

Accountability for Sexual and Reproductive Health and Rights in Humanitarian Settings

Examining the Role and Relationship of Diverse Branches of International Law



Technical Paper

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ACRONYMS AND ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
Center	Center for Reproductive Rights
CESCR	Committee on Economic, Social and Cultural Rights
ICL	international criminal law
ICRC	International Committee of the Red Cross
IHL	international humanitarian law
IHRL	international human rights law
Istanbul Convention	Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MISP	Minimum Initial Service Package for Sexual and Reproductive Health
OHCHR	Office of the United Nations High Commissioner for Human Rights
SGBV	sexual and gender-based violence
SOGIESC	sexual orientations, gender identities and expressions, and sex characteristics
SRH	sexual and reproductive health
SRHR	sexual and reproductive health and rights
UN	United Nations
WPS Agenda	Women, Peace and Security Agenda

I. Introduction: Aim, Scope, and Limitations of this Paper

This paper is the result of years of work done by the Center for Reproductive Rights on ensuring accountability for access to sexual and reproductive health (SRH) services in humanitarian settings, including in conflict and post-conflict settings. The Center engages in this work as part of a commitment to ensuring greater accountability of states and non-state actors in the provision of SRH information and services in humanitarian settings, and to ensuring justice, remedy, and redress for those who have experienced sexual and reproductive rights violations.

Sources for this paper are varied. They include desk research conducted by the Center and by pro bono law firms; a series of formal consultations with experts from the various fields of international law held in 2020;¹ field research led by the Center in collaboration with partners in the field; and advocacy efforts at the national, regional, and international level, including the United Nations (UN) human rights system and the UN Security Council.

The paper sets forth legal obligations and accountability under three branches of international law—international human rights law (IHRL), international humanitarian law (IHL), and international criminal law (ICL)—and commitments made by states at the UN Human Rights Council and the UN Security Council, in relation to access to SRH information and services for civilians in humanitarian settings, including in armed conflict. It also interrogates the interaction and relationship between these various branches of international law and identifies strengths and weaknesses in legal accountability mechanisms and protections in this context. While the paper is not intended to offer a strategy on how to go about ensuring accountability in this area, it sets forth key considerations for the development of such strategies, including the complementary nature of these branches of law and the critical role that IHRL has in helping shape, understand, and interpret SRHR obligations under these other branches of international law.

The paper looks at the range of SRH information and services. The Office of the United Nations High Commissioner for Human Rights (OHCHR)² has recognized that the priority SRH services in crisis and humanitarian settings should include both the Minimum Initial Service Package (MISP) which is a series of crucial, lifesaving minimum activities required to respond to the SRH needs of affected populations at the onset of a humanitarian crisis,³ as well as the core obligations of the right to sexual and reproductive health as articulated in the UN Committee on Economic, Social and Cultural Rights' (CESCR) General Comment No. 22.⁴

Section II of this paper provides a brief overview of the challenges in accessing SRH information and services in humanitarian settings and some select factors that hinder accountability. Section III identifies select features of the three branches of international law—including their scope, benefits, and limitations—that are relevant to the provision of SRH information and services. Section IV discusses obligations related to sexual and reproductive health and rights (SRHR) under each branch of law. Section V addresses the role that UN bodies, particularly the Human Rights Council and the Security Council, play in ensuring accountability in this area.⁵ Section VI explores the complementary and mutually reinforcing relationship between the various branches of law; in particular, it explores how the guarantees of non-discrimination and right to be free from inhuman treatment can help inform the development of obligations to ensure access to SRH information and services in humanitarian settings. Finally, section VII outlines some key findings and conclusions.

LIMITATIONS OF THIS PAPER

First, this paper is not an exhaustive presentation or analysis of all branches of international law. For example, it does not address international refugee law, a branch of international law governing the obligations that states have in relation to refugees, particularly in safeguarding their right to seek asylum and protection against non-refoulement.

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Second, the primary sources of IHL for this paper are the Geneva Conventions and their Additional Protocols; the International Committee of the Red Cross's (ICRC) *Study on Customary International Humanitarian Law*; and various IHL Commentaries. It is important to note that there is no international accountability mechanism expressly created to monitor and ensure compliance with the full range of IHL protections⁶ and that state practice is an important source for the development of IHL, which is reflected in customary IHL as set forth in the ICRC's *Study on Customary International Humanitarian Law* and the various Commentaries.⁷ This paper provides just a few express examples of state practice. In addition, it focuses on the protection of civilians, while IHL is aimed at protecting a broader range of persons, including prisoners of war and wounded and sick soldiers.

