

THE RIGHT TO AN ABORTION FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT

States' positive obligations to provide
non-discriminatory medical care
under the Geneva Conventions



**Global
Justice Center**

Human Rights Through the Rule of Law

DEDICATION

The GJC dedicates this report to the country of Norway, who broke the silence about the illegal denial of abortions to rape victims in conflict. We honor their principled and unfailing support for the rights of women as key to global justice.

ABOUT THE GLOBAL JUSTICE CENTER

The Global Justice Center is a human rights organization that works with judges, parliamentarians and civil society leaders on the strategic and timely enforcement of international equality guarantees.

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Introduction

Thousands of girls and women raped and impregnated in armed conflict are routinely denied abortions with devastating consequences.

This brief sets out that (1) rape victims, as the “wounded and sick,” are entitled to abortions under common Article 3 of the Geneva Conventions, its Additional Protocols I and II and customary international law, and (2) when states fail to provide abortions or fail to ensure that humanitarian actors on its territory provide abortions, these states are violating international humanitarian law.

A girl or woman who is a victim of war rape and is denied an abortion when she wants one faces one of three options: (1) undergoing an unsafe abortion; (2) carrying to term an unwanted pregnancy that increases her risk of maternal mortality; or (3) committing suicide. Further, when rape is used as a method of genocide and women are denied abortions, this can further the genocidal intent of the perpetrators. This is because rape in these circumstances is being used to eradicate a particular racial, ethnic, religious, or national group by ensuring that the woman gives birth to the child of the enemy.

The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* and the subsequent classification of rape as a war crime and crime against humanity in the Rome Statute of the International Criminal Court are historic legal advances recognizing a woman’s right to accountability for rape in conflict. However, this recognition of rape is not sufficient. It must be accompanied by measures to ensure that these victims receive the full range of medical care needed for their injuries, including abortions.

In conflict settings, these victims are denied abortions for a myriad of reasons. This brief specifically highlights how US abortion restrictions imposed on all humanitarian aid play a prominent role in this denial. The Global Justice Center (GJC) challenged these restrictions in a shadow report filed with the UN Human Rights Council for the Universal Periodic Review of the United States in November 2010.

This brief concludes with a set of recommendations to States, the United Nations, the United States and civil society on what immediate steps they can take to enforce the legal rights to abortions of these victims.

Part 1: The Denial Of Abortions To Girls And Women Raped In Armed Conflict Is A Violation Of Their Rights Under International Law

The routine use of rape as a weapon and tactic of war has become an increasing area of concern for the global community. This has been documented in at least 36 recent conflicts.¹

Since rape is an underreported² crime, accurate statistics on the full extent of its use in conflict situations are difficult to obtain. However, even based on the conservative estimates that are available, the sheer scale of this targeted violence against women and girls is shocking.

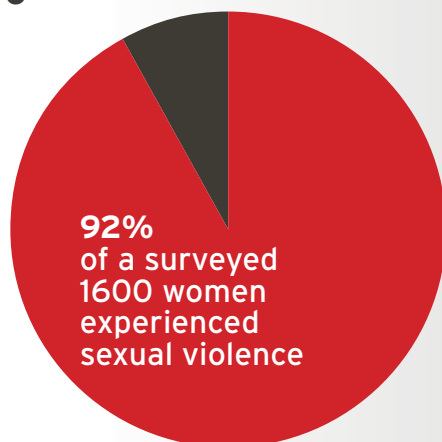
It is estimated that between 250,000³ and 500,000⁴ women were raped during the Rwandan genocide in 100 days, and that approximately 20,000 children⁵ were born as a result of these rapes. In Liberia, a 2005 - 2006 government survey of 1,600 women showed that 92% of the women interviewed had experienced some form of sexual violence.⁶ In 1971 the West Pakistan Army was responsible for the rapes of

some 200,000 Bangladeshi women, which resulted in approximately 25,000 children born of these rapes.⁷

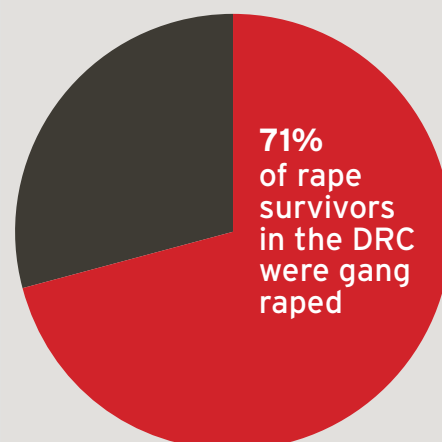
Local health centers in South Kivu, Democratic Republic of Congo (DRC) estimate that approximately 40 women are raped in the region every day,⁸ and the International Rescue Committee (IRC) estimates that for every rape reported in the DRC, 30 rapes go unreported.⁹ The Panzi Hospital, a major medical facility in the DRC providing care for rape victims - but not abortions - issued a report finding that 71% of 1,851 rape survivors treated at the hospital were gang raped.¹⁰ Another of its studies showed that approximately 6% of reported rape cases resulted in pregnancy.¹¹

Despite recognition and documentation of the endemic use of rape as a weapon of war, the care provided to rape victims remains inadequate. This is because these victims are routinely denied the option of abortion.

**Sexual Violence
in Liberia
2005-2006**



**Rape Survivors
in the DRC**



Recent Conflicts Where Mass Rape Has Been Documented

Afghanistan	Chechnya	India	Nepal	Vietnam
Algeria	The Democratic Republic of the Congo	Iraq	Peru	The Former Yugoslavia (Bosnia, Croatia, Kosovo, and Serbia)
Argentina	Cyprus	Indonesia	Pakistan	Zimbabwe
Bangladesh	East Timor	Côte d'Ivoire	Rwanda	The Sudan
Brazil	El Salvador	Kuwait	Sierra Leone	The Central African Republic.
Burma	Guatemala	Liberia	Somalia	
Burundi	Haiti	Mozambique	Turkey	
Cambodia		Nicaragua	Uganda	

source: Cassandra Clifford, *Rape as a Weapon of War and Its Long Term Effects on Victims and Society*, 2008

SECTION I - THE ROUTINE AND ILLEGAL DENIAL OF ABORTIONS TO GIRLS AND WOMEN IMPREGNATED BY RAPE IN ARMED CONFLICT

STATE AND INTERNATIONALLY FUNDED HUMANITARIAN AID PROVIDERS REGULARLY OMIT THE OPTION OF ABORTION FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT

The major providers of medical humanitarian services routinely exclude the option of an abortion to girls and women raped in armed conflict. Although a few courageous doctors and agencies provide abortion services episodically, this provision is a discretionary humanitarian act, not a recognition of a woman's non-derogable legal right. Further, many services are funded (at least in part) by the United States (US). Under US law, this funding cannot be used to provide abortions or discuss the need for abortions in fact-finding reports (see Part 1, Section III).

The non-provision of abortions is treated as an unfortunate but accepted reality for survivors of rape. No major report on sexual violence by USAID, the UN, or humanitarian medical providers discusses the right of women to abortions under IHL. In fact, the acceptance of medical care practices that exclude abortions has become so ingrained that even such exemplary and influential humanitarian organizations such as Oxfam and the Harvard Humanitarian Initiative accept the failure to provide abortions as routine.

