
MEMORANDUM

TO: INTERESTED PARTNERS CONCERNED ABOUT THE U.S. RESPONSE TO UPR
RECOMMENDATIONS ON U.S. ABORTION RESTRICTIONS

FROM: JANET BENSHOOF

SUBJECT: THE CONFLICT BETWEEN THE U.S. ABORTION RESTRICTIONS ON FOREIGN ASSISTANCE
AND U.S. OBLIGATIONS TO WAR VICTIMS UNDER COMMON ARTICLE 3 OF THE GENEVA
CONVENTIONS

DATE: JULY 22, 2015

- **U.S. Domestic Obligations Under Common Article 3 of the Geneva Conventions Conflict with U.S. Abortion Restrictions on Humanitarian Aid for Female War Rape Victims**

Female war rape victims, civilians and servicewomen are persons “wounded and sick in armed conflict” with inalienable and universal rights to be provided comprehensive medical care based solely on their condition, in all circumstances, (irrespective of national law) and with no adverse distinction based on sex (meaning that the outcome of medical care for a female victim of war rape “can be no less favorable” than for a male victim of war rape).¹ Further, the denial of abortion services to female victims of war rape in humanitarian medical facilities can constitute an independent breach of the prohibition on torture and inhumane treatment under common Article 3 of the Geneva Conventions.²

The fundamental humanitarian law issue raised by the U.S. abortion ban, is *not that there is a “right to abortion”* (or any other specific treatment) under the Geneva Conventions, *but rather that the right of female war rape victims to have access to all the medical care required by their condition, without adverse discrimination on the basis of sex, prohibits the omission of life and health saving abortion services.*

There is a conflict between binding U.S. domestic law ensuring that persons “wounded and sick in armed conflict” are provided non-discriminatory medical care in accord with common Article 3 of the Geneva Conventions and the enforcement of congressional abortion restrictions on foreign assistance attached to U.S. humanitarian aid for female war rape victims. This conflict is made all the more clear by the historic promulgation of the first authoritative Law of War Manual by the U.S. Department of Defense (“DOD”) in June 2015.³ The Law of War Manual is a single source, up to date compilation of international treaty and customary law obligations that the U.S. accepts as binding domestic law.⁴

- **The Geneva Conventions are Binding U.S. Law**

Starting with the U.S. ratification of the 1949 Geneva Conventions in 1955, there has been an unbroken line of legal authority affirming common Article 3, including the medical treatment rights of war victims, as binding U.S. domestic law.⁵ The expanded protections for persons “wounded and sick” in armed conflict in the 1977 Additional Protocols to the Geneva Conventions are also accepted as binding by the U.S. as customary international law (“CIL”).⁶

U.S. law implementing common Article 3 of the Geneva Conventions is found in federal statutes, such as the Military Commissions Act; Supreme Court decisions; Executive Orders of Presidents; Department of Defense (“DoD”) Directives; military manuals; and operational directives.

The recent June 2015, DOD Law of War Manual is the single most authoritative legal authority for U.S. domestic law on the laws of war, including the rights of war victims. The Manual adopts virtually the same language on the duty of the U.S. to “respect and protect” the “wounded and sick” as Additional Protocol I,⁷ which details the positive duties of states to ensure the medical rights of war victims, including the prohibition of adverse distinction based on sex in medical care for the wounded and sick.⁸

This Manual is unequivocal as to the binding obligation of the U.S. under common Article 1 to “respect and ensure respect” for the Geneva Conventions in all circumstances.⁹ *U.S. obligations to uphold war victims’ medical treatment rights under common Article 3 and CIL apply equally to the U.S. as a party to a conflict (“respect”) or in its role as a third party state funding humanitarian medical care for victims of armed conflict (“ensure respect”).*¹⁰

The U.S. commitment to upholding the laws of war is reflected in President Obama’s 2009 Executive Order 13491, Ensuring Lawful Interrogations: “*to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed,*”¹¹ and Executive Order 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities: “*to ensure compliance with all applicable laws governing the conditions of such confinement, including common Article 3 of the Geneva Conventions.*”¹²

