



**Global
Justice Center**

Human Rights Through Rule of Law

Global Justice Center's Submission

to

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Call for contributions: The right to sexual and reproductive health –

Challenges and Possibilities during COVID-19

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The Global Justice Center (GJC) is an international human rights organization, with consultative status to the United Nations, dedicated to advancing gender equality through the rule of law. We combine advocacy with legal analysis, working to ensure equal protection of the law for women and girls.

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The following is responding specifically to question 2(a) concerning measures introduced during the pandemic aiming at recognizing, restricting, banning and/or criminalizing access to legal abortion.

The COVID-19 pandemic posed unprecedented challenges to access to sexual and reproductive health services. As states enacted their COVID-19 response plans in the early phase of the pandemic, GJC noted an uptick in focus on abortion in the United States and around the globe - resulting in a mix of outcomes, both positive and negative. The unevenness with which abortion was dealt with underscores the importance that access to safe abortion services be protected as a matter of human right, recognized by officials as essential medical care, and not subject to restrictions.

Global Increase of Restrictions on Abortion Access¹

A number of US states moved to limit abortion by classifying abortions that are not a medical emergency as non-essential medical services that must be canceled or deferred, and ordering providers to stop their performance.² As a result, legal battles played out across these states. In Texas, the conflict first began after the governor enacted an executive order banning abortions as “a nonessential medical procedure that must be suspended to conserve scarce medical equipment for doctors treating coronavirus patients.”³ The fight went back and forth between different courts, causing chaos, confusion and disruption for providers and patients.⁴ There were numerous stories of pregnant women trying to access clinics for their appointments only to find them closed, waiting in clinic parking lots for hours while being harassed by protestors, and traveling for hours across state lines to reach the nearest available clinic.⁵ A similar pattern emerged in other states across the US.⁶

In these states, these emergency provisions were coupled with a range of pre-existing restrictions on abortion imposed by the federal and state governments, including on abortion funding, that already

¹ The following is derived from advocacy that the Global Justice Center has done in partnership with other reproductive health and rights groups.

² Serra Sippel & Akila Radhakrishnan, *Abortion is a human right. A pandemic doesn't change that*, CNN (Mar. 28, 2020, 9:13 AM), <https://www.cnn.com/2020/03/28/opinions/covid-19-abortion-access-human-right-sippel-radhakrishnan/index.html>.

³ Alice Miranda Ollstein, *Abortion providers ask Supreme Court to ease pandemic-related ban*, POLITICO (Apr. 11, 2020, 7:36 PM), <https://www.politico.com/news/2020/04/11/abortion-providers-ask-supreme-court-to-ease-pandemic-related-ban-179907>.

⁴ Sabrina Tavernise, *‘Overwhelmed and Frustrated’: What It’s Like Trying to Get an Abortion in Texas*, N.Y. Times (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/abortion-texas-coronavirus.html>.

⁵ *Id.*

⁶ For example, the abortion ban in Alaska, where one-third of women and girls live in rural parts of the state, will “disproportionately harm Alaskans already facing systemic barriers to health care – rural, indigenous, young, and poor people.” Schuyler Reid, *Alaska Issues Covid-19 Abortion Ban*, Human Rights Watch (Apr. 16, 2020 7:47 AM), <https://www.hrw.org/news/2020/04/16/alaska-issues-covid-19-abortion-ban#>.

render abortion difficult to access. Additionally, the US Congress passed several bills seeking to relieve the devastation caused by the virus. The legislation authorized funds to be used to respond to the virus, both domestically and internationally. Of particular concern, however, is that these funds are subject to abortion restrictions embedded in US law, such as the Helms, Siljander and Hyde amendments.⁷

In Italy, where the COVID-19 pandemic hit particularly hard, activists reported that hospitals across the country suspended medical abortions and shut down surgeries, including abortions.⁸ Concerningly, for six-months of the pandemic, Italy had more limited access to abortion than other European neighbors - limiting the availability of medical abortion to seven weeks as opposed to the recommended nine weeks.⁹