Third, although ICL is a critically important accountability tool, its scope of punishment is limited to individuals (i.e., it does not apply to states), and the threshold for criminal sanctions is very high; thus, it may not be as strong a mechanism of accountability for ensuring access to SRH information and services. Nonetheless, ICL is useful as a means of attributing crimes to states when their agents are the ones convicted of violations of ICL—and in this respect, it can facilitate state responsibility. It also plays an important role in deterring international crimes, including SGBV, that have implications for SRHR, which means that it has the potential to ensure some level of accountability for reparations in the area of access to SRH information and services.⁸ With this in mind, this paper presents some aspects of ICL that are relevant for the issues being addressed.

Lastly, regional mechanisms under the African Union, the Council of Europe, and the Organization of American States are important standard-setting bodies, including in the area of SRHR. This paper, however, focuses on the UN system, with a very limited presentation of standards developed by regional human rights systems, and only as they relate specifically to humanitarian settings, particularly in conflict.

The Center anticipates conducting further research to address these limitations.

II. Access to Sexual and Reproductive Health Information and Services in Humanitarian Settings

Sexual and gender-based violence in humanitarian settings is rampant and implicates a range of SRH consequences. These consequences disproportionately affect women, girls, and persons of diverse sexual orientations, gender identities and expressions, and sex characteristics (SOGIESC); they are also shaped by other factors, such as age, disability, legal status, race, and religion.

Conflict and crisis have been the main drivers behind the approximately 136 million people in need of humanitarian assistance globally. In 2019, an estimated 35 million women and girls of reproductive age required humanitarian assistance for reasons related to conflict and natural disasters; of these, at least 5 million were pregnant.⁹ Crises around the world have become increasingly protracted and complex, with individuals being displaced for an average of 26 years.¹⁰ **In countries designated as fragile states, the estimated lifetime risk of maternal mortality is 1 in 54, compared to a worldwide risk of 1 in 180;¹¹ notably, 66% of the globe's maternal deaths occur in fragile settings, totaling more than 500 deaths each day.**¹² While there continues to be a need for more reliable data on maternal mortality in conflict and displacement settings, maternal mortality and morbidity are highest in countries affected by humanitarian emergencies.¹³ A recent study noted that conflict countries have had consistently higher maternal mortality rates than non-conflict countries for the past 30 years. Access to reproductive and maternal health services for marginalized populations, including the poor, less educated, and those living in rural areas, was exponentially worse in conflict settings compared to their non-conflict counterparts.¹⁴ For example, available evidence indicates that pregnant women experience increased medical risk in crisis settings.¹⁵

In addition, sexual and gender-based violence in humanitarian settings is rampant and implicates a range of SRH consequences. These consequences disproportionately affect women, girls, and persons of diverse sexual orientations, gender identities and expressions, and sex characteristics (SOGIESC); they are also shaped by other factors, such as age, disability, legal status, race, and religion.

Among the SRH consequences of SGBV in humanitarian settings are severe mental health struggles, forced pregnancy, sexually transmitted infections (including HIV), genital injuries, the inability to access safe abortion, and social stigmatization.¹⁶ Often, survivors' ability to access SRH and general health services after an incident of violence is strained, as those targeted are among the most disenfranchised in humanitarian settings.¹⁷ Moreover, the social stigma and shame associated with SGBV, fear of abandonment by one's family or community, and fear of retribution by perpetrators of violence can dissuade survivors from reporting sexual abuse and accessing life-saving treatment and support.¹⁸ When survivors feel ill equipped or unable to seek SRH care, their trauma is further compounded as the physical, psychological and social harms caused by SGBV lasts far beyond the duration of the conflict itself.¹⁹ In order to address the multitude of SRH harms caused by SGBV, increased and coordinated prevention and response services—namely health, legal, and psychological counseling and redress mechanisms—must be made available in humanitarian settings.²⁰

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The impact of the current COVID-19 pandemic is amplified for those living in existing and emerging humanitarian crises and for those affected by conflict. Poor conditions are worsening—including a rise in insecurity, instability and conflict, deterioration in displacement sites, and resource constraints—all of which will exacerbate the existing multiple and intersecting forms of discrimination experienced by women, girls, and people of diverse SOGIESC. Alarming, some governments have been exploiting the global public health crisis to further hinder access to existing SRH information and services in humanitarian settings.²¹

However, efforts to leverage lessons learned from previous crises in order to address the unique maternal, newborn, and reproductive health challenges posed by COVID-19 are underway. For example, the Democratic Republic of Congo, taking lesson from the Ebola outbreak, has been training midwives (as opposed to just doctors), which is impactful because midwives provide many maternity-specific services.²² Further, research shows that collaborating with and supporting local community members through medical training can help expand access to SRH services.²³ For example, in Guinea, the recruitment of “lay” SRH workers (e.g., non-doctors and non-nurses) directly correlates with the increased utilization of SRH interventions by refugees.²⁴

