

ABORTION AND THE LAWS OF WAR: SUBVERTING HUMANITARIANISM BY EXECUTIVE EDICT

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INTRODUCTION

Humanitarian principles are under siege everywhere. From the shooting down of the Malaysian airliner in Ukraine, beheading of Western journalists and aid workers in Syria, murder of Christians in Iraq, and abduction of children as soldiers and sex slaves in the Congo—the headlines are filled with the flouting of international humanitarian law. That law is meant to protect non-combatants from the scourge of war. This essay tells the story of one of those disregarded principles: the prohibition against rape. The story is about why renewed efforts to get warring nations to obey the law could be brought down by a parallel movement to get Western nations to redefine it with a right to abortion.

Over the last decade, activists have sought to reinterpret the laws of war through a feminist lens. One objective is to pressure the United States to fund abortion through its foreign aid, something U.S. law has prohibited since 1973. Another goal is to compel humanitarian groups such as the International Committee on the Red Cross (ICRC) and major faith-based groups to perform the abortions, without the consent of host nations and regardless of any country's laws on the matter.

The campaign to reinterpret humanitarian law through a “gendered perspective” rests on aspirational, rather than accepted, legal ground. It requires an assumption that non-binding observations from human rights committees can be used to interpret the laws of war. It requires an assumption that such advisory committees and quasi-legal bodies have already “found” a right to abortion in international human rights law. It requires accepting the view that any restriction of abortion violates the prohibition of “cruel and inhumane treatment” found in the Convention Against Torture and other treaties. These assumptions are spurious.

After forty years, nations continue to reject those interpretations of the treaties and of their international obligations.² Even so, European nations and some high-level UN staff have signed onto the campaign, including the U.N. High Commissioner for Human Rights and the U.N. Secretary

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2. See Susan Yoshihara, *Lost in Translation: the Failure of the International Reproductive Rights Norm*, 11 AVE MARIA L. REV. 367 (2013).

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General. Five European nations took the United States to task before the UN Human Rights Council in 2015, telling Washington that its foreign aid law restricting abortion funding violates the international law.³

Contrary to its stated purpose, this movement is on a collision course with efforts to stop sexual violence in conflict. Governments that Western leaders are trying to get onboard the campaign against sexual violence in conflict find themselves in the crosshairs of abortion advocates. While leaders seek to end impunity for rape by enforcing agreed-upon understandings of the law, advocates seek the law's progressive reinterpretation, injecting division between nations and skepticism about the law.

The laws of war have criminalized rape for a century and a half.⁴ Yet war rape persists, with uneven condemnation and scant prosecution. Some still deny the gravity of the Japanese Army's abuse of "comfort women" in the Second World War⁵ and remain unaware of the ravages upon Bangladeshi women by Pakistani soldiers in the 1971 Liberation War.⁶ Even though sexual violence in the wars of Yugoslavia during the 1990s were widely-reported and roundly condemned, the practice continues unabated in the Democratic Republic of the Congo, despite political agreements, ceasefires, and UN peacekeeping presence. It persists in Iraq

3. Belgium, France, Norway, the Netherlands, and the UK made statements aimed at urging the Obama administration to reinterpret U.S. law and to fund abortion overseas. Human Rights Council Working Group on the Universal Periodic Review, Twenty-second session, *Draft report of the Working Group on the Universal Periodic Review, United States of America*, Geneva, 4-15 May 2015, p.17, 30.

http://www.upr-info.org/sites/default/files/document/united_states/session_22_-_may_2015/a_hrc_wg.6_22_1.10.pdf

4. President Lincoln's General Orders No. 100—the Lieber Code of 1863—comprised three articles prohibiting sexual violence. Lieber Code ¶ 153, Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863). The First Geneva Convention of 1864 and Article 3 common to the original text as well as the Second, Third, and Fourth Geneva Conventions (1906, 1929 and 1949) prohibit "violence to life and person" including cruel treatment and torture and "outrages upon personal dignity." Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 4 of Additional Protocol II (1977) to the Conventions specifies the prohibition of "rape." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. The Fourth Geneva Convention specifies that "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault" and Additional Protocol I reiterates it. The 1998 Rome Statute of the International Criminal Court recognizes "rape and sexual slavery" as crimes against humanity. Rome Statute of the International Criminal Court 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90.

5. TSUTOMU NISHIOKA, JAPAN POLICY INSTITUTE, THE COMFORT WOMEN ISSUE: A REVIEW OF THE FACTS AND COMMON MISUNDERSTANDINGS (2014).

6. Nayanika Mookherjee, *Available Motherhood: Legal Technologies, 'State of Exception' and the Dekinning of 'War-Babies' in Bangladesh*, 14 *Childhood* 339 (2007), available at <http://chd.sagepub.com/cgi/content/abstract/14/3/339>.

where Islamic State terrorists abducted 450-500 women and girls as of August 2014, predominantly from Christian communities, and transported them to Syria to be “given to ISIL fighters as a reward or to be sold as sex slaves.”⁷ It persists in Nigeria where Boko Haram continues to abduct school girls, despite unprecedented international outcry to “Bring Back Our Girls” taken from a Chibok school in April 2014. Two hundred nineteen of the girls remain in captivity as rescue efforts languish.

Rampant impunity was the reason why, in the summer of 2014, world leaders gathered in London at the ambitiously entitled “Global Summit to End Sexual Violence in Conflict.” That same year at the UN Security Council, a recurring but pro forma resolution on women, peace, and security, twice ignited debates on how to end sexual violence and make reparations; at last raising the issue above the UN’s bureaucratic agencies and committees on humanitarian and women’s issues.

Raising the issue’s international political profile revealed a contentious divide about praxis. It brought scrutiny to the frame feminists have used since the 1990s, specifically a “gendered” interpretation of the law based upon a particular version of equality and non-discrimination. Even in the United States, with some of the world’s most liberal abortion laws, the courts have so far rejected that version of equality in their consideration of reproductive rights.

Like its predecessor, the effort to create a human right to abortion, the pursuit of what this article refers to as “humanitarian abortion” takes place mostly by stealth.⁸ It has advanced through letter writing, comments by expert UN committees and bureaucrats in Geneva and New York, and the reinterpretation of ambiguous phrases in non-binding or soft law documents that escape public attention. All this is meant to avoid drawing fire from traditional societies until a time when enough academics, officials, and high court appointees concede to it that it then may be called new customary law.

Thus the stratagem advances because its progenitors have so far met little opposition from the governments with the most at stake. That is changing.

International attention has exposed its legal overreach. Indeed, while the movement retains influential supporters, such as Associate Supreme Court Justice Ruth Bader Ginsberg, it has provoked resistance from left-leaning European political circles and humanitarians whom it needs in order

7. Stephanie Nebehay, *Islamic State committing ‘staggering’ crimes in Iraq: U.N. report*, REUTERS (Oct. 2, 2014, 1:24 PM), <http://www.reuters.com/article/2014/10/02/us-mideast-crisis-un-idUSKCN0HR0R120141002>.

8. See Douglas Sylva & Susan Yoshihara, *Rights By Stealth: The Role of the UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion*, 1 NAT’L CATHOLIC BIOETHICS QUARTERLY 7 (2007).

to succeed.

The Obama administration, which enthusiastically lifted an embargo on promoting abortion abroad upon entering office,⁹ has so far declined to say publicly that it is obligated by international law to fund overseas abortions. But it has put humanitarian groups on notice that it intends to reinterpret the Helms Amendment, the U.S. law that prohibits funding abortions abroad, using renewed international attention to war rape as its pretext.¹⁰ Faith-based groups report they have been brought in to high-level White House meetings and were warned they will lose eligibility to compete for government grants and contracts if they do not comply with the abortion mandate.

Obama administration staff have reported that gender based violence initiatives have been going into place in order to deliberately set the stage for a policy change,¹¹ by which they expect with or without an executive order and with no Congressional consultation. The change is anticipated to create a new funding stream for abortion through foreign assistance among budgets that are in the billions of dollars. Despite requisite language defining monitoring requirements to assure abortion is only performed on those that fall within the exceptions for rape, endangering the life of the mother and other situations, staffers say that such monitoring will not happen. The result would be the de facto introduction of abortion on demand in the target countries.¹²

If the United States concedes to reinterpreting humanitarian law in this manner, we can expect the decision to have significant knock on effects. Not only may it sow cynicism in the difficult effort to end impunity for sexual violence in conflict, it may also undermine faith in the project of humanitarian law, already sorely tested.

I. UN STAFF PROMOTE THE ABORTION AGENDA

In August 2014, UN Secretary-General Ban Ki-moon jolted UN delegations in a guidance note asserting that in order to make reparations for war rape, nations should lift legal protection from abortion for their

9. Jake Tapper, Sunlen Miller, & Huma Khan, *Obama Overturns 'Mexico City Policy' Implemented by Reagan*, ABC NEWS (Jan. 23, 2009), <http://abcnews.go.com/Politics/International/story?id=6716958>.

10. Author interview with staff members from U.S.-based humanitarian organization, February 17, 2015.

11. Austin Ruse, *White House Poised to Fund Abortions Overseas*, CENTER FOR FAMILY & HUMAN RIGHTS (May 15, 2014), https://c-fam.org/friday_fax/white-house-poised-to-fund-abortions-overseas/.

12. *Id.*

unborn children.¹³ While he emphasized the need to include family members in the provision of rehabilitation services, his insertion of abortion and silence regarding mothers who give birth to children conceived after war rape was significant. As discussed below, tens of thousands of children have been born of war in recent years. Left off the UN agenda due to the circumstances of their births, their mothers are left to care for them without assistance afforded to other survivors in the post-conflict period.¹⁴

The Secretary-General did not invoke any human rights treaty in support of his claim. He rather cited the non-binding comments of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) in a 2011 communication with Peru.¹⁵ The Secretary-General called this communication of the committee a “decision,” lending an air of judicial authority to the committee’s work. In reality, the treaty’s optional protocol refers to them only as “views” and “recommendations.”¹⁶

What is more, Article 1 of the optional protocol of the treaty “recognizes the competence of the Committee. . . to receive and consider communications.” States’ Parties are told only to give “due consideration” to the views and recommendations.¹⁷ What States are obligating themselves to do is to receive and send observations and reports.¹⁸

The Secretary-General’s guidance note—which was authored by UN Women and the Office of the High Commissioner for Human Rights (OHCHR)—has even less authority than the CEDAW committee’s comments.¹⁹ At the event launching the guidance note, the head of UN Women, Phumzile Mlambo-Ngcuka, acknowledged the directive has no

13. U.N. Nations Unies, Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, U.N. Doc. (Jun. 2014), *available at* <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

14. “Rehabilitation aims to provide victims with all essential services that are needed to help them to move on and to carry out their life in a dignified way. It should not, as is often misunderstood, be limited to health services and to the person who experienced sexual violence. If appropriate, others, such as family members, should benefit from rehabilitation to maximize the probability of all victims’ recovery. *Among other legislative measures that are needed, legislation is required to provide women and girls, who become pregnant as a result of rape, with the choice of safe and legal abortion.*” *Id.* at 18 (emphasis added).

