

BRIEFING TO THE EUROPEAN COMMISSION AND MEMBERS OF THE EUROPEAN PARLIAMENT

# EU HUMANITARIAN AID MUST UPHOLD THE RIGHTS OF GIRLS AND WOMEN UNDER INTERNATIONAL HUMANITARIAN LAW

## SUMMARY

### A RECENT CHANGE IN POLICY, BUT NOT IN PRACTICE

In September 2015, the European Commission acknowledged that under international humanitarian law (IHL) and like all persons wounded in war, **girls and women impregnated by rape in armed conflict have the right to necessary medical care, including abortions.** The EU's 2016 budget also newly specifies that EU humanitarian aid must be provided in line with the non-discrimination rules of the Geneva Conventions and their Additional Protocols, and not be subject to any restrictions imposed by other donors. This means that the EU's humanitarian aid partners must ensure women suffer no "adverse distinction" in their medical treatment options, and must separate their EU funds from US funds in order to avoid the US ban on abortion currently restricting EU funds. The European Commission has yet to make these changes effective.

### IMPLEMENTING THIS POLICY IS REQUIRED UNDER IHL

The European Commission must take positive action to implement this new policy, and ensure the EU's 2016 budget is respected. This is critical to fulfil the EU's obligations under IHL – particularly as it relates to children, who have special rights under EU law and IHL. (A majority of war rape victims are girls under 18\*1.) Finally, IHL requires that its rules are disseminated to all the actors involved. This includes disseminating information about the EU's revised policy, and procedures to ensure that female war rape victims receive the care they need, including abortion services.

## I. Scene-setter: What changed recently

### THE PREVIOUS POLICY

Prior to September 2015, the European Commission did not differentiate between the rights of natural disaster victims on the one hand (governed by national law and international human rights law), and the rights of war victims on the other hand (governed by international humanitarian law and human rights law). Consequently, the Commission told its humanitarian partners to defer to prohibitive national laws on abortion when treating war rape victims. This policy failed to recognise (i) the universal rights of war

victims under IHL, and (ii) that unlike doctors treating natural disaster victims, doctors treating war victims are "protected persons" under IHL and are provided immunity from any prosecutions for violating local laws or restrictions.

### AN UPDATED POLICY ON ABORTION FOR WAR RAPE VICTIMS

The European Commission revised its policy in September 2015, affirming that "[in] cases where a pregnancy threatens a woman's or a girl's life or causes unbearable suffering, international humanitarian law and/or international human rights law may justify

offering a safe abortion rather than perpetuating what amounts to inhumane treatment”.<sup>2</sup> This language mirrors that of the United Kingdom, whose government affirmed in 2014 that IHL required the provision of abortion services to war victims, and subsequently communicated this to its humanitarian partners.<sup>3</sup> The European Parliament had previously called for this policy change, and now asks for its implementation.<sup>4</sup> The UK House of Lords’ Select Committee on Sexual Violence in Conflict also welcomed the policy change.<sup>5</sup>

The Commission’s position is now also aligned with declarations by the UN Secretary-General, UN Security Council resolutions, as well as the policies of France and the Netherlands.

### **A CLEARER EU BUDGET FOR 2016**

In January 2016, the Council and the Parliament jointly adopted the EU’s 2016 budget. By contrast with previous years, the budget now states that the EU’s rapid, effective and needs-based humanitarian aid (emphasis indicates new text)

*...[i]s granted to victims without discrimination **or adverse distinction** on the grounds of race, ethnic origin, religion, disability, sex, age, nationality or political affiliation. That assistance is provided **in accordance with international humanitarian law and should not be subject to restrictions imposed by other partner donors**, as long as it is necessary to meet the humanitarian needs to which such situations give rise.<sup>6</sup>*

“Without adverse distinction” and “in accordance with international humanitarian law” echo the principle found in common Article 3 of the Geneva Conventions, their Additional Protocols, and customary international law mandating that all persons “wounded and sick” in armed conflict receive comprehensive and non-discriminatory medical care in all circumstances. This obligation concerns not procedure, but results: the outcome of medical care provided to

female war victims must be the same as for male war victims, even if it requires different treatment, such as abortions.

