

Updating State National Action Plans to Ensure the International Humanitarian Rights of Women and Girls Raped in Armed Conflict

States Can and Must Ensure the Rights of War Rape Victims

“Recognizing the importance of Member States and United Nations entities seeking to ensure humanitarian aid and funding includes provision for the full range of medical, legal, psychosocial and livelihood services to women affected by armed conflict and post-conflict situations, and noting the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination.”

**- SECURITY
COUNCIL
RESOLUTION 2122
(OCTOBER 2013)**

On the occasion of the Global Summit to End Sexual Violence in Conflict, the Global Justice Center encourages States to exercise global leadership on the protection of women and girls raped in armed conflict by updating their National Action Plans (NAPs) to include explicit language accepting their international humanitarian law obligations to provide non-discriminatory medical care, justice, and reparations to war rape victims.

Women and girls raped in war are among the “war wounded,” therefore protected under international humanitarian law (IHL) ¹ by the absolute prohibition on adverse distinction, including on the basis of sex. In reality, however, women and girls raped in war are regularly subjected to discrimination in the medical care they receive and in the justice, accountability, and reparations measures available to them. The prohibition against adverse distinction applies to how all IHL rules are implemented, and it is so fundamental that it constitutes customary international law.² Adverse distinction is interchangeable with the term “non-discrimination:” in all cases IHL cannot be implemented in ways that are “less favorable” for women than men.³

Approximately 40 of 193 UN Member States have drafted NAPs which implement the Security Council’s Women, Peace and Security Resolutions (WPS Series). Most of these NAPs emphasize the WPS Series’ international human rights law (IHRL) prong that addresses gender equality and diminish the international humanitarian law (IHL) prong that addresses the situation of women and girls, including those subjected to sexual violence, in situations of armed conflict. Furthermore, most NAPs fail to discuss the framework of IHL and its absolute mandates, which provides important rights to girls and women affected by conflict. This document lays out the importance of, and makes recommendations on, distinguishing and integrating IHL rights in state NAPs.



❖ Discrimination against female war rape victims in the medical care they receive:

Female war rape victims (many of whom suffer from severe injuries that render pregnancy and childbearing dangerous or life-threatening) are almost universally denied access to safe abortion,⁴ while male war rape victims are provided all the necessary medical treatment required to restore them, as close as possible, to their prior condition. According to the former legal head of the International Committee of the Red Cross, Louise Doswald-Beck, “non-discrimination signifies that the outcome for each gender must be the same, not that the treatment must be identical. Therefore, as rape can result in additional consequences for women and girls compared to men and boys, most notably pregnancy, these additional consequences necessitate distinct medical care, including the option of abortion.”⁵ Accordingly, female war rape victims must be offered the option of safe abortion to save their lives and health and be accorded the best chance of being made whole, physically and psychologically.

❖ Discrimination against female war rape victims in opportunities for justice, accountability, and reparations:

Women and girls raped in war are denied the full protection of IHL’s framework for regulating the “means and methods” (weapons and tactics) of warfare. This framework, as currently implemented by States, fails to recognize and treat rape used as a tactic of warfare as it does all other unlawful weapons and tactics, such as chemical weapons, dum dum bullets or starvation. The fact that States recognize certain unlawful weapons and tactics, while they fail to recognize the illegality of an equally heinous and deadly tactic that disproportionately targets women and girls, violates IHL’s absolute prohibition on discrimination. Treating the use of strategic rape as an unlawful tactic of war will provide war rape victims access to the same opportunities for justice, restitution, and reparations as are available to victims of other unlawful weapons or tactics.

National Action Plans and International Humanitarian Law

In their NAPs implementing UN Security Resolution 1325 and its progeny, States are bound to comply with their pre-existing, non-derogable duties under IHL, as articulated in the Geneva Conventions and customary international law. Each State’s obligation to comply with IHL—in each and every action that it takes—stems from common Article I (CAI) of the Geneva

Conventions, which requires States “to respect and to ensure respect for these Conventions under all circumstances.” It is critical for States to recognize that, where the WPS Series sets out steps for carrying out pre-existing duties under IHL related to sexual violence in conflict, compliance with these duties is mandatory, not discretionary.

The WPS Series calls for the implementation of rights that fall into both IHRL and IHL: the IHRL mandate to achieve gender equality and the IHL mandate to provide protection, medical care, and justice to women and girls affected by sexual violence in conflict. Many NAPs, however, fail to distinguish between these two legal regimes in their implementation of the WPS Series. This conflation of IHRL and IHL, which have distinct legal bases and distinct legal force, causes States to overlook the absolutely obligatory nature of their IHL obligations. By failing to explicitly state that the protection of women and girls is pursuant to IHL mandates, States are not using the strongest legal force available to enforce such protections. In order to properly carry out States’ obligations under IHL, NAPs must explicitly state throughout under which regime a right is being enforced.

Distinguishing between which rights fall under which legal regime permits identification of (1) which body of law applies and (2) which governmental body or branch is responsible for enforcement of the right. The European Union Guidelines on Promoting Compliance with International Humanitarian Law is a prime example of policy guidance that distinguishes between the two legal regimes and identifies the responsible bodies.⁶ The Guidelines underline the importance of identifying “without delay” situations where IHL may apply and charges the responsible EU bodies with monitoring potential IHL situations within their authority and, where appropriate, recommending action to promote compliance. It is imperative that NAPs take a similar approach to implementation of the WPS Series. Distinguishing between IHL and IHRL rights as the EU Guidelines do would give NAPs the legal force necessary to properly implement both prongs of the WPS Series. By directing responsible bodies to preemptively identify situations in which each body of law applies, States will be in a position to swiftly and appropriately handle the urgent nature of such violations.

