



The Legal Landscape for Abortion Provision In U.S. Foreign Assistance

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ABOUT THIS BRIEF

This brief is a comprehensive analysis of three distinct but overlapping legal systems that inform prohibition or provision of funding for abortion services through United States foreign assistance programs. While the Center for Health and Gender Equity (CHANGE) supports universal access to comprehensive sexual and reproductive health care services that include safe and voluntary abortion, this analysis focuses specifically on how international and U.S. legal systems should inform U.S. funding of safe abortion services for women and girls who have been raped in conflict and crisis. Some of these legal frameworks may also apply to voluntary abortion care in other cases; however, the scope of this document is limited to cases of sexual assault.

As a legal analysis, this document does not explore evidence about the experiences or barriers to care encountered by women and girls who have been raped in conflict or crisis situations. Documentation of these experiences is important for purposes of educating decision makers about the impact of policies and laws. This analysis does not replace such documentation as its purpose is to provide the legal and policy context that has shaped or should shape access to comprehensive post-rape care, including safe abortion care.

INTRODUCTION

Women and girls who have been raped in conflict and crisis situations require access to comprehensive sexual and reproductive health care to help them physically and psychologically recover from the attack. Many of the women and girls impregnated due to rape will choose to terminate their pregnancies for a variety of reasons. These women and girls require safe and compassionate abortion services. However, they are frequently deprived of such care.

The international community, including key bilateral donors such as the United States government, has begun to formally recognize that comprehensive sexual and reproductive health care is vital to a just response to the violence these women and girls have experienced. While there has historically been silence about whether abortion is included within comprehensive care, a growing body of law and policy supports the explicit inclusion of safe abortion services within comprehensive post-rape care.

In fact, as this brief will argue, States that do not provide access to safe, voluntary abortion services for women and girls raped in conflict or crisis are failing in their international legal obligations as established in international humanitarian and human rights law. Moreover, although current practice would suggest otherwise, U.S. law and policies provide firm grounding to allow U.S. foreign assistance funding to be spent on abortion services for women and girls raped in conflict and crisis.

LEGAL ANALYSIS

Three interconnected legal frameworks weigh on the United States' provision of abortion in foreign assistance: international humanitarian law, international human rights law, and U.S. law. The first two are compiled in a number of well-known treaties.¹ Both of these frameworks provide protection for individuals' rights and guide States² on their duties in ensuring this protection. International humanitarian law lays out the protections owed to combatants and civilians

1 A treaty is a written agreement between two or more States consisting of rules and principles that govern the conduct of States in their international relations with one another. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, May 23, 1969 [hereinafter VCLT] art. 2(1)(a); Malcolm N. Shaw, *International Law* 93 (6th ed. 2008). To be a treaty, the instrument must firstly be a “binding instrument, which means that the contracting parties intended to create legal rights and duties. Secondly, the instrument must be concluded by states or international organizations with treaty-making power. Thirdly, it has to be governed by international law. Finally the engagement has to be in writing.” United Nations Treaty Collection, Definitions of key terms used in the UN Treaty Collection: Treaties, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#treaties, (accessed November 27, 2013). When a State party signs a treaty subject to ratification, acceptance or approval, “the signature does not establish the consent to be bound.” United Nations Treaty Collection, Glossary of terms relating to Treaty actions: Signature Subject to Ratification, Acceptance or Approval, http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#signaturesubject, (accessed November 27, 2013); see VCLT, arts. 10, 18. When a State ratifies a treaty, it is formally indicating “its consent to be bound to a treaty.” States are granted “the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislative to give domestic effect to that treaty.” United Nations Treaty Collection, Glossary of terms relating to Treaty actions: Ratification, http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#ratification, (accessed November 27, 2013); see VCLT, arts. 2(1)(b), 14(1), 16. See *North Sea Continental Shelf*, ICJ Reports, 1969, pp. 3, 25 (Federal Republic of Germany not bound to 1958 Geneva Convention on the Continental Shelf because it had signed but not ratified the treaty); See generally Malcolm N. Shaw, *International Law* 93-98 (6th ed. 2008). In the United States, ratification requires the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2.

2 The word “State” will be used to define nations, or countries, with a permanent population, a defined territory, a government, and the capacity to enter into relations with other nations or countries. Robert Beckman and Dagmar Butte, Introduction to International Law, <http://www.ilsa.org/jessup/intlawintro.pdf>.

during an armed conflict;³ international human rights law addresses the rights of all individuals at all times, both during a time of war and during a time of peace.⁴

The third legal framework, U.S. law, directs the U.S. government on the appropriate use of U.S. funds for foreign assistance programs and greatly impacts how U.S. foreign assistance policy is shaped. This is done primarily through the U.S. Foreign Assistance Act⁵ and a series of amendments added to this Act.⁶ In the United States, federal law, such as the U.S. Foreign Assistance Act, is the controlling legal framework.⁷ Although international law is arguably binding on all States,⁸ U.S. courts have struggled to reconcile international law with federal legislation,⁹ at times regarding it as non-binding. Despite this struggle, international law, specifically international humanitarian law and international human rights law, should influence the United States' recommendations on the appropriation of U.S. foreign assistance funds.

INTERNATIONAL HUMANITARIAN LAW

International humanitarian law applies during a time of armed conflict and protects the rights of both combatants and civilians.¹⁰ The Geneva Conventions of

3 “International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in hostilities and restricts the means and methods of warfare.” International Committee on the Red Cross, What is International Humanitarian Law?, July 2004, http://www.icrc.org/eng/assets/files/other/what_is_ibl.pdf.

4 International Committee of the Red Cross, IHL and human rights law, October 2010, <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm>.

5 United States Foreign Assistance Act of 1961, Public Law 87-195, 22 U.S.C. § 2151 et seq.

6 Amendments specifically related to abortion include the Helms Amendment, the Leahy Amendment, the Siljander Amendment, and the Biden Amendment. United States Agency for International Development (USAID), USAID's Family Planning Guiding Principles and U.S. Legislative and Policy Requirements, <http://www.usaid.gov/what-we-do/global-health/family-planning/usaid-family-planning-guiding-principles-and-us>.

7 Federal regulations, issued by federal agencies, boards, or commissions, explain how the agency intends to carry out a federal law. The Code of Federal Regulations (CFR) “is an annual codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the Federal Government.” National Archives, About the Code of Federal Regulations, Federal Register, <http://www.archives.gov/federal-register/cfr/about.html>.

8 According to international documents, including the Vienna Convention on the Law of Treaties, once a treaty is entered into force, it is binding on all State parties who have ratified the treaty. See VCLT, *supra* note 1. Even if a State has not ratified the treaty, it may become binding on all States as customary international law. “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1986). Treaties become customary international law when “such agreements are intended for adherence by states generally and are in fact widely accepted.” Restatement (Third) of the Foreign Relations Law of the United States § 102(3) (1986). Rules of customary international law bind all States. See Restatement (Third) of the Foreign Relations Law of the United States § 102(1) (1986). See generally Robert Beckman and Dagmar Butte, Introduction to International Law, <http://www.ilsa.org/jessup/intlawintro.pdf>; World Health Organization, International Law, <http://www.who.int/trade/glossary/story061/en/>.

9 Around the world, many governments and international scholars regard international law as binding on all States; however international treaties, especially human rights documents, have faced resistance in the United States. The cases listed reflect U.S. courts' attempt to reconcile national legislation with international law: *Medellín v. Texas*, 552 U.S. 491 (2008), *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008); *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008); *Cornejo v. Cnty. of San Diego*, 504 F.3d 853 (9th Cir. 2007); *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001); *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988). Supreme Court Justice Antonin Scalia has voiced opposition to international law being applied in U.S. courts: “The notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign's treatment of its own citizens within its own territory, is a 20th-century invention of internationalist law professors and human-rights advocates.” *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2776 (Scalia, J., concurring in part and concurring in judgment).