In the early part of the pandemic the parliament in Poland was set to debate a bill that would effectively ban abortions in the country. Opponents argued that the government was taking advantage of the pandemic moment to try and pass a bill at a time when the population could not freely protest as they did in 2016 due to the lockdown.¹⁰ A member of the Abortion Dream Team explained, “the coronavirus pandemic has made life harder for women seeking abortion. The organisation’s helpline has received around 550 calls in the month since lockdown was imposed in Poland, which is twice as much as during a usual month.”¹¹ Poland already had one of the strictest abortion laws in Europe,¹² and just recently changed its law to restrict access further to a “near-total ban on abortion” -- preventing termination of pregnancies “even in cases of severe and irreversible fetal defects.”¹³

In the Netherlands, a Dutch court rejected a case that would allow women to receive and self-administer medication abortion at home, thereby still requiring them to travel to a clinic to physically appear and take the pill in the presence of a doctor.¹⁴

The International Planned Parenthood Federation (IPPF) found, “Pakistan, El Salvador, Zambia, Sudan, Colombia and Germany were among the countries reporting more than 100 closures of clinics

⁷ Laura Litvan, Erik Wasson, and Laura Davison, *What’s In the \$900 Billion Virus Relief Bill Passed by Congress*, Bloomberg (Dec, 20, 2020, 8:45 PM, updated Dec. 22, 2020 7:56 AM), <https://www.bloomberg.com/news/articles/2020-12-21/virus-relief-includes-direct-payments-tax-breaks-airlines-aid>.

⁸ Francesca Visser, *‘Absurd’ rules obstruct abortion access in Italy during COVID-19*, Open Democracy (Apr. 3, 2020), <https://www.opendemocracy.net/en/5050/italy-access-abortion-during-covid/>.

⁹ *Id.* In August 2020 Italy announced revisions to outdated national guidance, which will ease restrictions on medical abortion. Hillary Margolis, *A Step Forward for Abortion Rights in Italy*, Human Rights Watch (August 11, 2020 4:45PM), <https://www.hrw.org/news/2020/08/11/step-forward-abortion-rights-italy>.

¹⁰ Chris Harris, *Coronavirus in Europe: Polish MPs set to debate abortion ban while lockdown prevents protest*, Euronews (Apr. 12 2020), <https://www.euronews.com/2020/04/12/coronavirus-in-europe-polish-mps-set-to-debate-abortion-ban-while-lockdown-prevents-protes>.

¹¹ Shaun Walker, *Concerns over Polish government tightening abortion laws during Covid-19 crisis*, The Guardian (Apr. 14, 2020), <https://www.theguardian.com/world/2020/apr/14/concerns-over-polish-government-tightening-abortion-laws-during-covid-19-crisis#maincontent>.

¹² Amnesty International, *Europe: Failures to guarantee safe access to abortion endangers health of women, girls amid COVID-19* (Apr. 8, 2020), <https://www.amnesty.org/en/latest/news/2020/04/europe-failures-to-guarantee-safe-access-to-abortion-endangers-health-of-women-and-girls-amid-covid-19/>.

¹³ Sandrine Amiel, *100 days since Poland banned abortion, Polish women are fighting back*, Euronews (May 12, 2021), <https://www.euronews.com/2021/05/12/100-days-since-poland-banned-abortion-polish-women-are-fighting-back>.

¹⁴ Molly Quell, *Dutch Woman Loses Bid for Abortion Pill Without Clinic Visit*, Courthouse News Service, (Apr. 14, 2020), <https://www.courthousenews.com/dutch-woman-loses-bid-for-abortion-pill-without-clinic-visit/>.

and community-based providers that serve poor women in hard-to-reach locations.”¹⁵ According to an IPPF survey of its national members, 23 reported reduced availability of abortion care.¹⁶

These examples raise the particular concern of governments taking advantage of this crisis moment to restrict, under the guise of safety, time-sensitive access to protected healthcare such as abortion. They also equally highlight the difficulties that pregnant people already face in accessing safe abortion care and how laws and policies which place barriers to access can render abortion fully inaccessible in moments of crisis.

Positive Steps to Increase Abortion Access

There were a few notable positive examples of states’ responses taking steps to increase access to abortion during this crisis.

