

WHAT IS THE LAW?

ARMED CONFLICT AND ABORTION SERVICES

Women's bodies have become part of the modern battlefield, where use of rape as a weapon of war shatters lives and decimates communities. Women and girls face life-threatening pregnancies arising from serious physical injury, risk of suicide, and the incapability of many young girls' bodies to safely carry a baby to term.¹

As a legal matter, armed conflict is a specific type of humanitarian setting, governed by a specific area of law—international humanitarian law (IHL). IHL ensures these victims receive the medical care they need by protecting them with rights. In cases of pregnancy, these rights require the option of abortion services. Indeed, abortion has been recognized as part of IHL's protections by the UK, France, the Netherlands, the European Union, the UN Secretary-General, the UN Security Council in Resolutions 2106 and 2122, and the UN Global Study on the Implementation of Security Council Resolution 1325.²

As a matter of practice, many humanitarian donors and actors use a “needs-based” model—administering medical care to meet patients' needs without regard to the legal framework. In light of reinvigorated global assaults on reproductive health, it is essential that needs-based approaches are bolstered by the strong rights-based protections embedded in IHL. Humanitarian actors, advocates and donors must ensure that their work and policies are grounded in victims' rights so that victims' needs are comprehensively met.

This factsheet outlines IHL's various provisions that protect abortion services for female victims of conflict.

IHL RIGHTS PROTECTING PREGNANT PERSONS

Right to all necessary medical care based solely on patient's condition and without adverse distinction based on sex

- As “wounded and sick” in armed conflict, pregnant women and girls must be provided “the medical care and attention required by their condition.”³
- In all cases, medical treatment should be as favorable to women as that granted to men.⁴ 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.⁵
- IHL does not spell out the types of treatments that should be given, but only requires that they be those based on the condition of the patient.

In the case of pregnant women and girls in armed conflict, necessary medical care includes the provision of abortion services. For example, the condition of a man raped by a stick requires surgery or some other procedure in the man's case, and the condition of a woman raped and impregnated by a penis **requires the option of an abortion.**

Right to be free from torture and other cruel, inhuman and degrading treatment

- IHL prohibits “cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”⁸
- “Torture” is defined as “severe physical or mental pain or suffering” on the basis of “discrimination of any kind.”⁹ The definition of torture is intentionally ambiguous so as to allow for the inclusion of new acts, treatments and interpretations.¹⁰

The denial of abortion services results in extended and intensified physical and mental suffering. Pregnant girls and women in conflict situations suffer traumas ranging from the dangers of pregnancy during war to social and familial stigmatization. In fact, **denial of abortion services has been explicitly determined to cause serious mental and physical suffering constituting cruel and inhuman treatment** in certain contexts.¹¹

OTHER PROTECTIONS BENEFITTING PREGNANT PERSONS

Doctors and other medical personnel are protected under IHL

- Humanitarian aid providers, including doctors and other medical personnel, that treat victims of armed conflict have immunity from prosecution and other forms of punishment when acting in accord with IHL and medical ethics.¹²
- Doctors may not be compelled to perform acts or to carry out, or refrain from the care needed by a patient's condition.¹³

These protections mean that **donor restrictions that prevent a doctor from providing abortion services violate IHL**. Humanitarian aid providers should be aware of these protections when negotiating their funding and operational contracts. This is especially critical in the shadow of global restrictions on reproductive health and rights—in particular, the US's Helms Amendment and the Global Gag Rule.

IHL and the Role of National Law

- IHL's protections and obligations apply specifically to conflict situations and cannot be derogated from. This means domestic laws cannot be used to excuse non-compliance with IHL.

Domestic abortion laws often contradict international law and standards. Nevertheless, because IHL is the governing law in conflict situations, restrictive national abortion laws that conflict with IHL's protections do not apply to cases concerning the wounded and sick. Humanitarian actors should be aware of all relevant laws, identify those that can serve to support their arguments and work on reproductive health, and advise on changes to domestic laws that fall short of international standards. This information should also be communicated by humanitarian donors to their affiliates and grantees.

1. Dr. H. Liebling et al., *Women and Girls Bearing Children through Rape in Goma, Eastern Congo: Stigma, Health and Justice Responses* (2012); see Harv. School of Pub. Health & Physicians for Human Rights, *The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan* (2004), at 20.

2. UK DFID, *SAFE & UNSAFE ABORTION* (2014), at 9; see Written parl. answers of F. Timmermans, Min. of For. Affairs, to questions regarding safe abortion for war rape victims (8 Mar. 2013); UNSC, U.N. Doc. S/PV.6984 (24 June 2013), at 48 (statement by Neth.); UNSC, U.N. Doc. S/PV.7160 (25 Apr. 2014), at 15 (statement by Fr.); EU Commission, *Letter from F. Mogherini and C. Stylianides in response to request of 39 MEPs for Commission to evaluate policy on abortions for victims of war rape* (11 Sept. 2015); R. Coomaraswamy, *Preventing Conflict, Transforming Justice, Securing the Peace—A Global Study of the Implementation of UNSCR 1325* (2015), at 77.

3. 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.

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

5. 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.

6. Letter from Former ICRC Legal Director Louise Doswald-Beck to US President Barack Obama (10 Apr. 2013).

7. 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.

8. Common Article 3 to the Geneva Conventions.

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

10. Int'l Committee of the Red Cross, 1958 Commentaries to Geneva Convention IV, art. 3, at 38.

11. 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).

12. 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.

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

14. Common Article 1 to the Geneva Conventions; Int'l Committee of the Red Cross, *Customary International Humanitarian Law Database*, r. 26 and 110. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 158 (Jul. 9); ICRC, *Non-discrimination and Armed Conflict*, INT'L REV. RED CROSS 841 (Mar. 2001); ICRC, *Prof. Stand. for Protection Work: Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Sit. of Violence* (Oct. 2009). See *Nicaragua v. United States*, Merits, Judgment, 1986 I.C.J. 14, ¶ 220 (Jun. 27),.

15. Int'l Committee the Red Cross, *Professional Standards for Protection Work: Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence* (2013), at 63.