15. Comm. on the Elimination of Discrimination against Women, L. C. v. Peru, U.N. Doc. CEDAW/C/50/D/22/2009 (Nov. 4, 2011).

16. Convention on the Elimination of all Forms of Discrimination against Women, Oct. 15, 1999, *Optional Protocol*, art. 7(4) and 8(3), U.N. DOC. A/RES/54/4 (Oct. 15, 1999), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>

17. *Id.* at art.8(3)

18. *Id.* at arts. 7-9.

19. The secretary-general’s note states that its purpose is to provide “policy and operation guidance for United Nations engagement” in post-conflict situations. Nations did not give the UN Secretariat a mandate for providing the guidance, rather, it was an initiative of the Office of the High Commissioner for Human Rights and UN Women, two UN agencies which promote abortion in the UN agenda.

legal weight, but called it part of a “broader struggle” for gender equality that needed to be taken to a higher level. The OHCHR representative present, second in command Ivan Šimonović, said the next level was to begin criticizing countries through treaty bodies, special rapporteurs, and the universal periodic review, to pressure states to change their laws.²⁰

UN Women’s and OHCHR’s insistence that nations introduce and apply the gender equality standard to sexual violence in conflict has met resistance at the Security Council. At a gathering of feminists, that included long-time abortion advocates Gloria Steinem and former U.S. Secretary of State Hillary Clinton, the head of UN Women’s Peace and Security branch, Anne Marie Goetz, said governments are more willing than ever to take up the issue of sexual violence, but not abortion rights. In her view, there is now “a very distinct and marked bifurcation of the Women, Peace, and Security agenda.”²¹

Of the four UN Security Council resolutions on sexual violence in conflict, none introduced anything that the states had not previously agreed upon, “that wasn’t in Section E of the Beijing Platform for Action or that wasn’t in the Geneva Conventions, frankly, or the Rome Statute.”²² What is more, recent conclaves such as the UK’s Global Summit to End Sexual Violence in Conflict represented a high water mark on the issue, but left abortion off the table. Goetz and her colleagues saw this as a “backlash” against the feminist agenda.²³ According to Goetz, “[the sexual violence issue has] very distinctively been separated away a little bit from the empowerment agenda and the notion that women have to be the solution to this problem and the solution has to involve attacking patriarchy.”²⁴

This can be seen in the 2013 UN Security Council resolution, UNSCR 2106, which did not mention abortion or abortion rights, but rather recognized “[t]he importance of providing timely assistance to survivors of sexual violence,” and urged “United Nations entities and donors to provide non-discriminatory and comprehensive health services, including sexual and reproductive health.”²⁵

Later that year the Security Council took up the matter again, rejecting

20. Stefano Gennarini, *Secretary General Launches Campaign for Abortion in Post-Conflict Situations*, CATHOLIC LANE, (Aug. 7, 2014), <http://catholiclane.com/secretary-general-launches-campaign-for-abortion-in-post-war-situations/> (last visited Dec. 4, 2014).

21. For Anne Marie Goetz’s comments during video of September 18, 2014, panel discussion at the Roosevelt Institute in New York see at minute 34:00, Roosevelt Institute, *Ending Violence against Women and Girls*, YOUTUBE.COM (Sept. 18, 2014), <https://www.youtube.com/watch?v=R2YvHa8n3t0>.

22. *Id.*

23. *Id.*

24. *Id.* at minute 36:00.

25. S.C. Res. 2106, ¶19, U.N. Doc. S/Res/2106 (June 24, 2013).

a call by France to include abortion. Instead, the Security Council in effect demoted the issue from “recognition” to “noting” it.²⁶ Referring to UNSCR 2122, Goetz was conflicted as to whether to declare victory or defeat, “[i]t doesn’t say this – termination of pregnancy – but that is what was meant and that was what was understood. So there’s been a huge leap actually, potentially, or at least, no, not a huge leap, but a door opened on that issue.”²⁷

The text of UNSCR 2122 says nothing about abortion, and this even after the subject was raised and rejected by the Security Council. Therefore, it is unclear what “door opened” to abortion, unless it was the mention of “sexual and reproductive health services” in terms of “discrimination.” The first term has been used by UN staff to include abortion. UN member states have rejected that interpretation consistently, however, including during the negotiations for the most recent UN human rights treaty, the only UN treaty to include the term “reproductive health.”²⁸

The term “sexual and reproductive health” has only been defined once by member states, in the 1994 Cairo conference on population and development, where a right to abortion was rejected.

The other term that may be seen as a “door opened” to abortion is the use of the term “discrimination.” For feminists and for the CEDAW committee, the term entails a very particular—and controversial—view of equality, also called “substantive equality,” that is based upon biological distinction and requires equal outcomes as well as opportunities. They furthermore assert that in order to achieve equal outcomes with men, women must have access to abortion, and therefore, nations are obligated to provide it.

In October 2013, even as the UN Security Council was rejecting abortion in UNSCR 2122, the CEDAW committee published a contrariwise set of guidelines innocuously entitled “general recommendation 30.”²⁹ In it they put forward: their own authority over the work of the Security Council; that CEDAW imposes “extraterritorial obligations” on states even for people who are not their own citizens; that the treaty cannot be derogated; that humanitarian law is only “complementary” to the treaty; that nations must include abortion in post-conflict health care, enshrine the CEDAW

26. *Id.* (Noting the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination).

27. See Goetz, *supra* note 21.

28. See Yoshihara, *supra* note 2, at 392-99 (discussing an original account of the proceedings of the debate over the term “sexual and reproductive health” during the 2006 negotiations for the Convention on the Rights of Persons With Disabilities).

29. Committee on the Elimination of All Forms of Discrimination Against Women, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/306/24, (Oct. 18, 2013).

committee's notion of substantive equality and non-discrimination in their new constitutions, and promote the committee's version of equality in every sphere of life "public and private." They even went so far as to tell states to take "temporary special measures to accelerate de facto equality."³⁰ Thus the UN committee closed ranks with activists launching a campaign for humanitarian abortion.

II. THE CAMPAIGN FOR HUMANITARIAN ABORTION

At the forefront of the campaign to create a right to humanitarian abortion is the New York-based advocacy organization Global Justice Center (GJC). Its president and founder, Janet Benshoof,³¹ describes her organization as an activist law firm trying "to redefine justice and redefine equality and redefine democracy."³² For ten years, the GJC has pursued the goal of getting the United States to lift its ban on funding abortions overseas, claiming that the United States is in violation of its international legal obligations under the Geneva Conventions.³³

Specifically, the GJC asserts that the war child re-traumatizes and victimizes her mother, and therefore legal protections for the unborn child constitutes torture, cruel, inhumane, and degrading treatment. The group cites the CEDAW committee's 2011 non-binding comments to Peru. The GJC also claims that legal protection of the unborn is a gross violation of redress and reparations under international humanitarian law.

To arrive at that conclusion, the group asserts that restrictions on funding abortion overseas is a violation of Common Article 3 of the Geneva Conventions which it claims is customary international law, binding on the United States even though it has not ratified all of the Conventions' additional protocols. Second, they argue that the funding restriction represents "cruel and inhumane treatment" by citing a controversial and non-binding comment from the UN Committee Against Torture and advisory clinical guidance from the World Health Organization. Third, they claim that Rule 110 of the International Committee of the Red Cross which, despite the GJC's claim, does not address abortion. And lastly, they base their assertion on the Women Peace and Security Resolutions from the UN Security Council, which have, contrary to their suggestion, rejected

30. *Id.*

31. *See Our Team: Janet Benshoof, Esq.*, GLOBAL JUSTICE CENTER, <http://globaljusticecenter.net/index.php/about-us/our-team> (last visited Dec. 4, 2014).

32. *See at minute 09:29, Janet Benshoof – President & Founder of Global Justice Center with Gael Sylvia*, SYLVIAGLOBAL.TV (Feb. 2013), <http://sylviaglobal.com/archives/6956>. To find out more about Gael Sylvia, visit <http://www.shesource.org/experts/profile/gael-sylvia-pullen>.

33. *See Humanitarian Aid for Rape Victims*, N.Y. TIMES.COM (Sept. 7, 2011), http://www.nytimes.com/2011/09/08/opinion/humanitarian-aid-for-rape-victims.html?_r=0.

inclusion of abortion.³⁴

The first salvo the GJC fired against the United States was its “shadow report” to the UN Human Rights Council (HRC) on the eve of the 2010 Universal Periodic Review (UPR).³⁵ The United States had boycotted the HRC in the wake of its scandalized and corrupted predecessor, the Human Rights Commission, but rejoined the body in 2009, thus subjecting Americans to the scrutiny of the committee.³⁶ The shadow report opposed the Helms Amendment—the law prohibiting U.S. foreign aid for abortion or to motivate a person to practice abortion—claiming it was a “gag rule” that resulted in the “censorship of abortion speech,”³⁷ and hence in infringement of the free speech rights of groups under the purview of the law.

The United States is a signatory of the Universal Declaration of Human Rights (UDHR) and party to the International Covenant on Civil and Political Rights (ICCPR), which recognize the freedom of expression.³⁸ The shadow report claimed that the Helms Amendment, because it limited the dissemination of information about abortion, put the United States in violation of its obligations under these human rights documents.³⁹ The report contended that denial of information about abortion amounts to the denial of humanitarian aid, because rape in war is a violation of Common Article 3 of the Geneva Conventions, and abortion is a medically necessary form of humanitarian aid for women who become pregnant as a result of sexual violence.

While the report called on the U.S. Congress to repeal the Helms Amendment,⁴⁰ the main purpose was to put pressure on, and provide an

34. See UPR Working Group of the Human Rights Council, on its 23rd session, Oct.–Nov. 2015, *Submission to the UN Human Rights Council Universal Periodic Review, United States*, GLOBAL JUSTICE CENTER (Nov. 2010), available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=426&cf_id=34.

35. *Id.*

36. See *Universal Periodic Review*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Dec. 5, 2014).

37. *Submission to the UN Human Rights Council Universal Periodic Review, United States*, *supra* note 34, at 3.

38. “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights art. 19, G.A. Res. 217 (III) A, U.N. DOC. A RES/217(III) (Dec. 10, 1948); “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” International Covenant on Civil and Political Rights art. 19.2, 19 Dec. 1966, 999 U.N.T.S. 171.

39. *Submission to the UN Human Rights Council Universal Periodic Review, United States*, *supra* note 34, at 6.

40. See Foreign Assistance Act of 1961, Pub. L. 87-195, §104(e)(2)(F) 75 Stat. 424 (codified

opportunity for, the Obama administration to do an end run around the law by changing the administration's interpretation of its requirements.