An April 2010 report by Oxfam and the Harvard Humanitarian Initiative, detailing sexual violence in the DRC, highlights the terrible consequences of war rape and acknowledges the horror experienced by those women who were raped and became pregnant. This report however, like all other reports, fails to acknowledge any rights of victims of these war crimes to abortions under the non-discrimination mandates of the Geneva Conventions.¹²

The Oxfam and Harvard Humanitarian Initiative report concludes by calling on the global community to address pregnancy from war rape by taking the following steps:

...further research to more clearly quantify the number of unintended pregnancies occurring due to rape, to describe the nature and degree of unsafe abortions occurring in the community, and to explore the means to provide preventative care through increasing provision and utilization of contraception and emergency contraception.¹³ (emphasis added)

In the community, they made such fun of me that I had to leave the village and live in the forest. Today the only thing that I can think about is that I want an abortion. I am hungry; I have no clothes and no soap. I don't have any money to pay for medical care. It would be better if I died with the baby in my womb.

—“Josephine,” South-Kivu, Democratic Republic of the Congo, March 2004 (as reported to Amnesty International)



Major humanitarian medical response protocols also treat abortion differently than any other necessary medical service for war victims.

For example, the World Health Organization's (WHO) general response protocol, as detailed in the *Clinical Management of Rape Survivors* manual, reflects the standard followed by the majority of humanitarian medical assistance providers in conflict situations. The manual recommends that female rape victims who present at a medical treatment center within 72 hours after a rape should be provided with the following: (1) their wounds treated, (2) emergency contraception (EC) to prevent potential pregnancy, (3) post-exposure prophylaxis (PEP) to prevent HIV transmission, and (4) medications to prevent sexually transmitted infections (STIs).¹⁴ For pregnant war victims, this protocol limits the provision of abortions to situations where it is “permitted by law.”¹⁵

This WHO protocol also reflects the fact that EC is effective only for those women who present for treatment within 72 hours of the rape. However, this excludes the vast majority of rape victims.¹⁶ One study found that over a three year period the percentage of women who sought medical care within 72 hours ranged from .6% to 3.2%.¹⁷ Further, a review of records at the Panzi Hospital in South Kivu, DRC showed that only 12% of women presented within one month of their sexual assault.¹⁸

Additionally, the Inter-agency Field Manual (IAFM) on Reproductive Health in Humanitarian Settings finds that:

...a systematic lack of access by crisis affected persons to comprehensive abortion care is a denial of their equal rights and protections as mandated under international human rights law...[and that] [f]orcing a woman to carry an unwanted or unviable pregnancy to term is considered degrading and causes mental suffering.¹⁹

However, even this comprehensive manual, which recognizes that this denial is a violation of women's rights, restricts the provision of abortion services to raped girls and women to circumstances where abortion is legal under local law.²⁰ This deference to local abortion laws is inaccurate. In situations of armed conflict, the Geneva Conventions²¹ and norms of customary international humanitarian law take precedence over national laws.²² Accordingly, in countries where domestic abortion laws prohibit the provision of abortion services to girls and women raped and impregnated in armed conflict, these laws are superseded by the IHL mandates that require the provision of abortion services (see Part II).

Even in places such as Sudan, where abortion for rape victims is legal, women are precluded from accessing safe abortion services. Human Rights Watch, in a study on victims of sexual violence in Sudan and Chad, found that “no abortion services were available for those who were unable to access emergency contraception within the mandatory 72 hours.”²³

THE OMISSION OF ABORTION SERVICES FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT IS DEADLY AND CRUEL

Every rape resulting in pregnancy has significant, sometimes deadly, physical, psychological and social consequences.

For girls and women raped in armed conflict, the physical consequences of rape are aggravated, as there is a direct link between armed conflict and increased rates of maternal mortality.²⁴ It has been found that “unwanted 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 [the] baseline maternal mortality rate.”²⁵ Further, where women are denied abortions, they may resort to “non-sterile” or “non-medical methods” which can lead to “death, infection, scarring or sterilization.”²⁶

The psychological consequences of rape and a resulting pregnancy are also severe. A study by the Harvard Humanitarian Initiative and Oxfam found that “[i]n their narrative descriptions of violence, women described sadness, anger, fear, anxiety, shame and misery as a result of the sexual assault... these emotions appeared to be augmented by pregnancy resulting from rape.”²⁷

Studies have also documented rape’s social consequences, particularly on familial and community relationships, and how the consequences are exacerbated by pregnancy.²⁸ Common social consequences

include ostracization by the community, spousal abandonment and physical violence by family members.²⁹ A study of sexual violence in DRC by Human Rights Watch found that:

...[i]f the rape resulted in pregnancy, most women and girls have given birth to the babies...[m]others of these children struggle to find ways of living with these children born out of rape, and they and their children are often rejected by their families. Consequences of such rejection are serious since families in the Congo are often the only safety net for assuring protection and survival to the vulnerable.³⁰

Children born of rape also suffer, as they are often recognized as “children of the enemy.”³¹ In Rwanda, children born of rape are known as “enfants mauvais souvenirs,” or children of bad memories.³² Where women are forced to carry to term unwanted pregnancies, the children are often subject to abandonment, rejection by the mother and/or the community, and infanticide.³³ A rape survivor of the Rwandan genocide stated that:

Almost all my family members have refused to accept the baby – it is a child of an Interahamwe [enemy militia]. They have told me that they do not want a child of wicked people. They always tell me that when my baby grows up that they will not give him a parcel of land. I don’t know what is going to happen to him.³⁴

**THE DENIAL OF ABORTIONS TO
RAPE VICTIMS CAN FURTHER
THE GENOCIDAL INTENT OF THE
PERPETRATORS**

Rape is used as an efficient tactic of war to terrorize and destroy communities. Human Rights Watch, in an examination of sexual violence in Darfur and Chad, concluded that “these incidents of rape [are] clearly aimed to subjugate, humiliate, and terrorize the entire community, not just the women and girls raped by the militias.”³⁵

“Some women reported that the Janjaweed yelled racial slurs, announcing their intention to exterminate the non-Arabs of Darfur as well as their intent to take their land and their intent to make the women give birth to Arab children.”

There are certain armed conflicts, however, where rape is also used with a specific genocidal intent.³⁶ The International Criminal Tribunal for Rwanda, in *Akayesu* held that:

With regard [to]...rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily

and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict [sic] harm on the victim as he or she suffers both bodily and mental harm.³⁷ (emphasis added).

In these cases rape can be used not just to terrorize, but also to eradicate communities by impregnating the women with children of the enemy, with the intent of “diluting” the composition of the group.³⁸ The International Criminal Tribunal for the former Yugoslavia found that “the systematic rape of women...is in some cases intended to transmit a new ethnic identity to the child.”³⁹ The trial chamber then went on to find that “[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late for them to undergo an abortion,” and that “it would seem that the aim of many rapes was enforced impregnation.”⁴⁰

This use of rape as a method of genocide can also be evidenced in the ongoing conflict in Sudan. A study of sexual violence in Sudan, found that “[s]ome women reported that the Janjaweed yelled racial slurs, announcing their intention to exterminate the non-Arabs of Darfur as well as their intent to take their land and their intent to make the women give birth to Arab children.”⁴¹

Accordingly, providing the option of abortions for girls and women who are raped is a means of preventing the genocide from occurring. Conversely, the failure to provide abortions for these victims can unwittingly facilitate the genocidal intent of the perpetrators.

SECTION II - THE RIGHT OF GIRLS AND WOMEN RAPED IN ARMED CONFLICT TO ABORTIONS UNDER THE GENEVA CONVENTIONS AND TO REDRESS AND REPARATIONS

International humanitarian law guarantees “protected persons” a range of fundamental rights. In the case of girls and women raped in armed conflict, this includes the right to non-discriminatory medical care, humane treatment and the right to be free from torture and cruel, inhuman and degrading treatment. These rights encompass a right to abortions and where abortions are denied, the right to redress and reparations.

While these victims also have rights under other areas of law, including international human rights law, this brief will focus on their rights under IHL.