10 International Committee on the Red Cross, What is International Humanitarian Law?, July 2004, http://www.icrc.org/eng/assets/files/other/what_is_ibl.pdf. International humanitarian law is limited to application during armed conflicts; this, however, makes the legal framework powerful. The rules and principles set out under international humanitarian law must be followed by States during a time of conflict.

1949 and its Additional Protocols I and II contain a number of articles reflecting international humanitarian law.¹¹ Under the Geneva Conventions and their Additional Protocols, all States “shall undertake to respect and ensure respect for the present Convention in all circumstances.”¹² International criminal tribunal statutes, such as the Rome Statute of the International Criminal Court,¹³ the Statute of the International Criminal Tribunal for the Former Yugoslavia,¹⁴ and the Statute of the International Criminal Tribunal for Rwanda,¹⁵ are supplementary to international humanitarian law and provide guidance on similar topics.

International humanitarian law addresses three rights and protections for civilians that are important to consider when evaluating whether international law affords women and girls raped and impregnated in conflict the right to safe, voluntary abortions. Although the Geneva Conventions and their Additional Protocols do not include explicit language recognizing a right to abortion care, their language on non-discrimination, humane treatment, and the right to medical care implicitly support interpretation for safe, voluntary abortions for women and girls. The treaties also include articles delineating State action and the responsibilities of all States to acknowledge and protect the rights laid out in the Conventions.

Non-Discrimination

International humanitarian law’s principle of non-discrimination supports a woman’s right to voluntary abortion care in the case of rape. Under the Geneva Conventions and their Additional Protocols, everyone must be treated humanely, without any adverse distinction founded on race, color, sex, or any other similar criteria.¹⁶ Specifically, victims of conflict and crisis must receive non-discriminatory medical care. Men’s medical needs are met during a time of armed conflict, and thus women’s and girls’ medical needs must also be met.

11 The four Geneva Conventions of 1949 have 195 State parties. Protocol I has 173 State parties and Protocol II has 167 State parties. The United States has ratified the first four Geneva Conventions of 1949. It has not ratified Protocols I and II. See International Committee for the Red Cross, *Treaties and State Parties to Such Treaties*, <http://www.icrc.org/applic/ihll/ihl.nsf/vwTreaties1949.xsp>. Protocols I and II codified law that had already been practiced by many states. Thus, some principles are deemed to be customary international law, binding on all States. Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, International Review of the Red Cross, Volume 87 (March 2005), http://www.icrc.org/eng/assets/files/other/irrc_857_henckaerts.pdf.

12 Geneva Conventions I, II, III, IV, art. 1; Protocol II, art. 1.

13 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, July 1, 2002 [hereinafter Rome Statute]. The Rome Statute has 119 State parties, 32 signatories, and 44 non-signatories. The United States has signed, but not ratified, the Rome Statute.

14 Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

15 Statute of the International Criminal Tribunal for Rwanda, adopted by Security Council on 8 November 1994, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

16 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, 12 August 1949 [hereinafter Geneva Convention I], art. 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 U.N.T.S. 85, 12 August 1949 [hereinafter Geneva Convention II], art. 3; Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, 12 August 1949 [hereinafter Geneva Convention III], art. 3; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, 12 August 1949 [hereinafter Geneva Convention IV], arts. 3, 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I], 1125 U.N.T.S. 3, 8 June 1977, arts. 9, 10; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], 1125 U.N.T.S. 609, 8 June 1977, arts. 2, 4, 7.

Rape is perpetrated against men and women through different methods and in different ways, resulting in different injuries requiring different medical care.¹⁷ Women and girls raped and impregnated in conflict or crisis, classified as the “wounded and sick” under the Geneva Conventions,¹⁸ receive incomplete medical care when they are denied the option of voluntary, safe abortion care. It is discriminatory to deny the medical care only women and girls need.

Humane Treatment

International humanitarian law’s principle of humane treatment, supplemented by international criminal tribunal statutes, also supports women’s and girls’ right to voluntary abortion care in the case of rape. Under international humanitarian law and international criminal law, all persons must be treated humanely.¹⁹ Humane treatment includes, at a minimum, the prohibition of “violence to life and person, in particular . . . cruel treatment and torture.”²⁰ It also includes the prohibition of “outrages upon personal dignity, in particular humiliating or degrading treatment.”²¹ These acts are prohibited at any time and in any place.²² Denial of access to voluntary abortion care for women and girls raped and impregnated during an armed conflict falls under both prohibited acts.

A woman suffers violence to her life and person if she is denied the right to voluntary abortion care. When a woman is raped and impregnated during conflict, she is at risk for depression and severe mental suffering. If she is forced to carry the fetus to term, it can be mentally and physically debilitating. Women tend to be rejected by their families or communities for birthing a “child of the enemy.”²³ They may resort to non-sterile or non-medical methods for an abortion, leading to infection or death.²⁴

Denial of safe, voluntary abortions is cruel treatment and torture. In addition to physical pain and suffering, the spectrum of cruel treatment and torture also includes forms of emotional and mental suffering, as well as torturous destruction

17 Rape is not specifically delineated in the Geneva Conventions as a war crime. However, the Geneva Conventions form a significant portion of “the laws and customs of war,” violations of which are considered “war crimes.” Article 147 of the Fourth Geneva Convention defines war crimes, or grave breaches of the Conventions, as “torture or inhuman treatment . . . willfully causing great suffering or serious injury to body or health.” Geneva Conventions IV, art. 147. Thus, rape is considered a war crime. The International Criminal Tribunal for Rwanda in *Akayesu* recognized rape as a crime against humanity and a violation of Article 3 common to the Geneva Conventions. Case No. ICTR-96-4-T, Sept. 2, 1998. See also *Delalić et al*, Case No. IT-96-21-T, 1998; *Furundžija*, Case No. IT-95-17/1-T, Dec. 10, 1998; *Kunarac et al*, Case No. IT-96-23, IT-96-23/1, Feb. 22, 2001. The Rome Statute now includes rape as a war crime. Rome Statute, art. 8.

18 From a legal perspective, any implication to a person’s physical or mental health, resulting from a war crime, is an injury. A civilian injured as a result of a war crime is considered “wounded and sick” under the Geneva Conventions. All wounded and sick shall be respected and protected. Geneva Conventions IV, art. 27; Protocol I, arts. 8, 10; Protocol II, art. 7. A woman raped during conflict is the victim of a war crime; any implications she suffers to her physical and mental well-being, as a result of the rape, are her injuries. She falls under the category of “wounded and sick,” injured as a result of enemy combatants. States have a duty to respect and protect her, which would include providing her with voluntary abortion care.

19 Geneva Conventions I, II, III, IV, art. 3; Geneva Conventions IV, art. 27; Protocol I, art. 10; Protocol II, arts. 4, 7; Rome Statute, arts. 7, 8; ICTY Statute, arts. 2, 5; ICTR Statute, art. 3.

20 Geneva Conventions I, II, III, IV, art. 3; Geneva Conventions IV, art. 32; Protocol II, art. 4; Rome Statute, arts. 7, 8; ICTY Statute, arts. 2, 5; ICTR Statute, arts. 3, 4.

21 Geneva Conventions I, II, III, IV, art. 3; Protocol II, art. 4; Rome Statute, art. 8.

22 Geneva Conventions I, II, III, IV, art. 3.

23 Harvard Humanitarian Initiative and Oxfam, *Now the World Is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo* at 5, April 2010; See generally Jeb Sharp, *Children born of the Rwandan genocide*, PRI’s The World, <http://pri.org/stories/2008-02-19/children-born-rwandan-genocide>.

