
ACCESS TO ABORTION AND INTERNATIONAL HUMANITARIAN LAW

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In today's military conflicts, sexual assault is often employed against civilians to frighten, demoralise, and even change the ethnic makeup of whole towns. For instance, there have reportedly been 50,000 rapes during the ongoing civil conflict in Syria. Women there claim to have been raped in groups while being drugged and blindfolded. ISIS often kidnaps women and girls in Iraq, holds them captive, and subjected them to sexual brutality, including rape and sexual slavery¹. A 2015 raid on Tabit featured the mass rape of more than 200 women and girls over the course of three days in Darfur, Sudan, where sexual violence has been utilised as a strategy of war for more than 12 years.

Lastly, Boko Haram publicly singles out young girls for abduction, forced marriage, rape, sexual enslavement, and other acts of gender-based violence in Nigeria.² In order to take advantage of the unique opportunities for legal change presented by the growing importance of international law, the widespread support for human rights, and the increasing influence of the global civil society, including the transnational women's movement, the Global Justice Centre was established in 2005. The Global Justice Centre is made up of attorneys with extensive knowledge of international law who are committed to putting the legal rights promised on paper into "practise" and using the framework provided by human rights legislation to create fundamental shifts in how the world is run.

Abolition is often denied to thousands of girls and women who have been raped and became pregnant during armed war, with terrible results. When a girl or woman is subjected to war rape and is refused access to abortion when she requests one, she frequently has three options:

¹ <https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape>

² https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session30/Documents/A-HRC-30-67_en.docx

- (1) get an unsafe abortion;
- (2) carry an unintended pregnancy to term; or
- (3) commit herself.

It is wrong and cruel to refuse these victims access to abortion care.

International humanitarian law safeguards the rights of war victims during armed conflict. In particular, those who have been the victims of war rape fall under the umbrella term "wounded and ill in armed conflict." As a result of this position, patients are qualified to receive thorough, impartial medical care based only on their illness. These absolute rights are violated when a medical service (such as abortion) that is solely required by one gender is not provided or is refused. States, international policymakers, and legal experts on international humanitarian law are increasingly acknowledging abortion as protected medical care under international humanitarian law. This article includes terminology and citations from laws, regulations, official statements, legal treatises, and other sources that support abortion as a protected medical procedure.

THE LEGAL ANALYSIS

- **What does IHL say regarding abortion for victims of rape in Armed conflicts?**

When examining IHL accords, one must first note the complete absence of any mention of the abortion debate. Therefore, it cannot be stated that IHL treaties grant a "right to abortion" or impose a general duty to offer abortions to rape victims. However, there are a few IHL clauses that are pertinent to and helpful when it comes to the humanitarian problem rape victims confront. Rape is illegal and is considered an international crime that has to be punished, as was previously said. The humanitarian problem of women and girls becoming pregnant as a result of rape perpetrated in connection with the armed conflict would not exist if IHL were properly upheld.³

³ 8 Article 3 common to the Geneva Conventions; Article 12, para. 2, and 15, para. 1, of the First Geneva Convention; Article 12, para. 2, and 18, para. 1, of the Second Geneva Convention; Article 16, para. 1, of the Fourth Geneva Convention; J.-M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press, Cambridge, 2005, Rule 110. On non-discrimination, Common Article 3; Article 14 of the Third Geneva Convention; Article 10 Additional Protocol I; Article 7 of Additional Protocol II; J.-M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press, Cambridge, 2005, rules 88 and 110.

IHL has made other significant, though not only, contributions to the problem. Additionally, IHL mandates that belligerents shall treat the injured and ill without regard to their status. All pregnant women and girls, including those who have been sexually assaulted, are protected by the IHL's provisions for injured and ill people and must get the treatment necessary for their conditions. This is demonstrated, for example, by Article 8, paragraph a, of Additional Protocol I to the Geneva Conventions⁴, which defines "wounded and sick" as "persons, whether military or civilian, who, due to trauma, disease, or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from engaging in any dangerous or combat-related activity."⁵

Expectant moms and other people who could require quick medical attention are also included by these words.” There is no reason why abortion could not be included under the definition of medical treatment under IHL, even if IHL treaties do not specifically state what type of medical care and attention are necessary in each unique situation. This implies that women and girls must have access to abortion if they so choose in nations where it is legal in certain circumstances. However, this does not imply that IHL forbids abortion in such circumstances regardless of the decision made by women and girls or regardless of the provisions of domestic legislation. There are no international directives stating that abortion is a necessary or sufficient medical procedure.⁶

However, States might benefit from advice from the World Health Organization (WHO) when drafting and amending national health laws and policies. The WHO believes that providing abortion as a choice in cases of rape should be possible, but as was already mentioned, state laws vary widely, with only slightly more than half of them allowing abortion as a choice in cases of rape when there are no additional risks to the mother's or the foetus' lives or health. Denial of abortions to certain raped women or girls (for example, those believed to belong to the enemy in an engagement ring) is also prohibited by the International Human Rights Law (IHL), which forbids discriminatory treatment in the provision of comprehensive medical care.⁷

⁴ https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf

⁵ Article 16 of the Fourth Geneva Convention which specifies that “the wounded and sick ... and expectant mothers, shall be the object of particular protection and respect”.