Prior to the COVID-19 pandemic, there was an upward trend in funding for reproductive health in emergencies,²⁵ notwithstanding significant gaps in the comprehensive and systematic delivery of these services. For example, accessibility has remained a major challenge in crisis situations because of infrastructure breakdowns, hindering especially women’s and girls’ ability to move because of insecurity. Despite some progress, basic services are often not fully available or accessible, with adolescent access being a particular challenge.²⁶ Gaining access to abortion is particularly challenging for all, including survivors of sexual violence.²⁷ This is due to various factors, including the procedure’s legality, misconceptions among service providers on its legality, and abortion being wrongly viewed as not being essential medical care.²⁸

The breakdown of state infrastructure exacerbates pre-existing systemic inequalities and patterns of discrimination that negatively affect women, girls, and people of diverse SOGIESC. In humanitarian settings, as in other contexts, persons can face intersecting forms of discrimination (including due to their legal status or disability), and women and girls, for example, are at an increased risk of being subject to stigma, discrimination, SGBV, exploitation, and forced marriage.²⁹ Ensuring the provision of SRH information and services in these settings is central not only to an effective humanitarian response but also to the fulfillment of international legal obligations.³⁰

To address this gap, the Inter-Agency Working Group for Reproductive Health in Crisis developed the Minimum Initial Service Package (MISP) for sexual and reproductive health in crisis situations.³¹ It is the most widely applied technical standard for the provision of SRH services in humanitarian settings.³² It was developed in order to address these often-overlooked needs, the absence of which have potentially life-threatening consequences.³³

The MISP addresses morbidity and mortality due to HIV and other sexually transmitted infections by promoting the use of standard safety precautions, the availability of free male and female condoms, the provision of antiretroviral therapy for people enrolled in such programs prior to the onset of an emergency, and the availability of syndromic treatment for sexually transmitted infections. Further, the MISP makes provisions for safe and clean access to newborn care and emergency obstetric care at the community level, referral hospital level, and primary health facility level, as well as a 24/7 referral system to enable transportation and communication between communities and health facilities. The package prioritizes safe abortion care (“to the full extent of the law”) and post-abortion care in health

care facilities. It also emphasizes widespread community awareness on the availability of contraceptives for women, adolescents, and men, as well as education and contraceptive counseling, with a focus on choice and consent. Finally, the package includes the provision of long-acting reversible and short-acting contraceptive methods (such as condoms and emergency contraception) by primary health care facilities.³⁴

LACK OF ACCOUNTABILITY

An absence of accountability, remedy, and redress for violations of IHRL and IHL continues to be a key feature across humanitarian settings. Obligations to respect, protect, and fulfill SRHR receive even less attention and are even less likely to be addressed in such settings compared to non-conflict ones. The breakdown of state infrastructure and disruption in access to basic services can lead to traditional accountability mechanisms becoming even more inaccessible or unavailable to women. Such mechanisms include access to domestic courts and tribunals, administrative processes within health systems (such as maternal death surveillance and response mechanisms), and social accountability processes that prioritize community participation in decision-making.

Moreover, accountability in these settings is often interpreted narrowly, either as health outcomes or limited to the punishment of perpetrators of crimes. As the OHCHR notes in its technical guidance on addressing maternal mortality in humanitarian settings, human rights accountability entails multiple forms of monitoring, review, and oversight (e.g., administrative, social, political, and legal), and it applies to multiple actors.³⁵ So while there are ongoing innovative approaches to promote accountability—all of which are critical to the realization of human rights—alone they are inadequate for addressing the full range of SRHR of persons in conflict-affected settings, including access to SRH information and services.³⁶

For example, Nigeria is involved in a non-international armed conflict against the non-state armed group Boko Haram,³⁷ whose massive and systematic attacks on women and girls have been widely documented.³⁸ According to a report released by the Center for Reproductive Rights and Legal Defence and Assistance Project, 1.17 million of the country's internally displaced persons are women, and 510,555 are girls of reproductive age. The report documents the effects of the Boko Haram conflict on the SRHR of women and girls, as well as the lack of accountability mechanisms. Sexual exploitation and sexual violence—including rape, sex trafficking, slavery, and demands for transactional sex to access food and non-food items—are commonplace, and inadequate responses for internally displaced persons in host communities and camps have exacerbated the violations. Moreover, SGBV has contributed to alarming rates of sexually transmitted infections, including HIV.³⁹