The senior legal counsel for GJC confided in an interview that getting Congress to repeal the Helms Amendment was a long shot, but getting the administration to effectively ignore it and to cite international humanitarian law when doing so would be a great victory, so long as they also cited humanitarian law when doing so.⁴¹

Norway willingly collaborated in the effort by citing the GJC report in its condemnation of U.S. law, essentially accusing the United States of violating the laws of war.⁴² Later, Benshoof claimed credit for having "gotten the country of Norway to directly contact the United States government and say it cannot keep this ban" on funding abortion abroad.⁴³

In its reply, the United States stated that it was unable to implement Recommendation 228 due to "currently applicable restrictions."⁴⁴ Benshoof took this as a friendly signal to abortion advocates that they should focus on

as amended is scattered sections of 27 U.S.C.); Foreign Operations, Export Financing, and Related Programs Appropriations

Act, 2003, Pub. L. 108-7 § 518, 117 Stat. 11 (2003). Section 104, "Population and Health," (e)(2)(F), "Prohibition on use of Funds for Abortion and Involuntary Sterilizations," 40-41, available at

<http://www.usaid.gov/sites/default/files/documents/1868/faa.pdf>.

41. Interview with Akila Radhakrishnan, Senior Legal Counsel, GJC, in N.Y. (Aug. 8, 2014) (on file with the author).

42. Norway stated:

The Global Justice Center (GJC) filed a shadow report for the universal periodic review of the U.S. expressing concern with regard to U.S. blanket abortion restriction on humanitarian aid and abortion speech restrictions on U.S. rule of law and democracy programs. Does the U.S. have any plans to remove its blanket abortion restrictions on humanitarian aid covering the medical care given women and girls who are raped and impregnated in situations of armed conflict? Does the U.S. government apply abortion speech restrictions on its rule of law and democracy programs?

Submission to the UN Human Rights Council Universal Periodic Review, United States, supra note 34, at add. 2, available at

http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/UnitedStatesAmerica_Add2.pdf. See also Human Rights Council, *Report of the Working Group on the Universal Periodic Review, United States of America*, at 28, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011), available at <http://www.state.gov/documents/organization/158198.pdf>.

43. See Interview by Geal Sylvia with Janet Benshoof, President, Global Justice Center, at minute 14:08 (Feb. 18, 2013), available at <http://globaljusticecenter.net/index.php/news-and-events/news1/gjc-in-the-news/238-listen-sylvia-global-radio-interviews-gjc-president-janet-benshoof>.

44. *Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights In Conjunction with the Universal Periodic Review Response to the U.N. Human Rights Council Working Group Report*, U.S. DEPARTMENT OF STATE (March 10, 2011), <http://www.state.gov/j/drl/upr/archive/157986.htm>.

attacking not the law but USAID policy, something the president could change with the stroke of a pen.⁴⁵ Thus GJC targeted USAID Acquisition and Assistance Policy Directive 08-01, which prevented U.S. humanitarian aid funds from being employed to finance or support abortion.⁴⁶

Additionally, State Department legal advisor Harold Koh, included in his response to Norway the administration's intention "to seek, as soon as practicable, Senate advice and consent to ratify Additional Protocol II to the 1949 Geneva Conventions," that is, the part of the Conventions dealing with humanitarian assistance to victims in the context of non-international armed conflict. Abortion advocates saw this as another tip of the hat toward their agenda since it was the same law they used to support their position.⁴⁷

The second round fired at the U.S. law was a letter writing campaign in 2011 to the U.S. president, seeking to capitalize on Norway's comments at the Human Rights Council and keeping up the pressure on the administration from its constituents. These included letters from the New York City Bar Association,⁴⁸ from the Global Justice Center,⁴⁹ a group of

45. The GJC claimed that the U.S. "cryptic, yet revealing response" to Norway's Recommendation 228 implied a willingness to loosen U.S. policy by bureaucratic fiat. See *Analysis of the U.S. response to Recommendation 228, 'Legal Update,'* GLOBAL JUSTICE CENTER, 1, available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=112&cf_id=34.

46. USAID Acquisition and Assistance Policy Directive (AAPD) 08-01 prohibits:

- (i) procurement or distribution of equipment intended to be used for the purpose of inducing abortions as a method of family planning;
- (ii) special fees or incentives to any person to coerce or motivate them to have abortions;
- (iii) payments to persons to perform abortions or to solicit persons to undergo abortions;
- (iv) information, education, training, or communication programs that seek to promote abortion as a method of family planning; and
- (v) lobbying for or against abortion.

OFFICE OF ACQUISITIONS AND ASSISTANCE, USAID, ACQUISITION AND ASSISTANCE POLICY DIRECTIVE (AAPD) 08-01, (2)(b)(ii) (2008), available at http://www.usaid.gov/sites/default/files/documents/1868/aapd08_01.pdf.

47. *Analysis of the U.S. response to Recommendation 228, 'Legal Update,' supra* note 45, at 2-3, point 4.

48. The Association of the Bar of the City of New York's president Samuel W. Seymour wrote to the president claiming that the United States was not in "compliance with its international obligations under IHL to provide non-discriminatory medical care to women and girls raped and impregnated in armed conflict." Seymour defined "non-discriminatory medical care" as the "right to receive abortion services" in cases of sexual and said that whereas the Helms Amendment "prohibits the use of federal funds for abortion services 'as a method of family planning' [. . .] the United States Agency for International Development (USAID) has interpreted the statute broadly in regulations and other guidance and statements and has in practice restricted funding for *all* abortion services," including abortion services in the case of victims of war rape. Seymour said the Association thus considered USAID policy, rather than the Helms Amendment, to be the real problem and recommended that President Obama "issue an executive order removing any restrictions on abortion funding imposed through regulations or other guidance or policies of

university professors,⁵⁰ and twelve members of the U.S. House of Representatives. The latter urged the president to interpret the Helms Amendment narrowly, as merely restricting rather than totally prohibiting abortion as a legitimate form of humanitarian assistance.⁵¹ From Europe, a working group at the European Parliament focused on reproductive health urged the U.S. president to immediately issue an executive order lifting U.S. abortion restrictions on humanitarian aid for girls and women raped in armed conflict.⁵² And European legal expert Louise Doswald-Beck wrote

government agencies from humanitarian assistance that conflict with or undermine U.S. compliance with its obligations under the Geneva Conventions and customary international law.” See Brigitte Triems, *EWL Writes to President Obama to Urge Action on the Routine Denial of Abortions for Girls and Women Impregnated by Rape During Armed Conflict*, EUROPEAN WOMEN’S LOBBY (Aug. 1, 2011), <http://www.womenlobby.org/news/ewl-news/article/ewl-writes-to-president-obama-to?lang=fr> [hereinafter *Brigitte Triems Letter to President Obama*]. For information on the relation between the NYC Bar Association letter and the GJC August 12th Campaign, see Samuel W. Seymour, *New York City Bar Association Letter to President Obama*, GLOBAL JUSTICE CENTER (Mar. 4, 2011), <http://globaljusticecenter.net/index.php/publications/letters/august-12th-letters/194-new-york-city-bar-association-letter-to-president-obama.html> [hereinafter *NYC Letter to President Obama*].

49. In the letter, Benshoof said the 2008 USAID policy directive “contains no life or rape exception,” it follows that it “exceeds any statutory requirement [concerning abortion], including the 1973 Helms Amendment to the Foreign Assistance Act.” She called on the president to issue “an Executive Order ordering all agencies to remove the abortion prohibition as applied to humanitarian aid for girls and women raped in armed conflict.” *Brigitte Triems Letter to President Obama*, *supra* note 48. See also Letter from the Global Justice Center to President Barack Obama (Aug. 12, 2011) available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=178&cf_id=34; *Executive Order Campaign: Letters to President Obama*, GLOBAL JUSTICE CENTER (2012), <http://globaljusticecenter.net/index.php/our-work/geneva-initiative/august-12th-campaign/u-s-abortion-restrictions/letters-to-president-obama> (the list of group signatories to the GJC’s letter as well as the list of groups who’ve sent their own letters to President Obama, as well as a list of all of the letters pertaining to the August 12th Campaign); *August 12th Letters*, GLOBAL JUSTICE CENTER (2012), <http://globaljusticecenter.net/index.php/publications/august-12th-letters>.

50. The university professors wrote to President Obama urging him “to issue an Executive Order lifting US abortion restrictions on humanitarian aid for girls and women raped and impregnated in situations of armed conflict.” *Joint Letter from Public Health and Law Academics and Professionals Letter to President Obama*, GLOBAL JUSTICE CENTER (Aug. 12, 2011), <http://globaljusticecenter.net/index.php/publications/letters/august-12th-letters/181-joint-letter-from-public-health-and-law-academics-and-professionals-letter-to-president-obama.html>.

51. In the letter, the congressmen voiced their concern “that the Helms Amendment—which restricts but does not prohibit abortion funding—is being implemented as though it were an absolute ban.” An accurate reading of the Helms Amendment, according to these congressmen, “would permit foreign-assistance funding for abortion in situations of rape, incest and life endangerment of the mother.” The letter was signed by Rep. Jan Schakowsky, Rep. Fortney Stark, Rep. Yvette Clarke, Rep. Lois Capps, Rep. Gwen Moore, Rep. Barbara Lee, Rep. Donald Payne, Rep. Lynn Woolsey, Rep. Diana DeGette, Rep. Maxine Waters, Rep. Louise Slaughter, Rep. Jesse Jackson, Jr. Letter from Congress of the United States to President Obama (Dec. 21, 2011), available at <http://thehill.com/images/stories/blogs/healthwatch/helmsamendment.pdf>.

52. Letter from Working Group, Reproductive Health, HIV/AIDS and Development in the European Parliament, International AIDS Society, to President Barack Obama, President of the United States (Mar. 6, 2013) available at,

in support of GJC's campaign, telling the president that "persons who are raped [in or as a result of armed conflict situations] fall into the category of 'wounded and sick,' due to the severe mental, and often also physical, trauma suffered."⁵³

Norway's accusation against the Americans in Geneva was effective in garnering some support for the GJC's campaign, but it would fail to persuade humanitarian policy makers in Europe.

III. AUTHORITIES REJECT HUMANITARIAN ABORTION

Each August on the anniversary of the first Geneva Convention, GJC convinced a few more groups to write letters. By 2013, however, the efforts seemed to backfire. A series of letters to and from Europe touched off a dispute within the European institutions and some governments on two central claims. First, that humanitarian law or human rights law had anything to do with abortion. Second, whether the U.S. policy had any chilling effect on abortion funded through European humanitarian aid programs. The letters allowed both sides to raise and respond to the merits of arguments for and against re-interpreting the law and are therefore worth examining in some depth.

Disharmony between European Commission policy and the GJC on this issue first came to light as a result of a resolution "on equality between men and women in the European Union" that the European Parliament adopted in March of 2012.⁵⁴ In the resolution, the European Parliament reminded "the Commission and the [EU] Member States of their commitment to implement UN Security Council Resolution 1325 on Women, Peace and Security"⁵⁵ on Women, Peace and Security" and so urged, in a reference to the Helms Amendment and USAID administrative restrictions, "the provision of EU humanitarian aid to be made effectively independent from restrictions on humanitarian aid imposed by the USA, in particular by ensuring access to abortion for women and girls who are victims of rape in armed conflicts."⁵⁶ On May 30, 2012, members of the Alliance of Liberals

http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=317&cf_id=34.

