



**Global
Justice Center**

Human Rights Through Rule of Law

Global Justice Center's Submission

to

The Office of the High Commissioner for Human Rights

Call for input: A comprehensive approach to promoting, protecting and respecting women's and girls' full enjoyment of human rights in humanitarian situations, including good practices, challenges and lessons learned at the national, regional and international levels

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The Global Justice Center (GJC) is an international human rights organization, with consultative status to the United Nations, dedicated to advancing gender equality through the rule of law. We combine advocacy with legal analysis, working to ensure equal protection of the law for women and girls.

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1. **Patterns and structures of discrimination and inequalities exacerbated or created by humanitarian settings**

Humanitarian situations have been marked by sexual and gender-based violence (“SGBV”)—weaponizing existing inequalities and patriarchal norms. Across situations of displacement, conflict, and—more recently—the pandemic, this is seen in the increases in domestic and intimate partner violence¹ as well as sexual exploitation and transactional sex in humanitarian settings as a means for accessing resources, security, and essentials.² In armed conflict and mass atrocity settings, in particular, perpetrators use SGBV to maximize their harm.³

Perpetrators of mass atrocity crimes frequently target people as a consequence of the gendered roles they are perceived to inhabit.⁴ These perceptions often reflect patriarchal and misogynistic attitudes, enforced through rigid binary concepts. Men are seen as, and thereby targeted as, heads of households, leaders, religious authorities, protectors, guardians of the group’s identity, and patriarchs. Women are viewed to be, and therefore targeted as, mothers, wives, daughters, bearers of future life, keepers of community’s and family’s honor, and sources of labor within the home.⁵

A cyclical relationship exists between existing discrimination and SGBV in humanitarian situations. Exclusion from political, civil, social, and economic life as well as societal perceptions leave women and girls vulnerable to SGBV.⁶ In turn, SGBV creates greater need for those rights and barriers to accessing them.⁷ The recent Report of the Working Group on discrimination against women and girls notes the particular relevance of sexual and reproductive rights.⁸ The denial of reproductive

¹ See, e.g. UNHCR Staff, *Gender-based violence on the rise during lockdowns* (Nov. 25, 2020), <https://www.unhcr.org/en-us/news/stories/2020/11/5fbd2e774/gender-based-violence-rise-during-lockdowns.html> and NANCY ABWOLA & ILARIA MICHELIS, *WHAT HAPPENED? HOW THE HUMANITARIAN RESPONSE TO COVID-19 FAILED TO PROTECT WOMEN AND GIRLS*, International Rescue Committee (2020).

² UNICEF, *Gender-based violence in emergencies* (Mar. 30, 2021), <https://www.unicef.org/protection/gender-based-violence-in-emergencies>.

³ SARETA ASHRAPH, *BEYOND KILLING: GENDER, GENOCIDE, & OBLIGATIONS UNDER INTERNATIONAL LAW*, Global Justice Center (2018). See also, Meg O’Mahony, *Women’s Experiences of Genocide*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM (Sept. 22, 2020), <https://www.ushmm.org/genocide-prevention/blog/womens-experiences-of-genocide>.

⁴ ASHRAPH, *supra* note 3.

⁵ *Id.* at 2.

⁶ Rep. of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council, 17th Sess., ¶ 22, 38, 73, and 88, U.N. Doc. A/HRC/17/26 (May 2, 2011).

⁷ Shirin Heidari & Claudia García Moreno, *Gender-based violence: a barrier to sexual and reproductive health and rights*, *REPRODUCTIVE HEALTH MATTERS* 24:47 (2016).

⁸ Report of the Working Group on discrimination against women and girls, *Women’s and girls’ sexual and reproductive health rights in crisis*, Human Rights Council, 47th Sess., ¶ 14, 23, U.N. Doc. A/HRC/47/38 (Apr. 28, 2021).

rights not only directly violates the right to health⁹, life¹⁰, privacy¹¹, non-discrimination, and freedom from torture and other cruel, inhuman, or degrading treatment¹²; it also perpetuates barriers to social, cultural, and economic rights.¹³ These circumstances are exacerbated in humanitarian settings. Rape, forced and early marriage, forced pregnancy, sexual slavery and other sexual and gender-based crimes increase the rate of unwanted pregnancies and the demand for comprehensive SRHR, including abortion.¹⁴

2. Challenges in promoting, protecting and respecting women's and girls' full enjoyment of human rights in humanitarian situations

A key barrier to ensuring the rights of women's and girls' enjoyment of human rights, particularly SRHR, in humanitarian situations is confusion over which laws apply and lack of political will to adhere to international legal standards.¹⁵ Multiple legal and policy standards often intersect in humanitarian aid situations, including international human rights law, national legislation, and donor agreements. International Humanitarian Law ("IHL") establishes specific legal obligations in situations of armed conflict that exceed the minimum standards of care in addressing the needs of victims of natural disasters and other emergencies, protecting medical needs as a legal right.

