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Protecting safe abortion in humanitarian settings: overcoming legal and policy barriers

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Abstract: *Women and girls are increasingly the direct and targeted victims of armed conflict and studies show that they are disproportionately and differentially affected. However, humanitarian laws, policies, and protocols have yet to be meaningfully interpreted and adapted to respond to their specific needs, including to sexual and reproductive health services and rights. In particular, safe abortion services are routinely omitted from sexual and reproductive health services in humanitarian settings for a variety of reasons, including improper deference to national law, the disproportionate influence of restrictive funding policies, and the failure to treat abortion as medical care. However, properly construed, abortion services fall within the purview of the universal and non-derogable protections granted under international humanitarian and human rights law. This commentary considers the protections of international humanitarian law and explains how abortion services fall within a category of protected medical care. It then outlines contemporary challenges affecting the realisation of these rights. Finally, it proposes a unification of current approaches through the use of international humanitarian law to ensure comprehensive care for those affected by armed conflict.* DOI: 10.1080/09688080.2017.1400361

Keywords: abortion, international humanitarian law, non-discrimination, conflict, sexual violence

Introduction

Women and girls are increasingly the direct and targeted victims of armed conflict and studies show that they are disproportionately and differentially affected.¹ Furthermore, sexual violence in today's armed conflicts is systematically used against civilians to demoralise, destroy, terrorise, and even change the ethnic compositions of entire communities. These shifts in the face of war require effective responses in humanitarian protocols, laws, and practices. Nowhere is this need more apparent than in the need to mainstream and systemise sexual and reproductive health (SRH) services in conflict-related humanitarian settings.

While SRH services in humanitarian settings, including in response to sexual violence, encapsulate a range of care, from HIV prophylaxis to wound care and STD prevention, one service is worth singling out – abortion. Today girls and

women, including those who become pregnant from rape, in conflict settings are routinely denied abortions with devastating consequences. While there are a multitude of reasons why safe abortion services are not currently available in the majority of humanitarian settings (including abortion stigma, attitudes amongst humanitarian actors, and restrictive donor policies), a frequently cited reason is restrictive abortion laws.² However, relegating abortion services to the confines of national laws fails to take into account the full framework of laws governing the provision of care to those affected by armed conflict, such as international humanitarian and human rights laws.

The availability of abortion services is also hampered by the fact that many humanitarian organisations do not consider abortion to fit into the realm of the care that they administer.² This view is slowly changing due to the pervasiveness of sexual violence in conflict zones and progressive donor policies that recognise the imperative to

provide abortion services to victims of sexual violence in humanitarian settings, which are discussed herein.

Despite this progress, the restrictions on humanitarian aid are as potent as ever. The Helms Amendment and President Trump's reinstatement and expansion of the Global Gag Rule have resulted in collective confusion, chilling effects on speech, and the further obstruction of abortion services. As the largest funder of global health assistance, the far-reaching impact of these combined US policies will have deadly consequences for women around the world. Thus, there is an urgent need to clarify the legal framework defining the rights of women and girls to medical care in conflict situations, including to safe abortion care.

This commentary addresses the gap in abortion services in SRH care in conflict-related humanitarian settings. It first shows that abortion services fall within a category of medical care that is protected by the international community's strongest legal framework. It then outlines contemporary challenges affecting the realisation of the rights protected by this framework. Finally, it proposes a unification of current approaches to ensure comprehensive care for female victims of armed conflict.

International humanitarian law and protection of women and girls' medical needs

International humanitarian law (IHL) is a body of law that specifically regulates conflict and guarantees a range of fundamental rights and protections to war victims. Specifically, the 1949 Geneva Conventions and their Additional Protocols require that persons "wounded and sick" be collected and cared for and receive comprehensive, non-discriminatory medical treatment based solely on their medical condition. As detailed below, these intentionally broad international legal protections encompass abortion services – a necessary medical care needed only by one biological sex – in conflict situations.

Pregnant women and girls in armed conflict are considered "wounded and sick" under IHL

Under IHL, the "wounded and sick" are persons, whether civilian or military, who are in need of medical assistance or care and who refrain from any act of hostility. The legal meaning of the terms "wounded" and "sick" "cover maternity cases

... and other persons who may be in need of immediate medical assistance or care, such as ... expectant mothers".* In addition, to be considered "wounded and sick", it is "irrelevant whether the need for care arises from a medical condition that pre-dates the conflict or is linked to, even if not caused by, the conflict" (Comm.para.743). The definition covers all persons in need of immediate medical treatment, including, but not limited to, sexual violence survivors.