53. Letter from Geneva Academy of International Humanitarian Law and Human Rights, to President Barack Obama, President of the United States (Apr. 10, 2013), *available at* http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=321&cf_id=34.

54. Eur. Parl. Doc. (A7 0041) (2012) *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0069+0+DOC+XML+V0//EN>.

55. *Id.* at 61.

56. *Id.*

and Democrats for Europe (ALDE), a parliamentary coalition, formally submitted a series of questions to the European Commission seeking to get the EC to admit that U.S. policy was blocking European aid.⁵⁷

The EC disagreed. Commissioner Kristalina Georgieva replied that the humanitarian aid provided by the European Commission was “not subject to any restrictions unilaterally imposed by other donors,”⁵⁸ but rather followed the guidelines set forth by the “Minimum Initial Service Package of Reproductive Health in Crises”—a set of rules and activities designed for the prevention and management of sexual violence.⁵⁹

Benshoof fired back a letter saying that deferring to the Minimum Initial Service Package “as defining the standard of care provided to rape victims in humanitarian settings” meant the EC was deferring to local laws and giving them precedence over the Geneva Conventions.⁶⁰ She said EU humanitarian aid policy was thus “directly or indirectly compromised by the ‘no abortion’ prohibition put on all US humanitarian aid”⁶¹ since the U.S. and EU fund the same set of large humanitarian relief organizations which do not segregate funds.

The European Commission came down definitely against Benshoof in a letter from the Commission’s Director-General for Humanitarian Aid and Civil Protection, Claus Sorensen:

Neither IHL nor international human rights law explicitly refer to abortion rights and therefore the legal primacy of international frameworks on this issue is not clear. Even if [international humanitarian law] IHL were to give unequivocal rights in this field (which does not currently appear to be the case), in many countries this law is only enforceable if

57. “The fact that the United States is the world’s largest provider of humanitarian aid has enabled it to define the treatment policy for victims of war rape. This US policy therefore has direct consequences for all humanitarian actions in which USAID is actively or passively involved, and could compromise humanitarian aid projects sponsored by the European Commission’s Humanitarian Office (ECHO), the Commission and Member States, as well as jeopardizing the EU’s power to shape its own development assistance policy in general.” *See* Question for Written Answer to the Commission Rule 117 (EC) No. 005386 of 30 May 2012, 2012 O.J. (C 256).

58. Kristalina Georgieva, *Answer on Behalf of Parliament*, EUROPEAN PARLIAMENT (July 17, 2012), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-005386&language=EN>.

59. MINIMUM INITIAL SERVICE PACKAGE (MISP) FOR REPRODUCTIVE HEALTH IN CRISIS SITUATIONS, <http://www.unhcr.org/4e8d6b3b14.html> (last visited Apr. 11, 2015).

60. *See* Letter from the Global Justice Center to Kristalina Georgieva, member of European Commission, International Cooperation Humanitarian Aid and Crisis Response (Aug. 14, 2012) *available at* http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=14&cf_id=34.

61. *Id.*

integrated into domestic law. Generally speaking, our humanitarian partners advise their staff operating in country to abide by the laws of the land. Violating domestic law would carry the risk of prosecution, which would put humanitarian aid at risk.⁶²

Not only did the European Commission view a complete absence in international human rights and humanitarian legal instruments of language endorsing abortion as a therapeutic option for victims in humanitarian contexts, it also saw the lack of consolidation between IHL and domestic law in several states where humanitarian relief action takes places. Thus, for the EC, IHL must be domestically codified and integrated before it can be domestically enforced, but such codification is not always present.

The alliance between the Norwegian government and the GJC came to light further in another letter, this one sent to Georgieva from Sophie in't Veld—a Dutch member of the European Parliament Working Group on Reproductive Health, HIV/AIDS, and Development.⁶³ In her letter, in't Veld referenced the “Scoping Paper” published by Norad, the Norwegian Agency for Development Cooperation.⁶⁴ Norad is a specialized directorate under the Norwegian Ministry of Foreign Affairs.⁶⁵ In the paper, Norad's reasoning for promoting abortion was identical to GJC's.⁶⁶

Benshoof sidestepped the EC's central reason for dismissing its claims—that there is no right to abortion in either humanitarian or human rights

62. Letter from Claus Sorensen, Director General, European Commission, to Janet Benshoof, President, Global Justice Center (Oct. 10, 2012) *available at* http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=381&cf_id=34.

63. *See* Letter from Sophie in't Veld, Member Elected to Parliament, European Parliament, to Kristalina Georgieva, Commissioner for International Cooperation, Humanitarian Aid and Crisis Response (Feb. 27, 2013) *available at* <http://www.epwg.org/media/16418/letter%20to%20georgieva.pdf>.

64. Joar Svanemyr, Sexual Violence in Conflict and the Role of the Health Sector, NORAD (Nov. 2011), <http://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjoner/sexual-violence-in-conflict-and-the-role-of-the-health-sector.pdf>.

65. *See* NORAD, <http://www.norad.no> (last visited Apr. 11, 2015).

66. Svanemyr, *supra* note 64, at 12 (“Women who are raped and impregnated in situations of armed conflict have increased rates of maternal mortality and risk of resorting to unsafe methods of abortion. States have an obligation to provide non-discriminatory medical care to the wounded and sick under Common Article 3 of the Geneva Conventions, Additional Protocols I and II, and customary international law. Abortion services and counseling constitute medically appropriate interventions for survivors of rape who have been impregnated. The denial of abortion to women who become pregnant as a result of being raped has been considered to constitute torture or cruel, inhuman or degrading treatment. Consequently, the denial of the full range of medically appropriate care to victims of rape in situations of armed conflict constitutes a violation of their rights under applicable international law”).

law—in a rebuttal letter to Director-General Sorensen.⁶⁷ She instead focused on the relationship between humanitarian and domestic law, recommending that EC should use the UK’s interpretation of the Geneva Conventions as a model.⁶⁸ The silence on the matter of rights was deafening, since the GJC’s entire claim is based upon applying the evolving interpretations of human rights “non-discrimination” to humanitarian law’s “adverse discrimination.”

Benshoof also claimed that abiding by local laws went against the spirit of IHL, which is designed “to establish binding international rules covering all war victims regardless of geographical location.”⁶⁹ Benshoof dismissed the risk to those performing abortions, arguing that since, in her view, they act in accordance with IHL, any prosecution would be unlawful.⁷⁰

This view contradicts the bedrock principle of consent in IHL. The International Committee of the Red Cross (ICRC) explained, “both Additional Protocols I and II [of the Geneva Conventions] require the consent of the parties concerned for relief actions to take place.”⁷¹ Additional Protocol I stipulates that relief actions are “subject to the agreement of the Parties concerned in such relief actions” and Additional Protocol II stipulates that relief actions are “subject to the consent of the High Contracting Party concerned.”⁷² In addition to the clear textual support undergirding the principle of consent, the ICRC appeals to common sense: it is “self-evident that a humanitarian organization cannot operate without the consent of the party concerned.”⁷³ Other humanitarian groups have famously departed from the tradition, most notably *Médecins Sans Frontières* (MSM),⁷⁴ which, as its name suggests, puts its humanitarian

67. See Letter from Janet Benshoof, President, Global Justice Center, to Kristalina Georgieva, Commissioner for International Cooperation, Humanitarian Aid and Crisis Response (Apr. 25, 2014) available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=405&cf_id=34.

68. *Id.*

69. *Id.*

70. *Id.*

71. See Rule 55: CUSTOMARY IHL (2014), *supra* note 3

72. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, ICRC (2014), <http://www.icrc.org/applic/ihl/ihl.nsf/c525816bde96b7fd41256739003e636a/609876dafd3eeeacc12563cd0051df9a?OpenDocument>. See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II)*, 8 June 1977, ICRC (2014), <http://www.icrc.org/applic/ihl/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545>.

73. Rule 55: Access for Humanitarian Relief to Civilians in Need, CUSTOMARY IHL (2014), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55#refFn_34_22.

74. See ICRC Neutrality and Neutrality in Humanitarian Assistance, ICRC RESOURCE CENTER (2010), <http://www.icrc.org/eng/resources/documents/misc/57jn2z.htm> (information on ICRC and

mission above even the fundamental tenets of international order such as territorial boundaries.

In June of 2014, Commissioner Georgieva replied to Benshoof. She made clear that the European Commission's "humanitarian partners advise their staff to abide by national law in the countries where they carry out their activities"—that is, that humanitarian workers under the auspices of the EU were instructed to defer to local laws regarding abortion. Georgieva also reiterated that "neither under IHL nor international human rights law is there at present an explicit 'right to abortion' or a universal obligation to provide abortions to rape victims."⁷⁵

Benshoof tried another tack, this one a retreat. In her July 7, 2014 reply to Georgieva, Benshoof said it wasn't necessary to establish a prior right to abortion: "The right in question is not an explicit right to abortion, as you say in your letter, but rather the undisputed right under the Geneva Conventions of those 'wounded and sick' in armed conflict to all the medical care required by their condition without discrimination on the basis of sex."⁷⁶ Abortion is then not to be provided as a right, per se, but as a necessary medical procedure addressing the "wounded and sick" condition of women made pregnant through war rape.

Benshoof thus predicated her campaign on a far broader question with even less consensus. Her interpretation of the Geneva Conventions requires that one first understand that pregnancy itself is a war wound and second that it is a wound requiring abortion to "heal" in such a way as a gangrening leg requires amputation. The view eschews consideration of the fact that pregnancy, distinct from the manner of conception, is the sustenance of nascent life and not a "wound or sickness." She insisted upon a particular interpretation of non-discrimination based upon biological distinction, which, as discussed in a following section, remains controversial even in the United States.⁷⁷

MSF's differing positions on neutrality and consent). See also RICHARD SHAPCOTT, *INTERNATIONAL ETHICS: A CRITICAL INTRODUCTION* (2010); Victoria Morgan, *The ICRC Today is a Paradox*, SWISSINFO (June 29, 2012, 11:00), <http://www.swissinfo.ch/eng/-the-icrc-today-is-a-paradox-/32993136>.

75. Letter from Kristalina Georgieva, Commissioner for International Cooperation, Humanitarian Aid and Crisis Response, to Janet Benshoof, President, Global Justice Center (June 30, 2014) (on file with the author).

76. Letter from Janet Benshoof, President, Global Justice Center, to Kristalina Georgieva, Commissioner for International Cooperation, Humanitarian Aid and Crisis Response (July 7, 2014) (on file with the author).

77. See *The Right to an Abortion for Girls and Women Raped in Armed Conflict: States' Positive Obligations to Provide Non-Discriminatory Medical Care under the Geneva Conventions*, GLOBAL JUSTICE CENTER 8, http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34.

This view rejects the logic that it is nature that discriminates between men and women in child bearing rather than laws and policies. Hence, what abortion advocates argue is that the Geneva Conventions should sanction the equalization of the outcomes of this biological difference between men and women in humanitarian settings.