The U.S. Supreme Court in *Hamdan v. Rumsfeld* in 2006 affirmed the status of common Article 3 of the Geneva Conventions as binding domestic law, acknowledging that, *although its “requirements are general ones,” they are “requirements . . . nonetheless.”*¹³

- **The Duty of the U.S. to Construe the Abortion Ban in Conformity with the Geneva Conventions**

The conflict between Congressional abortion restrictions on foreign assistance imposed on female war rape victims and U.S. law on common Article 3 of the Geneva Conventions *should not be happening*. The very existence of this conflict violates the Supreme Court’s maxim in *Murray v. Schooner Charming Betsy*, which prohibits an act of Congress “*to be construed*” in ways that international law.¹⁴ The language U.S. abortion restrictions in Congressional appropriations can easily be construed to uphold the rights of female war rape victims to non-discriminatory medical care, including abortions, under the Geneva Conventions and President Obama has the duty to do so.

- **The U.S. is Currently Formulating its Position on the Geneva Conventions and Abortion**

The U.S. is currently formulating a response to country recommendations that it lift the U.S. abortion restrictions on foreign assistance for women raped in war. These

recommendations are part of the Universal Periodic Review of the U.S. by the Human Rights Council on May 11, 2015. This UN process examines country violations of their obligations under international human rights and humanitarian *laws*, not country *policies*.¹⁵ Hence, the U.S. response to the Human Right Council must address the validity of imposing abortion prohibitions on U.S. aid for female war rape victims, given its binding obligations under IHL as set forth in the DOD Law of War Manual and elsewhere. The U.S. is the largest humanitarian donor globally and the U.S. abortion ban is the major reason girls and women are routinely denied abortions in humanitarian aid facilities in war zones.

- **Importance of This Issue for Women War Victims in Contemporary Conflicts**

The context and face of war is radically different today from when the Geneva Conventions were passed in 1949, and even from 1973 when the first U.S. abortion ban on foreign aid was passed. The laws of war were based on a model of male combatants fighting male “enemy” combatants with conventional weapons, with injuries treated in military field hospitals. A century ago, civilians accounted for less than 5% of wartime casualties, while in today’s armed conflicts, up to 90% of casualties are civilians, mainly women and children.¹⁶ Girls and women subjected to mass rape and forced pregnancy as tactics of warfare suffer *sui generis* mutilating injuries and death.

Currently, medical care for women and children war victims largely takes place in humanitarian facilities and civilian hospitals with little experience in according female war victims their special medical protection rights under the Geneva Conventions. *For IHL to remain the appropriate legal framework in situations of armed conflict, it must take into account the changing nature of warfare, including the specific needs of girls and women raped in war.*

- **The U.S. and the Montreux Document**

The “hands off” policy with regard to State and USAID funding for humanitarian entities working in war zones stands in sharp contrast to the detailed U.S. regulations designed to ensure U.S. funded private security contractors working in war zones comply with IHL.¹⁷

The U.S. is one of 58 countries who have signed the Montreux Document, outlining best practices to ensure private security companies working in situations of armed conflict do not violate international humanitarian law.¹⁸ Although the Document is not a binding international agreement, the U.S. acknowledges that the IHL it recites is binding on the U.S.¹⁹ For example, the Document affirms the obligations of contracting states “to ensure respect” for international humanitarian law, to implement its obligation domestically, and that contracting states are accountable for IHL violations of their private contractors.²⁰

Subsequent to signing the Document in 2008, DOD, with the full input of USAID,²¹ implemented new regulations making the duties of private contractors to comply with IHL explicit.²² Further, these regulations created new contractual requirements, including IHL training as a prerequisite qualification for DOD contracts.²³

The failure of the U.S. to impose these same duties on U.S. recipients of humanitarian aid working in war zones is inexplicable, given that U.S. accountability for the IHL violations of U.S. funded humanitarian aid organizations is clear.²⁴