Pregnant girls and women in conflict situations are in immediate need of medical care and are "expectant mothers". Plainly then, pregnant girls and women in conflict situations fit within the protected class of the "wounded and sick" under IHL.

Pregnant women and girls in armed conflict are to be collected and cared for and receive the medical care required by their condition

IHL requires that the wounded and sick are collected and cared for. The basic rule is that the wounded and sick 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 adverse distinction made "on any grounds other than medical ones" (Comm.para.762,764;4,art.10;5). IHL does not spell out the types of medical treatment that should be given. Rather, it requires that they be those necessitated by the patient's condition. In other words, women and girls impregnated in war are entitled to any and all of the medical care that they may need, whether that be safe and quality maternal care or, for those who wish to terminate their pregnancy, safe abortion services.

Pregnant women and girls in armed conflict are entitled to treatment without adverse distinction on the basis of their sex

In the treatment of the wounded and sick, IHL prohibits adverse distinctions on the basis of race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.⁶ Importantly, IHL does *not* prohibit non-adverse distinctions – distinctions that are justified by the substantively different

*International Committee of the Red Cross. Commentary of 2016 on convention (I) for the amelioration of the condition of the wounded and sick armed forces in the field.³ Citations to this Commentary will be referred to in the text as (Comm.para.724, 4,art.8(a).

situations and needs of the wounded and sick are permitted. Thus, IHL allows for treatment that meets a person's specific needs (Comm.para.576). A person's biological sex is recognised as requiring such differential treatment.

Women and girls have medical needs distinct from men and boys, exposing them to particular risks and social stigmas connected with being wounded or sick. In recognition of these facts, IHL establishes that non-discriminatory medical care means that women shall "in all cases benefit by [medical] treatment as favourable as that granted to men" (Comm.para.1430). The law requires that the outcome for each sex must be the same, not that the treatment should necessarily be identical.⁷

For example, in the context of rape, which is perpetrated in a variety of ways and a variety of methods, the injuries suffered necessitate distinct medical care. A person raped with the barrel of a gun who develops a fistula requires different treatment than a person raped by a penis who becomes pregnant. While in the former case, the "medical care and attention required by their condition" may necessitate surgery or some other procedure, the pregnant person may require an abortion. In fact, in some cases, such as when a pregnancy is life threatening, abortion is the only medical option.

Denying one category of medical care (abortion) to one biological sex (women and girls) in armed conflict is thus considered discriminatory and prohibited by IHL. Safe abortion services, accordingly, must be a part of non-discriminatory medical care.

The denial of abortions violates the right to humane treatment and the right to be free from cruel and inhuman treatment

In addition to encompassing abortion services as non-discriminatory and necessary medical care, IHL also protects the procedure via its guarantee of humane treatment and the right to be free from treatment that is cruel and inhuman. While a precise legal definition of humane treatment does not exist, its meaning is context specific and encompasses "the physical and mental condition of the person," and differences based on sex (Comm.para.553,577). In addition, to qualify as cruel or inhuman treatment, an act must cause physical or mental pain of a serious nature – such as a lack of adequate medical attention or

the act of carrying to term an unwanted pregnancy (Comm.para.618,620).

The denial of safe abortion services results in extended and intensified physical and psychological suffering. Pregnant girls and women in conflict situations suffer countless traumas ranging from the dangers of pregnancy during war to, where the pregnancy results from rape, social and familial stigmatisation and ostracisation. 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.⁷

Protections for women and girls under international human rights law

While IHL is the *lex specialis* – or law governing a specific subject matter – of armed conflict, obligations and rights under international human rights law run concurrently and help to define IHL rights. Accordingly, the inclusion of abortion services within IHL's various legal protections is bolstered by relevant protections under human rights law. The Human Rights Committee (HRC), the Committee against Torture, and the Committee on the Elimination of Discrimination against Women have all weighed in on the legal obligations to provide abortions in certain settings.^{8–9}