Director General Sorenson's letter and Commissioner Georgieva's letter represented a resounding rejection by high political authorities in the European Commission of the core premise of the campaign for humanitarian abortion. Even the Dutch government dismissed the idea of any right to abortion in the Geneva Conventions.⁷⁸ Such rejections provide the most clear indication of a lack of international consensus regarding the politicized and gendered interpretation of IHL. The ICRC similarly rejected the entire premise underlying Benshoof's campaign: there is no right to abortion in international human rights law, and none in international humanitarian law.

A follow-on interview with EC officials confirmed their position that abortion is not part of a nation's obligations under the Geneva Conventions, and that the EC is committed to respecting national laws on the matter.⁷⁹

One by one the feminist claims underlying their assertion of abortion rights under international human rights and humanitarian law have been rejected by the high legal and political authorities they have sought to persuade.

78. In March of 2013, the Dutch Minister of Foreign Affairs, Frans Timmermans, and the Dutch Minister of Foreign Trade and Development Aid, Liliaane Ploumen, responded to Dutch parliamentarian Sjoerd Sjoerdsma on the matter. They rejected the notion that there was a right to abortion anywhere in the Geneva Conventions, even though they said they supported funding it through the nation's foreign aid, even in contravention of national laws. See Memorandum from the Global Justice Center Translating Parliamentary Questions and Answer for Readership (Apr. 18, 2013) available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=319&cf_id=34. See also *Netherlands Affirms Right of Women Raped in Armed Conflict to Abortions as Part of Necessary Medical Care Under International Law*, GLOBAL JUSTICE CENTER (2012), <http://globaljusticecenter.net/index.php/news-and-events/news1/press-releases/319-netherlands-affirms-right-of-women-raped-in-armed-conflict-to-abortions-as-part-of-necessary-medical-care-under-international-law>.

79. "As mentioned in 2012 it is still the European Commission's understanding that under neither international humanitarian law nor international human rights law is there at present an explicit 'right to abortion' or a universal obligation to provide abortions to rape victims [. . .] Generally, we understand that our humanitarian partners advise their staff to abide by national law in the countries where they carry out their activities. In countries where access to abortion is restricted, raped women and girls seeking abortion could be prosecuted. Any violation of domestic law could also lead to judicial proceedings against our partners, which would jeopardize our partners' humanitarian work and thereby their ability to provide humanitarian assistance and protection to those in need, including women and girls who become pregnant as a result of rape." Email from Javier Perez, Assistant to the Director General, Humanitarian Aid and Civil Protection, to Antonio Sosa (Aug. 27, 2014) (on file with the author).

IV. ONE TRAGEDY, TWO SOLUTIONS: HUMANITARIAN V. FEMINIST
RESPONSES TO SEXUAL VIOLENCE

Most remarkable about the campaign for humanitarian abortion is that its proponents admit they lack evidence that women want what they prescribe. When asked how she knows abortion is needed in developing countries, Janet Benshoof responds, “Check the morgue.”⁸⁰ That is, she asserts that a woman who died from an illegal abortion would have been, had she lived, an advocate for legal abortion. Aside from the problem of ascribing motives and voting preferences to the deceased, there is the problem of physical evidence. Even the World Health Organization admits that it can only estimate the number of maternal deaths, much less the number of deaths due to abortion, since there is no reliable data.⁸¹ Recent studies have shown that liberalizing abortion does not improve overall maternal health in a country, and that nations with the most protective abortion laws also have the lowest rates of maternal deaths.⁸²

The divergence is between a deductive approach that seeks to operationalize feminist theory and the inductive reasoning of humanitarians seeking to align policy with circumstances on the ground.

A. Humanitarian responses to Sexual Violence in Conflict

The humanitarian response is aligned with studies based upon the experience of women raped in conflict. The war in the Democratic Republic of Congo (DRC)⁸³—involving nine countries and twenty armed groups—
—is infamous for the widespread, systematized incidence of rape and sexual slavery, claiming more than 1.8 million women victims.⁸⁴ In an

80. Interview with Akila Radhakrishnan, Senior Counsel, Global Justice Center (August 8, 2014). Recording on file with the author.

81. The World Health Organization most recent figures for annual global maternal deaths shows a significant drop in those due to abortion—from 13% to 7.9% of the total. The figure includes miscarriages and WHO says it adjusts the number upwards since it lacks actual data to back the figure. Lale Say et al., *Global Causes of Death: a WHO Systematic Analysis*, e323 THE LANCET 2 (2014), http://ac.els-cdn.com/S2214109X1470227X/1-s2.0-S2214109X1470227X-main.pdf?_tid=afdc1ae0-7c02-11e4-946e-00000aacb361&acdnat=1417731351_9b152d8ba30514b3cb078fc3927df20d.

82. Elard Koch & Monique Chireau et al., *Abortion Legislation, Maternal Healthcare, Fertility, Female Literacy, Sanitation, Violence against Women and Maternal Deaths: A Natural Experiment in 32 Mexican States*, 5 BMJ OPEN e006013 (2015), available at <http://bmjopen.bmj.com/content/5/2/e006013.full>.

83. *Special Report: Congo*, RESUCE.ORG, <http://www.rescue.org/special-reports/special-report-congo-y> (last visited Apr. 11, 2015) (estimate for deaths between 1998 and 2003).

84. Amber Peterman, Tia Palermo & Caryn Bredenkamp, *Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo*, 101(6) AM. J. PUB. HEALTH 1060 (2011), available at

investigation on behalf of the UN Office of the High Commissioner for Human Rights (OHCHR) to determine the victims' "most pressing needs" to "help restore their dignity," almost all of the victims said their greatest needs were "the paramount need for peace," as well as "medical care and education for their children and in some cases for themselves."⁸⁵

Lack of education and accessible clean water are contributing factors to sexual violence since women and children fell victim while traveling on poorly lit roads. One of the victims' main requests, even above reparations, was peace and security. According to the UN report victims have "urgent and desperate basic needs for medical care, housing, and a means of support for themselves and their children." Asking women how their dignity could be restored they responded, "virtually every one started with peace and security as their first and most immediate personal need, pleading with the panel to carry this message to the rest of the world."⁸⁶

None of the victims interviewed expressed a desire that her child had not been born. A 2002 Human Rights Watch Report similarly found that "most unmarried girls who became pregnant as a result of rape generally gave birth to the children even though they understood that doing so made it impossible to hide the rape and also entailed the burdens of bringing up the child."⁸⁷

The report portrayed the strong desire of women to give birth to their babies, despite the consequences of rejection by their own kin. One girl told Human Rights Watch that when her employer suggested abortion, "I spoke with my father, and he asked me—would a child stop you continuing with your studies? I said no and he said I should keep the child. My father is a Christian. He said he would stand by me."⁸⁸ The report highlighted a woman raped by Mai-Mai and FDD combatants near Kazimia in June 2001 returned home after three days recovering in the hospital to find "her

<http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2010.300070?hits=10&andorexactfulltext=&andFIRSTINDEX=0&searchid=1&author1=Bredenkamp&resourcetype=HWCIT&RESULTFORMAT=&sortspec=relevance&maxtoshow=&>. See also *Democratic Republic of Congo Profile*, BBC.com, <http://www.bbc.com/news/world-africa-13283212> (last updated Sept. 16, 2014, 5:41 AM). For more information about ongoing abductions, see Erica Smith, *Child Solider Recruitment in DR Congo Remains 'Endemic' Says New UN Report*, Impunity Watch Reporter (Oct. 25, 2013), <http://impunitywatch.com/child-solider-recruitment-in-dr-congo-remains-endemic-says-new-report/>.

85. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, REPORT OF THE PANEL ON REMEDIES AND REPARATIONS FOR VICTIMS OF SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO TO THE HIGH COMMISSIONER FOR HUMAN RIGHTS 12 (Mar. 2011), <http://www.refworld.org/docid/4d708ae32.html>.

86. *Id.* at 38.

87. HUMAN RIGHTS WATCH, THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO, 66 (2002), available at <http://www.hrw.org/reports/2002/drc/Congo0602.pdf>.

88. *Id.* at 66-67.

husband, a development worker, welcomed her. He said, ‘We are together—it [the rape] was not her fault.’⁸⁹

Similar stories are found in the investigations of Fiona Lloyd-Davies, who documented the plight of women in DRC between 2001 and 2011, during the height of the wars. In her film “Seeds of Hope,”⁹⁰ she recounts the story of Masika Katsuva, who founded a village for rape survivors and their children born of war:

Like so many women survivors, she too was rejected when she and her two teenage daughters were raped by militia men. Her husband was murdered in front of her, chopped up and she was forced to eat his private parts.

Her two daughters Rachel and Yvette were 15 and 13 years old, and both of them conceived children. Masika’s husband’s family rejected them and she brought her daughters and their babies to a market town hugging the shore of Lake Kivu to try and rebuild their lives.

This year I made a film about her and her work. She’s taking care of 170 women at the moment, they call her Mama Masika. Over the past 10 years she’s helped more than 6,000 victims of rape, providing them with a wide range of care—practical, medical and psychological.⁹¹

A review of the DRC’s various protocols⁹² for treating sexual violence shows that they are focused on responding to the desires expressed by these

89. *Id.* at 67.

90. See TRAILER FOR SEEDS OF HOPE (Pulitzer Center 2013), <http://pulitzercenter.org/projects/africa-east-congo-mineral-mining-dutch-foreign-affairs-rape-human-rights-DRC>.

91. Fiona Lloyd-Davies, *Why eastern DR Congo is ‘rape capital of the world’*, CNN (Nov. 25, 2011, 5:53 AM)

<http://www.cnn.com/2011/11/24/world/africa/democratic-congo-rape/>.

92. The 2009 Comprehensive Strategy on Combating Sexual Violence in the Democratic Republic of the Congo emphasizes four priorities: combating impunity, protection and prevention, security sector reform, and assistance to survivors. The UN Office for the High Commissioner of Human Rights and MONUC joint human rights office in DRC is the lead agency for combating impunity, which includes matters of reparations and guarantees of non-repetition. COMPREHENSIVE STRATEGY ON COMBATING SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF THE CONGO, EXECUTIVE SUMMARY 2–4 (2009), available at <http://monusco.unmissions.org/Portals/MONUC/ACTIVITIES/Sexual%20Violence/KeyDocuments/Comprehensive%20Strategy%20Executive%20Summary.pdf>. In September 2014, Kinshasa released an additional plan specific to its armed forces, the Plan for the Congolese Army on tackling Sexual Violence.

Congolese women. They emphasize prompt attention, compassion, and understanding—especially for women who are bearing children as a result of rape.⁹³

What is needed to address the atrocities in DRC and elsewhere is not reinterpretations of the law, but enforcement of the laws that nations have already agreed to.⁹⁴ This was the conclusion of the newly-appointed UN Secretary General’s Special Representative on Sexual Violence in Conflict, Margot Wallström upon returning from a visit to DRC in 2010. She told the UN Security Council it was the “rape capital of the world.”