- **The UPR is an Important Opportunity for this Administration to Affirm its Support for Non-Discrimination under the Laws of War**

The United States response to UPR recommendations on U.S. abortion restrictions on foreign assistance is a unique opportunity for the legacy of the Obama Administration. Action by the President restoring rape, life and incest exceptions and affirming U.S. support for the rights of women raped in armed conflict under common Article 3 of the Geneva Conventions will establish the Obama Administration as a standard bearer for equality under the laws of war. Most importantly, strong Presidential action will save the lives of women and girls who risk death and suffer lifelong terror due to being impregnated by mass rape in war.

¹ The four Geneva Conventions of 1949 govern the treatment of certain groups during armed conflict. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter Third Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; collectively, the “1949 Geneva Conventions.” Three articles are common to all four Conventions: common Article 1, common Article 2 and common Article 3; Convention relative to the Treatment of Prisoners of War, Jul. 27, 1929, Geneva, art. 16 ; According to the ICRC Commentary to the Third Geneva Convention, Article 16 (“The wording [in Art. 16] excludes differentiation only when it is of an adverse nature. Absolute equality might easily become injustice if applied without regard to considerations such as state of health, age, sex, rank or professional aptitude. The principle of equality in the Convention must therefore be understood in this way which admits such differentiation.”) [hereinafter ICRC commentary]; Office of General Counsel, Department of Defense, Law of War Manual, §7.5 (June 2015) [hereinafter DoD, Law of War Manual]; *see also* Letter from Louise Doswald-Beck, Professor of International Law, to President Barack Obama (April 10, 2013), [available at http://www.globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=321&cf_id=34](http://www.globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=321&cf_id=34); Customary International Humanitarian Law, Rule 88 Non-Discrimination, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88 [hereinafter Rule 88 Non-Discrimination].

² 1949 Geneva Conventions, *supra* note 1 ; *see* Letter from Department for International Development, to UK humanitarian aid grantees (Jun. 27, 2014) (on file with the Global Justice Center). This letter introduces the new UK policy on safe and unsafe abortion in developing countries, noting that “In situations of armed conflict or occupation where denial of abortion would threaten the woman’s or girl’s life or cause unbearable suffering, international humanitarian law principles may justify offering an abortion rather than perpetuating what amounts to inhuman or degrading treatment.” DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, SAFE AND UNSAFE ABORTION - THE UK’S POLICY ON SAFE AND UNSAFE ABORTION IN DEVELOPING COUNTRIES (a DfID Strategic Document), June 2014, at 9 ; Letter from Louise Doswald-Beck, *supra* note 1; U.S. Delegation to U.N. General Assembly Third Committee, *Statement Clarifying Legal Points of Importance*, 2004 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 331.

³ DoD, Law of War Manual, *supra* note 1; Press Release, U.S. Department of Defense, DoD Announces New Law of War Manual (June 12, 2012), [available at http://www.defense.gov/Releases/Release.aspx?ReleaseID=17335](http://www.defense.gov/Releases/Release.aspx?ReleaseID=17335).

⁴ DoD, Law of War Manual, *supra* note 1.

⁵Derek Jinks, *Is the President Bound by the Geneva Convention?*, Public Law and Legal Theory Working Paper No. 61, The Law School of the University of Chicago (March 2004), 19-20 (citing Geneva Conventions for the Protection of War Victims : Hearing on Executives, D, E, F and G Before the Senate Comm. On Foreign Relations, 84th Cong., 1st Sess. 24 (1955) (statement of Richard R. Baxter, Office of the General Counsel, Department of Defense ; see also Mary McLeod, Acting Legal Adviser, Department of State, *Opening Statement at 53rd Session of the U.N. Committee Against Torture, Nov. 3 – 28, 2014*, Nov. 12, 2014 (noting that “the law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims,”); DoD, Law of War Manual, *supra* note 1, at §8.1.4.1 (DoD policy has explicitly incorporated the standards in Common Article 3 as minimum standards).

