

War Rape

A Comparison of the European Commission's Policy with International Humanitarian Law

Together, Member States and the European Commission are the world's leading providers of humanitarian aid. The EU promotes a vision of humanitarian relief based on advancing compliance with international law. The Commission's *sui generis* policy on abortion and the Geneva Conventions flouts this vision by violating the inalienable rights of women and girls raped in conflict to all necessary medical care, without adverse distinction on the basis of sex, in all circumstances. This policy breaches EU Law, the Geneva Conventions, and UN Security Council resolutions.

Background: What is the European Commission's current policy on humanitarian aid?

The Commission's current policy is that the universal mandates of international humanitarian law do not govern the medical care given to women and girls raped and impregnated in war. Instead the Commission applies national abortion laws as the appropriate medical care standard for these victims. These women—civilians and combatants alike—are the only category of persons “wounded and sick” in armed conflict who are, in violation of their rights, deliberately denied a medical treatment in a humanitarian context.

1 The European Commission's Policy on Abortion and the Geneva Conventions Deviates from Existing EU Laws and Policies

The EU has made clear in its primary law, secondary law, and policies the need for its humanitarian operations in armed conflict settings to comply with the Geneva Conventions or international humanitarian law (“IHL”). However, by deviating from these explicit mandates, the Commission's policy on abortion and IHL is an anomaly.

International Humanitarian Law in EU Law & Policy

Treaty on the Functioning of the European Union: “Humanitarian aid operations shall be conducted in compliance with the principles of international law” (Art. 214)

Council Regulation 1257/96 on humanitarian aid: “civilian operations to protect the victims of fighting...are governed by international humanitarian law”, and their “principal objectives...shall be...to support civil operations to protect the victims of fighting or comparable emergencies, in accordance with current international agreements” (Preamble and ¶ 2(g))

EU Guidelines on promoting compliance with international humanitarian law: “IHL is applicable in times of armed conflict and occupation”; “situations where IHL may apply must be identified without delay” (Official Journal C 303 of 15/12/2009, ¶¶ 1 and 15(a))

European Consensus on Humanitarian Aid: “The EU is committed to operationalising these Guidelines [on compliance with international humanitarian law] in its external relations” (¶ 16 (2008))

DG ECHO, Gender: Different Needs, Adapted Assistance: “The EU’s efforts to promote gender equality are in line with international conventions and commitments. Furthermore international humanitarian law, international human rights law and refugee law...provide a framework for EU humanitarian aid” (¶ 3.1(2013))

DG ECHO Framework Partnership Agreement: “Actions shall only be eligible for Union funding if they comply...in situations of armed conflict, with international humanitarian law” (¶ 3.2 (2014))

2 What Does IHL Say?

Under the Geneva Conventions and their Additional Protocols, persons “wounded and sick” are entitled to: (1) comprehensive, non-discriminatory medical treatment based solely on their medical condition irrespective of national law; (2) the right to be free from torture or cruel, inhuman or degrading treatment, including in the context of medical treatment; and (3) treatment by doctors protected from national prosecution under IHL.¹ These rights of war victims, including raped women and girls, are peremptory norms of IHL, meaning that they are binding on the entire global community, non-derogable in all circumstances and not dependent on domestic incorporation.² IHL’s standard of legal protection is radically different than any national standard covering victims of natural disasters and is universally binding.

As war rape is perpetrated against women and men in different ways, the injuries suffered require different medical care. A man raped by a stick may need reconstructive surgery, while a woman raped by a penis may need an abortion. The same act of war—rape—leads to different injuries, requiring different medical care to reach the same health outcome. Under IHL the outcome of care for female rape victims may not be “less favorable than that for men.”³ Thus, **within IHL’s guarantee of all necessary medical care without adverse distinction, women and girls raped and impregnated in conflict are entitled to safe abortion services.** The United Nations Security Council affirmed this in Resolutions 2106 and 2122, making clear that women and girls impregnated by war rape should be provided abortion services.⁴

3 The European Commission’s Policy vs. the Geneva Conventions

Former Commissioner Georgieva has explained the Commission’s policy in various communications since 2012, including in letters to the Global Justice Center and answers to parliamentary questions.⁵ The Commission’s reasoning is insupportable under IHL, as demonstrated below.

Commission Policy	International Humanitarian Law
<i>Neither international humanitarian law nor international human rights law explicitly refer to abortion, and therefore European humanitarian aid partners are not required to provide abortions for war rape victims.</i>	The right in question is not an “explicit right to abortion,” but rather the undisputed right under the Geneva Conventions of all persons “wounded and sick” in armed conflict to all the medical care their condition requires without any adverse distinction. ⁶ IHL does not refer to any particular medical treatments, and indeed could not, since medical protocols evolve over time according to medical advances. ⁷ Moreover, IHL treaties do not specify what kind of medical care and attention is required in each specific case. Accordingly, abortion, like any other necessary treatment, falls under the meaning of medical care under IHL.