Wallström’s successor, Zainab Hawa Bangura, has reiterated the call to end impunity and enforce existing international law as the way ahead. The former foreign minister and health minister from Sierra Leone said the violence in her own country—with some 60,000 war time rapes—led her to her role as advocate for the victims, the youngest of which was just three

93. Democratic Republic of the Congo, Public Health Ministry in collaboration with the Ministry of Gender, Family, and Child, National Program of Reproductive Health, *Protocole National de Prise en Charge Psychosociale et Santé Mentale des Survivants des Violences Sexuelles* (National Protocol of Psychosocial and Mental Health Facilitation for Survivors of Sexual Violence), June 2012, at 24:

As in other cases, the same approach must be taken. It is necessary to take into account that the pregnancy women raped or pregnant following a rape sees herself confronted by difficulties on the level of self esteem but also in the social context, especially in this second case [women pregnant due to rape]. It is possible that she rejects the idea of having a child and that ideas of loss and/or abandonment of the child occur to her. She could also have ideas of self-destruction which could translate themselves into a suicidal attempt.

We mustn’t forget that the child born as a result of rape (or, more literally, following a rape) will be a constant reminder of what happened not only for her but also for the family and her entourage. Psychosocial assistants, neuropsychiatric nurses, clinical psychologists, doctors, and psychiatrists must listen to the victim and not just pretend to listen. That consists of explaining to the victim that it is normal to think about rejecting what happened and, above all/especially, its consequences but that you are going to speak about it and discuss it because there are always other options that the victim can find.

In the cases of children issued from rape, it is important to leave the dossier open until 4 or 5 months after their birth, in order to following the evolution of the child (to prevent mistreatment). It is necessary to work with the family and the couple to accept what has happened, the child which has come, through mediation, listening and information techniques.

94. “If women continue to suffer sexual violence, it is not because the law is inadequate to protect them, but because it is inadequately enforced. . . . Our aim must be to uphold international law, so that women – even in the war-torn corners of the world – can sleep under the cover of justice.” *Tackling sexual violence must include prevention, ending impunity – UN official*, US NEWS CENTER (Apr. 27, 2010), <http://www.un.org/apps/news/story.asp?NewsID=34502#.VDwS8md0yM8>.

years old.⁹⁵

After the UN reported that some 1,700 women had been raped in Somali refugee camps in 2012 the nascent Somali government detained one of the victims who spoke to a reporter. Bangura lashed out at the government for having “criminalized the victim,” “reinforced the culture of silence and stigma surrounding sexual violence,” and “emboldened perpetrators and would-be perpetrators” who knew they would be protected by state inaction and “the shame of their victims.”⁹⁶ On the eve of the London summit on sexual violence in June 2014, Bangura said a leading Somali judge told her, “[i]n Somalia, we don’t have rape.”⁹⁷

Ending impunity was the purpose of the 2014 international protocol, introduced by Britain’s foreign minister William Hague, whereby Western nations would commit themselves to identifying and punishing perpetrators. Hague was reported to be seeking the act be declared a “grave breach” of the Geneva Conventions that could lead to universal jurisdiction, the prosecution of perpetrators in foreign courts.⁹⁸

Significantly, the protocol did not mention abortion except to highlight the need to investigate any evidence of forced abortion, in accordance with its prohibition in the Rome Statute. As discussed above, feminists considered this a setback for their pursuit of humanitarian abortion. The protocol’s purpose was rather to increase the number of prosecutions by collecting the strongest possible evidence.⁹⁹ It included a field manual of sorts for first responders and investigators and guidelines for post-rape protocols, with recommended questions and documentation techniques.¹⁰⁰

The protocol coincided with the London summit, gathering of 1,700

95. Associated Press, *UN Official: Nigerian Schoolgirls Face Rape Danger*, ONLINE MAIL (Jun. 6, 2014, 8:44 PM), <http://www.dailymail.co.uk/wires/ap/article-2650961/UN-official-Nigerian-schoolgirls-face-rape-danger.html>.

96. Zainab Hawa Bangura, *Go After the Rapists in Somalia, Not their Victims*, HUFFINGTON POST (Feb. 6, 2013, 3:24 PM), http://www.huffingtonpost.com/zainab-hawa-bangura/go-after-the-rapists_b_2632251.html.

97. Associated Press, *supra* note 95.

98. Alice Allen, *What can William Hague do to prevent sexual violence in conflict?*, THE GUARDIAN (Apr. 10, 2013, 7:13 AM), <http://www.guardian.co.uk/global-development/poverty-matters/2013/apr/10/william-hague-sexual-violence-conflict>.

99. FOREIGN & COMMONWEALTH OFFICE, INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT: BASIC STANDARDS OF BEST PRACTICE ON THE DOCUMENTATION OF SEXUAL VIOLENCE AS A CRIME UNDER INTERNATIONAL LAW (2014), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf.

100. Katie Nguyen, *G8 reaches “historic” agreement to end rape as weapon of war*, THOMSON REUTERS (Apr. 11, 2013, 5:00 PM), <http://www.trust.org/item/?map=g8-reaches-historic-agreement-to-end-rape-as-weapon-of-war>; *FCO Press Release: Launch of G8 Declaration on Sexual Violence*, GOV.UK (Apr. 11, 2013), <https://www.gov.uk/government/news/g8-declaration-on-preventing-sexual-violence-in-conflict>

delegates from 129 countries, including 79 cabinet ministers, and ambitiously entitled “Global Summit to End Sexual Violence in Conflict.”¹⁰¹ The action plan that emerged from the meeting emphasized accountability, protection, security, and legal sector reform. While it recognized “full reproductive health rights,” it made no mention of abortion. Rather, it recognized the need to protect and support the war child and other child victims of sexual violence.¹⁰²

B. Feminist Responses To Sexual Violence In Conflict

The feminist approach views children born of rape as incidental to sexual violence, or worse, co-aggressors. So says R. Charli Carpenter, who found in her content analysis of news stories from the wars in the former Yugoslavia in the 1990s, that sensationalist media and post-conflict criminal trials perpetuated the perception that these children were unwanted.¹⁰³ During the International Criminal Tribunal for the Former Yugoslavia (ICTY), news reports and the questions asked by prosecutors at the proceedings deliberately highlighted incidents of mothers aborting, abandoning, or killing their children after birth.¹⁰⁴ Press reports from 1995 suggested a majority of mothers abandoned their newborns after the Rwanda genocide and led the government to consider liberalizing abortion.¹⁰⁵ Carpenter found that such stories garnered more press than stories of women who loved their children and raised them despite complicated feelings about their birth.¹⁰⁶

Western interest in reproductive rights shaped reporting of widespread rape in the Bosnian conflict as well. In 1993 feminists staged a conclave in Vienna to coincide with the World Human Rights Conference. At their meeting, feminists rallied around the slogan “Women’s Rights are Human

101. *Global Summit to End Sexual Violence in Conflict*, GOV.UK, <https://www.gov.uk/government/topical-events/sexual-violence-in-conflict> (last visited Apr. 11, 2015).

102. “We also acknowledged the many victims who are less visible, less recognised and less able to receive assistance. This includes children who are born of conflict-related rape who suffer the lifelong consequences of the act, girl child soldiers who are ‘married’ to combatants and forced into sexual slavery, and men and boys in detention who are systematically raped as a form of punishment or torture.” Foreign & Commonwealth Office, *Policy paper: Chair’s Summary - Global Summit to End Sexual Violence in Conflict*, GOV.UK (June 13, 2014), available at <https://www.gov.uk/government/publications/chairs-summary-global-summit-to-end-sexual-violence-in-conflict/chairs-summary-global-summit-to-end-sexual-violence-in-conflict>.

103. R. CHARLI CARPENTER, *FORGETTING CHILDREN BORN OF WAR: SETTING THE HUMAN RIGHTS AGENDA IN BOSNIA AND BEYOND* 70 (2010).

104. *Id.* at 118.

105. Judith Matloff, *Rwanda Copes with Babies of Mass Rape*, CHRISTIAN SCIENCE MONITOR, March 27, 1995, <http://www.csmonitor.com/1995/0327/27014.html>.

106. TEDx Talks, *Smile at the Man Who Did this to You: Stories of Hope from Rwanda: Jules Shell at TEDxScottAFB* (June 20, 2012), <https://www.youtube.com/watch?v=SahTTuKqfTI>.

Rights,” an idea expressed in Charlotte Bunch’s 1990 article of a similar name.¹⁰⁷ The conferees concluded that the roots of sexual violence were due to “structural relationships of power, domination, and privilege between men and women in society.”¹⁰⁸ The solution was the upheaval of patriarchal societies and included a call for abortion rights as a prerequisite to equality. The Vienna agenda would shape human rights advocacy and the UN approach on sexual violence for the next twenty years. Both Amnesty International and Human Rights Watch would institute women’s rights sections and launch campaigns against sexual violence leading to their advocacy for abortion in the late 1990s.

The 1990s saw a burgeoning feminist literature prescribing abortion as the solution to rape and sexual violence in conflict.¹⁰⁹ Beverly Allen’s influential book, *Rape Warfare*, suggested that infanticide could be psychologically healthy for the mother, and likened enforced pregnancy to biological warfare.¹¹⁰ The Center for Reproductive Rights claimed that pregnancy “maximizes the pain of rape” and “prolongs physical and emotional pain.”¹¹¹ Still other feminists said the pregnancies amounted to genocide, representing a foreign occupation of the womb, preventing reproduction of another, and therefore, representing a form of destruction.

One result was that the very UN agencies and major human rights groups responsible for helping nations protect children born of war deliberately rejected the issue due to competing concerns. Beginning in 1996, successive UN reports on sexual violence made no mention of the children. A Canadian report from a conference in Winnipeg removed such references.

Norway had an infamous history of mistreating war children born of German soldiers and Norwegian mothers during and after World War II.¹¹² Despite, or perhaps because of that sad legacy, Norway denied funding for a children’s rights advocacy group seeking to initiate an international

107. Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q., Nov. 1990, at 486-98. For Bunch’s oral history of the Vienna meeting and the origins of the feminist human rights approach see, at minute 11:20, Roosevelt Institute, *Ending Violence against Women and Girls*, YOUTUBE.COM (Sept. 18, 2014), <https://www.youtube.com/watch?v=R2YvHa8n3t0>.