The concept of guaranteeing necessary and non-discriminatory medical care for women and girls, outlined above and a central component to the protection of the wounded and sick, is shared with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW is the first human rights treaty to explicitly require States parties to ensure access to family planning services.^{10–11} In conflict and post-conflict settings, the CEDAW Committee has established that States parties are required to ensure that SRH services include "emergency contraception; maternal health services, including antenatal care ... safe abortion services; [and] post-abortion care ...".¹² The denial of abortion as gender-based discrimination is also recognised by the HRC and Committee against Torture.^{8–9} Accordingly, States parties' failure to remove barriers to women's effective access to SRH services constitutes discrimination against women in violation of CEDAW, the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).

The denial of abortion services has also been found to violate the international human rights to humane treatment and to be free from torture. A range of UN experts, including the Special Rapporteur on torture, have found that “[w]ithholding access to reproductive health services that only women need is inherently discriminatory and can violate States’ commitments under the [CAT].”¹³ The Committee against Torture has increasingly found that access to abortion, in particular for rape survivors, implicates the rights guaranteed by the CAT.^{9,14} In the same vein, restrictions on abortions have been found by the HRC, charged with monitoring and enforcing compliance with the ICCPR, to violate the Covenant’s article 7 prohibition on torture or cruel, inhuman or degrading treatment.^{8–9}

IHL’s rights to non-discriminatory and needs-based medical care, as well as the rights to humane treatment and to be free from treatment that is cruel and inhuman, must be interpreted in light of these parallel provisions of human rights law. In doing so, the decrees of the ICCPR, CAT, and CEDAW firmly verify that abortion services for female victims of conflict are included in IHL’s various protections.

Increasing recognition of IHL’s protections

There is growing international recognition that abortion services are a part of IHL’s protections of “needs-based medical care” in academia,^{15–17} international policy guidance, and state practice. In 2013, the UN Security Council passed two resolutions calling for States to provide safe abortion services to girls and women raped in war.^{18–19} In response to these resolutions, the United Kingdom reviewed and changed its humanitarian aid policy to acknowledge that safe abortion services for these victims are protected under IHL.²⁰ The Netherlands and France have similarly expressed the importance of complying with this IHL mandate.²¹

Similarly, in September 2015, the European Commission issued a policy position stating that if a woman or girl’s life is in danger or a pregnancy would cause unbearable suffering, IHL warrants the option of abortion.²¹ Furthermore, the European Parliament has passed a series of resolutions urging the European Union (EU) and EU Member States to segregate their humanitarian aid from other donors whose humanitarian aid is corrupted by abortion restrictions (such as the United States), to keep humanitarian aid free from restrictions on

necessary medical treatment, and to ensure that aid is administered in line with IHL.²¹ Several of these resolutions also call for a commitment that women and girls in conflict settings receive all SRH services, including safe abortions.

The reality of the need to ensure that safe abortion services are available for rape victims, as well as included in humanitarian aid funding, has also been recognised multiple times by the UN Secretary General.^{22–24} Likewise, the Global Study on the Implementation of Security Council Resolution 1325 noted that access to safe abortion is particularly important in conflict settings, where pregnancy is considerably more dangerous (due to the destruction and disruption of health services and access to care), and called on the United Nations and its Member States, as well as other humanitarian donors and actors, to ensure access to such services as a matter of women’s rights under IHL and international human rights law.¹

Despite this progress, abortion services are still very much absent in conflict-related humanitarian settings, owing to deep and longstanding trends and viewpoints.

Contemporary challenges

The relationship between national abortion laws and IHL

Restrictive national abortion laws are often invoked to block the application of IHL’s rights and obligations. Proponents of this position often point to the notion that there is “no international right to abortion” when deferring to national legislation on the issue. But as outlined above, IHL does not guarantee the right to any specific medical service, instead it contains generalised rules that protect those who fall under its protections – including pregnant women. Even while IHL is not specific, it is clear that its protections are universal and non-derogable.

As noted above, in armed conflict, IHL is the *lex specialis*, meaning that its rules concerning the wounded and sick in armed conflict override the provisions of other legal regimes, national and local. This universality and relationship to national law is a unique feature of IHL aimed at ensuring that domestic policies and practices cannot be used to abrogate IHL’s protections. One of the hallmarks of the Geneva Conventions is that the legal rights they guarantee protect individuals to the exclusion of other laws, and cannot be renounced or rescinded (Comm.para.987–1002).

