

**Submission to the Office of the High Commissioner for Human Rights concerning the forthcoming report on protecting the rights of the child in humanitarian situations (Human Rights Council resolution 34/16)**

September 2017

**Introduction**

Due to their particular vulnerability, international law provides children with a robust battery of rights under a variety of instruments and they enjoy greater legal protections than adults. In the context of humanitarian situations, this includes legal protections under international human rights, refugee and humanitarian law, including access to medical care.<sup>1</sup>

In order to ensure the realization of these rights, it is essential that international actors make two critical distinctions in deploying these protections. First, there must be a distinction amongst “humanitarian situations” between armed conflict and all other emergencies, as they are governed by different legal regimes. Second, there must be a distinction between the experiences of boys and girls. Responses to protect the rights of “children” must recognize the differential treatment of boys and girls—both in how they are victimized in conflict, but also in their subsequent care and in redress and reparations measures.

The Global Justice Center (GJC) submits this report to the Office of the High Commissioner to highlight the differential experience of boys and girls in humanitarian settings and to call on humanitarian providers to ensure children, regardless of their gender or sex, receive all the medical care required by their specific condition.

GJC is an international legal human rights organization focused on using international law for strategic change and to achieve sustainable justice, peace and security. Amongst other activities, GJC works globally to develop and implement legal strategies to define, establish and protect human rights and gender equality.

**Necessary Distinction 1: Armed conflict is different, and provides distinct rights to children, than other humanitarian situations**

International humanitarian law (IHL) is a body of law that specifically regulates conflict and guarantees war victims a range of fundamental rights and protections. Importantly, IHL’s provisions concerning the “wounded and sick in armed conflict” override general provisions of other legal regimes, national and local.<sup>2</sup> The universality of IHL and its relationship to national law are aimed to ensure that domestic policies and practices cannot undermine IHL’s protections.<sup>3</sup> This is a unique feature of IHL—neither human rights law nor refugee law contain this specificity and strength. As a result, victims of a natural disaster do not have the same rights as victims of armed conflict, as they lack IHL protections.

IHL provides that “children affected by armed conflict are entitled to special respect and protection.”<sup>4</sup> A core component of these protections is that children must be provided with the care and aid they require.<sup>5</sup> The care and aid owed to children includes: protection from indecent

assault<sup>6</sup> and sexual violence;<sup>7</sup> separation from adults (other than family members) while deprived of liberty;<sup>8</sup> access to education;<sup>9</sup> access to food;<sup>10</sup> access to medical care;<sup>11</sup> evacuation for safety reasons;<sup>12</sup> family reunification.<sup>13</sup>

Furthermore, these IHL provisions are supported by international human rights law (IHRL), specifically the Convention on the Right of the Child (CRC), which is the only IHRL treaty that explicitly discusses IHL. Article 38 of the CRC provides that “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child” and that “In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.” Furthermore, Article 39 of the CRC provides that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.” Provisions and measures essential for the realization of children’s rights in armed conflict include: ensuring the provision of essential care and assistance; access to health care; prohibition of torture, abuse, or neglect; and ensuring humanitarian assistance and relief and humanitarian access.<sup>14</sup> The framework of the CRC overlaps with IHL provisions, and a violation of the IHL protections owed to children is also a violation of Art. 38 of the CRC.

Thus, the full achievement of children’s rights in humanitarian settings requires that humanitarian actors and donors ensure the special protections for children afforded under IHL. Failure to do so would risk falling short of delivering child victims of conflict all the rights to which they are entitled.

### **Necessary Distinction 2: Differential treatment of boys and girls in armed conflict requires differential medical care**

Gender is an increasingly apparent factor in how parties to armed conflict carry out their violence. For example, ISIS’s genocidal strategy against the Yazidis is carried out in different ways against men and women, boys and girls: men and women of non-childbearing age are killed, boys are recruited, and young women and girls are enslaved and subjected to systematic sexual violence.<sup>15</sup>

This differentiated treatment calls for a differentiated response, and nowhere is this more apparent than in the context of medical care. Women, men, boys and girls have distinct medical needs, exposing them to particular risks and social stigmas connected with being “wounded” or “sick” in armed conflict. In recognition of these facts, IHL establishes that non-discriminatory medical care means that females “shall in all cases benefit by [medical] treatment as favourable as that granted to men.”<sup>16</sup> The law requires that outcome for each gender must be the same, not that the treatment is identical. The mandate to provide non-discriminatory medical care overlaps with the special protections provided to children. As a result, girls must be provided with the distinct care and aid that they require, both as children and as female, which may be distinct than the care provided to boys.