In armed conflict, ("IHL") is the *lex specialis* and thus takes precedence over other legal regimes that contravene its provisions and protections.¹⁶ This is why, as a general rule, soldiers cannot be domestically prosecuted for their licit acts of war, such as killing enemy soldiers while on the battlefield. The same is true with respect to domestic abortion laws that may infringe on rights and obligations under IHL. Importantly, IHL's protections and obligations are non-derogable, and the International Committee of the Red Cross's Professional Standards for Protection Work calls for protection actors to "be prepared to point out that domestic law cannot be used as an excuse for non-compliance with international obligations."¹⁷

⁹ Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

¹⁰ Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

¹¹ *Id.*

¹² See Report of the Sp. Rapp. on torture, ¶ 46, U.N. Doc. A/HRC/22/53 (1 Feb. 2013); see also CAT Concluding Observations: Peru, ¶ 23; Committee against Torture, Concluding Observations: Chile, ¶ 7(m), U.N. Doc. CAT/C/CR/32/5 (14 June 2004); Human Rights Committee, General Comment No. 28, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

¹³ See, Brenda Wright, *Reproductive Rights are Economic Rights: Expanding the Reach of the Supreme Court's Abortion Decision*, DEMOS (June 29, 2016), <https://www.demos.org/blog/reproductive-rights-are-economic-rights-expanding-reach-supreme-courts-abortion-decision>.

¹⁴ Sarah Martin, *Research Query: Supporting GBV Survivors who are Pregnant due to Rape*, GENDER BASED VIOLENCE AOR HELP DESK (Nov. 2020), <https://gbvaor.net/sites/default/files/2021-04/GBV%20AoR%20HD%20-%20Supporting%20GBV%20Survivors%20Pregnant%20Due%20to%20Rape.pdf>. See also, Anthony Idowu Ajayi & Henrietta Chinelo Ezegbe, *Association between sexual violence and unintended pregnancy among adolescent girls and young women in South Africa*, 20 BMC PUB. HEALTH 1370 (2020).

¹⁵ Int'l Comm. of the Red Cross, *Strengthening Legal Protection for Victims of Armed Conflicts: Rep. for the 31st Int'l Conference of the Red Cross and Red Crescent*, 2, No. 31IC/11/5.1.1, Oct. 2011.

¹⁶ Int'l Comm. of the Red Cross, *Lex Specialis*, Casebook, <https://casebook.icrc.org/glossary/lex-specialis>.

¹⁷ International Committee of the Red Cross, *Professional Standards for Protection Work*, 2013, pp. 63-64, <https://www.yumpu.com/en/document/view/38675884/icrc-002-0999/65>. See also Int'l Comm. of the Red Cross.

Pregnant people in armed conflict are recognized as “wounded or sick” and are entitled to all of the rights and protections based on that status,¹⁸ including the provision of “medical care and attention required by their condition.”¹⁹ Medical care must be based solely on the person’s condition and without adverse distinction on the basis of sex. In all cases, medical treatment should be as favorable to women as that granted to men.²⁰ The right does not mean that medical treatment must be identical. Instead, medical outcomes for the sexes must be the same and can be achieved through differential treatment.²¹ In the case of pregnant people in armed conflict, necessary medical care includes the provision of abortion services. For example, the condition of a person raped by a stick requires surgery or some other procedure, and the condition of a person raped and impregnated requires the option of an abortion.

IHL also prohibits cruel treatment and torture and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”²² Torture is defined as “severe physical or mental pain or suffering” for unlawful purposes, including “discrimination of any kind.”²³ The denial of abortion services has been explicitly determined to cause serious mental and physical suffering constituting torture and other cruel, inhuman and degrading treatment in certain contexts.²⁴

Properly construed, abortion services fall within the purview of the non-derogable protections granted under IHL.

3. Barriers in reporting and seeking justice

At the domestic level, legislation may fail to criminalize sexual and gender-based violence, establish inadequate or disproportionate penalties, create impunity for perpetrators, or codify discriminatory language and perspectives. Women and girls are, thus, left without avenues for justice. For example, sexual and gender-based crimes were central to Daesh’s brutal atrocities in Iraq.²⁵ However, the domestic penal code does not sufficiently define relevant crimes. Rape and forced marriage lack clarity on consent and force, as well as having too limited a construction to accommodate the range of violations committed by Daesh.²⁶ Definitions of enslavement and torture fail to address gendered and sexualized forms of the violations.²⁷ In addition, prosecutions are hindered by placing undue burden on victims to initiate proceedings²⁸ and relying underqualified judicial bodies to refer the situations to appropriate venues.²⁹ Moreover, Iraq has no domestic legislation penalizing genocide,

Commentary of 2016 on convention (I) for the amelioration of the condition of the wounded and sick armed forces in the field (Geneva, 12 August 1949), ¶¶ 987–1002. 2016.