24 Médecins Sans Frontières, “*I Have No Joy, No Peace of Mind*”: Medical, Psychosocial, and Socio-Economic Consequences of Sexual Violence in Eastern DRC (2004): 20. http://www.doctorswithoutborders.org/publications/reports/2004/sexualviolence_2004.pdf

of a person's liberty and freedom. Forcing a woman to carry and deliver an unwanted fetus which is the result of a rape by an enemy combatant is subjecting a woman to severe physical, emotional, and mental pain and suffering.

Lastly, the denial of access to voluntary abortion care by State governments is an outrage upon a woman's personal dignity. A woman raped and impregnated in conflict often suffers extreme humiliation and shame within her family and community. Forcing her to deliver the fetus may provide for an even more traumatic experience, which she may suffer through alone if her family has chosen to abandon her. The systematic lack of access to safe, voluntary abortions forces a woman to deliver an unwanted fetus and is degrading treatment in violation of international humanitarian law.

Right to Medical Treatment

International humanitarian law's right to medical treatment also supports women's and girls' right to a safe, voluntary abortion in the case of rape. All protected persons²⁵ "shall receive, to the fullest extent practicable and with least possible delay, the medical care and attention required by their condition."²⁶ A woman raped and impregnated in conflict by enemy forces makes her a protected person who requires medical care and attention based upon her condition. Her condition, being raped by an enemy combatant and pregnant as a result, requires comprehensive sexual and reproductive health care, including abortion care if she chooses. States have a duty to provide protected persons, including raped and impregnated women and girls, with the medical care and attention they need.

INTERNATIONAL HUMAN RIGHTS LAW

International human rights law, which applies at all times and is not limited to a time of war, sets out the rights of individuals that States must protect.²⁷ The International Bill of Rights is made up of the Universal Declaration of Human Rights,²⁸ the International Covenant on Civil and Political Rights,²⁹ and the International Covenant on Economic, Social and Cultural Rights.³⁰ Other

25 Protected persons are those who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Geneva Convention IV, art. 4.

26 Geneva Convention IV, art. 56; Protocol I, art. 10; Protocol II, art. 7.

27 International human rights law applies to States at all times. For various historical reasons, and because States have resisted some of this universality as challenges to sovereignty, international human rights law does not always carry the same binding legal weight as international humanitarian law. In the United States, treaties can be either self-executing or non-self-executing. Early in the country's history, the United States Supreme Court differentiated between treaties equivalent to an act of the legislature enforceable in courts, or self-executing treaties, and those treaties the legislature must execute before enforceable in court, or non-self-executing treaties. See Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in US Courts*, 37 *Yale Journal of International Law* 51 (2012) at 52. See also *Medellín v. Texas*, 128 S. Ct. 1346 (2008). The International Covenant on Civil and Political Rights has been declared non-self-executing by the U.S. Senate. U.S. reservations, declarations, and understandings, *International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992) RUD no. III.

28 This is a declaration, rather than a treaty or convention, and States do not ratify the declaration. However, it has acquired customary international law status through State practice and the opinions of States. United Nations, *The Foundation of International Human Rights Law*, http://www.un.org/en/documents/udhr/br_law.shtml.

29 International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Mar. 23, 1976 [hereafter ICCPR]. There are 167 State parties to this treaty. The United States ratified the treaty on June 8, 1992, but attached a non-self-executing declaration to the treaty.

30 International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, Jan. 3, 1976 [hereafter ICESCR]. There are 161 State parties to this treaty. The United States signed the treaty on October 5, 1977 but has not ratified the treaty.

international human rights treaties include the Convention on the Elimination of All Forms of Discrimination against Women,³¹ the Convention on the Rights of the Child,³² and the Convention on the Rights of Persons with Disabilities.³³ Some international human rights treaties, such as the Convention against Torture,³⁴ address a specific human right.

Non-Discrimination and Humane Treatment

All of these treaties implicitly suggest a right to voluntary abortion care in the case of rape, although not explicitly stated in that language. Similarly to international humanitarian law, international human rights treaties promote the principle of non-discrimination³⁵ and the right to be treated humanely.³⁶

The principle of humane treatment is further defined by a February 2013 report³⁷ by the United Nations General Assembly's Special Rapporteur on Torture, Juan E. Méndez.³⁸ According to the report, international and regional human rights bodies recently recognized that women and girls seeking reproductive health services may encounter abuse and mistreatment on the basis of gender; as a result, they suffer tremendous and lasting physical and emotional distress. The report cites as an example of human rights violations which amount to inhuman treatment, the denial of legally available health services, specifically naming abortion and post-abortion care.³⁹ The Committee against Torture has

31 Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, Sept. 3, 1981 [hereafter CEDAW]. The treaty has 187 State parties. The United States signed the treaty on July 17, 1980, but has not ratified the treaty.

32 Convention on the Rights of the Child, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, Sept. 2 1990 [hereafter CRC]. This treaty has 193 State parties. The United States signed the treaty on Feb. 16, 1995, but has not ratified it.

33 Convention on the Rights of Persons with Disabilities, U.N. Doc. A/61/49 (2006), 2515 U.N.T.S. 3, May 3, 2008 [hereafter CRPD]. This treaty has 138 State parties. The United States signed the treaty on July 30, 2009, but has not ratified it.

34 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85, June 26, 1987 [hereafter Torture Convention]. This treaty has 154 State parties, including the United States. The U.S. ratified the treaty on October 21, 1994. This treaty was declared non-self-executing by the U.S. Senate as part of the declarations, reservations, and understandings.

35 Under the Universal Declaration of Human Rights, every person “is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . sex . . . or other status.” Universal Declaration of Human Rights, U.N. Doc A/810, Feb. 20 1967, [hereafter UDHR], art. 2. *See also* ICCPR, arts. 2, 4, 24; ICESCR, art. 2; CEDAW, art. 1; CRC, art. 2; CRPD, art. 3. All of these articles state that individuals must not be discriminated against, and therefore must receive non-discriminatory medical treatment.

36 Multiple international human rights treaties declare that persons shall not be subjected to “torture or cruel treatment.” *See* Torture Convention, art. 4; UDHR, art. 5; ICCPR, art. 7; CRC, art. 37; CRPD, art. 15. They also state that individuals must not be subjected to “inhuman or degrading treatment.” *See* Torture Convention, art. 16; UDHR, art. 5; ICCPR, art. 7; CRC, art. 37; CRPD, arts. 1, 15. The Convention against Torture defines torture as “any act by which severe pain or suffering, *whether physical or mental*, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Torture Convention, art. 1. When a girl or woman is raped and impregnated and does not have access to voluntary abortion care, she suffers both physically and mentally. This suffering is not mild, but rather quite severe. States must also undertake to prevent acts of “inhuman or degrading treatment . . . which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Torture Convention, art. 16.

37 U.N. reports are not binding law on the United States; however they are influential and persuasive on U.S. foreign policy and foreign assistance funding.

38 The report analyzes, *inter alia*, gender-specific forms of torture as a means to ensure the torture protection framework is applied in a gender-inclusive manner. U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc A/HRC/22/53 (Feb. 1, 2013), ¶ 45.