THE RIGHT OF VICTIMS OF WAR RAPE TO ABORTIONS UNDER COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS

The right of girls and women raped in armed conflict to abortions arise under: common Article 3 of the Geneva Conventions, Articles 10 and 16 of

Additional Protocol I, Articles 7 and 10 of Additional Protocol II, and customary international law (CIL).

Common Article 3 specifies that: (1) “the wounded and sick shall be collected and cared for;” (2) “persons taking no active part in hostilities...shall in all circumstances be treated humanely, without any adverse distinction founded on...sex...or any other similar criteria;” and (3) prohibits “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁴² These rights have been expanded on by the Additional Protocols and they are now considered to constitute CIL.⁴³

While the primary obligation to guarantee the rights contained in common Article 3 rests with parties to a conflict, all states have the duty to ensure that these core mandates of IHL to care for the wounded and sick are complied with (see Part II).⁴⁴

On any given night in eastern DRC, armed groups of men will overrun a village and divide into bands of three to five, forcing themselves into houses where they seize and serially rape women and young girls. Some mutilate female genitals with guns, pieces of glass, wood, or heated plastic. Some take their victims to the forest and torture them as sex slaves for days, months, or years.

—Denis Mukwege & Cathy Nangini, *Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo*



GIRLS AND WOMEN RAPED IN ARMED CONFLICT ARE COVERED BY THE MANDATE TO CARE FOR THE WOUNDED AND SICK

The fundamental principle to care for the wounded and sick is codified by common Article 3 and is elaborated by Additional Protocols I and II to the Geneva Conventions (*hereinafter* AP I and AP II, respectively). The International Committee of the Red Cross (ICRC) has held that the protections in these articles constitute CIL, which applies to both international and internal armed conflicts,⁴⁵ and are binding even on non-signatory states.⁴⁶ Additionally, this duty is non-derogable and *jus cogens*.⁴⁷

The definition of “wounded and sick” is “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, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers.”⁴⁹ Accordingly, girls and women raped in armed conflict fit within the class of victims protected under the Geneva Conventions.

The denial of abortions to girls and women raped in conflict is a breach of the principle of non-discrimination

The principle to care for the wounded and sick requires that it be without distinction,⁵¹ as laid out in AP I and AP II:

[The] wounded, sick and shipwrecked...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.⁵² (emphasis added).

We note that the prohibition on adverse distinction is the same as the principle of non-discrimination.⁵³ Further, the only permissible distinction that may be made between persons presenting for medical treatment is a distinction to give priority to those in most urgent need of care.⁵⁴

As rape is perpetrated against women and men in different ways and by different methods, the injuries suffered necessitate different medical care. For example, a woman raped with a stick who develops a fistula requires different treatment than a woman raped by a penis who becomes pregnant. The denial of abortions to girls and women raped and impregnated in conflict – while male and non-pregnant female rape victims theoretically receive all necessary medical care – is therefore a breach of the principle of non-discrimination.

Additionally, under CIL girls and women affected by armed conflict are to be given special protections.⁵⁵ The ICRC has held that this includes (1) prohibitions on any discriminatory measure not indicated by the Conventions (i.e. discriminatory measures based on political or other doctrines), and (2) a requirement to give special attention to “concepts such as physiological specificity, honour... pregnancy and childbirth.”⁵⁶

Therefore, medical humanitarian assistance programs that omit the option of abortion illegally discriminate against girls and women who are raped, which violates their rights under common Article 3, AP I and AP II, and CIL. The *jus cogens* status of this right means that there is a duty on

all states to take action to ensure that the denial of abortions is addressed in both international and internal armed conflicts (see Part 2, Section 1).

THE RIGHT OF GIRLS AND WOMEN RAPED IN ARMED CONFLICT TO BE TREATED HUMANELY

All individuals covered by the Geneva Conventions have the fundamental entitlement⁵⁷ to be treated humanely. Common Article 3 guarantees that “protected persons” should “be treated humanely... without any adverse distinction founded on...sex...or any other similar criteria”⁵⁸

The denial of abortions to raped girls and women results in increased maternal mortality and compounds the physical, psychological, and social consequences of rape. (For a more detailed discussion of these consequences see Part 1, Section I). Forcing girls and women to carry a pregnancy to term that is the result of rape violates these victims’ rights to be treated humanely.

The principle of humane treatment found in the Geneva Conventions is echoed in the Basic Framework for Humanitarian Assistance adopted by the UN General Assembly.⁵⁹ Since the treatment provided to girls and women is primarily through international humanitarian assistance,⁶⁰ it must be done humanely, which includes abortions.

The governing principles of humanitarian aid under IHL, as found by the ICJ are that it be given ‘without discrimination’ of any kind and that it be given “to alleviate human suffering and protect human life, health and dignity.”⁶¹ (internal quotations omitted). Contrary to these core tenants of humanitarian assistance, the denial of abortion services to girls and women raped and impregnated aggravates the harm suffered and subjects these victims to further cruel, inhuman and degrading treatment.

FAILURE TO PROVIDE ABORTIONS TO VICTIMS OF WAR RAPE CONSTITUTES TORTURE AND CRUEL, HUMILIATING AND DEGRADING TREATMENT

It is already recognized that girls and women raped in armed conflict are victims of torture. The International Criminal Tribunal for the Former Yugoslavia (ICTY), in its decision in *Čelebići*, held that rape in armed conflict can constitute torture.⁶² In this decision, the Tribunal found “the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity...rape causes severe pain and suffering, both physical and psychological.”⁶³

To deny these victims the option of an abortion is to inflict further torture and cause re-traumatization

This horrific situation is illustrated by the testimony of one woman who was raped and impregnated during the Rwandan genocide to Foundation Rwanda:

When I realized I was pregnant, my first thought was that I should abort but I didn’t know how to abort or where to go for such services. So I stayed with my pregnancy until I gave birth. After giving birth I thought of killing it because I was bitter and didn’t know who the father is. It was painful but eventually I decided not to kill it. I have stayed with it and it is the cause of trauma to me every time I look at this boy that has no family.⁶⁴

Denial of access to safe abortion services to women who have become pregnant as a result of rape and human trafficking violations can constitute torture or cruel, inhuman or degrading treatment

Common Article 3 prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment.”⁶⁵ Further, the article is intentionally ambiguous so as to leave it open to interpretation and to incorporate recent developments in the law of torture.⁶⁶ Recent characterizations support the notion that the denial of abortions constitutes torture. For example:

- (a) The Committee on Torture (CAT) has found that torture and cruel, inhuman and degrading treatment can encompass the denial of abortions in the context of rape.⁶⁷ The Committee wrote, of Nicaragua’s 2009 state report to CAT, that it was: “Deeply concerned by the general prohibition of abortion set forth in Articles 143-145 of the [Nicaragua] Criminal Code, 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.”⁶⁸

- (b) The denial of abortion as cruel and inhuman treatment has also been recognized by the Human Rights Committee. In the case of *KL v. Peru*, the Committee concluded that the denial of abortion to a woman whose life was endangered by a pregnancy constituted a violation of Article 7 of the International Covenant on Civil and Political Rights,⁶⁹ which prohibits torture and cruel and inhuman treatment.
- (c) The Inter-agency Working Group on Reproductive Health in Crises (IAWG),⁷⁰ in its 2010 Inter-agency Field Manual on Reproductive Health in Humanitarian Settings, also classifies the denial of abortion as torture and cruel, inhuman and degrading treatment. The IAWG notes that “denial of access to safe abortion services to women who have become pregnant as a result of rape and human trafficking violations, can constitute torture or cruel, inhuman or degrading treatment.”⁷¹

Given that the prohibition on torture is *jus cogens*, no state may have any law that “authoris[es] or condon[es] torture or . . . [that is] capable of bringing about this effect.”⁷² Accordingly, any medical humanitarian assistance programs that do not include the option of abortion are in contravention of the prohibition on torture under common Article 3.

