Global Justice Center
Human Rights Through the Rule of Law

Global Justice Center Legal Update:

US Position on Imposing Abortion Restrictions on Victims of War Rape is Weakening

> **GJC President Janet Benshoof:** "The "no abortion" policy, attached to all US humanitarian aid for victims of rape in armed conflicts, is both deadly and illegal. Recent actions by the Administration on this ban make clear that now is the time to pressure President Obama to bring the U.S. in compliance with the Geneva Conventions by lifting this ban."

Rape used as a weapon of war against girls and women is a routine feature of armed conflicts globally. All victims of armed conflict, classified the "wounded and sick" under the Geneva Conventions, have the absolute right to non-discriminatory medical care. Yet, one group of victims, those girls and women who become pregnant from war rape, are singled out for incomplete medical care as they are routinely and deliberately denied the option of abortion in humanitarian medical settings. *This omission of abortion from the medical services given rape victims is due in large part to the blanket abortion restrictions the US places on all its foreign assistance, including humanitarian aid.* (See GJC brief).

The Global Justice Center has made it a priority to challenge the abortion prohibitions on US foreign aid as violating the rights of girls and women, raped and impregnated in armed conflict, under the Geneva Conventions. The current USAID administrative policy, formally adopted in 2008 (AAPD 08-01), contains no exception for abortions for rape or to save the life of the rape victim, and is, at least on paper, more restrictive than federal statutory requirements (including the Helms Amendment to the Foreign Assistance Act, which first placed abortion restrictions on foreign aid in 1973).

As a first step the GJC filed a shadow report challenging the US restrictions with the Human Rights Council (HRC) for the 2010 Universal Periodic Review (UPR) of the US. Citing this GJC report, Norway questioned the US at the UPR and became the first country to formally recommend that the US *"remov[e] blanket abortion restrictions on humanitarian aid covering medical care given women and girls who are raped and impregnated in situations of armed conflict"* (Recommendation 228).

The US response to Norway's recommendation on March 18, 2011, was that the US could not remove the blanket abortion restrictions on humanitarian aid because of "currently applicable restrictions." We interpret this cryptic, yet revealing response, as a positive movement on the part of the US which allows for lifting the restrictions via a Presidential Executive Order. We believe this State Department response, the first "crack" in the Helms restrictions in some 37 years, is a subtle but clear milestone in our global campaign to ensure victims of rape in conflict receive full medical care, including abortions.

It is now up to President Obama to issue an Executive Order – similar to the Executive Order relating to torture and Guantanamo – lifting the US restrictions against abortion tied to all humanitarian aid.

The Association of the Bar of the City of New York has joined this campaign and sent a letter to President Obama on March 5 urging him to "issue an executive order rescinding all restrictions on U.S. funds humanitarian assistance that would prevent abortion as medically indicated from being provided in situations of armed conflict." [Below is a more detailed analysis of the US response to UPR Recommendation 228 by Norway.]

GJC Analysis: The US Response to the March 18, 2011 UPR Recommendation Indicates Support for an Executive Order Lifting the US Abortion Ban on Humanitarian Aid for Victims of Armed Conflict

1. The response admits that blanket abortion prohibitions attach to all US humanitarian aid for conflict victims and to the governments of the 22 countries currently in armed conflict.

2. The response is unlike all of the other responses from the US in that it "rejects" the recommendation but refrains from challenging its legal basis (that girls and women raped in armed conflict have rights under IHL to non-discriminatory medical care). The US response to Recommendation 228 fails to mention the Geneva Conventions, in stark contrast to the more expansive discussions in other recommendations, such as those involving torture and Guantanamo, in which the US discusses its obligations under the Geneva Conventions and defends its stance in line with the law. In contrast, the US is simply silent in response to Recommendation 228 and does not defend its position.

3. The language "due to currently applicable restrictions" is highly revealing. First, the fact that the words "due to federal statutory law" were not used is instructive. This can be read as an admission that the restrictions on abortions in instances of rape and incest are administrative rather than statutory, which is precisely the argument that the NYC Bar Association put forward in its letter on this issue to President Obama. The restrictions are not actually rooted in the statutory language of Helms and other related statutes; they are the result of USAID policies implemented by the Bush Administration. Therefore, the US response to Recommendation 228, decidedly worded without reference to any statute, allows President Obama the opportunity to change the abortion restrictions through an Executive Order. Had the US response cited statutory authority, it would indicate that Congress needs to pass legislation in order to lift the restrictions. It is notable that the words "currently applicable" are not used *anywhere else* in the US UPR response. This terminology, as opposed to "applicable restrictions," indicates fluidity in the situation. A change in policy is now potentially in play.

4. The press comment on the US UPR by Harold Koh (Legal Adviser, State Department, and the official charged with issuing the response) states that the Obama Administration intends to seek Senate advice and consent to ratify the 1977 Additional Protocol II (AP II) to the Geneva Conventions. AP II is one of the specific sources of law we have

supporting our position, and it actually enhances States' positive obligations to "wounded and sick" civilians in situations of internal armed conflict. If ratified, AP II would be an additional source of international law that the US is party to that says that its policy goes against the mandates of international law. Moreover, provisions on care for "wounded and sick" in Protocol II are *already considered binding by the US as customary international law*.

5. The US response to Recommendation 228 also contrasts with its recommendation relating to the ICESCR (International Covenant for Economic Social and Cultural Rights), in which it distinguishes its legal obligations under ICESCR (which it has not accepted) from obligations under human rights treaties it has accepted. This is relevant because the US has accepted the Convention against Torture and the International Covenant on Civil and Political Rights – both of which individually lend legal support for our position by providing specifics on point precedents.

    a. ICCPR - In *KL v. Peru*, the Human Rights Committee concluded that the denial of an abortion to a woman whose life was endangered by a pregnancy is a violation of Article 7 of the ICCPR (prohibiting torture and cruel and inhuman treatment) (Human Rights Committee, KL. v. Peru, ¶ 6.6, U.N. Doc. CCPR/C/85/1153/2003 (Nov. 22, 2005)). The United States reservation to Article 7 of the ICCPR (if valid at all) would appear not to be operative in this case. The reservation limits US obligations under Article 7 "to the extent 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and-or Fourteenth Amendments to the Constitution of the United States." There exists authority from the Third Circuit that the denial of abortions for women in prison violates the 8th Amendment.

    b. Convention on Torture – The Committee on Torture, in response to Nicaragua's 2009 State Report, found that torture and cruel, inhuman and degrading treatment can encompass the denial of abortions to rape victims.

6. The US could argue that, despite all IHL treaties to the contrary, common Article 3 obligations for medical care for victims are solely, not just "primarily," the responsibility of the countries in conflict. However, the reach of the US restrictions to the foreign governments of the countries in conflict (~ 22) effectively precludes these countries from fulfilling their primary obligations under common Article 3 to ensure that victims of war rape in their territory receive medical care without discrimination, including abortions. This also impacts the way government funds from other donor countries are used. Of course, the countries in conflict could segregate US funds, but if they cannot hold their own soldiers accountable, they surely cannot account for foreign aid streams.