Following are recommendations for States to fully integrate their IHL obligations to the “wounded and sick”—namely, women and girls raped in conflict—into their NAPs.

Recommendations for Integration of IHL into State NAPs

- ❖ Distinguish between international humanitarian law and international human rights law
 - ✦ Clearly delineate the aspects of the NAP that are pre-existing duties under the IHL regime (e.g. responses to sexual violence in armed conflict),⁷ distinguishing them from additional mandated duties under the IHRL regime (e.g. measures to enhance gender equality);

❖ Ensure the right to non-discriminatory, comprehensive medical care

- ✦ Declare the supremacy of IHL over national laws in determining standards for treating victims of war rape. Recognize the obligation under IHL to provide comprehensive, non-discriminatory medical care, including the option of safe abortion services, to those raped in armed conflict, and ensure that their humanitarian aid implementing organizations comply with this mandate. This IHL obligation persists even where local laws may criminalize abortion.
- ✦ Implement and fully comply with the IHL mandates of UN Security Council Resolution 2122 (2013), which urges Member States and United Nations entities to provide “access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination,” and UN Security Council Resolution 2106 (2013), which urges “United Nations entities and donors to provide non-discriminatory and comprehensive health services, including sexual and reproductive health, psychosocial, legal, and livelihood support and other multi-sectoral services for survivors of sexual violence. . .”
- ✦ Affirm that sexual violence and denial of abortion constitute torture and cruel, inhuman and degrading treatment, prohibited by international human rights law and common Article 3 the Geneva Conventions.
- ✦ As IHL requires, encourage provision of reparations to female sexual violence victims that have been denied comprehensive non-discriminatory medical care, including access to safe abortions. Ensure that reparations take into account the fact that denial of abortion constitutes discrimination on the basis of sex as well as cruel and inhuman treatment, and take into account the costs of the physical, psychological, and economic consequences (e.g. the costs of raising the child(ren)) of sexual violence and forced pregnancy.

❖ Ensure the right to non-discriminatory justice and reparations

- ✦ Affirm that rape used as a tactic of war to achieve military objectives is a prohibited tactic of war under the IHL framework regulating the means and methods of warfare.

- ✦ Commit to reforming domestic laws on means and methods of warfare and/or the implementation of IHL to integrate the prohibition of rape as an unlawful tactic of war.
- ✦ Recognize that States bear responsibility under IHL for the use of rape as an illegal tactic of war in their territories, including by their forces. This includes duties to cease such acts and to provide compensation and other forms of reparations.
- ✦ Declare the use of sexual violence as a tactic of war a grave breach of the Geneva Conventions, which can be prosecuted using universal jurisdiction.
- ✦ Commit to seeking the amendment of the Rome Statute to the International Criminal Court to include as a war crime the use of rape as a tactic of war.
- ✦ Establish a process for researching and monitoring the injuries and deaths that result from rape, which is key to (1) jumpstarting the process of stigmatization that is critical to deterring the use of unlawful weapons and tactics under IHL, and (2) gathering information to update national medical protocols to provide better medical treatment for the specific and severe wounds that result from rape used as a tactic of war.
- ✦ Commit to “address sexual violence as a method or tactic of conflict in peace agreements.” This will echo the language called for by the Secretary General in his 2013 report on conflict-related sexual violence in which he called on the Security Council, Member States and regional organizations to do so.⁸ This also supports the guidance put forth by the UN Department of Political Affairs (DPA) on addressing sexual violence in ceasefire and peace agreements, which states that a “recognition of sexual violence used in conflict as a method and tactic of war” is an essential provision to include in such agreements.⁹

¹ In addition, sexual violence in conflict implicates the prohibition on torture and cruel treatment. See Common Article 3, sub-para. 1, to all four Geneva Conventions of 12 August 1949.

² Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War common art. 3, 12 Aug. 1949, 75 U.N.T.S. 287. For a full discussion, see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. I: RULES* 308 (2005) (“Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.”).

³ Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 14, 12 Aug. 1949, 75 U.N.T.S. 135. (“Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.”); see also Françoise Krill, *The Protection of Women in International Humanitarian Law*, *INT’L REV. RED CROSS*, 249 (31 Dec. 1985).

⁴ Global Justice Center, *The Right to an Abortion for Girls and Women Raped in Armed Conflict* (February 2011), available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34.

⁵ Letter from Prof. Louise Doswald-Beck, Former Head, Legal Division, International Committee of the Red Cross, to President Obama (10 Apr. 2013), at 2, available at http://www.globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=321&cf_id=34.

⁶ Updated European Union guidelines on promoting compliance with IHL (2009/C 303/06) (15 Dec. 2009), Section II, ¶ 12.

⁷ The IHL legal framework applies in situations of armed conflict and supersedes any contrary national law. It is absolute and non-derogable. In contrast, the IHRL legal framework is more limited in its application and is “less obligatory” than that of IHL.

⁸ United Nations, Report of the Secretary General on Sexual Violence in Conflict, ¶ 129, U.N. Doc. S/2013/149 (Mar. 14, 2013).

⁹ United Nations Department of Political Affairs, *Guidance for Mediators: Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements*, pg. 8 (2012), available at <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/DPA%20Guidance%20for%20Mediators%20on%20Addressing%20Conflict-Related%20Sexual%20Violence%20in%20Ceasefire%20and%20Peace%20Agreements.pdf>.

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