THE RIGHT OF GIRLS AND WOMEN WHO ARE VICTIMS OF WAR RAPE TO ABORTIONS IS REINFORCED BY IHL PROVISIONS PROTECTING DOCTORS

Under Article 16 of AP I, states are mandated to assure that all “[p]ersons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other

medical rules designed for the benefit of the wounded or sick or to the provisions of the Conventions or of this Protocol, to refrain from performing acts or from carrying out work required by those rules and provisions.”⁷³ This requirement is substantially the same as the requirement in Article 10 of AP II.

Medical ethics requires that a doctor treats a patient solely based on medical considerations and the patient’s wishes. The World Medical Association’s (WMA) *Regulation in Times of Armed Conflict* requires that where doctors have conflicting loyalties, the primary obligation must be to patients and that “in all their professional activities, physicians should adhere to international conventions on human rights, international humanitarian law and WMA declarations on medical ethics.”⁷⁴

Prohibiting a doctor from providing an abortion to a rape victim who wants one violates Article 16 of AP I and Article 10 of AP II by compelling that doctor to refrain from providing treatment that is required by medical ethics and IHL. Accordingly, these articles prohibit states from forbidding the doctors it funds from providing abortions when such treatment is required by medical ethics.

DENYING ABORTIONS FOR GIRLS AND WOMEN RAPED AND IMPREGNATED IN ARMED CONFLICT IS A GROSS VIOLATION OF IHL ENTITLING THE VICTIMS TO REDRESS AND REPARATIONS

Victims whose rights under IHL are violated are entitled to reparation and remedy. This right encompasses equal and effective access to justice and adequate, effective and prompt reparation for the harm suffered.⁷⁵ “[r]eparation measures express the obligation of the State to provide redress to victims when, by action or omission, it has infringed against their rights.”⁷⁶ Girls and women who have been raped in armed conflict and denied access

to abortions in violation of their rights under IHL are entitled to reparations. The reparations provided to victims can take many forms and can be economic, political and symbolic and can encompass (1) restitution, (2) compensation, (3) measures of rehabilitation, (4) measures of satisfaction, and (5) guarantees of non-repetition.⁷⁷

To date, no reparations programme has succeeded in fully reflecting the economic impact of raising children born of rape

The Special Rapporteur on Violence against Women recently filed a comprehensive report with the Human Rights Council on the issue of reparations for gender based violence.⁷⁸ This report specifically outlines that restitution and compensation measures to “women subjected to violence in countries coming out of widespread conflict”⁷⁹ should take into account the specific harms that are caused to women by this type of heinous act,⁸⁰ including: “the costs of ongoing medical treatment, pregnancy, abortions, and raising children resulting from rape.”⁸¹ The report also noted that “[t]o date, no reparations programme has succeeded in fully reflecting the economic impact of raising children born of rape.”⁸²

In addition to compensation and restitution, raped girls and women are entitled to guarantees of non-repetition. In fact, the Special Rapporteur finds this to “offer the greatest potential for transforming gender relations,” because these can fuel “broader institutional or legal reforms that might be called on to ensure non-repetition.”⁸³ In the case of rape victims who were denied abortions, this guarantee could include the repeal of criminal abortion laws.

SECTION III - THE IMPOSITION OF ABORTION RESTRICTIONS BY THE UNITED STATES ON HUMANITARIAN AID VIOLATES THE RIGHTS OF GIRLS AND WOMEN UNDER INTERNATIONAL HUMANITARIAN LAW

The United States, as the largest donor of humanitarian aid globally,⁸⁴ has enormous influence on how aid is provided. All foreign assistance funds disbursed by the US contain abortion related restrictions. In 1973, Congress enacted the “Helms Amendment,” which covers Part 1 of the Foreign Assistance Act (FAA). The Helms Amendment reads, “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...” Further, the Helms Amendment contains a provision that prohibits abortion speech, stating that none of the funds can be used to “motivate or coerce any person to practice abortions.”⁸⁵

USAID has broadly applied these restrictions to “information, education, training, or communication programs...” about abortion.⁸⁶ This broad interpretation was codified in 1978.⁸⁷ Subsequently, USAID issued policy determinations that explicitly applied these restrictions to contracts with foreign governments, foreign private organizations and international non-governmental organizations, including those providing humanitarian assistance.⁸⁸ These restrictions on its foreign aid, which go so far as to prohibit foreign governments receiving US aid from discussing abortion, constitutes a major force behind the daily denial of abortions for girls and women raped and impregnated in armed conflict. These restrictions are unaffected by the lifting of what is termed the “global gag rule” by President Obama.⁸⁹

These abortion restrictions censor humanitarian organizations working in conflict areas that would otherwise discuss the option of abortions with girls and women who are raped. Aid groups fear that education and dissemination of information about abortion services for rape victims may result in the revocation of US funding. This inevitably causes a lack of information on abortion to rape victims. A report on access to abortions in Sudan and Chad found that:

...the question of access to safe abortion as an option for victims of rape is not openly discussed in any health facility receiving international humanitarian assistance in Darfur, Chad or elsewhere...Humanitarian agencies seem to assume it is not essential to provide abortion services or accurate information for victims of rape in camp or IDP settings. It is likely that US government anti-abortion policies have contributed to reluctance to provide safe abortion services.⁹⁰ (emphasis added).

Whether services are offered on a more selective “don’t ask” basis is difficult to discern, but in any event this would leave the care offered to the courage of the

providers, not the medical needs of the victims. The experience of the Global Justice Center staff in researching this brief overwhelmingly confirms that there is no upfront discussion on the rights of girls and women to abortion services or reform of criminal abortion laws by USAID.

Further, GJC research has found that in humanitarian aid settings US funds are rarely, if ever, segregated from other donor funds. This comingling of funds means that US abortion restrictions are applied to the entire pool of funds. This blatantly undermines the policies of other countries, such as the UK, whose development policy explicitly recognizes the right to safe abortion and the need for women in conflict to have access to abortion services.⁹¹

Further, since the US provides humanitarian aid to both governments and humanitarian actors, the result is that both are thwarted from providing abortion services. In the case of governments the application of these US abortion restrictions has legal implications. For example, when the US provides humanitarian aid to Sudan, it prevents Sudan from using those funds to offer the option of abortion in state funded medical care programs to girls and women raped during the conflict, which it is required to do under the Geneva Conventions and its own domestic laws.

The principle of non-discrimination underlies all international humanitarian law, which is a body of rules specifically intended to solve humanitarian problems arising directly from armed conflicts... because international humanitarian law deals with exceptional situations – armed conflicts – no derogations whatsoever from its provisions are permitted. Just as importantly, international humanitarian law binds not only States, but also non-State parties to a conflict.

—International Review of the Red Cross,
Non-discrimination and armed conflict



Part 2: States' Obligations Under International Humanitarian Law And The Laws Of State Responsibility To Enforce The Right To Abortions For Girls And Women Raped In Armed Conflict

This Part of the brief examines states' positive obligations under international law to enforce the right of girls and women raped and impregnated in armed conflict to abortions.

States that omit abortion services in their provision of humanitarian aid are illegally withholding essential care on the basis of sex

As discussed in Part 1, the right to abortions for these victims arises directly from their status as “protected persons,” including as the “wounded and sick” under the Geneva Conventions. While these victims also have rights under other areas of international law, including international human rights law, this Part of the brief will focus on the two areas of law that impose duties on states to act in the event of the denial of such medical care. These are IHL (specifically common Article 1 of the Geneva Conventions) and the customary laws of state responsibility (hereinafter laws of state responsibility).