The International Committee of the Red Cross's Professional Standards for Protection Work calls for protection actors to "be prepared to point out that domestic law cannot be used as an excuse for non-compliance with international obligations."²⁵ This means that national law cannot be used as a shield to block the application of international law, and in fact, relevant domestic laws should only be used in protection work when they "reinforce overall protection, and are in conformity with international law."²⁵

One area where the conflation between national law and IHL is particularly problematic concerns protections for medical staff in humanitarian situations. Under IHL, the right to medical care determined by need is so important that doctors are provided immunity from local prosecution and punishment, as long as they provide care in line with war victims' needs (Comm.para.1758–1760). Doctors and medical staff also cannot be obliged or compelled to act in any other way than in accordance with victims' needs. Medical personnel must conduct their care solely in accordance with medical ethics, which requires care based on patients' needs and with their informed consent (Comm.para.765). Where national laws errantly take precedent, the protections are overlooked. Moving forward, more awareness needs to be built amongst humanitarian actors, both of the protections IHL offers to them and of the rights that guide the provision of care. Furthermore, a more affirmative approach must be taken in the negotiation of humanitarian agreements, as IHL specifically protects doctors from prosecution – the fear of which is one of the largest barriers to the provision of safe abortion care.

In sum, in the context of abortion services, national abortion laws cannot supersede IHL's mandates to furnish the wounded and sick with all necessary and non-discriminatory medical care, humane treatment, and protection from torture or inhuman treatment.

Funding policies as a positive and negative force

Even where legal concerns are not an issue, an enormous impediment to the provision of abortion services in humanitarian settings has been funding restrictions, in particular those imposed by the United States government. Since 1973, the United States has enforced abortion restrictions on all of its foreign aid. Originating from the Helms Amendment to the Foreign Assistance Act, the US

categorically prevents its funds from being used to provide abortion services, to discuss abortion as an option, or even discuss the need for safe abortion services in fact-finding reports.²⁶ The Helms Amendment is currently implemented without exceptions for rape, life endangerment, or incest. Furthermore, while the Leahy Amendment does permit counselling and information about all pregnancy options, in line with *local* law, studies have shown that the amendment is ill-understood and little utilised.²⁷ Today, the situation is made worse by President Trump's reinstatement of the Global Gag Rule, now termed "Protective Life in Global Health Assistance," which nearly fully censors the abortion-related activity of any non-US recipient of US global health assistance, with narrow exceptions in cases of rape, incest and life endangerment.²⁸

Such policies not only actively stifle abortion-related care, they also create a chilling environment around SRH, such that many recipients of US aid refuse to engage even in permitted activities.^{27,29} Since the US is the largest bilateral provider of humanitarian aid, US policy sets the tone on abortion in the majority of humanitarian settings. Furthermore, for those organisations that are already reluctant to include abortion within their work, these restrictions are a convenient excuse for not including abortion in their SRH packages.

However, the tide on this issue is slowly turning. Global awareness of the harms of permanent US abortion restrictions, such as the Helms Amendment, over the past eight years has resulted in the progress discussed above, including the adoption of explicit funding policies that recognise abortion as protected care under IHL and commitments to fund such services. Such policies serve two objectives. First, they demonstrate to humanitarian actors that there are donors who consider abortion services to be vital care and that there are in fact funds available to provide safe abortion care. Second, because it is states that define what the practice of IHL looks like, these funding policies help to develop the recognition that abortion is protected care under IHL.

Importance of recognising abortion as equivalent to any other medical care

Abortion is frequently singled out from other medical care, which not only serves to further stigmatise abortion, but also legitimises its denial. When women are faced with an

unwanted/unintended, health- and/or life-threatening pregnancy, the option of abortion is the only medical service available to ameliorate the situation. In this context, abortion clearly fits under the definition of “medical care” (“the provision of what is necessary for a person’s health and well-being by a doctor, nurse or other healthcare professional”).³⁰ As a result, it is important that restrictions on abortion, including legal restrictions, be understood as impediments to women’s access to medical care.