In the United Kingdom, except for Northern Ireland, the government approved the use of abortion pills at home up to the tenth week of pregnancy - “[w]omen will be sent the two pills required for an early termination in the post following a telephone or e-consultation with a doctor.”¹⁷ Notably, the decision was “limited for two years or until the coronavirus crisis is over.”¹⁸ Similarly, in France, where abortion has been legal since 1974, the Health authority decided to extend access to medical abortions at home up to nine weeks during the pandemic.¹⁹

In the US, states such as Massachusetts²⁰ and New Jersey²¹ took steps to protect abortion as an essential service in light of COVID-19. In New Jersey, the governor’s executive order suspending elective surgeries and invasive procedures included an explicit exemption for terminating pregnancies.²²

These examples of protective action, leadership and guidance were needed more than ever at this critical time and should be utilized as models to guide states in ensuring that their laws and policies, whether directly related to COVID-19 or not, are compliant with their human rights obligations.

¹⁵ Amber Milne, *Women face 'catastrophic' risks as thousands of sexual health clinics close*, Reuters (Apr. 9, 2020 3:34 PM), <https://www.reuters.com/article/us-health-coronavirus-women-trfn/women-face-catastrophic-risks-as-thousands-of-sexual-health-clinics-close-idUSKCN21R39C>.

¹⁶ International Planned Parenthood Federation, *COVID-19 pandemic cuts access to sexual and reproductive healthcare for women around the world* (Apr. 9, 2020), <https://www.ippf.org/news/covid-19-pandemic-cuts-access-sexual-and-reproductive-healthcare-women-around-world>.

¹⁷ Aamna Mohdin, *Relaxation of UK abortion rules welcomed by experts*, The Guardian (Mar. 30, 2020), <https://www.theguardian.com/world/2020/mar/30/relaxation-of-uk-abortion-rules-welcomed-by-experts-coronavirus>.

¹⁸ *Id.*

¹⁹ Sarah Elzas, *France extends access to abortions during Covid-19 pandemic*, RFI (Apr. 11, 2020), <http://www.rfi.fr/en/france/20200411-france-extends-access-to-abortions-during-covid-19-pandemic>.

²⁰ Steph Solis, *Coronavirus response: Hospitals must cancel colonoscopies, knee replacements; abortions can continue as scheduled*, Mass Live (Mar. 17, 2020), <https://www.masslive.com/coronavirus/2020/03/coronavirus-response-hospitals-must-cancel-colonoscopies-knee-replacements-abortion-can-continue-as-scheduled.html>.

²¹ Dennis Carter, *State Officials Try to End Legal Abortion During COVID-19 Crisis*, Rewire News (Mar. 23, 2020, 5:33 PM), <https://rewire.news/article/2020/03/23/state-officials-try-to-end-abortion-during-covid-19-crisis/>.

²² Press Release, Governor Murphy Suspends All Elective Surgeries, Invasive Procedures to Preserve Essential Equipment and Hospital Capacity (Mar. 23, 2020), <https://t.e2ma.net/message/bezr1c/vds5dt>.

Abortion Must be Recognized as Essential Medical Care

The pandemic has brought to the forefront the urgency of this issue. It is critical that abortion be recognized as essential medical care and that access cannot be restricted. The need for abortions does not stop during a pandemic, nor does the need to access such healthcare in a time-sensitive manner. Abortion bans and barriers simply make access more difficult, and in many cases force pregnant persons to travel far distances to seek out the care they need, at a time when governments and health experts are advising the population to stay at home in order to avoid contracting or spreading the virus. As a result, this crisis has further highlighted the need for states to take steps to ensure multiple safe access points to abortion care, including options via telehealth systems and services such as increased access to medication abortions.²³

As the rest of this submission highlights, states' obligations under international human rights and humanitarian law are essential components of ensuring access to and consultation regarding safe abortion care.

The following responds specifically to question 4 concerning other relevant information on laws and policies affecting the right to sexual and reproductive health.

Globally, access to sexual and reproductive health and rights, particularly abortion, is hindered by restrictive international donorship policies and national legislation. While there is a strong international legal framework that assures these rights and protections abortion as medical care, under implementation is a significant barrier.