Common Article 1 of the Geneva Conventions requires that all states, whether or not they are a party to the conflict, “respect” and “ensure respect” for the Conventions. The laws of state responsibility, which are codified by the Draft Articles on Responsibility of States for Internationally Wrongful Acts [*hereinafter* Draft Articles], give definition to state obligations under common Article 1. Therefore, it is critical that our discussion of state obligations covers both IHL and the laws of state responsibility.

For example, when a state breaches its obligations under common Article 1, it is said to have committed an “internationally wrongful act,” which attracts legal consequences under both the Geneva Conventions and the laws of state responsibility. Further, when the internationally wrongful act arises to the level of a serious breach of a peremptory norm – as is the case here – then additional obligations are imposed on all states. By invoking both IHL and the laws of state responsibility, the full “legal arsenal” is being brought to bear on all states to enforce the fundamental right to abortions for girls and women raped in armed conflict.

SECTION I - THE FAILURE OF STATE PARTIES TO A CONFLICT TO PROVIDE ABORTIONS TO GIRLS AND WOMEN

THE FAILURE OF A STATE PARTY TO A CONFLICT TO PROVIDE ABORTIONS IS A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW

State parties to a conflict have the primary responsibility to ensure that the right to non-discriminatory medical care for girls and women raped and impregnated is enforced. The ICRC found that in situations of armed conflict, this means that “[s]tates, including the occupying powers, have, first and foremost the responsibility for protecting and assisting the populations under their control, and [these states] should organize and carry out necessary relief actions.”⁹²

A state party to a conflict, such as the DRC, must (1) ensure that the humanitarian⁹³ medical assistance it provides to girls and women raped and impregnated in armed conflict is non-discriminatory (i.e. it includes abortions), and (2) ensure that all humanitarian aid providers on its territory do the same.⁹⁴

States’ absolute obligations to provide abortions arise under common Article 3 of the Geneva Conventions, its Additional Protocols and CIL (see Part I, Section II). Therefore, states that omit abortion services in their provision of humanitarian aid are illegally withholding essential care on the basis of sex. Not only are states failing to alleviate suffering, but they are subjecting women and girls to even further trauma by forcing them to carry to term an unwanted pregnancy. This denial amounts to a breach of a state party to a conflict’s primary obligations to provide non-discriminatory medical care, ensure humane treatment, and prohibit torture, cruel, inhuman, and degrading treatment, under the Geneva Conventions and is therefore a violation of IHL.

Common Article 1 of the Geneva Conventions requires that all states “respect” and “ensure respect” for the Conventions.⁹⁵ To “respect” means that the state is under an obligation to do everything it can to ensure that the rules of armed conflict are respected by the organs of the state, as well as by all others under its jurisdiction. Because the Conventions guarantee essential care for civilians affected by conflict,⁹⁶ the mandate to “respect” obliges States to guarantee that this is done in a manner that comports with the “core humanitarian principles underlying the Conventions”⁹⁷ and that it is “given without discrimination of any kind.”⁹⁸ The failure to ensure that abortions are provided to girls and women in armed conflict is a breach of states obligations under IHL.

Not only are states failing to alleviate suffering, but they are subjecting women and girls to even further trauma by forcing them to carry to term an unwanted pregnancy

Further, as explained in Part 2, Section 2, the duty “to ensure respect” means that states, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict.⁹⁹

THE FAILURE OF A STATE PARTY TO A CONFLICT TO ENSURE ABORTIONS INVOKES THE LAWS OF STATE RESPONSIBILITY

In order to fully address the crimes against women in conflict, the global community must make certain not only that states “respect” and “ensure respect” for the Geneva Conventions under

common Article 1, but that states also comply with their additional obligations under the laws of state responsibility. This requires state parties to cease breaches of their international obligations and to provide reparations.

THE FAILURE TO PROVIDE ABORTIONS IS AN INTERNATIONALLY WRONGFUL ACT UNDER THE LAWS OF STATE RESPONSIBILITY

Under the laws of state responsibility, the act of a state, whether it is an act, omission, legislation, or a “specific administrative action,” is an “internationally wrongful act” if it, in whole or in part,¹⁰⁰ can be (1) attributed to the state and (2) is a violation of an international obligation, such as a treaty.¹⁰¹ Thus, the failure of conflict states, or states providing humanitarian aid to victims, to provide abortions breaches their obligations

under the Geneva Conventions and is an internationally wrongful act. This act is attributable to the state whether the denial of abortion is the result of a criminal abortion law or the omission of these services.

Under the laws of state responsibility, a state cannot rely on domestic laws as an excuse for non-compliance with its international obligations.¹⁰² Therefore, a domestic criminal abortion law cannot be used as a defense for the failure of a state to comply with its international obligations to provide abortions.¹⁰³

Not all internationally wrongful acts are of the same gravity. Certain acts are considered to breach rights so fundamental that the breach is deemed



Rape is a form of sexual violence, a public health problem and a human rights violation. Rape in war is internationally recognized as a war crime and a crime against humanity, but is also characterized as a form of torture, and in certain circumstances, as genocide.

All individuals, including actual and potential victims of sexual violence, are entitled to their protection of, and respect for, their human rights, such as the right to life, liberty and security of the person, the right to be free from torture and inhuman, cruel or degrading treatment, and the right to health.

Governments have a legal obligation to take all appropriate measures to prevent sexual violence and to ensure that quality health services equipped to respond to sexual violence are available to all.

—WHO, *Clinical Management of Rape Survivors*

to be one against the global community. These are considered serious breaches of peremptory norms under laws of state responsibility.¹⁰⁴

THE FAILURE TO PROVIDE ABORTIONS IS A SERIOUS BREACH OF A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

Article 40 of the Draft Articles codifies state responsibility for a “serious breach of a peremptory norm.” In order to invoke responsibility for such a breach, it must be established that (1) the norm is “peremptory” and (2) the breach is “serious.”

1. The Obligation to Care for the Wounded and Sick Without Distinction is Peremptory

The commentary to the Draft Articles provides that the characterization of an international norm as peremptory requires the “recognition by international practice, international jurisprudence of international and national courts and tribunals and in legal doctrine.”¹⁰⁵ The Draft Articles recognize specific norms as peremptory,¹⁰⁶ and also provides that “new peremptory norms of general international law can come into existence through the process of acceptance and recognition by the international community of States as a whole.”¹⁰⁷

The ICRC has found that “the duty to care for wounded and sick combatants without distinction is a long-standing rule of customary international law.”¹⁰⁸ This requirement can be found in some form in the Lieber Code of 1863,¹⁰⁹ the Geneva Conventions of 1864,¹¹⁰ 1906,¹¹¹ 1929¹¹² and 1949¹¹³ and the Additional Protocols to the Geneva Conventions of 1977.¹¹⁴ Further, the Hague Conventions of 1899¹¹⁵ and 1907¹¹⁶ reiterate this duty and provide that the rules to care for the wounded and sick are “governed by the Geneva

Conventions.” The inclusion of this duty in every iteration of the international laws of war over the past 150 years indicates that the duty to care for the wounded and sick is a fundamental rule of IHL.

the duty to care for wounded and sick combatants without distinction is a long-standing rule of customary international law

The International Court of Justice (ICJ) has found that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’...[that] these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intragressible principles of international customary law.”¹¹⁷ The International Law Commission, in the commentary to the Draft Articles, concluded that based on this description of the fundamental rules of IHL by the ICJ, “it would seem justified to treat these as peremptory.” Therefore, the duty to care for the wounded and sick without distinction should be treated as a peremptory norm of general international law under laws of state responsibility, as defined by Article 40 of the Draft Articles.

The denial of abortions to girls and women raped in situations of armed conflict – which constitutes discriminatory medical care – violates this peremptory norm of international law.