39 U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc A/HRC/22/53 (Feb. 1, 2013), ¶ 46. The report also highlighted court cases addressing the lack of access to voluntary abortion care as torture. In the case of *R.R. v. Poland* (2011), the European Court of Human Rights declared that access to information about reproductive health is imperative to a woman's ability to exercise reproductive autonomy, and the rights to health and physical integrity. In the case of rape, women's access to safe abortion procedures can be made “virtually impossible”

also expressed concerns about restrictions on access to abortion and absolute bans on abortion as violating the prohibition of torture and ill-treatment.⁴⁰ The Special Rapporteur calls upon all States to ensure women and girls have access to emergency medical care, including post-abortion care, without fear of criminal penalties or reprisals. Furthermore, States should ensure that abortion services are effectively available without adverse consequences to the woman or the health professional.⁴¹

Right to Health

International human rights treaties also recognize a right to health. Under the Universal Declaration of Human Rights, and multiple other international human rights treaties, every individual has the right to “the enjoyment of the highest attainable standard of physical and mental health,”⁴² which includes the highest attainable standard of reproductive health.⁴³ Women and girls raped and impregnated in crises are no exception, and for them the highest attainable standard should include access to voluntary abortion care. The lack of access to voluntary abortion care is a denial of women’s and girls’ right to the highest attainable standard of health and a violation of international human rights law.

The United Nations Committee on the Elimination of Discrimination against Women adopted General Recommendation No. 30 in October 2013 as comprehensive and authoritative guidance on ensuring women’s and girls’ rights before, during, and after conflicts and crises. States are obliged to turn to General Recommendation No. 30 when they are involved in war efforts, providing peacekeeping troops, or contributing assistance for humanitarian aid and post-conflict relief efforts. The document details States’ duties and obligations with respect to the Convention on the Elimination of All Forms of Discrimination against Women. In the General Recommendation, the Committee addressed women’s and girls’ right to comprehensive sexual and reproductive health in conflict settings. States have a duty to “ensure that sexual and reproductive health care includes access to . . . safe abortion services.”⁴⁴

by administrative hurdles and official negligence and destruction. The Human Rights Committee decided the landmark case *KL v. Peru* (2005) and deemed the denial of a therapeutic abortion a violation of an individual’s right to be free from ill-treatment. U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc A/HRC/22/53 (Feb. 1, 2013), ¶¶ 47-49.

40 States are in violation of article 7 of the International Covenant on Civil and Political Rights when women who are pregnant as a result of rape are denied access to safe abortions. U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc A/HRC/22/53 (Feb. 1, 2013), ¶ 50.

41 U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc A/HRC/22/53 (Feb. 1, 2013), ¶ 90.

42 UDHR, art. 25; ICESCR, art. 12; CEDAW, art. 12; CRC, art. 24; CRPD, art. 25.

43 See Office of the United Nations High Commissioner for Human Rights and World Health Organization, *The Right to Health*, Human Rights Fact Sheet No. 31, at 3-4; see also United Nations General Assembly, Vienna Declaration and Programme of Action, World Conference on Human Rights, at ¶ 41; UN International Conference on Population and Development Principle 8; U.N. Committee on Economic, Social, and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, U.N. Doc E/C.12/2000/4 (Aug. 11, 2000), ¶ 8.

44 “Ensure that sexual and reproductive health care includes access to sexual and reproductive health and rights information; psychosocial support; family planning services, including emergency contraception; maternal health services, including antenatal care, skilled delivery services, prevention of vertical transmission and emergency obstetric care; safe abortion services; post-abortion care; prevention and treatment of HIV/AIDS and other sexually transmitted infections, including post-exposure prophylaxis; and care to treat injuries such as fistula arising from sexual violence, complications of delivery or other reproductive health complications, among others.” U.N. Committee on the Elimination of Discrimination against Women (CEDAW), *CEDAW General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, U.N. Doc CEDAW/C/GC/30 (Oct. 18, 2013), ¶ 52(c).

The United Nations Special Rapporteur on the Right to Health, Anand Grover, submitted a report in August 2013 evaluating “the right to health obligations of States and non-State actors towards persons affected by and/or involved in conflict situations.”⁴⁵ Noting that “[c]onflict may aggravate women’s vulnerability to . . . discrimination and gender-based violence,”⁴⁶ the Special Rapporteur highlighted how “women in conflict situations are more likely to turn to unsafe abortion services when facing an unplanned pregnancy.”⁴⁷ States involved in conflict have the “primary responsibility for realizing the right to health,”⁴⁸ however “other States and non-State actors, including armed groups, international organizations and humanitarian non-governmental organizations, also bear obligations towards the realization of the right to health of affected populations.”⁴⁹ While not binding law on the United States,⁵⁰ reports and recommendations from the international community and the United Nations should influence the United States obligations to protect and support women’s and girls’ sexual and reproductive health.

State Action

Similar to the Geneva Conventions and their Additional Protocols, international human rights treaties recognize the duty of States to ensure respect for the rights set out in the conventions.⁵¹ This affirmative duty to ensure respect for, and take the necessary steps to give effect to, the rights recognized in the treaties supports women’s and girls’ right to voluntary abortion care in the case of rape.

45 U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc A/HRC/23/41 (Aug. 9, 2013), summary.

46 U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc A/HRC/23/41 (Aug. 9, 2013), ¶ 43.

47 U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc A/HRC/23/41 (Aug. 9, 2013), ¶ 43.

48 U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc A/HRC/23/41 (Aug. 9, 2013), ¶ 51.

49 U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc A/HRC/23/41 (Aug. 9, 2013), ¶ 51. The Special Rapporteur referenced the International Covenant on Economic, Social and Cultural Rights’ obligation for all States to “take steps, individually and through international cooperation and assistance, towards the full realization of economic, social and cultural rights, including the right to health. To comply with their international obligations, States must respect the right to health of populations in other countries, protect against violations by third parties where they are able to influence those third parties through legal or political means, and facilitate access to essential health services in other countries, depending on the availability of resources. In particular, States have an obligation to provide humanitarian aid in disasters and emergencies, including conflict and post-conflict situations.” U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc A/HRC/23/41 (Aug. 9, 2013), ¶ 52.

50 General Recommendations by the United Nations Committee on the Elimination of Discrimination against Women are not binding law on any States. They are recommendations for States in upholding commitments to the Convention on the Elimination of All Forms of Discrimination against Women. They guide States on how to interpret and enforce the Convention in their domestic laws. Similarly, reports by U.N. Special Rapporteurs are not binding law on any States. Special Rapporteurs are independent experts appointed by the Human Rights Council to report on a specific human rights theme and provide recommendations for States.

51 All international human rights treaties require that States “undertake[] to respect and ensure rights recognized” and “take the necessary steps to adopt laws or other measures as may be necessary to give effect to the rights recognized.” See UDHR, Preamble; ICCPR, art. 2; ICESCR, Preamble, art. 12; CEDAW, arts. 2, 3, 12, 14; CRC, art. 2; CRPD, arts. 1, 4, 15, 25. Therefore, States must not only respect the rights recognized, but also pass legislation or take any other steps as may be necessary to ensure these rights are not violated. States have a duty to respect all the rights set out in these Conventions, without any distinction based on sex or similar criteria. They must treat everyone humanely and pass any legislation to ensure individuals do not suffer torture, cruel, inhuman or degrading treatment. States should pass legislation to ensure women and girls who are raped and impregnated in crises receive the voluntary abortion care they need as part of their right to the highest attainable standard of health.