The EU budget also newly makes clear that the EU’s humanitarian aid may not be subject to restrictions imposed by other donors. (The USA notoriously forbid that their humanitarian aid fund abortions.) This new formulation requires that humanitarian organisations funded by both entities keep EU funds separate from US funds. The European Parliament has repeatedly called for humanitarian funds to be shielded from the influence of foreign donors.<sup>7</sup>

### **NEW ICRC COMMENTARY AFFIRMS RIGHTS AND OBLIGATIONS UNDER IHL**

Finally, in March 2016 the International Committee of the Red Cross (ICRC) published the first instalment of its new commentaries on “the contemporary practice and legal interpretation” of the Geneva Conventions. These authoritative commentaries “give people an understanding of the law as it is interpreted today, so that it is applied effectively in today’s armed conflicts”.<sup>8</sup>

The Commentary notes that in today’s conflicts, in order to fulfil the requirements of humane treatment and non-discrimination, it is important to take into

**“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 a violation not only of the right to medical care but also of the prohibition on ‘adverse distinction’ found in common Article 3, the Additional Protocols to the Geneva Conventions and customary international law.”**

*Preventing Conflict, Transforming Justice, Securing the Peace: Global Study on the Implementation of United Nations Security Council Resolution 1325 (p. 77).*

account the ways in which gender affects victims of war differently, requiring that treatment be specifically tailored to their needs. The Commentary also adds that international entities that become parties to conflict – such as the EU – are bound by customary international law and its obligations.

## Background: The EU's special obligations and commitments in relation to children

The Additional Protocols to the Geneva Conventions establish that children shall receive special protection and respect. In many conflicts, about half of those raped in armed conflict are children under 18 – and it is children under 15 who are at highest risk of death from pregnancy and forced childbearing. This means the majority of the beneficiaries of this new policy formulation will be girl children, in relation to whom the EU has special obligations and made special commitments.

These include:

- » The EU *Guidelines on Children and Armed Conflict* (2008);
- » The communication *A Special Place for Children in EU External Action* (2008);
- » The staff working document *Children in Emergency and Crisis Situations* (2008);
- » The EU *Agenda for the Rights of the Child* (2011);
- » The action plan *Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016–2020* (2015).

Under these obligations, the EU must:

- » Distinguish its aid to victims of armed conflict (governed by IHL and international human rights law) from its aid to victims of natural disasters (governed by international human rights law and national law);
- » Ensure that all its humanitarian partners comply with IHL in all circumstances, irrespective of local laws;
- » Ensure aid is delivered without any “adverse distinction”, which requires the medical outcome for women to be as favourable as for men. (It adds that even neutral rules can be adverse and inhumane, depending on how they impact women.)

## II. What must happen now

To implement its new policy, and to respect the EU's 2016 budget, its own commitments and its obligations under IHL, the European Commission must:

### INFORM HUMANITARIAN PARTNERS

Under IHL, the European Commission has the positive obligation to disseminate information about IHL rights and requirements to its humanitarian partners.<sup>9</sup> Partnership agreements between the European Commission and humanitarian partners already make clear the latter must comply with IHL,<sup>10</sup> but partners are unlikely to respect the Commission's new policy if they do not know about it. This means the European Commission must inform its humanitarian partners of its new policy as the United Kingdom did in 2014.<sup>11</sup>

➔ ***The European Commission should inform its partners via a written memo, and/or through its annual ECHO Partners' Conference in the autumn. The memo should underscore the EU's existing commitments on the protection of children in armed conflict.***

### INFORM HUMANITARIAN STAFF

Doctors and medical staff operate under complex and sometimes threatening circumstances. However, when humanitarian staff act in situations of armed conflict (as opposed to other emergency contexts), they have explicit obligations under IHL, which provide them with critical protections if complied with.<sup>12</sup> Doctors and medical staff therefore need clear guidance to ensure that their actions comply with IHL, and need to be assured that when they do so, the EU stands behind them and will ensure their protection.

➔ ***The European Commission should ensure its contracts, memoranda of understanding, and other agreements with humanitarian partners and conflict states clearly state that in situations of armed conflict, IHL governs the medical care for the wounded and sick and these obligations must be complied with by all humanitarian staff.***

➔ ***The European Commission should inform its partners' staff of its revised policy via a written memo, and through specific training.***

### **MONITOR THE IMPLEMENTATION OF THIS NEW POLICY**

Under IHL, the European Commission is responsible for ensuring that the humanitarian organisations it funds follow IHL and implement its own policy. Furthermore, under the special protections given to children under IHL, the European Commission must ensure that pregnant girl children are *actually offered* and receive abortion services.

