center, 'The Right to an Abortion for Girls and Women Raped in Armed Conflict' (February 2011), *available at* http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34.
[23] Francoise Duroch, Melisa McRae & Rebecca Grais, 'Description and Consequences of Sexual Violence in Ituri province, Democratic Republic of Congo' (April 2011), *available at* http://www.biomedcentral.com/1472-698X/11/5 (finding that "29.3% of the victims of sexual assault in the DRC are minors referring to those less than 18 years of age . . . [and that] [g]ang rape was reported in 55.7% . . . of minors . . .").
[24] Harvard & Oxfam, 'Now the World is Without Me,' at 41.
[25] See e.g. Concluding Observations of the Committee against Torture on Nicaragua, UN Doc. CAT/C/NIC/CO/1, 10 June 2009, para. 16 ("The Committee is deeply concerned by the general prohibition of abortion . . . even in cases of rape, incest or apparently life-threatening pregnancies that in many cases are the direct result of crimes of gender violence. For the woman in question, this situation entails constant exposure to the violation committed against her and causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression.").
[26] See Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, UN Doc. A/HRC/22/53, 11 February 2013, para. 45.
[27] Common Article 1 to all four Geneva Conventions of 12 August 1949.