US foreign aid policies violate of the international rights to expression and association under the ICCPR

It is widely accepted and commonly clarified that under international human rights law access to safe abortion care is protected as a matter of a multitude of complementary and intersecting rights, including to health, life, non-discrimination, privacy, and to be free from torture or cruel, inhuman, or degrading treatment.²⁴ Moreover, while often overlooked, the rights to freedom of expression and association are also infringed when states impose restrictions on access to abortion services.²⁵

Under article 19 of the International Covenant on Civil and Political Rights (ICCPR) everyone has the right to freedom of expression, including the right “to seek, receive and impart information and ideas of all kinds” through any manner (such as speech, writing, art) or medium.²⁶ Article 22 of the ICCPR affirms an association’s right to carry out its activities, and the UN Human Rights Committee has

²³ See Jaime Todd-Gher & Payal K Shah, *Abortion in the context of COVID-19: a human rights imperative*, Sexual and Reproductive Health Matters (Apr. 19, 2020), <https://www.tandfonline.com/doi/full/10.1080/26410397.2020.1758394>.

²⁴ Center for Reproductive Rights, *Safe and legal abortion is a woman’s human right*, (Oct. 2011), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Safe%20and%20Legal%20Abortion%20is%20a%20Womans%20Human%20Right.pdf>.

²⁵ See Global Justice Center, *US Abortion Restrictions on Foreign Aid and Their Impact on Free Speech and Free Association*, (Mar. 2018), <https://www.globaljusticecenter.net/blog/19-publications/899-us-abortion-restrictions-and-free-speech>.

²⁶ International Covenant on Civil and Political Rights, art. 19(2), Dec. 16, 1966, 99 U.N.T.S. 171.

stated that the protection of Article 22 extends to all the activities of an association.²⁷ International jurisprudence recognizes NGOs as essential to the promotion of human rights, whether they advocate for policy change or provide meaningful support and resources to citizens. Furthermore, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has found that the right to seek and secure funding from domestic, foreign, and international entities is inherent to an organization's right to association.²⁸ As a result, states are obligated to refrain from implementing restrictions upon an NGO's access to funding.²⁹

Central to the democratic process, the rights to expression and association cannot be obstructed by governments unless restrictions pass a strict three-part test. Specifically, the ICCPR requires that any restrictions on expression or association: (1) be provided by law; (2) have a legitimate aim; and (3) be necessary and proportionate to achieving that aim.³⁰ US-imposed restrictions on safe abortion care embedded in its foreign aid--specifically the Helms and Siljander Amendments, and the Global Gag Rule (when it is in place, as it was during the first year of the pandemic)--fail every part of the ICCPR's test.

Restrictions are "provided by law," when they are accessible to the public, are formulated with precise language that allows those affected to regulate their conduct, and do not allow for "unfettered discretion" by their implementers.³¹ The Helms and Siljander Amendments and the Global Gag Rule (collectively "US abortion restrictions") are not only restrictions on the provision of services, but also apply to a broad range of abortion-related expression, including information, research, technical assistance and advocacy.³² They prohibit US funding recipients from expressing any ideas that "motivate" or "lobby" for abortion.³³ These extremely vague terms are so encompassing that they cause US-funding recipients to over-apply the restrictions, leading to a situation where patients in US-foreign-aid-funded clinics are unable to receive information regarding abortion.³⁴ Additionally, despite requests for clarification and persistent confusion among grantees, the US government advised on

²⁷ International Covenant on Civil and Political Rights, art. 22, Dec. 16, 1966, 99 U.N.T.S. 171; *Korneenko v. Belarus*, U.N. Human Rights Committee, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (Nov. 3, 2006).

²⁸ Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, U.N. Doc. A/HRC/23/39 (Apr. 24, 2014). See also Maina Kiai and Community of Democracies, *General Principles: Protecting civic space and the right to access resources* (Nov. 2014), http://freemassembly.net/wp-content/uploads/2014/11/General-principles-funding-update_Nov.-14.pdf.

²⁹ International Covenant on Civil and Political Rights, art. 22(2), Dec. 16, 1966, 99 U.N.T.S. 171.

³⁰ International Covenant on Civil and Political Rights arts. 19(3), 22(2).

³¹ Human Rights Comm., General Comment No. 34, ¶ 25; 2012 Report of the Special Rapporteur on the Situation of Human Rights Defenders, ¶¶ 64, 66-67.

³² USAID, *Standard Provisions for Non-US Non-governmental Organizations - A Mandatory Reference for ADS Chapter 303*, pp. 28, 80, <https://www.usaid.gov/sites/default/files/documents/303mab.pdf>.