United Nations Security Council Resolutions on Women, Peace, and Security

The United Nations Security Council Resolution 1325 (2000) is an international instrument that addresses the impact of conflict and crisis on women and girls.⁵² The U.N. Security Council recognized that “civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict . . . and increasingly are targeted by combatants and armed elements.”⁵³ To support the goals of the Resolution and change how women’s and children’s lives are affected by crisis situations, four pillars⁵⁴ were created within the Resolution. The Resolution calls for “increased representation of women at all decision-making levels in national, regional, and international institutions and mechanisms for the prevention, management, and resolution of the conflict”⁵⁵ and an “increase in the participation of women at decision-making levels in conflict resolution and peace processes.”⁵⁶ It calls on all parties to armed conflict to “take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict”⁵⁷ and to improve intervention strategies in the prevention of violence against women and girls. Lastly, it calls for the advancement of relief and recovery measures through a “gender perspective, including, inter alia: the special needs of women and girls.”⁵⁸

U.N. Security Council Resolution 1325 established international and national recognition of the effect of crisis and conflict on women and girls, and it launched the country efforts to create national action plans on women, peace, and security.

United Nations Security Council Resolution 2122 (2013) builds on U.N. Security Council Resolution 1325 and the four other subsequent resolutions⁵⁹ by contributing additional language and increasing state obligations to promote women, peace, and security.⁶⁰ It outlines the right of women and girls, raped and impregnated in conflict, to comprehensive sexual and reproductive health. Specifically, the U.N. Security Council recognizes “the importance of Member States and United Nations entities seeking to ensure humanitarian aid and funding includes provision for the full range of medical, legal, psychosocial and livelihood services to women affected by armed conflict and post-conflict situations, and noting the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination.”⁶¹

Report of the Secretary-General on Women and Peace and Security

The clearest language to date comes from the United Nations Secretary-General

52 United Nations Security Council Resolutions are not binding, mandatory law on States, but rather persuasive and influential principles for States to apply within their own national laws and policies.

53 S.C. Res. 1325, U.N. Doc. S/RES/1325, (Oct. 31, 2000).

54 Participation, Protection, Prevention, and Relief and Recovery.

55 S.C. Res. 1325, ¶ 1, U.N. Doc. S/RES/1325, (Oct. 31, 2000).

56 S.C. Res. 1325, ¶ 2, U.N. Doc. S/RES/1325, (Oct. 31, 2000).

57 S.C. Res. 1325, ¶ 10, U.N. Doc. S/RES/1325, (Oct. 31, 2000).

58 S.C. Res. 1325, ¶ 8, U.N. Doc. S/RES/1325, (Oct. 31, 2000).

59 S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 18, 2008), S.C. Res. 1888, U.N. Doc. S/RES/1888, (Sept. 30, 2009), S.C. Res. 1889, U.N. Doc. S/RES/1889, (Oct. 5, 2009), S.C. Res. 1960, U.N. Doc. S/RES/1960, (Dec. 16, 2010).

60 This resolution creates a roadmap for a more systematic approach to implementing the four pillars of Resolution 1325.

61 S.C. Res. 2122, U.N. Doc. S/RES/2122, (Oct. 18, 2013).

report on women and peace and security in September 2013, which addresses the gaps and challenges to the implementation of Resolution 1325.⁶² Although there has been measurable progress in the implementation of the four pillars of the Resolution, the report insists that efforts must be made by all States to close the gaps and conquer the challenges to ensuring women's and girls' rights are met prior to, during, and in the aftermath of conflict situations. The report highlights that "greater attention needs to be paid to the full range of human rights violations experienced by women, including the gender-specific impacts of . . . withholding of humanitarian assistance."⁶³ Most importantly, the Secretary-General urges States to "strongly condemn violence against women and girls committed in armed conflict and post-conflict situations . . . and stress[es] the need to address the root causes of structural violence against women and all physical, mental and sexual and reproductive health consequences of violence against women, including through provision of emergency contraception and safe abortion."⁶⁴ States have a duty to ensure "humanitarian aid and funding provides for the full range of medical, legal, psychosocial and livelihood services to victims of rape, including access to services for safe termination of pregnancies resulting from rape, without discrimination and in accordance with international human rights and humanitarian law."⁶⁵

U.S. LAW

In addition to international humanitarian law and international human rights law, U.S. foreign assistance funds are subject to U.S. laws and policies. Recipients of U.S. foreign assistance include low- and middle-income countries, countries of strategic importance to the United States, and countries recovering from war.⁶⁶ The United States government distributes about half of its economic assistance through the Department of State and the United States Agency for International Development (USAID).⁶⁷ Economic assistance relating to sexual and reproductive health is allocated according to U.S. laws and policies currently in place.

U.S. foreign assistance for women and children in conflict and crisis receives support from both global health and humanitarian assistance funding streams.

62 Similar to General Recommendations by the U.N. Committee on the Elimination of Discrimination against Women, U.N. Secretary-General Reports are not binding law on any States. The report includes recommendations and guidance for States in support of each State's application of U.N. Security Council Resolutions in their home country.

63 The Secretary-General, *Report of the Secretary-General on Women, Peace, and Security, delivered to the Security Council*, U.N. Doc. S/2013/525 (Sept. 4, 2013), ¶ 10.

64 The Secretary-General, *Report of the Secretary-General on Women, Peace, and Security, delivered to the Security Council*, U.N. Doc. S/2013/525 (Sept. 4, 2013), ¶ 11.

65 The Secretary-General, *Report of the Secretary-General on Women, Peace, and Security, delivered to the Security Council*, U.N. Doc. S/2013/525 (Sept. 4, 2013), ¶ 72(a).

66 See generally *U.S. Overseas Loans and Grants: Obligations and Loan Authorizations, July 1, 1945-September 30, 2011*, USAID, 2013, <http://gbk.eads.usaidallnet.gov/>.

67 See [ForeignAssistance.gov](http://www.foreignassistance.gov/web/AgencyLanding.aspx), Foreign Assistance by Agency, (last updated October 15, 2013) <http://www.foreignassistance.gov/web/AgencyLanding.aspx>. Other government organizations that have funded foreign assistance projects, as of fiscal year 2011, include: African Development Foundation, Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Interior, Department of Justice, Department of Labor, Department of the Air Force, Department of the Navy, Department of the Treasury, Department of Transportation, Environmental Protection Agency, Export-Import Bank of the United States, Federal Trade Commission, Inter-American Foundation, Millennium Challenge Corporation, National Science Foundation, Open World Leadership Center, Overseas Private Investment Corporation, Peace Corps, and Trade and Development Agency. US Overseas Loans and Grants, USG Organizations Involved in Overseas Assistance, (last updated January 2013) <http://gbk.eads.usaidallnet.gov/about/organizations.html>.

On the ground, global health and humanitarian assistance activities are integrally linked; however, when aid is initially distributed, the two sectors are distinct and isolated from one another.⁶⁸ Although the two sectors appear to address different issues at different times,⁶⁹ they both have protecting health at their core⁷⁰ Furthermore, “U.S. humanitarian and global health assistance is often directed to the same countries and sometimes even the same communities.”⁷¹ A roundtable expert discussion on the topic of U.S. humanitarian and global health assistance, hosted by the Kaiser Family Foundation in July 2013, concluded that “the current policy climate was more favorable than ever for forging greater linkages between U.S. humanitarian assistance and global health programs.”⁷² This is important to the discussion of voluntary abortion care provision because barring executive clarification of the Helms Amendment, discussed more below, U.S. agencies providing foreign assistance are interpreting restrictions on abortion funding in potentially inconsistent ways.

Currently, U.S. law does not bar U.S. funds from supporting access to abortion services for women and girls raped in conflict and crisis. However, in practice, the existing legal provision described below has created a chilling effect on the use of U.S. funds for abortion, even though legally allowed.