For example, in the context of rape, which is perpetrated against girls and boys in a variety of ways and a variety of methods, the injuries suffered necessitate distinct medical care. The injuries suffered

by a boy may necessitate surgery or some other procedure in the boy's case, while girls may also require surgery, and, if she becomes pregnant from the rape, an abortion. Indeed, in the case of a pregnancy that threatens the life of a girl, the option of an abortion is the *only* appropriate medical service—rape in conflict causes many physical injuries that render childbirth extremely dangerous.<sup>17</sup> Consequences which are exacerbated for girls, as “adolescents aged 15-19 are twice as likely to die during pregnancy and childbirth, and girls under 15 are five times more likely to die, compared with women aged 20 and older.”<sup>18</sup>

Today, abortion services are routinely omitted from sexual and reproductive services in humanitarian settings for a variety of reasons, including failing to make distinctions between the experiences between boys and girls, and between armed conflict and other emergencies. Other barriers to girls full access to their rights are improper deference to national law, the disproportionate influence of restrictive policies, failing to comprehend abortion as medical care, and claims that a “needs-based” approach to humanitarian aid is something distinct from IHL's requirements.

Denying or failing to provide one category of medical care (abortion) to one sex in armed conflict is discriminatory and prohibited by IHL. In an era punctuated by increasing crimes against children, it is critical that humanitarian donors do everything in their power to guarantee that victims of war rape actually receive the medical care demanded by law.

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<sup>1</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949), Arts. 4, 23, 24; 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), arts. 70(1), 77; HENCKAERTS, JEAN-MARIE AND DOSWALD-BECK, LOUISE, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES (ICRC/Cambridge University Press) Rules 118 (provision of basic necessities to persons deprived of their liberty) and 135 (children).

<sup>2</sup> Common Article 2 to the Geneva Conventions of 1949.

<sup>3</sup> HENCKAERTS, JEAN-MARIE AND DOSWALD-BECK, LOUISE, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES (ICRC/Cambridge University Press) Rule 110 (2005); Common Article 7 to the Geneva Conventions of 1949; Int'l Committee of the Red Cross, 2016 Commentaries to Geneva Convention I, Art. 7, ¶ 1; Common Article 2 to the Geneva Conventions of 1949.

<sup>4</sup> ICRC, Customary IHL Database, Rule 135, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule135](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule135).

<sup>5</sup> AP I, Art. 77; AP II, Art. 4; See CIHL “Rule 135. Children affected by armed conflict are entitled to special respect and protection.”

<sup>6</sup> AP I, Art. 77; see also GC IV, Art. 50 (children under occupation)

<sup>7</sup> See Rule 93; see also GC IV, Art. 50 (children under occupation)

<sup>8</sup> CIHL Rule 120 Accommodation for Children Deprived of Their Liberty; Rule 135

<sup>9</sup> GC IV, Art. 24, 50 (children under occupation); AP II, Art. 4(3)(a); See Rule 55 Access for Humanitarian Relief to Civilians in Need.

<sup>10</sup> GC IV, Art. 24, Art. 89; AP I, Art. 70(1); See GC IV, Art. 23; see Rule 118; see also Art. 50 (children under occupation)

<sup>11</sup> GC IV, Art. 24; AP I, Art. 70(1); See GC IV, Art. 23; See Rule 118; see also Art. 50 (children under occupation)

<sup>12</sup> GC IV, Art. 24; AP I, Art. 78(1); AP II, Art. 4(3)(e); See Rule 129

<sup>13</sup> AP II, Art. 4(3)(b); Rule 105; See GC IV, Art. 24

Note: the commentary references Rules 55 (access for humanitarian relief to civilians in need; 118 provision of basic necessities to persons deprived of their liberty; and 131 (treatment of displaced persons) with respect to access to education, food, and health care. However, none of these rules explicitly discuss education and, based on the content of Rule 55, humanitarian relief must encompass access to education.

<sup>14</sup> UN Committee on the Rights of the Child, Report on the Second session, UN Doc. CRC/C/10, 19 October 1992, § 73.

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<sup>15</sup> See Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, *"They came to destroy": ISIS Crimes against the Yazidi*, U.N. Doc. A/HRC/32/CRP.2 (Jun. 15, 2016).

<sup>16</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950), art. 14; ICRC, Customary IHL, Rule 88 (non-discrimination).

<sup>17</sup> Helen Liebling, Henny Slegh, & Benoit Ruratotoye, *Women and Girls Bearing Children through Rape in Goma, Eastern Congo: Stigma, Health and Justice Responses*, Vol. IV ITUPALE ONLINE J. AFR. STUDIES 18, 25 (2012). See Save the Children, *Unspeakable Crimes against Children: Sexual Violence in Conflict*, 2013, at v; Cassandra Clifford, Presentation at the 7th Global Conference on Violence and the Contexts of Hostility: *Rape as a Weapon of War and It's [sic] Long Term Effects on Victims and Society*, Budapest, Hungary (5 – 7 May 2008), available at <http://ts-si.org/files/BMJCliffordPaper.pdf> [hereinafter Clifford, *Rape as a Weapon of War*] (“Victims [of war rape] are often raped multiple times and gang raped, which can cause a much higher degree of physical and physiological injuries, and often lead to death.”)

<sup>18</sup> Save the Children, *Unspeakable Crimes against Children: Sexual Violence in Conflict*, 2013, at 16.