¹⁸ Int’l Comm. of the Red Cross. Commentary of 2016 on convention (I) for the amelioration of the condition of the wounded and sick armed forces in the field (Geneva, 12 August 1949). 2016.

¹⁹ Common Article 3 to the Geneva Conventions; Additional Protocol I to the Geneva Conventions, art. 10; Additional Protocol II to the Geneva Conventions, art. 7.

²⁰ Geneva Convention III, art. 14; ICRC, Customary International Law Database, r. 110.

²¹ Common Article 3 to the Geneva Conventions; Additional Protocol I to the Geneva Conventions, art. 10; Additional Protocol II to the Geneva Conventions, art. 7.

²² Common Article 3 to the Geneva Conventions.

²³ Elements of Crimes for the ICC, Definition of torture as a war crime (ICC Statute, art. 8(2)(a)(ii) and (c)(i)).

²⁴ See Report of the Sp. Rapp. on torture, ¶ 46, U.N. Doc. A/HRC/22/53 (1 Feb. 2013); *et al, supra* note 12.

²⁵ For more information, please see: GLOBAL JUSTICE CENTER, IRAQ’S CRIMINAL LAWS PRECLUDE JUSTICE FOR WOMEN AND GIRLS (2018), <https://globaljusticecenter.net/files/IraqiLawAnalysis.4.6.2018.pdf>.

²⁶ See, Penal Code art. 393(1)-(2) (Iraq) and Personal Status Law No. 188 of 1959 art. 9 (Iraq).

²⁷ Constitution art. 37(first)(C). (Iraq); Criminal Procedure Code arts. 127, 218; Penal Code arts. 332-3. Constitution art. 37(Third) (Iraq).

²⁸ Criminal Procedure Code arts. 6 and 9(F) (Iraq).

²⁹ Personal Status Law No. 188 of 1959 art. 9(3) (Iraq).

war crimes, or crimes against humanity. The barriers to justice faced by the Yazidi and other victims of Daesh in Iraq are not unique; similar shortcomings in domestic legislation and judicial frameworks affect women and girls across geographic contexts.

International justice mechanisms have also been plagued by inadequate investigation, prosecution, and judgments on sexual and gender-based crimes (“SGBC”). The International Criminal Court (“ICC”) has only two standing convictions on SGBC, Bosco Ntaganda and this year’s decision against Dominic Ongwen. Ongwen’s case was the first time that the crime against humanity of forced marriage was charged as an other inhumane act was being prosecuted before the ICC, and that the crime of forced pregnancy was prosecuted before *any* international court.³⁰ While these recent victories for gender justice are a hopeful sign, they cannot unwrite the history of women and girls’ experience being ignored in international jurisprudence. The Lubanga case in the ICC stands as a cautionary tale for the Office of the Prosecutor failing to include SGBC—in that case rape and sexual enslavement—in its indictment, resulting in the exclusion of evidence being heard in trial.³¹ International criminal tribunals are further restricted in their capacity to provide redress due to capacity, focus on mid to high-level perpetrators, jurisdictional limitations, and complementary role to domestic systems.

Over the past two decades, UN mandated bodies have increasingly become integral mechanisms for investigation and reporting. The Human Rights Council investigative bodies have covered human rights violations as well as grave international crimes. At times the resulting reports offer the only reliable source of documentation, including primary accounts, especially where the State restricts access. While some of the mandates have identified SGBV as an ongoing and relevant violation, gender mainstreaming has not been systematized. The mandate for the Fact-Finding Mission on Venezuela and the recent report of the Commission on Human Rights in South Sudan are unique in their recognition of the effects of humanitarian crises on SRHR.³² However, reproductive violations are largely absent from both the mandates and reports, despite reports from activists and journalists that they are occurring.

³⁰ Women’s Initiative for Gender Justice, *Trailblazing ICC Judgment on SGBC – Ongwen verdict advances international accountability for forced marriage and forced pregnancy* (Feb. 4, 2021), <https://4genderjustice.org/trailblazing-icc-judgment-on-sgbc-ongwen-verdict/>.

³¹ Lubanga, ICC-01/04-01/06, Trial Judgment, paras. [629-630].

³² H.R.C. Res. 42/25, ¶ 14, U.N. Doc. A/HRC/RES/42/25 (Oct. 8, 2019); Rep. of the Commission on Human Rights in South Sudan, 43rd Sess., ¶ 55, U.N. Doc. A/HRC/43/56 (Jan. 31, 2020).