Helms Amendment

The Helms Amendment was first enacted in 1973, appended to the Foreign Assistance Act of 1961. The provision states that “no foreign assistance funds may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions.”⁷³

The language of this amendment is silent on the use of foreign assistance funds to pay for the performance of abortion in the case of rape. The federal status

68 Josh Michaud, Jennifer Kates, Allison Valentine, and Adam Wexler, *U.S. Humanitarian Assistance and Global Health Policy: Opportunities and Barriers for More Effective Coordination*, The Henry J. Kaiser Family Foundation, Issue Brief October 2013, at 1.

69 “One of the reasons for this separation is that the objectives of these two kinds of programs differ at their core: humanitarian assistance programs are designed to be flexible and quickly address the immediate emergency needs of persons at risk, while global health programs are focused on delivery of services over a longer-term, building sustainable health care systems, growing host country capacity, and contributing to overall development.” Josh Michaud, Jennifer Kates, Allison Valentine, and Adam Wexler, *U.S. Humanitarian Assistance and Global Health Policy: Opportunities and Barriers for More Effective Coordination*, The Henry J. Kaiser Family Foundation, Issue Brief October 2013, at 2.

70 Josh Michaud, Jennifer Kates, Allison Valentine, and Adam Wexler, *U.S. Humanitarian Assistance and Global Health Policy: Opportunities and Barriers for More Effective Coordination*, The Henry J. Kaiser Family Foundation, Issue Brief October 2013, at 2. The stated mandate of the U.S. Office of Foreign Disaster Assistance (OFDA), the lead U.S. agency responsible for providing humanitarian assistance, is to “save lives, alleviate human suffering, and reduce the social and economic impact of humanitarian emergencies worldwide.” USAID Office of U.S. Foreign Disaster Assistance, <http://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance/office-us> (last visited November 14, 2013).

71 An analysis of U.S. assistance found that “of the 54 countries that received disaster support from OFDA in FY 2011, 33 (almost two-thirds) also received global health support, including 17 of 21 African countries. Also, 95% of the total amount of OFDA assistance in FY 2011 went to countries where at least one, but often several, global health programs were present. Of the 17 countries with complex emergencies that prompted an OFDA response that year, 13 had global health programs and in 10 of those 13, more than one global health program was present.” Josh Michaud, Jennifer Kates, Allison Valentine, and Adam Wexler, *U.S. Humanitarian Assistance and Global Health Policy: Opportunities and Barriers for More Effective Coordination*, Henry J. Kaiser Family Foundation, Issue Brief October 2013, at 2.

72 Josh Michaud, Jennifer Kates, Allison Valentine, and Adam Wexler, *U.S. Humanitarian Assistance and Global Health Policy: Opportunities and Barriers for More Effective Coordination*, The Henry J. Kaiser Family Foundation, Issue Brief October 2013, at 6.

73 United States Foreign Assistance Act of 1961, U.S. Code 22 (1961). § 2151 et seq., section 104(f) as amended.

quo on abortion restrictions and the current political consensus within the U.S. Congress is to support abortion funding in the cases of rape, incest, and life endangerment.⁷⁴ Nevertheless, USAID has consistently misinterpreted the Helms language⁷⁵ to exclude funding for abortion services where it is not used as a method of family planning such as in the case of rape. USAID also does not support the purchase of certain equipment and commodities that could be used to perform abortions or to provide post-abortion care.⁷⁶

Worldwide, about 47,000 women die from unsafe abortion every year, and thousands more suffer from life-threatening injuries caused by unsafe abortion procedures.⁷⁷ As countries around the world are reforming their abortion laws in recognition of this major contributor to maternal mortality and morbidity, the Helms Amendment continues to prevent U.S. assistance from supporting modern service provision.

Leahy Amendment

The Leahy Amendment, introduced in 1994 as an amendment to the Foreign Assistance Act of 1961, seeks to clarify language in the Helms Amendment. There were concerns among policy makers and implementers that providing information or counseling about all legal pregnancy options could be in violation of Helms' language stating, "[n]one of the funds made available . . . may be used . . . to motivate or coerce any person to practice abortions."⁷⁸ The Leahy Amendment clarified "the term 'motivate,' as it relates to family planning assistance, shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options."⁷⁹ Nevertheless, the Leahy Amendment has not been fully utilized by the U.S. government in interpreting the Helms Amendment.⁸⁰

POLICY ANALYSIS

U.S. POLICY

The executive branch has also adopted a number of policies that guide use of foreign assistance funds. There are multiple policies and initiatives in place that bolster gender equality in foreign assistance, and address gender-based violence of women and girls globally, especially in conflict or crisis. While these policies demonstrate a clear and robust commitment by the USG to address gender equality and gender-based violence, they do nothing to mitigate the chilling effect

74 See Hyde Amendment, Indian Health Services, women in federal prison, federal employee health benefits, the Affordable Care Act; Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, Guttmacher Policy Review 16 (Summer 2013).

75 See Sneha Barot, *Unsafe Abortion: The Missing Link in Global Efforts to Improve Maternal Health*, Guttmacher Policy Review 14 (Spring 2011).

76 Code of Federal Regulations (e-CFR), Title 48, Federal Acquisitions Regulation System, Vol. 5, Ch. 7, Parts 700-799-Agency for International Development: 725.704 (May 2012).

77 Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, Guttmacher Policy Review 16 (Summer 2013).

78 Luisa Blanchfield, Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Legislation and Policy, *Congressional Research Service* 8-9, December 1, 2010, http://assets.opencrs.com/rpts/R41360_20101201.pdf.

79 Department of State, Foreign Operations, and Related Programs Act ("FY2010 Foreign Appropriations") (Division F of P.L. 111-117), FY2010, 123 Stat. 3325.

80 Kristina Kallas and Akila Radhakrishnan, *If These Walls Could Talk, They Would Be Censored: U.S. Restrictions on Pro-Choice Speech*, Reproductive Laws for the 21st Century Papers, Center for Women Policy Studies, June 2012 at 8.

of Helms, nor do they provide the necessary clarity in U.S. policy to remove questions and barriers around U.S. support for access to post-rape abortion services.

U.S. National Action Plan on Women, Peace, and Security

To support the initiatives of U.N. Security Council Resolution 1325, the president of the U.N. Security Council released statements in 2004 and 2005 welcoming efforts of Member States in implementing the resolution at the national level by developing national action plans. As of June 2013, 42 Member States have adopted national action plans and others are being finalized.⁸¹ All of the national action plans address one or more of the four pillars set out in Resolution 1325.

The United States National Action Plan,⁸² released in December 2011 and paired with Executive Order 13595,⁸³ aims to prevent conflict and build peace in countries experiencing crisis situations.⁸⁴ This is to be achieved by advancing women's and girls' inclusion in peace negotiations, peacebuilding activities, and conflict prevention; protecting women and girls from sexual and gender-based violence; and ensuring equal access to relief and recovery assistance in areas of conflict and insecurity.⁸⁵ In its National Action Plan, the U.S. recognizes that women and girls have distinct needs and vulnerabilities that must be addressed within assistance programs. Female survivors of sexual violence "require access to sexual and reproductive health services," especially when their vulnerabilities are exacerbated in crisis contexts.⁸⁶

The United States National Action Plan commits to supporting women's and girls' increased access to reproductive and maternal health services in conflicts and crisis.⁸⁷ There is no reason—legally or morally—to exclude safe abortion care from the list of sexual and reproductive health services supported with U.S. funds under this commitment.

