

Legal Summary:

EU Humanitarian Aid and International Obligations

Together, Member States and the European Commission are the world's leading providers of humanitarian aid, for both conflict and non-conflict emergencies, with over €1.35 billion contributed in 2013. Although the EU makes a positive difference for millions on the ground, the EU's restrictive policy on abortion and the Geneva Conventions violates the inalienable rights of women and girls impregnated by war rape to all necessary medical care, including safe abortion services. As set out in this factsheet, this policy breaches EU Law, the Geneva Conventions, and UN Security Council resolutions.

The Rights of Girls and Women Raped in Armed Conflict to Abortions under International Law

The Geneva Conventions, their Additional Protocols, and customary international law provide protections to those considered the “wounded and sick” in armed conflict. These protections are absolute, non-derogable, and universal, irrespective of national laws.¹

Importantly, the principle of “no adverse distinction” underlies each of the following rights.² The concept of no adverse distinction means that, in certain circumstances and depending on the special needs of certain groups of victims, preferential treatment may be granted to them.

Right to all necessary medical care based on their condition and without adverse distinction based on sex

• As “wounded and sick” in armed conflict, women and girls impregnated by war rape must be provided, “to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition,” with no distinction made “on any grounds other than medical ones.”³

• IHL does not spell out the types of treatments that should be given, but only requires that they be based on the condition of the patient.⁴

• The concept of no adverse distinction means that, in certain circumstances and depending on the special needs of certain groups of victims, preferential treatment may be granted to them.

• Thus, embedded in this right is the fact that the outcome of medical treatment, in all cases, should be as favorable to women as that granted to men.⁵

In the case of women and girls raped and impregnated in armed conflict, necessary medical care includes the provision of abortion services. As rape is perpetrated against women and men in different ways and by different methods, the injuries suffered necessitate different medical care. In the case of man raped by a stick, versus a women raped and impregnated by a penis, while the “medical care and attention required by the condition” may require surgery or some other procedure in the man’s case, the pregnant woman may require an abortion.

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

<ul style="list-style-type: none"> • Common Article 3 prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment.”⁶ • The term torture is left intentionally 	<p>ambiguous so as to leave it open to interpretation and to incorporate recent developments in the law of torture.⁷</p> <ul style="list-style-type: none"> • “Torture” is the infliction of “severe physical or mental pain or suffering on the basis of “discrimination of any kind.”⁸
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The denial of safe abortion services to war rape victims results in extended and intensified physical and psychological suffering.⁹ International and regional human rights bodies have increasingly recognized that the denial of abortion services can cause tremendous and lasting physical and emotional suffering for rape survivors, breaching prohibitions on torture and cruel treatment.¹⁰

Right to be treated by doctors and other medical personnel protected under IHL

<ul style="list-style-type: none"> • Doctors and other medical personnel treating victims of armed conflict have immunity from prosecution and other forms of punishment when acting in accord with IHL and medical ethics.¹¹ Humanitarian aid providers 	<p>enjoy similar protections when caring for the wounded and sick.¹²</p> <ul style="list-style-type: none"> • Doctors may not be compelled to perform acts or to carry out, or refrain from, the care needed by a patient’s condition.¹³
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This means that medical personnel must act in accord with the rights of the “wounded and sick” to all necessary medical care and to be free from torture. Therefore, medical personnel and humanitarian aid providers must ensure that impregnated victims of war rape have access to abortion services. Further, restrictions which prevent a doctor from providing abortion services for these victims violate IHL’s prohibition not to compel doctors.

Legal Obligations to Ensure Abortion Services for War Rape Victims

European Union Law

<ul style="list-style-type: none">• Article 214 TFEU specifies that, “humanitarian aid operations shall be conducted in compliance with the principles of international law”.¹⁴• Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid mandates that “civilian operations to protect the victims of fighting... are governed by international humanitarian law and should accordingly be a part of humanitarian action”.¹⁵• The EU guidelines on the promotion of compliance with international humanitarian law requires that humanitarian action must identify, without delay, situations where IHL applies and presume that the	<p>Commission and other EU entities are themselves in compliance with IHL in their operations.¹⁶</p> <ul style="list-style-type: none">• The CJEU has found that EU institutions must comply with customary international law in the exercise of their powers.¹⁷ The provisions of IHL related to the care for the wounded and sick are considered to be customary international law, and accordingly¹⁸ EU institutions—including the Commission—must comply with these mandates in their provision of humanitarian aid.
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*It is clear that IHL is incorporated into EU law. Accordingly, EU institutions must comply with IHL when relevant to their actions. For female war rape victims, this requires that **EU funds must guarantee the provision of safe abortions services in line with the rights and medical needs of the wounded and sick under IHL.***

International Humanitarian Law

<ul style="list-style-type: none">• Where IHL applies, there is a duty to “respect” and “ensure respect”, for the requirements of IHL, in all circumstances.¹⁹ This includes engagement with conflict situations by providing humanitarian aid.²⁰	<ul style="list-style-type: none">• This obligation is universal, absolute, and non-derogable, and domestic laws cannot be used to excuse non-compliance with IHL.²¹
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In order to “respect” and “ensure respect” for IHL, humanitarian actors providing medical care must ensure safe abortion services in accord with the rights of the “wounded and sick” under IHL.