2. The Failure to Provide Abortions for Girls and Women Raped in Armed Conflict is a Serious Breach of the Obligation to Care for the Wounded and Sick Without Distinction

A breach of an obligation is “serious” if it “involves a gross or systematic failure by the responsible State to fulfill the obligation.”¹¹⁸ (emphasis added). The Draft Articles provide that:

‘[G]ross’ refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule...factors which may establish the seriousness of a violation would include...the scope and number of individual violations and the gravity of the consequences for the victims.¹¹⁹ (emphasis added)

The scope and scale of the use of rape in armed conflict is widespread (see Part 1, Section I). Part 1 of this brief demonstrated both the scale of rape used in conflict and the devastating consequences for these victims. For example, in the ongoing conflict in the DRC, approximately 40 women are raped daily in South Kivu¹²⁰, and a three day attack in the Walikale region resulted in the rapes of approximately 52 girls and 235 women.¹²¹ These victims, when they are able to access medical care, are routinely denied abortions. Part 1 of this brief also highlighted the gravity of the physical, psychological, social, and often deadly consequences of denying abortions.

Consequently, the failure of a state to ensure abortions for girls and women unquestionably qualifies as a “gross” failure by a State to fulfill the obligation to care for the wounded and sick without distinction.

THE LEGAL CONSEQUENCES FOR STATES COMMITTING INTERNATIONALLY WRONGFUL ACTS AND SERIOUS BREACHES OF PEREMPTORY NORMS

Where a state commits a serious breach of a peremptory norm, or a lesser internationally wrongful act, the obligations incurred include the duty to “cease the act, if it is continuing” and to offer “appropriate assurances and guarantees of non-repetition, if circumstances so require.”¹²² The consequences for a state when it commits a serious violation of a peremptory norm are substantially the same as the consequences that are incurred for the commission of an internationally wrongful act.¹²³ In addition, where there is a breach of a peremptory norm non-state parties incur secondary obligations to cooperate to bring the breach to an end.¹²⁴

Since criminal abortion laws that do not allow for exceptions in the case of girls and women raped during armed conflict are an internationally wrongful act, those laws must be modified or clarified in order to meet the requirement to cease the wrongful act. According to the commentary to the Draft Articles, “[a]ssurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of legislation which allowed the breach to occur).”¹²⁵ Where the internationally wrongful act is the omission of services, states must ensure that those providers of medical services on its territories include the option of abortion for this class of victims.

Under the Basic Principles and Guidelines on the Right to a Remedy and Reparation¹²⁶ there are obligations to provide reparations to individuals. As the denial of abortions to girls and women raped in armed conflict is a gross violation of IHL, state parties to a conflict have the obligation to provide remedies and reparations to the victims, which can be economic, political and/or symbolic. The rights and remedies due to girls and women raped in armed conflict are discussed in detail in Part 1, Section I.

SECTION II - THE OBLIGATION OF ALL STATES TO ENSURE THE PROVISION OF ABORTIONS TO GIRLS AND WOMEN

While state parties to a conflict have primary obligations to ensure the rights of girls and women to abortions, all states have a duty to ensure that state parties to a conflict are complying with this fundamental IHL mandate. This obligation arises under both common Article 1 of the Geneva Conventions and the laws of state responsibility. Further, when third party states provide medical services, they must ensure the care provided is non-discriminatory, as required by their obligations under CIL and common Article 3.

THE DUTY TO ENSURE RESPECT UNDER THE GENEVA CONVENTIONS REQUIRES THIRD PARTY STATES TO ADDRESS THE DENIAL OF ABORTIONS

Under common Article 1 of the Geneva Conventions all states are required to “ensure respect” for the Conventions.¹²⁷ The ICJ has found that this duty imposes on “every party...whether or not it is a party to a specific conflict,” an “obligation to ensure that the requirements of the instruments in question are complied with.”¹²⁸

The ICJ has also found this obligation to constitute CIL.¹²⁹ It is not enough for states to abstain from actions that encourage or assist in IHL violations, rather all states must take positive steps against those states perpetrating or supporting the violations.¹³⁰

When a state party to a conflict fails to provide abortions to girls and women who have been raped, common Article 1 requires third party states to guarantee that state parties to a conflict are (1) providing humanitarian medical care

that comports with IHL, and (2) ensuring that all actors on its territory do the same.¹³¹ Under common Article 1, states that are not directly engaged in the conflict are required to take all appropriate measures to end violations of IHL committed by state parties to the conflict.¹³²

The ICJ, in their discussion of the scope of responsibilities of the US as a third party state to the conflict in *Nicaragua*, found that:

The Court considers that there is an obligation on the United States Government, in the terms of Article I of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances,” since such an obligation does not derive only from the Conventions themselves, but from the general principle of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.¹³³

OBLIGATIONS UNDER THE LAWS OF STATE RESPONSIBILITY TO ADDRESS AND REMEDY THE OMISSION OF ABORTIONS TO RAPE VICTIMS BY A STATE PARTY TO A CONFLICT

The failure to provide abortions to girls and women raped in armed conflict is a serious breach of a peremptory norm of international law (see Part 2, Section I). The ICTY stated in relation to compliance with humanitarian rules that:

[a]s a consequence of their absolute character, these norms of international law...lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations.¹³⁴

Where there is such a breach, all states have clear obligations to act in response.¹³⁵ First and foremost, states must cooperate to end the breach. This means that states should cooperate through the UN and use any resources at their disposal to end this breach.¹³⁶ Second, states can neither recognize as lawful the situation created by the serious breach, nor aid or assist in maintaining that situation.¹³⁷ Therefore, when a state provides humanitarian assistance to a state in conflict for medical services, the donor state must ensure that the medical care provided is non-discriminatory. In light of this obligation, states that have

their humanitarian assistance, directly or indirectly co-mingled with US funds, may unwittingly be violating their duty not to aid or assist.

ALL STATES HAVE A DUTY UNDER THE GENEVA CONVENTIONS TO ENSURE THAT THEIR PROVISION OF HUMANITARIAN ASSISTANCE COMPLIES WITH INTERNATIONAL HUMANITARIAN LAW

The most basic and direct means for states to comply with their obligation under common Article I of the Geneva Conventions to “ensure respect” is to provide humanitarian aid.¹³⁸ In the Nicaragua decision, the ICJ states that humanitarian assistance must be “limited to the purposes hallowed in the practice of the Red Cross, namely, ‘to prevent and alleviate human suffering’ and to ‘protect life and health and to ensure respect for the human being;’ it must also, and above all be given without discrimination to all in need.”¹³⁹ (emphasis added)

When States provide humanitarian assistance in situations of armed conflict, the medical aid they provide must include abortions in order to comply with their obligations under CIL to ensure that the care they provide is non-discriminatory and humane.

Further, the principle of independence controls the interaction between states and the humanitarian organizations they support. The ICRC has explicitly stated that donor states must “provide funding with a guarantee of operational independence.”¹⁴⁰ Policies such as US abortion restrictions on humanitarian aid that require humanitarian assistance programs to omit certain types of care violate this principle.

**US ABORTIONS RESTRICTIONS
ON FOREIGN AID AS APPLIED TO
HUMANITARIAN ASSISTANCE VIOLATE
THE INTERNATIONAL OBLIGATIONS OF
THE UNITED STATES**

The Helms Amendment and other related US abortion restrictions, as applied to humanitarian aid for rape victims in conflict, are a violation of the United States' duty to "ensure respect" for the Geneva Conventions. The application of these restrictions to humanitarian aid is an internationally wrongful act. Consequently, the United States incurs obligations to cease this conduct¹⁴¹ by ensuring that abortion restrictions are not placed on the humanitarian aid it provides to situations of armed conflict.