U.S. Strategy to Prevent and Respond to Gender-based Violence Globally

In August 2012, U.S. President Obama passed Executive Order 13623, instituting the first-ever U.S. Strategy to Prevent and Respond to Gender-based Violence Globally ("Strategy").⁸⁸ The Executive Order also established an Interagency Working Group to address gender-based violence and coordinate implementation

81 Austria, Australia, Belgium, Bosnia and Herzegovina, Burundi, Canada, Chile, the Democratic Republic of the Congo, Côte d'Ivoire, Croatia, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Guinea, Guinea-Bissau, Iceland, Ireland, Italy, Kyrgyzstan, Liberia, Lithuania, Nepal, the Netherlands, Norway, the Philippines, Portugal, Rwanda, Senegal, Serbia, Sierra Leone, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Uganda, the United Kingdom of Great Britain, Northern Ireland, and the United States of America.

82 United States National Action Plan on Women, Peace, and Security, December 2011, http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf.

83 Executive Order No. 13595, 76 FR 80725 (2011) <http://www.whitehouse.gov/the-press-office/2011/12/19/executive-order-instituting-national-action-plan-women-peace-and-security>.

84 United States National Action Plan on Women, Peace, and Security, December 2011, at 1, http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf.

85 United States National Action Plan on Women, Peace, and Security, December 2011, at 1, http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf.

86 United States National Action Plan on Women, Peace, and Security, December 2011, at 9, http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf.

87 United States National Action Plan on Women, Peace, and Security, December 2011, at 22-23, http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf.

88 Executive Order No. 13623, 77 FR 49345 (2011) <http://www.whitehouse.gov/the-press-office/2012/08/10/executive-order-preventing-and-responding-violence-against-women-and-girls>.

of the Strategy.⁸⁹ Drafted by the Department of State, USAID, and other U.S. agencies, the Strategy delineates four key objectives: “to increase coordination of gender-based violence prevention and response efforts among U.S. Government agencies and with other stakeholders; to enhance integration of gender-based violence prevention and response efforts into existing U.S. Government work; to improve collection, analysis, and use of data and research to enhance gender-based violence prevention and response efforts; and to enhance or expand U.S. Government programming that addresses gender-based violence.”⁹⁰

The Department of State and USAID both have implementation plans for the Strategy. The Department of State’s implementation plan “aims to ensure appropriate care for survivors of violence while also strengthening deterrents to such violence.”⁹¹ It will accomplish this by “supporting survivors through vital assistance, including meeting physical, legal, and psychosocial needs; preventing violence through education efforts and public awareness campaigns; prosecuting perpetrators to enhance accountability and counter impunity; and sharing best practices and information within the United States Government.”⁹² The Department of State’s policy initiatives include advocating for development and implementation of laws and policies in other countries to monitor, prevent and respond to gender-based violence, building off of existing platforms like the Global Health Initiative, and address the causes, including root causes, of gender-based violence, especially violence against women and girls.⁹³

USAID’s implementation plan complements and builds upon existing USAID policies, including the Gender Equality and Female Empowerment Policy, and the U.S. National Action Plan on Women, Peace, and Security. It also complies with the Global Health Policy.⁹⁴ USAID’s goals for preventing and responding to gender-based violence are: mainstream and integrate gender-based violence prevention and response activities into work across sectors;⁹⁵ sharpen program priorities; and expand collaborative efforts. One of the major obstacles to preventing and responding to gender-based violence is “women’s lack of decision-making power in social contexts;”⁹⁶ to have transformative impact on gender-based violence, “women must have full access to social services and treatment, and they must have a voice in decision-making.”⁹⁷

89 Executive Order No. 13623, 77 FR 49345 (2011) <http://www.whitehouse.gov/the-press-office/2012/08/10/executive-order-preventing-and-responding-violence-against-women-and-girls>.

90 U.S. Department of State, Release of First United States Strategy to Prevent and Respond to Gender-based Violence Globally, Media Note, Office of the Spokesperson, August 10, 2012, <http://www.state.gov/r/pa/prs/ps/2012/08/196342.htm>. See United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, <http://www.state.gov/documents/organization/196468.pdf>.

91 United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, at 27, <http://www.state.gov/documents/organization/196468.pdf>.

92 United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, at 27, <http://www.state.gov/documents/organization/196468.pdf>.

93 United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, at 31, <http://www.state.gov/documents/organization/196468.pdf>.

94 United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, at 33, <http://www.state.gov/documents/organization/196468.pdf>.

95 “USAID humanitarian assistance programs are designed to minimize risks from harm, exploitation, and abuse for disaster- and conflict-affected populations. Therefore, in active conflicts and in post-conflict environments, USAID will pay close attention to protecting women, girls, men, and boys from physical harm.” United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, p36, <http://www.state.gov/documents/organization/196468.pdf>.

96 United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, at 40, <http://www.state.gov/documents/organization/196468.pdf>.

97 United States Strategy to Prevent and Respond to Gender-Based Violence Globally, August 2012, at 40,

Both the Strategy and implementation plans lend greater weight to the policy imperative of a full response to gender-based violence in conflict and crisis, which includes access to safe, voluntary abortion care.

USAID Gender Equality and Female Empowerment Policy

USAID released its Gender Equality and Female Empowerment Policy in March 2012. USAID's goal with this policy is to "improve the lives of citizens around the world by advancing equality between women and girls and men and boys, and empowering women and girls to participate fully in and benefit from the development of their societies."⁹⁸ The Policy outlines three outcomes USAID will work to achieve: "reduce gender disparities in access to, control over and benefit from resources, wealth, opportunities, and services—economic, social, political, and cultural; reduce gender-based violence and mitigate its harmful effects on individuals and communities, so that all people can live healthy and productive lives; increase capability of women and girls to realize their rights, determine their life outcomes, and influence decision-making in households, communities, and societies."⁹⁹ To do this, USAID will integrate gender equality and female empowerment into USAID's work.¹⁰⁰ USAID will also work to address the unique challenges in crisis and conflict-affected environments.¹⁰¹ Each bureau and office will adhere to the Policy and fully carry out its roles and responsibilities. USAID's Gender Equality and Female Empowerment Policy compliments USAID's implementation of the U.S. National Action Plan on Women, Peace, and Security.¹⁰²

U.S. Department of State Policy Guidance: Promoting Gender Equality

The U.S. Department of State instituted a department-wide policy guidance in March 2012 promoting gender equality to achieve national security and foreign policy objectives.¹⁰³

To fully implement the policy guidance, Department bureaus and embassies will "develop strategic plans to promote gender equality and advance the status of women and girls across geographic regions and functional bureaus."¹⁰⁴ Embassies and bureaus are to "ensure that the full range of U.S. assistance programming identifies and addresses existing gender disparities, capitalizes on the unique skills and contributions of women and girls, and is accessible and responsive to women and girls."¹⁰⁵ This guidance compliments the Department's implementation of the U.S. National Action Plan on Women, Peace, and Security.

<http://www.state.gov/documents/organization/196468.pdf>.

98 USAID Gender Equality and Female Empowerment Policy, March 2013, <http://www.usaid.gov/sites/default/files/documents/1870/GenderEqualityPolicy.pdf>.

99 USAID Gender Equality and Female Empowerment Policy, March 2013, <http://www.usaid.gov/sites/default/files/documents/1870/GenderEqualityPolicy.pdf>.

100 USAID Gender Equality and Female Empowerment Policy, March 2013, <http://www.usaid.gov/sites/default/files/documents/1870/GenderEqualityPolicy.pdf>.

101 USAID will ensure that relief and recovery efforts are specifically responsive to the different needs and priorities of women and men, and enable women's safe and equitable access to assistance, services, and livelihood support. USAID Gender Equality and Female Empowerment Policy, March 2013, <http://www.usaid.gov/sites/default/files/documents/1870/GenderEqualityPolicy.pdf>.

102 U.S. Department of State Policy Guidance: Promoting Gender Equality to Achieve Our National Security and Foreign Policy Objectives, March 2012, <http://www.state.gov/documents/organization/189379.pdf>.