⁶ WHO, “Safe Abortion care”, p. 69.

⁷ Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 24, Women and health, 5 February 1999, para. 11.

If abortion is legal in cases of rape, the State must make sure that all women and girls in these situations can access it. For example, the State must require that health care providers who decline to perform such services due to conscientious objection still refer these women and girls to alternative health care providers. Let's examine if the "right to abortion" is granted to women and girls who get pregnant as a result of rape under human rights law, which might be a good addition to IHL.

- **What does Human Rights say about Abortion of Victims of rape in Armed conflict?**

In contrast to IHL treaties, human rights treaties often do not include the topic of abortion or allow for an express "right to abortion."

The "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2003), also known as the Maputo Protocol⁸, offers one exception in this regard and states in Article 14, paragraph 2 c),⁹"States Parties shall take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the woman" (emphasis added).

To our knowledge, this Protocol, which has been approved by 28 States to date, is the only human rights agreement that specifically obliges States to take all necessary steps to legalise medical abortions in certain circumstances.

Despite the fact that human rights treaties do not recognise a "right to abortion," the following query is crucial and, in our opinion, more intriguing. Could denying access to abortion result in additional abuses of human rights? For instance, would denying an abortion to a woman or child who became pregnant after being raped qualify as cruel, inhumane, or humiliating treatment? There is currently no agreement among the States about this issue's resolution or abortion-related issues in general.

Because of the psychological and/or physical suffering experienced by the pregnant woman, some States believe that refusing an abortion in certain circumstances—particularly when it is life-threatening or when the pregnancy is the result of rape—can be considered a cruel, inhuman, or degrading treatment. Others believe that each State should decide how to restrict

⁸ <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>

⁹ [https://www.achpr.org/legalinstruments/detail/Article/14/\(2\)\(physical/health/of/the/mother\)](https://www.achpr.org/legalinstruments/detail/Article/14/(2)(physical/health/of/the/mother))

abortion in line with the culture, religion, or beliefs of its citizens and that international law does not preclude States from doing so, both in times of peace and during times of armed conflict.¹⁰

However, the WHO states that “the protection of women from cruel, inhuman, and humiliating treatment necessitates that females who have gotten pregnant as a consequence of coercive or forced sexual acts can lawfully access safe abortion services.”¹¹

Although there is a propensity to view the denial of abortion in some circumstances as a harsh, inhuman, or degrading treatment, human rights practise in this regard is not entirely clear. There is binding case law and non-binding human rights precedent that suggests denying abortion access to women who were pregnant via rape in nations where it is allowed to do so may constitute inhuman or humiliating treatment.

For instance, the European Court of Human Rights found that Poland violated Article 3 of the European Convention on Human Rights¹²(inhuman or degrading treatment) in the case of *P. and S. v. Poland*¹³ because a 14-year-old girl who had been raped and became pregnant as a result had no access to a safe abortion and was harassed by the government and pro-life activists despite the fact that Polish law permitted abortion in cases of rape.

Some human rights organisations have voiced concern about nations where abortion is fully prohibited or highly limited in non-binding concluding remarks or findings to the degree that it might, in some cases, result in cruel, inhuman, or degrading treatment.

The 2013 Report of Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, provides a good illustration of this trend¹⁴. In it, Méndez interprets the Human Rights Committee's practise as meaning that denying women who became pregnant due to rape access to safe abortions violates Article 7 of the International

¹⁰ For instance, the Holy See and several Catholic and Arab countries advocated against the inclusion of forced pregnancy into the Rome Statute of the International Criminal Court fearing that the inclusion of this crime might be interpreted as imposing an obligation on national systems to provide forcibly impregnated women access to abortion. See C. Steains, “Gender Issues”, in R. S. Lee (ed. by), *The International Criminal Court: The Making of the Rome Statute. Issues – Negotiations – Results*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 366- 367

¹¹ WHO, “Safe Abortion care”, p. 92

¹²<https://www.equalityhumanrights.com/en/human-rights-act/article-3-freedom-torture-and-inhuman-or-degrading-treatment>

¹³ <https://hudoc.echr.coe.int/fD>

¹⁴ <https://digitallibrary.un.org/record/793910>

Covenant on Civil and Political Rights¹⁵ (on cruel, inhuman, or degrading treatment). It is unclear if these developments in the human rights field will lead to a widely recognised interpretation of the ban against cruel, inhuman, or degrading treatment, which might have an impact on the IHL rules that correspond. IHL does, in fact, forbid cruel, inhuman, or humiliating treatment, and it is important to define these terms in light of the changes occurring in both the IHL and the human rights fields. In other words, both human rights legislation and IHL should agree on what constitutes cruel, inhuman, or degrading treatment. These two systems of law unquestionably coincide in that regard. Some human rights organisations, including the Human Rights Committee (HRC) and the Committee on the Elimination of Discrimination Against Women (CEDAW)¹⁶, have also stated in non-binding concluding observations that the complete prohibition and criminalization of abortion envisaging no exception, including where the mother's life is in danger, to protect her physical or mental health, or in cases where the mother has committed a crime, is also necessary.¹⁷ There is no universally recognised definition of when life starts, which has led to the right to life being invoked in a variety of ways, most notably by pro-abortion campaigners who emphasise the mother's right to life and anti-abortion activists who emphasise the right to life of the foetus. In any instance, unless the pregnant woman or girl has health issues that might endanger her life, the mother's right to life is not always relevant in the context of pregnancy after rape. In situations when there has been rape followed by pregnancy, the right to health seems to be more important, especially when social and mental health are taken into account.