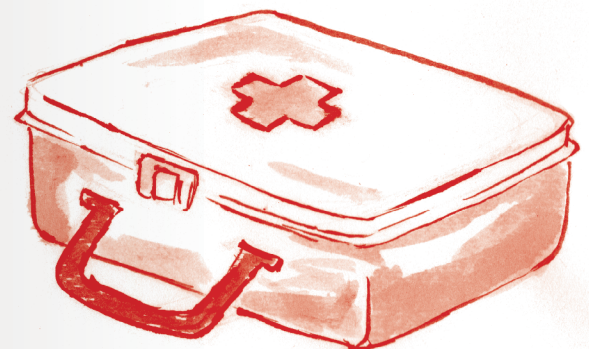
Further, all states have a duty to ensure that the United States complies with its obligations under the Geneva Conventions.¹⁴² Examples of avenues for ensuring respect include engaging with regional or international bodies and applying diplomatic pressure.

During the Universal Periodic Review of the US in November 2010, Norway recommended "[t]he removal of blanket abortion restrictions on humanitarian aid covering medical care given women and girls who are raped and impregnated in situations of armed conflict."¹⁴³

States must also be careful that the US abortion restrictions do not impede their own ability to "ensure respect" for the Geneva Conventions. This can occur when US funds are comingled the funds of other donor governments, with the consequence that all funds become subject to the same abortion restrictions that apply to US aid (see Part 1, Section III).

Where safe abortion services are not available or are unaffordable, women who feel they need to end a pregnancy resulting from rape are at risk of serious complications and even death.

—Médecins Sans Frontières, *Shattered Lives: Immediate medical care vital for sexual violence victims*



Conclusion

The deliberate use of rape as a tactic of warfare is horrifying and tragic. However, the victims do not need to endure further suffering by being forced to carry to term unwanted pregnancies resulting from the rape with no option of an abortion. This is not just wrong, it is illegal. The Geneva Conventions guarantee the rights to non-discriminatory medical care, humane treatment and freedom from torture, cruel, inhuman and degrading treatment.

The global community has a duty to ensure that these girls and women are granted their rights under IHL, which supersedes any local criminal abortion laws. State parties to a conflict are specifically obligated to respect the Geneva Conventions by

providing the option of abortions to girls and women who are victims of rape, and to ensure that humanitarian actors operating in their territory do the same.

All states also have a duty under both the Geneva Conventions and the laws of state responsibility to abide by their international obligations. This includes taking all measures possible to end the pernicious effect of the United States' abortion restrictions. These restrictions prevent states and humanitarian actors from providing abortions which would assist in alleviating the suffering of these victims.

Humanitarian aid should relieve human suffering, not prolong it.



Women subjected to sexual violence of any form during armed conflicts should be given special treatment as victims.

There will be different responses needed for women who were raped but did not become pregnant, those who became pregnant and terminated the pregnancy... Women who decide to give birth after a rape-induced pregnancy should be provided with medical, psychological and social assistance, but the same assistance should also be granted to those who decide to give their children for adoption.

However, the option to terminate a pregnancy following rape should be open to all women who may wish to choose it and those who gave birth.

—Report of the UN High Commissioner for Human Rights, *Systematic rape, sexual slavery and slavery-like practices during armed conflicts*

Recommendations

In order for all states to honor their obligations under IHL and the laws of state responsibility to girls and women who are raped and impregnated in armed conflict, the Global Justice Center makes the following recommendations:

TO STATE GOVERNMENTS:

ENSURE THAT STATE FUNDED HUMANITARIAN ASSISTANCE PROGRAMS & DOMESTIC POLICIES COMPORT WITH INTERNATIONAL HUMANITARIAN LAW

- Conduct a review by the highest state legal officer or national human rights institution of domestic laws to ensure that they comport with state obligations under international law.
- Incorporate access to abortion into domestic policy that covers plans for humanitarian assistance to ensure compliance with IHL mandates to provide non-discriminatory medical care. This includes incorporating explicit language into these policies that in times of armed conflict, local abortion laws do not preclude the provision of abortion services to raped girls and women.
- Incorporate the right to abortion for girls and women raped and impregnated in situations of armed conflict into national action plans on the implementation of Security Council Resolution 1325.
- Require that funds for humanitarian assistance programs do not get comingled with funds provided by the US government, thereby subjecting the entire pool of funds to the US abortion restrictions.
- Ensure that the collection of data in conflict settings includes data collection on the methods of rape used, the resultant injuries and the type of treatment offered, including abortions.

ADDRESS US ABORTION RESTRICTIONS PLACED ON ALL FOREIGN AID

- Utilize diplomatic pressure and engage the US in a dialogue to advocate for the removal of US abortion related conditions on foreign aid.
- Treat any abortion restrictive clauses in contracts for humanitarian assistance with the US as invalid, since the restrictions are illegal under IHL.

PROVIDE REDRESS AND REPARATIONS FOR GIRLS AND WOMEN WHO WERE DENIED ABORTIONS IN VIOLATION OF THEIR RIGHTS UNDER IHL

- Provide redress and reparations to girls and women raped and impregnated in armed conflict who are denied their rights to complete, non-discriminatory medical care in line with the Basic Principles and Guidelines on Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

WORK COOPERATIVELY TO END BREACHES OF THE RIGHTS OF GIRLS AND WOMEN RAPED AND IMPREGNATED IN ARMED CONFLICT

- Ensure that all medical service providers, whether funded by state parties to the conflict or third party states, include the option of abortion for all girls and women victims of rape.
- Take all measures to respond to breaches by state parties to a conflict of their obligations to provide abortions, including cooperative action through international organizations such as the United Nations.

TO THE UNITED NATIONS:

ENSURE THAT ALL UN COORDINATED HUMANITARIAN EFFORTS INCLUDE THE OPTION OF ABORTION FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT

- Include the right to abortions for these victims under IHL in all medical response protocols and revise any medical response protocols that do not currently make this right explicit.
- Make clear in all UN trainings, including of peacekeeping forces, that girls and women who are raped and impregnated must be informed of their right to an abortion, which is guaranteed under the Geneva Conventions.
- Ensure the protection by UN peacekeeping troops of any humanitarian aid workers, including doctors, who provide abortions services.

ENSURE PUBLIC RECOGNITION BY ALL RELEVANT UN BODIES AND MECHANISMS OF THE RIGHT TO ABORTIONS UNDER INTERNATIONAL HUMANITARIAN LAW

- Include and monitor the implementation of this right in reports by the Secretary General and the Special Representative of the Secretary General on Sexual Violence in Conflict to UN bodies and in reports required under Security Council Resolutions 1325, 1820, 1888 and 1889.
- Issue a statement from the Office of the High Commissioner for Human Rights recognizing this right.
- Include the recognition of this right in general comments by the Human Rights Committee and the CEDAW Committee.

TO THE UNITED STATES:

LIFT THE APPLICATION OF US ABORTIONS RESTRICTIONS, INCLUDING THE HELMS AMENDMENT, FROM HUMANITARIAN AID FOR SITUATIONS OF ARMED CONFLICT

- Accept the recommendation of the Norwegian Government during the Universal Periodic Review at the Human Rights Council that these restrictions be removed.
- Issue an Executive Order removing these restrictions from humanitarian assistance, bringing the US into compliance with their obligations with the Geneva Conventions.
- Revise USAID guidelines so that these restrictions are not placed on humanitarian aid and notify all grant recipients of the removal of these terms from their contracts.
- Monitor aid recipients, including states and humanitarian actors, to ensure that abortions are included in the services provided to girls and women raped in armed conflict.
- Review all US abortion restrictions on foreign assistance currently in place to ensure that the restrictions are not in violation of US obligations under international human rights and humanitarian law, including but not limited to, guarantees of free expression and speech.