103 U.S. Department of State Policy Guidance: Promoting Gender Equality to Achieve Our National Security and Foreign Policy Objectives, March 2012, <http://www.state.gov/documents/organization/189379.pdf>.

104 U.S. Department of State Policy Guidance: Promoting Gender Equality to Achieve Our National Security and Foreign Policy Objectives, March 2012, <http://www.state.gov/documents/organization/189379.pdf>.

105 U.S. Department of State Policy Guidance: Promoting Gender Equality to Achieve Our National Security and Foreign Policy Objectives, March 2012, <http://www.state.gov/documents/organization/189379.pdf>.

U.S. Global Health Initiative

Introduced by President Obama in 2009, the U.S. Global Health Initiative (GHI) is an overarching approach to U.S. global health policy that seeks to strengthen, streamline, and increase the efficiency of existing U.S. global health programs, including maternal and child health, and family planning.¹⁰⁶ The GHI recognizes that sexual and reproductive health issues, including maternal health and family planning, are all interconnected, and that the health needs of women and girls are particularly urgent. It delineates seven guiding principles,¹⁰⁷ two of which are particularly critical for advancing sexual and reproductive health: the focus on women, girls, and gender equality, and integration of health sectors.

A woman- and girl-centered approach recognizes the disparate health needs and life circumstances of women and addresses them accordingly. Creating an environment in which women and girls can reach the highest attainable standards of physical and mental health requires the GHI to not only provide basic health services, but to recognize and address the economic, cultural, social, and legal barriers for women and girls accessing those services. This will require paying attention to gender inequality, violence against women, and human rights violations.

Integrated sexual and reproductive health care is fundamental for preserving the wellbeing of all women and girls. Health sectors must integrate their relief and recovery efforts with humanitarian aid and gender-based violence initiatives to provide comprehensive sexual and reproductive health to women and girls, especially those raped and impregnated in crisis. By integrating health sectors, and working to achieve gender equality for women and girls, U.S. global health investments will be significantly more effective. Providing women and girls who are raped and impregnated in crises with voluntary abortion care is the start to integrating health sectors and focusing on gender equality for women and girls.

Mexico City Policy

The Mexico City Policy, not currently in force,¹⁰⁸ stipulates that nongovernmental organizations receiving U.S. family planning assistance cannot use their own, non-U.S. funds to inform the public or educate their government on the need to make safe abortion legal and available, or provide legal abortion services, advice on where to get an abortion, or information on abortion. When in effect, this policy, which is often called the Global Gag Rule, does allow for exemptions in the cases of rape, incest, and the life of the mother, but does not allow safe, voluntary abortion for a woman's physical or mental health.¹⁰⁹ Organizations that refuse to be “gagged” in this manner are ineligible to receive U.S. funding.

106 See U.S. Global Health Initiative, <http://www.ghi.gov/>.

107 Focusing on women, girls, and gender equity; country ownership; health systems strengthening; promoting global health partnership; integration; research and innovation; and improving metrics, monitoring, and evaluation. U.S. Global Health Initiative, Principles, <http://www.ghi.gov/principles/#.UoUVrHDBOSo>.

108 Although the Mexico City Policy is not currently in force, it still contributes to challenges in the field for organizations that receive U.S. funding and also provide safe, voluntary abortion care.

109 Acting Director Francis A. Donovan, U.S. Agency for International Development, Memorandum for All Contracting Officers and Negotiators: Restoration of the Mexico City Policy—White House Memorandum for the Acting Administrator of the U.S. Agency for International Development (revised). Washington, D.C.: U.S. Agency for International Development, March 29, 2001.

President Obama repealed the policy on January 23, 2009. His statement called for a new approach to family planning that would end the politicization of women’s health around the world. “For too long, international family planning assistance has been a political wedge issue, the subject of a back and forth debate that has served only to divide us,” he said. “I have no desire to continue this stale and fruitless debate. It is time that we end the politicization of this issue.”¹¹⁰

The Mexico City Policy is controlled solely by the executive branch, meaning the president has the power to repeal or reinstate the policy without Congressional approval. It was first put in place by President Ronald Reagan in 1984.¹¹¹

Documentation and analyses of the impact of the Global Gag Rule have shown how the policy harms the health and lives of poor women and girls by limiting access to family planning services and restricting the right to make informed health decisions. It has also been found that the policy does not reduce abortion¹¹² and may actually increase abortion rates.¹¹³

Because of its harmful effects, President Bill Clinton repealed the policy in 1993, but it was reinstated by President George W. Bush in 2001. In a subsequent memo in August 2003, President Bush extended the policy to “voluntary population planning” assistance provided by the U.S. Department of State, but excluded any foreign assistance allocated under the President’s Emergency Plan for AIDS Relief (PEPFAR).¹¹⁴

CONCLUSION

Three legal frameworks—international humanitarian law, international human rights law, and U.S. law—support comprehensive sexual and reproductive health. It has become increasingly clear that these frameworks support the inclusion of abortion services in sexual and reproductive health services for women and girls raped in conflict and crisis. Significant authorities within the international community have declared that international treaties and resolutions are to be read in support of safe abortion care in the cases of rape, incest, and life endangerment. The United States has already taken a stand to prevent, protect, and provide relief

110 President Barack Obama, The White House. Mexico City Policy and Assistance for Voluntary Population Planning. Washington, DC: Office of the President, January 23, 2009. http://www.whitehouse.gov/the_press_office/MexicoCityPolicyVoluntaryPopulationPlanning.

111 Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, Guttmacher Policy Review 16 (Summer 2013).

112 Ipas. “The Global Gag Rule Harms Democracy, Women and U.S. Interests Abroad.” Chapel Hill, NC: IPAS. August 2007. “In its technical and policy guidance on safe abortion, WHO notes that imposing abortion bans does not stop nor necessarily even lower abortion rates.” Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, Guttmacher Policy Review 16 (Summer 2013), See also WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*, second ed., Geneva: WHO, 2012, http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf.

113 Bendavid, Eran, Patrick Avila, and Grant Miller. “United States Aid Policy and Induced Abortion in Sub-Saharan Africa.” *Bulletin of the World Health Organization* 89, no. 12 (2011). <http://www.who.int/bulletin/volumes/89/12/11-091660/en>. “[R]esearch shows that the abortion rate in Africa and Latin America (29 and 32 per 1,000 women aged 15–44, respectively), where abortion is illegal under most situations in most countries, is actually much higher than in Western Europe (12 per 1,000), where abortion is broadly legal.” Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, Guttmacher Policy Review 16 (Summer 2013); See also Guttmacher Institute, Facts on induced abortion worldwide, *In Brief*, 2012, http://www.guttmacher.org/pubs/ib_IAW.pdf.

114 United States Agency for International Development. USAID’s Family Planning Guiding Principles and U.S. Legislative and Policy Requirements. Washington, DC: USAID, December 14, 2006. http://www.usaid.gov/our_work/global_health/pop/restrictions.html.

and recovery for gender-based violence globally through its laws and policies, which explicitly include support for comprehensive sexual and reproductive health care. Therefore, there exist no legal barriers to—and in fact there is significant legal support for—the provision of abortion services for women and girls who are raped in conflict and crisis.

ABOUT CHANGE

The Center for Health and Gender Equity (CHANGE) is a U.S.-based nongovernmental organization that promotes the sexual and reproductive health and human rights of women and girls globally by shaping rights-based and just U.S. policies. CHANGE advocates for effective, evidence-based policies and increased funding for critical programs. CHANGE believes that every individual has the right to basic information, technologies, and services needed to enjoy a healthy and safe sexual and reproductive life free from coercion and preventable illness.

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