108. Bunch, *supra* note 107, at 491.

109. JUTTA JOACHIM, AGENDA SETTING, THE UN, AND NGOS: GENDER VIOLENCE AND REPRODUCTIVE RIGHTS 133-61 (2007).

110. BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA 131 (1996).

111. CARPENTER, *supra* note 103, at 70.

112. Steve Rosenberg, *Living Hell of Norway’s ‘Nazi’ Children*, BBC NEWS (Mar. 8, 2007, 6:13 AM), <http://news.bbc.co.uk/2/hi/6432157.stm>; Rob Sharp, *The Chosen Ones: The War Children Born to Nazi Fathers in a Sinister Eugenics Scheme Speak Out*, THE INDEPENDENT (Jan. 20, 2008), <http://www.independent.co.uk/news/world/europe/the-chosen-ones-the-war-children-born-to-nazi-fathers-in-a-sinister-eugenics-scheme-speak-out-771017.html>.

treaty.¹¹³

Nor were the children a subject of concern for UNICEF. Carpenter found that to the contrary, UNICEF acted as the gatekeeper on the issue of sexual violence in conflict, keeping the children born of rape in war off the international agenda.¹¹⁴ When Carpenter consulted for UNICEF and prepared a survey of survivor children in 2005, the agency refused to make it public due to fear of the reaction of some NGOs and governments.¹¹⁵ The next year, a UNICEF representative pulled support from a conference on the issue, saying he “remained to be convinced of the merit of UNICEF treating these children as a specific group.”¹¹⁶

The feminist approach pitted the rights of children against that of their mothers. Intentionally or not, it also contributed to leaving children born of war out of post-conflict peace building programs and their mothers to raise them without the material and social benefits accorded to other survivors.¹¹⁷

It is important to note that the feminist interpretation was explicitly rejected by nations during the negotiation of the Rome Statute establishing the International Criminal Court. Concerns about a feminist reading of the term “forced pregnancy” in the draft document led governments from more traditional nations to make sure the term could not be misinterpreted. The final document includes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as a crime against humanity,¹¹⁸ and goes on to clarify:

‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. *This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.*¹¹⁹

It was a defeat for the feminists. Even so, they hailed the codification of

113. CARPENTER, *supra* note 103, at 46.

114. *Id.*

115. *Id.* at 178.

116. *Id.* at 47.

117. Eunice Apio, *Uganda’s Forgotten Children of War*, in *BORN OF WAR: PROTECTING CHILDREN OF SEXUAL VIOLENCE SURVIVORS IN CONFLICT ZONES* (R. Charli Carpenter ed., 2007), 106-7.

118. Rome Statute of the International Criminal Court art. 7(1g), July 17, 1998, 2187 U.N.T.S. 90, available at <https://www.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/fb2c5995d7cbf846412566900039e535>.

119. *Id.* at art. 7 (2)(f) (emphasis added).

“forced pregnancy” as a turning point, claiming the new formulation reflected their view that pregnancy is a distinct war crime in addition to that of rape. Carpenter observes, “[t]hrough such intellectual and semantic gymnastics, forced pregnancy was constructed both as a component of rape and a specific crime itself, under the rubric of war crimes, crimes against humanity, and genocide” while the violations of the child’s rights were ignored, and instead invoked as “evidence of the atrocit[y].”¹²⁰

C. Origins And Logic Of The Feminist Approach

Before launching the Global Justice Center in 2005, Janet Benshoof led the Center for Reproductive Rights (CRR), a New York-based public-interest law firm she founded in 1992. Its purpose was to expand abortion globally, and it serves to reinforce the U.S. abortion rights movement by advancing a feminist interpretation of equality in the law.

Like her mentor Ruth Bader Ginsburg, Benshoof views abortion rights as a prerequisite for equal protection and laments that such cases do not receive the highest degree of scrutiny by the courts. She laid out a strategy for using international law on the domestic front in her 2011 article on CEDAW:

Although equal protection guarantees do not require positive structural remedies under the U.S. Constitution, this is not the case with international human rights laws. Most notably, the major human rights treaty for women, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has an inclusive definition of equality that requires strict scrutiny of all laws negatively-impacting women, and imposes obligations on states parties to undertake affirmative measures to eliminate systemic inequality.¹²¹

Benshoof argues that U.S. ratification of CEDAW would “radically reframe the right to equality accorded women under the U.S. Constitution.” Failing that, she urges U.S. courts to use CEDAW committee interpretations. Ginsburg, too, advocates for the use of international jurisprudence.¹²²

120. CARPENTER, *supra* note 103, at 107.

121. Janet Benshoof, *U.S. Ratification of CEDAW: An Opportunity to Radically Reframe the Right to Equality Accorded Women Under the U.S. Constitution*, 35 N.Y. REV. OF L. & SOC. CHANGE 103, 104 (2011).

122. “Foreign opinions. . . can add to the store of knowledge relevant to the solution of trying questions. . . . The March 2005 decision in *Roper v. Simmons* presents perhaps the fullest expressions to date on the propriety and utility of looking to “the opinions of [human]kind.”

In this “export-import” strategy, abortion rights are first exported to foreign courts, specifically seeking decisions that use the equality argument. The second step is importing that perspective to the U.S. by persuading justices that there is an international custom requiring them to do so.

Through its “strategic litigation” the Center for Reproductive Rights seeks favorable decisions citing its arguments by selecting national courts whose judges seem sympathetic to feminist arguments. Her most touted case was in Colombia where her organization helped bring the suit that resulted in Colombia’s Constitutional Court¹²³ decision to liberalize abortion while citing CEDAW committee comments.¹²⁴ What she doesn’t mention is that even the Colombian justices did not agree that the text of CEDAW contained any abortion rights.¹²⁵

Likewise, the Benschhof’s GJC seeks “strategic enforcement”¹²⁶ to get nations to change their policies on abortion through reinterpretation of humanitarian law. The GJC refers to this as the “low hanging fruit” approach, which involves “using universally accepted laws, such as the Geneva Conventions, as the foundation for global enforcement of other

Holding unconstitutional the execution of persons under the age of 18 when they committed capital crimes, the Court declared it fitting to acknowledge ‘the overwhelming weight of international opinion against the juvenile death penalty.’ Justice Kennedy wrote for the Court that the opinion of the world community provides ‘respected and significant confirmation of our own conclusions.’ “ Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Address at the Constitutional Court of South Africa, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication Constitutional Court of South Africa (Feb. 7, 2006), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_02-07b-06.

123. Benschhof, *supra* note 121, at 109.

124. Corte Constitucional [C.C.] [Constitutional Court], mayo10, 2006, *Recomendaciones a Colombia del Comité para la eliminación de la discriminación contra la mujer, encargado de monitorear la CEDAW*, *available at* <http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm> (2006).

125. Colombian Constitutional Court Justice Rafael Nieto Navia, in his dissenting opinion, wrote that all of the international instruments that were brought to bear in deciding the suit, such as [. . .] the Convention on the Elimination of All Forms of Discrimination Against Women,” lack any stipulation that would lead to “a free path to the practice of abortion.” After clarifying and stressing that only the texts of the international treaties themselves, and *not* the recommendations made by the treaty committees, hold legal weight in the Court’s decisions, Justice Nieto Navia referred to the necessary incoherence of any pro-abortion interpretation of the international instruments themselves: “In relation to the international treaties and instruments, life is the first right that is protected and on it depends the very existence of all the other rights, given that this previous [right] antecedes them. Insofar as this right exists by virtue of [someone] being human and not by virtue of the state recognizing whether someone is human, the state cannot decide when and in which cases this right is not to be recognized, for this would imply discriminatory treatment, which neither the [Colombian] Political Constitution, nor the treaties protecting human rights, authorize.” *See* Colombian Constitutional Court, May 10, 2006, C-355/06, “Intervención de Rafael Nieto Navia.”

126. *See About Us*, GLOBAL JUSTICE CENTER (2012), <http://globaljusticecenter.net/index.php/about-us/mission>. *See also Our Work* GLOBAL JUSTICE CENTER (2012), <http://globaljusticecenter.net/index.php/our-work/geneva-initiative>.

international laws and human rights guarantees.”¹²⁷ International humanitarian law “provides a ‘neutral’ source for investigating human rights abuses/war crimes,”¹²⁸ in such a way as to reach their controversial goals.

To accept the campaign’s argument, one must make many prior assumptions that are by no means uncontroversial. First is the assumption that biological distinction defines discrimination. Erika Bachiochi argues that biological differences regarding pregnancy are precisely the reason why the Court has not seen equality as the main reason abortion rights ought to be recognized.¹²⁹ Other legal scholars have found the biological distinction view of discrimination incoherent.¹³⁰ Whereas feminists view the child born of war rape as an agent of the enemy, scholars have shown that comparing an unborn child to an “aggressor” is problematic. The mother-child relationship does not mirror aggressor-victim relationships, and the courts have found an interest in both the pregnant woman and her unborn child.¹³¹

Among the most important components of this stratagem is a non-binding “general recommendation” from the CEDAW committee, made in 1998. Louise Doswald-Beck, who was formerly the head of the

127. See *Geneva Initiative*, GLOBAL JUSTICE CENTER (2012),

<http://globaljusticecenter.net/index.php/our-work/geneva-initiative>.

128. See Janet Benshoof, President, Global Justice Center, Presentation: Enforcing International Law for Radical Change (Nov. 2012),

http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=109&cf_id=34. For details on the GJC’s strategy regarding which legal instruments to use depending on the situation, see *The International Legal Framework of Peace Negotiations: Requirements and Recommendations for Enforcing women’s Rights*, GLOBAL JUSTICE CENTER (2014), http://www.globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=421&cf_id=34.

129. “A legislature does not engage in sex-role stereotyping when it passes a law that is based upon the biological facts of childbearing (for example, that women, and not men, gestate and bear children), but that it is sex-role stereotyping when a law seeks to define traditionally the social roles of men and women in reliance upon those biological facts (for example, because women bear children, they care less about their professional work.)” Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARVARD J. OF L. & Pub. Pol. 889, 906-07 (2013).

130. According to Paulsen, “Abortion restrictions impose legal burdens not on the basis of gender but on the basis of the asserted presence and value of a human life *in utero*. To be sure, only women become pregnant. But [abortion restrictions do] not regulate *women* as a class; [they] regulate[] the conduct of *men and women* relevant to the commission of or assistance in abortion” Michael Stokes Paulsen, *quoted in* Bachiochi, *supra* note 129, at 905-07.

131. According to Erika Bachiochi, “The human being at the embryonic and fetal stages of development can be compared neither to a relatively autonomous, adult human being (or even to a born infant) nor to a stranger; rather, this nascent human life is utterly dependent upon its mother for survival, as all human beings are at this stage of human development. Such existential dependence is unique to this phase of human life. Indeed, the relationship between a pregnant mother and her unborn child is unique among all human relationships, which is why it is so very difficult to find a suitable analogy.” Bachiochi, *supra* note 129, at 931-32.

International Committee of the Red Cross's legal division, argues that "the definition of non-discrimination (or "non-adverse distinction") under IHL is the same as that in major human rights treaties including CEDAW, and precludes using biological differences between males and females as a rationale for less favourable treatment of females."¹³² Doswald-Beck cites the CEDAW committee's general recommendation 24 and not the text of the treaty.¹³³

Two of her claims ring hollow. The first is her reliance on the non-binding CEDAW recommendation. That recommendation asserts that, "when possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion," and warns nations that they "must also put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12."¹³⁴ This is a sweeping mischaracterization of the text, which refers only to non-discrimination in health care.¹³⁵

Nonetheless, the CEDAW committee used this interpretation to pressure more than 90 countries over 120 times to liberalize their abortion laws in just the first 10 years of adopting their stance in favor of abortion.¹³⁶ The people of war-torn DRC have not been spared. In their last review, the committee told the Congolese:

To remove punitive legislative provisions imposed on women who undergo abortion, in line with general recommendation No. 24 (1999), in particular when pregnancy is harmful to the mother's life and health and in instances of incest and rape, and more particularly in cases of rape perpetrated in the context of the conflict.¹³⁷

Here again the committee cites itself as authoritative, presuming

132. Letter from Louise Doswald-Beck, former Head of the International Committee of the Red Cross's Legal Division, to President Barack Obama (April 10, 2013) (on file with author) (emphasis added). See Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), gen. rec. 24, ¶¶ 11, 14 (1999), <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>; Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), gen. rec. 25, ¶ 8 (1999), <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>.