United Nations Security Council Resolutions

<ul style="list-style-type: none">• UN Security Council Resolutions 2106 and 2122 make clear that women and girls impregnated by war rape must be provided access to safe abortion services.²²• Resolution 2106 calls for the provision of “non-discriminatory and comprehensive health services, including sexual and reproductive health . . . services for survivors of sexual violence.”²³• Resolution 2122 calls for “access to the full	<p>range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination.”²⁴</p> <p>The Secretary General’s 2014 Report on Women, Peace and Security to the Security Council clarifies that this language is intended to cover abortion services.²⁵</p> <ul style="list-style-type: none">• UN Member States are bound by the UN Charter and must therefore accept and carry out the decisions of the UN Security Council.²⁶
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These resolutions make clear that not only are abortions a part of the full range of medical care which must be made available to impregnated war rape victims under international law, but also that UN Member States (and therefore all EU Member States) are obliged to ensure the provision of safe abortion services when providing medical care in humanitarian settings.

Endnotes

¹ICRC, *Non-Discrimination and Armed Conflict* (March 2001), <http://bit.ly/1uwphUF>.

²*Id.*

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

⁴Letter from Former ICRC Legal Director Louise Doswald-Beck to US President Barack Obama, Apr. 10 2013.

⁵Geneva Convention III, art. 14; ICRC, *Customary International Law Database*, Rule 110.

⁶Common Article 3 to the Geneva Conventions of 1949.

⁷ICRC, Commentaries to Geneva Convention IV, art. 3, p. 38.

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

⁹Harvard. Hum. Ini. & Oxfam Int’l, *Now the World is Without Me: An Investigation of Sexual Violence in Eastern DRC* (Apr. 2010).

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

¹¹ICRC, Commentary to Additional Protocol I to the Geneva Conventions, art. 16, ¶665.

¹²Additional Protocol I, art. 16.

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

¹⁴Treaty on the Functioning of the European Union, art. 214.

¹⁵Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid – OJ L 163, 02/07/996 P. 0001-0006, preamble.

¹⁶EU Guidelines on Promoting Compliance with International Law, Official Journal C 303 of 15/12/2009, ¶¶ 1 and 15(a).

¹⁷Case C-286/90 *Anklagemyndigheden v. Peter Michael Poulsen and Diva Nav. Corp.* (1992), ¶ 9; Case T-115/94 *Opel Austria GmbH v. Council* (1997), ¶ 90; Case C-162/96, *A. Racke GmbH Co. v. Hauptzollamt Mainz* (1998), ¶¶ 45-46.

¹⁸See generally, ICRC, *Customary International Humanitarian Law Database*, Rules 87, 88, 90, 93, 110.

¹⁹Common Article 1 to the Geneva Conventions.

²⁰See *Nicaragua v. United States*, Merits, Judgment, I.C.J. Reports 1986, ¶ 220.

²¹ICRC CIHL, Rule 26 and 110. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ¶ 158, 2004 I.C.J. 136 (Jul. 9); ICRC, *Non-discrimination and Armed Conflict*, INT’L REV. RED CROSS 841 (March 2001); ICRC, *Prof. Stand. For Protection Work: Carried Out by Humanitarian and Human Rights Actions in Armed Conflict and Other Sit. of Violence*, (Oct. 2009).

²²S.C. Res. 2106, ¶ 19, U.N. Doc S/RES/2106 (Jun. 24, 2013); S.C Res 2122, recitals, U.N. Doc S/RES/2122 (Oct. 18, 2013).

²³S.C. Res. 2106, ¶19, U.N. Doc S/RES/2106 (Jun. 24, 2013).

²⁴UN Security Council Resolution 2122, UN Doc S/RES/2122, Preamble (2013).

²⁵Secretary-General, *Report on women peace and security*, ¶ 72(a), delivered to the Security Council, U.N. Doc. S/2013/525 (Sept. 4, 2013).

²⁶U.N. Charter, art. 25.

²⁷TFEU, art. 263.

²⁸Case C-162/96, *A. Racke GmbH Co. v. Hauptzollamt Mainz* (1998), ¶¶ 45-46; TFEU, art. 214; TEU, art. 3(5).

²⁹Treaty on European Union, art. 19(3); Dan Vataman, *The CJEU after the reform established by the Lisbon Treaty* at 4-9 (2014).

³⁰Curia, General Presentation of CJEU, <http://bit.ly/1ppabu7>.