More generally, a number of human rights organisations have voiced their concern over harshly restrictive and punitive abortion laws and urged States to review their restrictive legislation to allow abortion in situations where the pregnant woman's life is in danger, as well as in cases of rape or incest. A failure to guarantee access to abortion when it is legal and highly restrictive abortion laws - even when the life or health of the women or girls are at risk - have been considered, at least, an issue of concern, according to the practise of human rights bodies, despite the fact that no "right to abortion" has been recognised thus far.

¹⁵<https://www.cambridge.org/core/books/commentary-on-the-international-covenant-on-civil-and-political-rights/article-7-torture-cruel-inhuman-or-degrading-treatment-or-punishment>

¹⁶ <https://www.un.org/womenwatch/daw/cedaw/>

¹⁷ European Court of Human Rights (ECtHR), *P. and S. v. Poland*, 30 October 2012, paras 157-169. See also HRC, Concluding Observation: Poland, UN Doc. CCPR/CO/82/POL/Rev.1 (2004), para. 8.

INTERNATIONAL HISTORIC CASE LAWS

The Supreme Court of the United States' judgement in **Roe v. Wade**,¹⁸ which divided the country into "pro-choice" and "pro-life" camps, became one of the most consequential decisions in its history. This historic ruling demonstrates that the majority of anti-abortion laws are unconstitutional due process violations. The complainant, Jone Roe, wished to end her pregnancy since it was the consequence of rape. According to the Court's decision, the State cannot restrict a woman's right to an abortion during the first trimester, the State may regulate abortions during the second trimester "in ways that are reasonably related to maternal health," and the State may decide to restrict or even outlaw abortions during the third trimester, which marks the viability of the foetus.

so, creating a balance between the constitutional rights of the individual and the state's legitimate interests.

As a result, the SC overturned a number of state restrictions on abortion, including laws restricting abortion, laws requiring parental consent for minors to obtain abortions, laws requiring spousal consent or notification, laws mandating that abortions be performed in hospitals rather than clinics, laws prohibiting state funding for abortions, and laws outlawing the majority of very late-term abortions.

CONCLUSION

In an environment of armed conflict, women and girls who become pregnant after being raped confront a very challenging and traumatic situation. Their previously existing anguish is frequently made worse by pregnancy. They must make difficult decisions and might run grave dangers to their health and lives.

When women and girls have carried these pregnancies forward, some have chosen to abort them; those who chose to keep them have experienced rejection and marginalisation, had to leave their family and community, and have had to move in order to survive with their kid. In other instances, the lady or the kid was murdered by the family. Because of the circumstances surrounding their conception, delivery, and the psychological trauma experienced by their mothers, children born to rape may also experience developmental and health issues. When

¹⁸ (1973) 410 U.S. 113

faced with such possibilities, many sexual assault victims decide to end their pregnancies because they find it emotionally, logically, and practically difficult to carry the pregnancy to term. In times of armed conflict, however, access to safe abortion treatment is not always possible.

Many women and girls self-induce abortions or seek abortions from inexperienced practitioners due to a lack of access to safe abortion treatment, including legislative constraints. An important public health issue is unsafe abortion.¹⁹ The inability to get safe abortion treatment during armed situations is caused by a variety of factors. In essence, the legal question of how much abortion is permitted for women and girls who have been sexually assaulted in various nations is far more narrowly focused than the humanitarian issue we are discussing.²⁰ When it comes to the question of safe access to abortion, practical, social, and administrative hurdles are just as essential as (or often even more important than) legal ones. Additional obstacles in situations of armed conflict include persistent violence, a lack of security, the damage of highways, and a shortage of medical workers.

¹⁹ “Unsafe abortion” is defined by the World Health Organization (WHO) as “a procedure for terminating an unintended pregnancy, carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both”. See: “Safe abortion care: the public health and human rights rationale”, in *Safe abortion: technical and policy guidance for health systems*, 2nd ed., WHO, Geneva, 2012, p. 18 (hereafter: WHO, “Safe Abortion care”)

²⁰ The WHO estimates that 22 million unsafe abortions take place around the world each year. Close to 50,000 pregnancy-related deaths are due to complications relating to unsafe abortion. One in four women and girls who undergo unsafe abortion are likely to develop temporary or lifelong disabilities requiring medical care. WHO, “Safe Abortion care”, pp. 17-21. See also, Beijing Declaration and Platform for Action, 15 September 1995, para. 97: “Unsafe abortions threaten the lives of a large number of women, representing a grave public health problem as it is primarily the poorest and youngest who take the highest risk”.