³³ Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 104(f)(1), 75 Stat. 424, as amended by the Foreign Assistance Act of 1973 (P.L. 93-189); Foreign Assistance and Related Programs Appropriations Act 1982, Pub. L. No. 97-121, 95 Stat. 1657 (Dec. 29, 1981); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, 119 Stat. 2175, "Child Survival and Health Programs Fund"; Luisa Blanchfield, Cong. Research Serv., R41360, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Law and Policy 5* (Updated Aug. 21, 2020), <https://fas.org/sgp/crs/row/R41360.pdf>.

³⁴ CHANGE, *Prescribing Chaos in Global Health: The Global Gag Rule from 1984-2018* (June 2018), at 37; Int'l Women's Health Coalition, *Reality Check: Year One of the Global Gag Rule* (May 2018), at 9. See generally, Global Justice Center and Center for Health and Gender Equality, *Censorship Exported: The Impact of Trump's Global Gag Rule on the Freedom of Speech and Association*, https://globaljusticecenter.net/files/Censorship_Exported_Impact_of_Trumps_GGR.pdf.

compliance with the Global Gag Rule on a “case-by-case basis,” which lacked fairness and transparency.³⁵ For these reasons, US abortion restrictions’ vagueness, and inconsistent and opaque compliance enforcement fail the “provided by law” requirement of the ICCPR.

Under the second prong of the ICCPR’s test, the only “legitimate” aims for restricting rights to expression and association are to respect the rights or reputations of others or to protect national security, public order, public health or morals.³⁶ Further, expression restrictions cannot “impede political debate” or withhold “information of legitimate public interest that does not harm national security[.]”³⁷ The Helms and Siljander Amendments directly impede political debate and information access by preventing free and open discussion on a particular human right--the right to safe abortion care. For example, USAID’s Kenya mission prevented Kenyan grantees from attending a 2013 government-convened meeting because the discussion of “a strategy to reduce maternal mortality in Kenya” fell “under restricted activities” of the Helms and Siljander Amendments.³⁸ By impeding political debate and censoring information of legitimate public interest, the US abortion restrictions fail the second prong of the ICCPR’s test.

Under the third prong of the test, restrictions are not “necessary” if there are less intrusive ways to achieve the aim, if the restrictions are not directly connected to achieving the aim, or if the harm caused by the restriction is disproportionate to the interest protected.³⁹ The Helms Amendment applies to all foreign assistance and is therefore not proportionate in the least. As a result, the US censors speech on abortion in countries where the US is involved in other types of foreign assistance but not family planning assistance, which is overbroad and unconnected to any legitimate aim. Further, the US government does not even consistently deem the Global Gag Rule “necessary”—it is a political policy reinstated and rescinded along partisan lines. It is also ineffective in achieving any aim—a 2011 study found that the Global Gag Rule actually increased abortion rates in sub-Saharan Africa as organizations supporting family planning and contraceptive access were forced to reduce programming.⁴⁰ Thus, US abortion restrictions also fail the third prong of the ICCPR’s test.

In sum, by constraining abortion-related activities, speech, and financial resources, the US has violated its fundamental obligations under international law to ensure free expression and association. These violations are not merely theoretical—because of US policy, people all over the world are denied their right to access safe abortion services. At a time when human rights and their defenders face increasing levels of discrimination and attack, it is imperative that all governments, international organizations, and civil society insist on the provision of essential abortion services as a matter of right.

³⁵ *Protecting Life in Global Health Assistance Six Month Review*, U.S. Dep’t of State (Feb. 6, 2018), <https://www.state.gov/f/releases/other/278012.htm>; *Background Briefing: Senior Administration Officials on Protecting Life in Global Health Assistance*, U.S. Dep’t of State (May 15, 2017), <https://www.state.gov/r/pa/prs/ps/2017/05/270879.htm>.

³⁶ ICCPR, Article 19(2)(a) and 21.

³⁷ Human Rights Comm., General Comment No. 34, ¶¶ 28, 30; 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶¶ 30, 40-41.