Confronting challenges: rights protect needed care

These challenges, however, are exactly what IHL is designed to overcome. At its most basic, IHL ensures war victims receive the medical care they *need* by protecting them with *rights*. In fact, IHL as we know it today arose from a global reaction to the mistreatment of prisoners of war as “protected persons” during the Second World War. One of the many lessons learned in that war’s aftermath was that political and military prerogatives undermine the treatment of war victims. As a practical matter, this is no less true for a prisoner of war than it is a survivor of war rape.

Still, the challenges outlined above and their accompanying undercurrent of gender discrimination all consort to make abortion services virtually absent in conflict-related humanitarian settings.² As a matter of current practice, many humanitarian donors and actors have envisioned

a “needs-based” model, situating “needs” as something other than “rights.” Instead of publicly and explicitly upholding victims’ rights under IHL, these actors claim they adhere to the highest level of care by focusing on victims’ needs. But as described above, this is not how IHL works. As history has taught us, notwithstanding good intentions, war victims are vulnerable to abuse unless their rights are specifically invoked (Comm.para.990). Therefore, it is essential that needs- and rights-based approaches are considered as two sides of the same coin. Put simply: war victims’ needs are explicitly protected by IHL rights.

Conclusion

IHL anticipated the expansion of armed conflict to include civilian victims and accordingly grants broad but determinate rights to the “wounded and sick.” As shown above, these rights require the provision of abortion services for pregnant victims of armed conflict. Despite increasing international recognition of abortion services as part of IHL’s protections, concerning global trends threaten to revert to an antiquated and discriminatory paradigm, undermining victims’ fundamental legal protections. To confront these challenges, humanitarian actors, advocates, and donors must ensure that their work and policies are grounded in victims’ rights so that victims’ needs are comprehensively met.

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Résumé

Les femmes et les filles sont toujours plus souvent les victimes directes et ciblées des conflits armés qui les touchent différemment et de façon disproportionnée, ainsi que le montrent des études. Néanmoins, le droit, les politiques et les protocoles humanitaires n'ont pas encore été interprétés et adaptés efficacement pour répondre à leurs besoins spécifiques, notamment de services et droits de santé sexuelle et génésique. En particulier, les services d'avortement sans risque sont systématiquement absents des services de santé sexuelle et génésique assurés dans les contextes humanitaires pour différentes raisons, notamment

Resumen

Las mujeres y niñas son cada vez más las víctimas directas y específicas del conflicto armado, y los estudios muestran que son afectadas de manera desproporcionada y diferencial. Sin embargo, las leyes, políticas y protocolos humanitarios aún no han sido interpretadas de manera significativa ni adaptadas para responder a sus necesidades específicas, tales como servicios de salud y derechos sexuales y reproductivos. En particular, los servicios de aborto seguro son omitidos de manera rutinaria de los servicios de salud sexual y reproductiva en entornos humanitarios por una variedad de razones, entre ellas deferencia

une déférence induite à la législation nationale, l'influence anormalement importante de politiques de financement restrictives et l'incapacité de considérer les avortements comme des soins médicaux. Pourtant, correctement interprétés, les services d'avortement relèvent des protections universelles et non dérogeables garanties en vertu du droit international humanitaire et du droit international des droits de l'homme.

Ce commentaire examine les protections du droit international humanitaire et explique comment les services d'avortement entrent dans une catégorie de soins médicaux protégés. Il souligne ensuite les obstacles contemporains qui compromettent la réalisation de ces droits. Enfin, il propose une unification des approches actuelles par l'utilisation du droit international humanitaire afin de garantir des soins complets aux personnes touchées par les conflits armés.

inadecuada a la ley nacional, la influencia desproporcionada de políticas de financiamiento restrictivas y no considerar los servicios de aborto como atención médica. Sin embargo, cuando son interpretados debidamente, los servicios de aborto se pueden clasificar bajo el alcance de las protecciones universales y no derogables otorgadas por el derecho internacional humanitario y de derechos humanos.

Este comentario considera las protecciones del derecho internacional humanitario y explica cómo los servicios de aborto se pueden clasificar bajo la categoría de atención médica protegida. Esboza los retos contemporáneos que afectan la realización de estos derechos. Por último, propone la unificación de enfoques actuales por medio del uso del derecho internacional humanitario para asegurar que se brinde atención integral a las personas afectadas por el conflicto armado.