<p><i>European humanitarian aid partners need to comply with restrictive national abortion laws to protect women and girls raped in war from being arrested and their doctors from being prosecuted.</i></p>	<p>To ensure that war victims are provided all necessary care, the Additional Protocols state doctors treating war victims are obligated to provide all the care needed regardless of national laws, and in turn cannot be punished or prosecuted under national laws.⁸ The medical mandates of IHL are absolute, non-derogable, and must be provided in all circumstances.</p> <p>Additionally, under IHL, doctors may not be compelled to perform acts or to carry out, or refrain from the care needed by a patient's condition.⁹ Further, deference to national abortions laws, even where abortion is legal, likely violates IHL mandates to provide all necessary medical care without delay and without any adverse distinction.¹⁰ For example, in some countries, national laws require doctors to comply with burdensome regulatory obstacles such as parental/spousal consent, which violate these mandates.</p>
<p><i>The primacy of IHL depends on its incorporation into domestic law.</i></p>	<p>Under common Article 1 of the Conventions, all states are obliged “to respect and ensure respect for the Conventions in all circumstances.”¹¹ This obligation is not contingent on incorporation of IHL into domestic law. The International Committee of the Red Cross's Guidelines on Professional Standards for Protection Work provide that domestic laws are to be used only when they reinforce the protections if IHL.¹² The Guidelines also point out that where there is conflict, domestic law cannot be used as an excuse for non-compliance with international law. Military manuals also make this principle very clear.¹³</p>
<p><i>The European Commission is a “needs-based” and “non-discriminatory” donor that supports the provision of the same type of care to victims of rape in armed conflict as to any other victims of rape in any other emergency context.</i></p>	<p>The Commission's one-policy-fits-all approach is incompatible with IHL. Treating female victims of rape in armed conflict the same as “any other victim of rape in any other emergency context,” violates their special and non-derogable rights under IHL, for which any violation entitles them to redress and reparations. This includes medical care governed by IHL, not national laws. Put simply, victims of natural disasters do not have the same rights as victims of armed conflict who are entitled to the full protections of IHL.</p>

4 Moving Forward

It is the duty of the EU to ensure that its humanitarian aid for war victims is in accordance with IHL and is accountable for violations by its implementing partners. Accordingly, the Commission must adopt a policy on abortion and the Geneva Conventions. The policy must affirm the primacy of IHL in situations of armed conflict and that the full protections of IHL apply equally to men and women, guaranteeing the same favorable outcomes—regardless of the medical procedures required in reaching that outcome. Such a policy is also necessary in order to bring the EU in line with UN Security Council Resolutions 2106 and 2122.

Footnotes

¹Common Article 3 to the Geneva Conventions of 1949; Additional Protocol I of the Geneva Conventions, arts. 10, 16; Additional Protocol II of the Geneva Conventions, arts. 7, 10.

²ICRC, Customary International Law Database, Rules 26 and 110; Jelena Pejic, Non-discrimination and Armed Conflict, INT'L REV. RED CROSS 841 (March 2001).

³Geneva Convention III, art. 14; Geneva Convention IV, common Article 3; ICRC, Customary International Law Database, Rule 110.

⁴S.C. Res. 2106, ¶ 19, U.N. Doc S/RES/2106 (June 24, 2013); S.C. Res 2122, recitals, U.N. Doc S/RES/2122 (Oct. 18, 2013).

⁵Letters from Kristalina Georgieva, Comm. for Int'l Coop., Hum. Aid., and Crisis Response, to GJC, June 30, 2014 and Sept. 8, 2014; Letter from Claus Sorensen, Dir. Gen. of ECHO, to GJC, Dec. 20, 2012.

⁶Additional Protocol I to the Geneva Conventions, art. 16(2); Additional Protocol II to the Geneva Conventions, Art. 10(2).

⁷Letter from Former ICRC Legal Director Louise Doswald-Beck to US President Barack Obama, 10 Apr. 2013.

⁸ICRC, Commentary to Additional Protocol I to the Geneva Conventions, art. 16, ¶ 664.

⁹Additional Protocol II, art. 10; Additional Protocol I, art. 16; ICRC, Commentary to Protocol I, art. 16, ¶¶ 650, 665.

¹⁰ICRC, Customary International Law Database, Rule 110.

¹¹Common Article 1 of the Geneva Conventions of 1949.

¹²ICRC, Prof. Stand. For Protection Work Carried Out by Humanitarian and Human Rights actors in Armed Conflict and Other Sit. of Violence, (Oct. 2009).

¹³UK Manual of Law of Armed Conflict, ¶ 15.4.1; United States Army Judge Advocate General's Legal Center and School, Law of Armed Conflict Deskbook at 27 (2014).