³⁸ Laura Bassett, *Instruments of Oppression*, Huffington Post, <http://highline.huffingtonpost.com/articles/en/kenya-abortion/>; Ipas, Briefing Note: The Helms Amendment and USAID Censorship and Intimidation in Reproductive Health in Kenya (Feb. 28, 2014) (on file with author).

³⁹ Human Rights Comm., General Comment No. 27, ¶ 14.

⁴⁰ Eran Bendavid, Patrick Avila, & Grant Miller, *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*, World Health Org. Bulletin, Sept. 27, 2011, <http://www.who.int/bulletin/volumes/89/12/11-091660/en/>.

The COVID-19 pandemic has shown the importance of access to essential medical care, including abortion, during times of crisis. It highlights the need for states to do more to recognize and ensure abortion as a protected right so that it is not curtailed, especially during times of emergency. Harmful policies, such as US abortion restrictions, exacerbate these problems by preventing access to necessary healthcare. Although the Global Gag Rule was recently rescinded its harmful effects linger, several other policies remain and should be permanently repealed. As the last year has revealed, this is a matter not only specific to the US but is rather an urgent issue of global concern.

Access to abortion must be provided as a matter of right under international humanitarian law

Considering the intensifying effects the pandemic has had on humanitarian contexts, it is important to pay particular attention to the situation of access to sexual and reproductive health and rights in armed conflict contexts. While international human rights standards apply across contexts, the specific situation of armed conflict is governed by international humanitarian law (“IHL”). IHL establishes specific legal obligations in situations of armed conflict that exceed the minimum standards of care in addressing the needs of victims of natural disasters and other emergencies, protecting medical needs as a legal right. Properly construed, abortion services fall within the purview of the non-derogable protections granted under IHL.

Pregnant people in armed conflict are recognized as “wounded or sick” and are entitled to all of the rights and protections based on that status,⁴¹ including the provision of “medical care and attention required by their condition.”⁴² Medical care must be based solely on the person’s condition and without adverse distinction on the basis of sex. In all cases, medical treatment should be as favorable to women as that granted to men.⁴³ The right does not mean that medical treatment must be identical. Instead, medical outcomes for the sexes must be the same and can be achieved through differential treatment.⁴⁴ In the case of pregnant people in armed conflict, necessary medical care includes the provision of abortion services. For example, the condition of a person raped by a stick requires surgery or some other procedure, and the condition of a person raped and impregnated requires the option of an abortion.

IHL also prohibits cruel treatment and torture and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”⁴⁵ Torture is defined as “severe physical or mental pain or suffering” for unlawful purposes, including “discrimination of any kind.”⁴⁶ The denial of abortion services has been explicitly determined to cause serious mental and physical suffering constituting torture and other cruel, inhuman and degrading treatment in certain contexts.⁴⁷

⁴¹ Int’l Comm. of the Red Cross. Commentary of 2016 on convention (I) for the amelioration of the condition of the wounded and sick armed forces in the field (Geneva, 12 August 1949). 2016.

⁴² Common Article 3 to the Geneva Conventions; Additional Protocol I to the Geneva Conventions, art. 10; Additional Protocol II to the Geneva Conventions, art. 7.

⁴³ Geneva Convention III, art. 14; ICRC, Customary International Law Database, r. 110.

⁴⁴ Common Article 3 to the Geneva Conventions; Additional Protocol I to the Geneva Conventions, art. 10; Additional Protocol II to the Geneva Conventions, art. 7.

⁴⁵ Common Article 3 to the Geneva Conventions.

⁴⁶ Elements of Crimes for the ICC, Definition of torture as a war crime (ICC Statute, art. 8(2)(a)(ii) and (c)(i)).

⁴⁷ See Report of the Sp. Rapp. on torture, ¶ 46, U.N. Doc. A/HRC/22/53 (1 Feb. 2013); see also CAT Concluding Observations: Peru, ¶ 23; Committee against Torture, Concluding Observations: Chile, ¶ 7(m), U.N. Doc. CAT/C/CR/32/5 (14 June 2004); Human Rights Committee, General Comment No. 28, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