TO CIVIL SOCIETY:

MONITOR STATE PARTIES TO A CONFLICT TO ENSURE THAT THEY ARE PROVIDING ABORTION SERVICES FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT

- Submit shadow reports to treaty bodies, including the Human Rights Committee, the Committee on Torture, the CEDAW Committee, and the Committee on the Rights of a Child.
- Submit shadow reports to the UN Human Rights Council for the Universal Periodic Review of state parties to a conflict.
- Utilize the Human Rights Council Complaint Procedure created by ECOSOC resolution 1503 where a consistent pattern of the violation of the right to abortions for girls and women raped in armed conflict can be documented.
- Treat any abortion restrictive clause in humanitarian assistance contracts with the US as invalid, since the restrictions are illegal under IHL.

Endnotes

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- 2 Program on Humanitarian Crisis and Human Rights, Harvard School of Public Health and Physicians for Human Rights, *The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan* at 6, Oct. 2004 [hereinafter Harvard Report Darfur].
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- 11 *Id.*
- 12 Harvard Humanitarian Initiative and Oxfam, *Now the World is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo* at 41, April 2010 [hereinafter Oxfam Report Congo].
- 13 *Id.* at 52.
- 14 WHO, *Clinical Management of Rape Survivors: Developing protocols for use with refugees and internally displaced persons* at 21-24, 2004 [hereinafter WHO Manual]. See also Médecins Sans Frontières, *Not Enough Time*, Aug. 20, 2004, available at: <http://www.doctorswithoutborders.org/news/article.cfm?id=757%20&cat=field-news/>.
- 15 *Id.* at 28.
- 16 *Id.* at 25.
- 17 Steiner et. al., *Sexual violence in the protracted conflict of DRC programming for rape survivors in South Kivu* at 6, 3:3 Conflict and Health, Mar. 15, 2009.
- 18 Oxfam Report Congo at 11.
- 19 Inter-agency Field Manual on Reproductive Health in Humanitarian Settings, *Chapter 7: Comprehensive Abortion Care* at 153, 2010 Revision [hereinafter Inter-agency Field Manual].
- 20 *Id.*
- 21 The four Geneva Conventions of 1949 govern the treatment of certain groups during armed conflict. 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 [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 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter Third Convention]; 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 [hereinafter Fourth Geneva Convention]; collectively, the “1949 Geneva Conventions.” Three articles are common to all four Conventions: common Article 1, common Article 2 and common Article 3.
- 22 1949 Geneva Conventions, common Article 2.
 - 23 Human Rights Watch, Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad, Apr. 12, 2005, [hereinafter HRW Report Darfur & Chad], available at: <http://www.hrw.org/en/reports/2005/04/12/sexual-violence-and-its-consequences-among-displaced-persons-darfur-and-chad>.
 - 24 Oxfam Report Congo at 41. The report found that “Management from pregnancy resulting from rape is always challenging even in western countries with advanced health care systems. However in DRC pregnancy, labour and delivery can be more detrimental to a woman’s health. Some experts estimate the maternal mortality ratio (MMR) in Eastern DRC to be 3,000 deaths per 100,000 live births, more than three times the MMR for Sub-Saharan Africa overall (920 deaths per 100,000 live births).”
 - 25 Harvard Report Darfur at 20.
 - 26 Clifford, *supra* note 1, at 2.
 - 27 Oxfam Report Congo at 41.
 - 28 Physicians for Human Rights & Harvard Humanitarian Initiative, Nowhere to Turn: Failure to Protect, Support and Assure Justice for Darfuri Women at 29, May 2009 [hereinafter PHR & HHI Report Darfur].
 - 29 PHR & HHI Report Darfur at 22. *See also* Oxfam Report Congo at 27.
 - 30 Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War* at 47, March 2005.
 - 31 Oxfam Report Congo at 5.
 - 32 Anne Firth Murray, FROM OUTRAGE TO COURAGE 156 (Common Courage Press 2008).
 - 33 Leslie Shanks and Michael J. Schull, *Rape in war: the humanitarian response* at 1153, Canadian Medical Association Journal, 163 (9), Oct. 31, 2000.
 - 34 Murray, *supra* note 32, at 153 (*citing* Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, 1996).
 - 35 HRW Report Darfur & Chad at 5.
 - 36 *See* for example the decision of the Iraqi High Tribunal in the *Anfal* case, which found that rape was used as a part of the genocide of the Kurdish people. Prosecutor v. Ali Hasan Al Majid (Al-Anfal), Appellate Verdict, Case No. 1/C Second/2006 (Iraqi High Trib., Tr. Chamber II, June 24, 2007).
 - 37 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Trial Judgment, ¶ 731 (Sept. 2, 1998).
 - 38 Anne-Marie L.M. de Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND ICTR 58 (Intersentia 2005).
 - 39 Prosecutor v. Radovan Karadzic and Ratko Mladic, No. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 94, (Jul. 11, 1996).
 - 40 *Id.* at ¶ 64.

- 41 PHR & HHI Report Darfur at 52.
- 42 1946 Geneva Conventions, common Article 3(1).
- 43 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 86 and 400 (International Committee of the Red Cross 2005) [hereinafter ICRC CIHL].
- 44 International Committee of the Red Cross, *Protection of victims of armed conflict through respect of International Humanitarian Law* at 4, Reference Document – 27th International Conference of the Red Cross and Red Crescent, Geneva, Oct. 31 – Nov. 6, 1999.
- 45 ICRC CIHL at 86 and 400.
- 46 It has been argued that the four Geneva Conventions, which each have 194 State signatories, are part of customary international law in large part because of their universal ratification. See Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 J. Int'l Crim. Just. at 683, 686-689 (2009).
- 47 Jelena Pejic, *Non-discrimination and armed conflict*, INT'L REV. RED CROSS 841 (March 2001), available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/57IQZQ/>.
- 49 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts, art. 8(a), Jun. 8, 1977, 1125 U.N.T.S. 302 [hereinafter Additional Protocol I].
- 51 The ICRC study of customary international humanitarian law also supports the notion that the prohibition on non-discrimination extends to medical care: "In a communication to the press issued in 1993, the ICRC stated that its delegates in Bosnia and Herzegovina were once more witnessing 'blatant violations of the basic principles of international humanitarian law' and cited the 'adverse discrimination . . . practiced in the medical care given to sick and wounded civilians and combatants' as an example." ICRC CIHL at 2075 (citing ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993).
- 52 Additional Protocol I, art. 10 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 7, Jun. 8, 1997, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].
- 53 ICRC CIHL at 309.
- 54 *Id.*
- 55 The ICRC CIHL study expressly relate the need for special protection of women in armed conflict to sexual violence and the consequences thereof: "The practice collected with regard to the specific needs of women is reinforced by and should be viewed in the light of the specific practice relating to the prohibition of sexual violence (see Rule 93)..." ICRC CIHL at 475.
- 56 ICRC, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, Vol. III at 147 (Jean Pictet ed., 1952-1960) [hereinafter Commentaries]. The Commentaries, developed and published by the ICRC, are the definitive interpretation of the Conventions.
- 57 Commentaries Vol. IV at 38.
- 58 1949 Geneva Conventions, common Article 3.
- 59 Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46-182, U.N. GAOR, 78th plen. Mtg., UN Doc. A/Res/46/182, (Dec. 19, 1991).
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- 62 Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (“Čelebići” judgment), Case No. IT-96-21-10, Judgment, ¶¶495-496 (November 16, 1998).
- 63 *Id.* at ¶495.
- 64 Foundation Rwanda, *Testimonies*, available at: <http://www.foundationrwanda.org/>.
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- 66 Commentaries Vol. IV at 39. The official ICRC commentary to this Article provides that “It is always dangerous to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; the more specific and complete a list tries to be, the more restrictive it becomes.”
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- 68 *Id.*
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