133. CEDAW, gen. rec. 24, *supra* note 132.

134. *Id.*

135. *Id.* at art.12.

136. Human Rights Watch, *International Human Rights Law and Abortion in Latin America* (May 1, 2005), <http://www.hrw.org/reports/2005/05/01/international-human-rights-law-and-abortion-latin-america>.

137. Concluding observations of the Committee on the Elimination of Discrimination against Women, Democratic Republic of the Congo, U.N. Doc. CEDAW/C/COD/CO/6-7 (2013), available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws55.htm>.

incorrectly that a sovereign nation is obligated to comply with its views. The DRC government responded, “The law criminalizing abortion remains in force to this day. There are currently no plans to amend it.”¹³⁸ Thus while treaty bodies have no authority to interpret treaties in ways that create new rights—and nations continue to reject their recommendation when they do—abortion advocates continue to cite committee views as authoritative because it fits their broader strategy.¹³⁹

Likewise, Doswald-Beck asserts that a March 2013 comment by the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Juan Mendez “confirms” the position.¹⁴⁰ But the rapporteur cannot confirm anything but his own opinion in the matter. He is not a representative of any government, and UN member states have never agreed upon his view.

The claim demonstrates, more broadly, that in order to make the strategy work, humanitarian law will have to undergo the same radical reinterpretation the feminists applied to human rights law. All this forebodes a period of even more aggressive incursions into the post-conflict peace building process.

V. FALLOUT FOR HUMANITARIANISM

Time and again, victims of sexual violence in conflict have reported that impunity is a major contributor to the violence. That is why nations have agreed to make enforcement of the humanitarian law’s prohibition against rape a priority. The campaign to insert abortion into this effort runs counter to what nations—and victims—have agreed needs to be done.

The Obama administration’s reinterpretation of the Helms Amendment to include humanitarian abortion would have far reaching effects. In addition to blocking consensus from Western donors, it would, in an era of fiscal austerity, redirect funds from efforts at maternal and child health, education, and other programs such as justice and reconciliation.

138. “Abortions outside a medical setting are damaging to women’s health and, as such, are punishable offences under articles 165 and 166, Book II of the Criminal Code. Abortion is an offence in the Democratic Republic of the Congo, regardless of the motive and whether self-induced or performed by another person. Offenders may be liable to severe penalties as provided for in the aforementioned laws. The law criminalizing abortion remains in force to this day. There are currently no plans to amend it.” Democratic Republic of Congo, Reply to List of Issues from CEDAW, 2013.

139. The CEDAW committee officially “welcomed” findings in the Roundtable Report. See General Assembly, 53d Sess., *Report of the Committee on the Elimination of Discrimination against Women, 18th and 19th Sessions*, U.N. Doc. A/53/38/Rev.1, 37-38 (1998). For an in depth analysis of the work of the treaty bodies promoting abortion, see Douglas Sylva & Susan Yoshihara, *Rights by Stealth: The Role of the UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion*, 7 NAT’L CATHOLIC BIOETHICS QUARTERLY (2007).

140. Doswald-Beck, *supra* note 132.

“The fact of the matter is [abortion is] not only divisive in our country and in other donor countries, it’s extremely divisive in recipient countries where it’s often illegal.”¹⁴¹

This conclusion from Canadian Prime Minister Stephen Harper is shared by other officials seeking to gain international, and in the U.S., bi-partisan, support for humanitarian aid. Harper went to widely-publicized fisticuffs with then-U.S. Secretary of State Hillary Clinton in 2010 to keep abortion out of the G-8 summit in Muskoka which focused on maternal health. Harper said in 2014 he was trying to build consensus among Western nations to add to his pledge of \$3.5 billion to improve maternal and child health and that abortion would derail the effort.¹⁴²

Janet Benshoof has said of her campaign, “This is not political, it’s legal.”¹⁴³ But if that is true, it requires far more evidence than this campaign has mustered. The lack of testimony from survivors demonstrates that the campaign is out of step with, and runs counter to, other evidence-based campaigns. It belies the claim that the strategy is undertaken in the name of victims in conflict zones. And it reinforces the conclusion that it is undertaken to advance the broader abortion advocacy effort in the United States.

Indeed, the feminist approach to sexual violence in conflict is part of a broader problem of conflating the human rights and humanitarian agendas in practice.¹⁴⁴

The 1993 establishment of the UN’s Office of the High Commissioner on Human Rights created a powerful advocate for reinterpreting UN treaties with boutique rights that the framers had no intention of promoting. Thus it is no surprise that the within the UN it is OHCHR, the CEDAW committee, and the feminist-led UN Women that drive the campaign for abortion as a human right and humanitarian imperative.

Yet even if one advocates the use of UN human rights treaties to interpret the Geneva Conventions, the fact remains that not a single UN human rights treaty mentions abortion. To the contrary, nations continually oppose any assertion that abortion is part of “sexual and reproductive health” when it is presented during negotiations and at the UN General Assembly. Claims that there is a positive or customary international law right to abortion are thus not founded but merely represent the

141. Kim Mackrael, *Harper Excludes Abortion from Maternal Health Plan*, THE GLOBE AND MAIL (May 29, 2014), <http://www.theglobeandmail.com/news/politics/harper-urges-united-nations-to-keep-aim-on-improving-maternal-child-health/article18917048/>.

142. *Id.*

143. Interview by Geal Sylvia with Janet Benshoof, *supra* note 43.

144. LARRY MINEAR, *THE HUMANITARIAN ENTERPRISE: DILEMMAS AND DISCOVERIES* 38 (2002).

aspirations of the claimants.

Application of this far-fetched legal reasoning would curtail U.S. capacity to carry out its foreign aid objectives. It would do so by rendering many faith-based organizations ineligible to partner with the government. A UN study found that faith-based groups deliver most of the maternal and newborn care in Africa, and that without these groups women and children would lose services.¹⁴⁵ These groups provide up to 70% of general health care in some regions of the world, and USAID would lose a large number of its partners if they were disqualified by not providing abortion.¹⁴⁶

The requirement would also violate the rights to freedom of religion or belief of aid workers from recipient countries who would have to be complicit in order to provide the objectionable services. This infringement upon the human right to freedom of religion or belief of humanitarians pits, falsely, the principles of humanitarianism and human rights against one another.

Furthermore, lack of consent from host nations may jeopardize humanitarians from all nationalities working on the ground. The ICRC, the EC and the World Health Organization have noted their concern that their aid workers could be harmed by performing illegal procedures.¹⁴⁷ Aid workers have already come under fire, as nations, rebel groups, and terrorists disregard the law and the principles of humanitarianism. A change in policy could lead to a chilling effect on the relief of human suffering.

As the dispute over abortion at the UN Security Council in 2013 illuminates,¹⁴⁸ the policy change would be viewed, correctly, as a

145. Mariana Widmer et al., *The Role of Faith-based Organizations in Maternal and Newborn Health Care in Africa*, 114 INT'L J. OF GYNECOLOGY AND OBSTETRICS 218–22 (2011), available at <http://www.wilsoncenter.org/sites/default/files/Role%20of%20FBO%20in%20MNCH%20Africa.Widmer.pdf>.

146. When USAID changed its policy on providing abortifacients, the US Conference of Catholic Bishops was denied a renewal of an existing grant funding anti-human trafficking programs. Kathleen Miller, *Catholic Group Dropped from Aid Contract Linked to Abortion*, BLOOMBERG (October 10, 2011), <http://www.bloomberg.com/news/2011-10-10/catholic-group-dropped-from-u-s-aid-contract.html>.

147. ICRC report on sexual violence in conflict: Cadre de référence CICR sur les violences sexuelles dans les situations de conflit armé et autres situations de violence, Document interne (2014). See also WORLD HEALTH ORGANIZATION, REPRODUCTIVE HEALTH IN CONFLICT AND DISPLACEMENT: A GUIDE FOR PROGRAM MANAGERS 57 (2000), available at http://www.who.int/maternal_child_adolescent/documents/924159263x/en/.

148. Even though Guatemala had to address its own horrific history of violence against women in conflict, it could not cosponsor UNSCR 2122 because the resolution did not include language specifically contextualizing the term “sexual and reproductive health” in the context of national legislation. Meanwhile Switzerland made a point of recommending the inclusion of abortion. Aisling Swaine, *Substantive New Normative Provisions on Women and Armed Conflict Concurrently Adopted by the United Nations Security Council and the CEDAW Committee*, AM. SOC'Y OF INT'L L. BLOG (Feb. 18, 2014),

circumvention of the democratic process in—and the sovereignty of—developing nations. As Pope St. John XXIII observed in *Pacem in Terris* about the UN, a change in US policy “would inevitably arouse fears of its being used as an instrument to serve the interests of the few or to take the side of a single nation,” and would therefore break down the trust among nations and undermine the project of humanitarianism.¹⁴⁹

“Even though nations may differ widely in material progress and military strength,” John XXIII observed, “they are very sensitive as regards their juridical equality and the excellence of their own way of life.”¹⁵⁰ The policy change would be a contravention of the international idea of sovereign equality upon which we deploy our better angels to help our fellow men and women, especially in times of war and humanitarian disaster.

VI. CRI DE COEUR

High-level political commitment to end impunity for rape in warfare is a victory for women and children waiting for justice. It remains to be seen whether it proves a political turning point. That may depend upon the degree to which the feminist agenda, deeply imbedded in the UN rights-based agenda, continues to collide with recent initiatives to end impunity and bring relief to survivors.

One by one, the claims of those promoting “humanitarian abortion” have been rejected. Nonetheless, it is unlikely they will abandon the campaign for an international right to abortion. Instead, activists and governments in their sway will continue to promote the practice of abortion in war-torn countries, performed by humanitarians and paid for by the American taxpayer. They will persevere not just out of ardent belief in their ideology, but also their pursuit of abortion rights as a matter of equality in the United States, a goal that has so far eluded them. The reinterpretation of international law to suit these aims will persist no matter the cost to women and children in the world who are still waiting for the most basic rights to life, liberty, and security.

So long as the movement finds collaborators among the elites in governmental and UN staff, the issue will inject the controversy into future debates. Many developing nations will continue to resist the effort as a Western incursion, thus dissipating pressure on them to end impunity for

<http://www.asil.org/insights/volume/18/issue/5/substantive-new-normative-provisions-women-and-armed-conflict>.

149. Pope John XXIII, *Pacem In Terris* ¶ 138 (April 11, 1963), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html.

150. *Id.*

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sexual violence. The abortion issue will go on dividing rather than uniting nations. Tragically, that will make putting an end to rape in warfare much harder in the years ahead.