While the protection of abortion services under IHL has been increasingly recognized—including by the European Union, the UN Secretary-General, the UN Security Council, and the Inter-Agency Field Manual on Reproductive Health in Humanitarian Settings⁴⁸—services are not comprehensively provided. Despite concrete international rights to such care, access to abortion continues to be inconsistently provided because of a lack of clear donor guidance, funding restrictions, misunderstandings of the protections afforded under IHL, and lack of clarity on the governing legal system. The International Committee of the Red Cross concluded that “[t]he principal cause of suffering in armed conflicts remains the inability to respect the law in force, whether for lack of means or political will, rather than the deficiency or absence of rules.”⁴⁹

Multiple legal and policy standards often intersect in humanitarian aid situations, including international human rights law, national legislation, and donor agreements. Domestic law applies in all situations, including crises. However, when determining the rights and duties in the specific context of armed conflict, IHL is the *lex specialis* and thus takes precedence over other legal regimes that contravene its provisions and protections.⁵⁰ This is why, as a general rule, soldiers cannot be prosecuted for their licit acts of war, such as killing enemy soldiers while on the battlefield. The same is true with respect to abortion laws—where a person “wounded and sick” in armed conflict requires the option of abortion, IHL’s provisions relating to non-discriminatory medical care and the prevention of torture displace national or local abortion laws as they relate to that person.

Importantly, IHL’s protections and obligations are non-derogable, and the International Committee of the Red Cross’s Professional Standards for Protection Work calls for protection actors to “be prepared to point out that domestic law cannot be used as an excuse for non-compliance with international obligations.”⁵¹ Indeed, IHL protects humanitarian aid providers, including medical personnel, from prosecution and other forms of punishment when acting in accord with IHL and medical ethics.⁵² It also prohibits compelling providers to perform or refrain from performing care needed on the basis of a patient’s condition.⁵³

⁴⁸ UK DfID, *Safe & Unsafe Abortion*, (2014), p. 9; United Nations Security Council, U.N. Doc. S/PV.7160 (25 Apr. 2014), at 15 (statement by France’s Mr. Araud); UNSC, U.N. Doc. S/PV.6984 (24 June 2013), at 48 (statement by Neth.); EU Commission, Letter from Janez Lenarčič, Commissioner for Crisis Management, European Commission, to Sophe in't Veld & Samira Rafaela, Members, European Parliament (Apr. 15, 2020); Letter from Janez Lenarčič, Commissioner for Crisis Management, and Jutta Urpilainen, Commissioner for International Partnerships, European Commission, to Akila Radhakrishnan, President, Global Justice Center (Apr. 23, 2021)(on file with author); R. Coomaraswamy, *Preventing Conflict, Transforming Justice, Securing the Peace – A Global Study of the Implementation of UNSCR 1325*, (2015), p.77; Inter-Agency Working Group on Reproductive Health in Crises, *Minimum Initial Service Package* 60, 161 (2011); Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Responses* 327, 331-332 (4th ed. 2018).

⁴⁹ Int’l Comm. of the Red Cross, *Strengthening Legal Protection for Victims of Armed Conflicts: Rep. for the 31st Int’l Conference of the Red Cross and Red Crescent*, 2, No. 31IC/11/5.1.1, Oct. 2011.

⁵⁰ Int’l Comm. of the Red Cross, *Lex Specialis, Casebook*, <https://casebook.icrc.org/glossary/lex-specialis>.

⁵¹ International Committee of the Red Cross, *Professional Standards for Protection Work*, 2013, pp. 63-64, <https://www.yumpu.com/en/document/view/38675884/icrc-002-0999/65>. See also Int’l Comm. of the Red Cross, *Commentary of 2016 on convention (I) for the amelioration of the condition of the wounded and sick armed forces in the field* (Geneva, 12 August 1949), ¶¶ 987–1002. 2016.

⁵² Int’l Committee of the Red Cross, *Commentary to Additional Protocol I to the Geneva Conventions*, art. 16, ¶ 665. *Additional Protocol I*, art. 16; *Additional Protocol II*, art. 10.

⁵³ *Additional Protocol II*, art. 10; *Additional Protocol I*, art. 16; ICRC, *Commentary to Additional Protocol I*, art. 16, ¶¶ 650, 665.

Too often guarantees for the provision of sexual and reproductive health services, in particular abortion services, in responses to conflict are left out. IHL protects these essential and life-saving medical interventions in various of its provisions, and the international community--including international donors, regional bodies and the UN--must unequivocally provide for and support their provision as a matter of right and legal obligation.