⁶ DoD Law of War Manual, 1.10.2.2 (“The customary law of war is part of U.S. law insofar as it is not inconsistent with any treaty to which the United States is a Party, or a controlling executive or legislative act”); see also *id.*, at 8.1.4.1 (« DoD has explicitly incorporated the standards in common Article 3 as minimum standards » and affirms that the additional protections of the wounded and sick in the Protocols are enforced by U.S. as CIL).

⁷ DoD, Law of War Manual, *supra* note 1, at § 7.3.3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 302 [hereinafter Additional Protocol I].

⁸ ICRC Commentary, *supra* note 1 ; See also Rule 88 Non-Discrimination, *supra* note 1 ; DoD, Law of War Manual, *supra* note 1, at § 7.5.

⁹ DoD Law of War Manual, *supra* note 1, at 1.2.1. (Parties to the 1949 Geneva Conventions undertake to respect and ensure respect for the conventions in all circumstances).

¹⁰ See International Court of Justice Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 16 (June 27 1986) (holding that aid of third party states must be in compliance with common Article 3); see also DoD, Law of War Manual, *supra* note 1 (citing *Nicar. v. U.S.* approvingly throughout).

¹¹ Exec. Order No. 13491, 74 FR 4893 (2009).

¹² Exec. Order No. 13492, 74 FR 4897 (2009).

¹³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006) ; See also Steven Solomon & David Kaye, *The International Law of Hamdan v. Rumsfeld*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 200 (A. MacDonald ed., 2005) (“It would, in theory, follow that the President has a constitutional obligation to faithfully execute common Article 3 as now interpreted by the Hamdan Court, irrespective of implementing legislation.”).

¹⁴ See *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (cited approvingly in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ; see also DoD Law of War Manual, 1.3.2.2. («In addition to treaties, domestic statutes have also been construed not to violate international law, including the law of war, if any other construction remains possible, » citing *Charming Betsy*).

¹⁵ Global Justice Center, *Submission to the UN Universal Periodic Review : Twenty-Second Sess. Of the UPR Working Group of the Human Rights Council* (Oct. – Nov. 2015).

¹⁶ The UN Secretary-General has addressed this issue of rising civilian casualties in war: “While during the First World War, only 5 per cent of all casualties were civilians, during the 1990s civilians accounted for up to 90 per cent of casualties. A recent study estimated that 3.2 million deaths occurred in internal armed conflicts from 1990 to 1995.” *Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000)*, 2002, ¶ 3, available at <http://www.un.org/womenwatch/daw/public/eWPS.pdf>.

¹⁷ 48 CFR 252.225-7040; 48 CFR 52.225-26 ; *Montreux Document Questionnaire*, State Dep’t (December 2012), <http://www.state.gov/documents/organization/226402.pdf>.

¹⁸ Federal Department of Foreign Affairs, *Participating States of the Montreux Document*, FDFA (Aug. 4, 2015), <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>.

¹⁹ Program Support, Office of the Deputy Assistant Secretary of Defense, *Private Security Companies (PSC)* (Last updated : April 15, 2015), <http://www.acq.osd.mil/log/ps/psc.html>; *Montreux Document*, U.N. GASC, 63rd Sess., U.N. Doc. A/63/467, at 7-8 (Oct. 6, 2008).

²⁰ *Montreux Document*, U.N. GASC, 63rd Sess., U.N. Doc. A/63/467, at 7-8 (Oct. 6, 2008)

²¹ See Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations or Other Significant Military Operations Rule, 76 Fed. Reg. 49,650 at 49,653 (August 11, 2011) (to be codified at 32 C.F.R. pt. 159).

²² 48 CFR 252.225-7040; 48 CFR 52.225-26.

²³ *Id.*

²⁴ DoD Law of War Manual, *supra* note 1, at § 10.3.5; *see also* GC art. 29 (“The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.”).