➔ ***As part of the Single Form and Framework Partnership Agreement which the Commission updates regularly, and specifically the Gender–Age Market Toolkit, the European Commission and its partners should develop indicators on the provision of abortions to female war rape victims.***

### **IMPLEMENT BUDGET SEPARATION**

The EU's 2016 budget makes clear that EU aid must be provided in accordance with IHL, and must not be impacted by partner donors' restrictions. This mandates the separation of EU funding from US funding by organisations funded by both, so that EU and US policies do not conflict.

➔ ***The European Commission should inform its partners via a written memo, and update its Framework Partnership Agreement to mandate keeping EU and US funds separate.***

## **III. Notes**

1. Save the Children, *Unspeakable Crimes against Children: Sexual violence in conflict*, (2013), at 2.
2. European Commission, Letter from Federica Mogherini and Christos Stylianides in response to request of 39 MEPs, 11 September 2015, ARES(2015)3757306.
3. Department for International Development, *Safe and unsafe abortion: The UK's policy on safe and unsafe abortion in developing countries*, June 2014, <http://bit.ly/hrffl86>.
4. European Parliament resolution of 28 April 2016 *on attacks on hospitals and schools as violations of international humanitarian law* (2016/2662(RSP)); European Parliament resolution of 17 Dec. 2015 *on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter* (2015/2229(INI)); European Parliament resolution of 16 December 2015 *on preparing for the World Humanitarian*

*Summit: Challenges and opportunities for humanitarian assistance* (2015/2051(INI)); European Parliament resolution of 8 October 2015 *on the mass displacement of children in Nigeria as a result of Boko Haram attacks* (2015/2876(RSP)); European Parliament resolution of 9 July 2015 *on the security challenges in the Middle East and North Africa region and the prospects for political stability* (2014/2229(INI)); European Parliament resolution of 9 Jun. 2015 *on the EU Strategy for equality between women and men post 2015* (2014/2152(INI)); European Parliament resolution of 30 Ap. 2015 *on the situation in Nigeria* (2015/2520(RSP)); and European Parliament resolution of 30 April 2015 *on the situation of the Yarmouk refugee camp in Syria* (2015/2664(RSP)).

5. House of Lords Select Committee on *Sexual Violence in Conflict, Sexual Violence in Conflict: A War Crime*, 12 April 2016, <http://bit.ly/28MGOg>.
6. *European Union's general budget for the financial year 2016*, Official Journal L48 of 24/02/2016, p. 1435.
7. European Parliament resolution of 16 Dec. 2015 *on preparing for the World Humanitarian Summit: Challenges and opportunities for humanitarian assistance* (2015/2051(INI)); European Parliament resolution of 9 June 2015 *on the EU Strategy for equality between women and men post 2015* (2014/2152(INI)); European Parliament resolution of 13 June 2013 *on the Millennium Development Goals – defining the post-2015 framework* (2012/2289(INI)); and European Parliament resolution of 13 March 2012 *on equality between women and men in the European Union – 2011* (2011/2244(INI)).
8. International Committee of the Red Cross, *Commentary on the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 22 March 2016, <http://bit.ly/28LuEbY>.
9. Geneva Conventions of 1949, Article 47 (I), Article 48 (II), Article 127(1) (III), Article 144(1) (IV); Additional Protocol I, arts. 80, 83, 86; see also Commentaries to Additional Protocol I, arts. 80, 83, 86.
10. DG ECHO, *Framework Partnership Agreement*, ¶ 3.2 (2014).
11. Department for International Development, *Safe and unsafe abortion: The UK's policy on safe and unsafe abortion in developing countries*, June 2014, <http://bit.ly/hrffl86>.
12. See Protocol Additional (II) to the Geneva Conventions II, art. 10; Protocol Additional (I) to the Geneva Conventions II, art. 10, art. 16; ICRC, *Commentary to Protocol I*, art. 16, ¶¶ 650, 665 (General protection of medical duties: protecting those providing medical care to the wounded and sick “against any compulsion to perform acts - or refrain from performing acts - contrary to the patient's interests”); ICRC, *Customary IHL Database*, Rule 26 (medical activities).