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Human Rights Accountability Mechanism in a Ugandan Refugee Settlement

A novel accountability mechanism being implemented in a Ugandan refugee settlement has the aim of identifying barriers to SRH information and services and improving access.⁴⁰

In northern Uganda, the Center for Reproductive Rights and CARE International have undertaken a project on rights-based accountability for violations of the SRHR of refugee and host community women and girls. The project builds the capacity of community representatives to integrate a human rights-based approach into SRH service provision. It also establishes a mechanism for collecting, reviewing and responding to community-led monitoring of SRH outcomes and to service users' SRHR-related complaints and feedback when services fall short of human rights standards. To ensure its effectiveness, the mechanism is supported by an independent third party who has the authority to review decisions made and to ensure access to an effective remedy when rights are not respected.

To date, the accountability mechanism has reviewed complaints relating to refugee women's experiences of disrespect and abuse, discrimination and stigma experienced by pregnant adolescents when accessing SRH information and services, inaccessible medical equipment for women with disabilities, the marginalization of girls from menstrual hygiene kit distribution programs, and the violation of patients' rights to privacy. The results demonstrate how rights-based accountability mechanisms can facilitate access to an effective remedy and changes to government and providers' policies and practices when human rights are not respected. For example, the mechanism has ordered the reform of subcounty by-laws to ensure access to SRH services for adolescents and to prevent early forced marriage; garnered commitments by health sector duty bearers to increase the formal oversight and monitoring of SRH service delivery; and restitution of access to antiretroviral treatment for refugees.

The project highlights the importance of working directly with duty bearers and rights holders in the development of accountability mechanisms and is a rare example of an accountability mechanism that aims to ensure access to human rights based SRH information and services in a humanitarian setting.⁴¹

LIMITED DATA EVIDENCE

Linked to a lack of accountability is the lack of data and evidence on the need for, provision of, and efficacy of comprehensive SRH services.⁴² It is known that women and girls need these services throughout their lives,⁴³ that the risk of SGBV likely increases in humanitarian settings,⁴⁴ and that availability and quality of services often decreases in such contexts.⁴⁵ However, because of the insecure nature of these settings and systemic patterns of discrimination and gender inequality, including against people of diverse SOGIESC, collecting data and documenting access to SRH services and SRHR violations is extremely difficult. Some states and humanitarian service providers point to the lack of evidence on reproductive rights violations occurring in conflict settings as justification for their failure to guarantee SRH information and services. Some have also used this lack of evidence to marginalize key SRH information and services and not include them as essential services in the initial humanitarian response.⁴⁶ There is however, some emerging evidence that generally shows that when accountability mechanisms are in place, people are more likely to undertake actions to meet their needs.⁴⁷ Further research is needed to fill the gap showing how rights-based programming and meaningful accountability, including access to justice and remedies, can support positive health outcomes for women and girls and a more effective humanitarian response.⁴⁸

LIMITED POLITICAL WILL AND PRIORITIZATION

Globally, sufficient political will and national and international policies prioritizing reproductive rights, accountability, and the needs of women and girls affected by conflict, backed by sufficient resources, are largely absent. Relevant foreign policy interventions regularly omit a comprehensive focus on the needs of women and girls and rarely target the need for access to SRH information and services. Moreover, due to political ideologies, some positions and policies are intentionally developed to hinder access to comprehensive services, posing restrictions on humanitarian and other foreign aid.⁴⁹

In addition, **comprehensive SRH information and services are not always included in the initial phase of a humanitarian response and, despite evidence to the contrary, are not always viewed as life-saving or essential.**⁵⁰ While SGBV has become more of a priority in humanitarian responses, there is still a general failure to adopt a human rights-based approach when addressing such violence, as well as a failure to link SGBV to the need to ensure access to comprehensive SRH information and services.⁵¹

Lastly, key actors often exhibit a general lack of prioritization and awareness of SRH issues in humanitarian settings. An example of this can be seen in the situation of Rohingya refugees fleeing Myanmar to Bangladesh who were victims of sexual violence and rape. Although abortion services (called menstrual regulation) were available in 37 refugee camps (Bangladesh allows menstrual regulation services for up to 12 weeks of pregnancy), the services were both insufficient for the number of women and girls requiring them and under-utilized due to low awareness of them.⁵² As noted by OHCHR, “discrimination against women is a factor in the non-prioritization of those services only required by women, including those related to maternal health and sexual and reproductive health more broadly, reflecting societal hierarchies among who matters and who does not. This is further compounded by multiple and intersecting forms of discrimination, including on the basis of age, ethnicity, race, religion and migration status.”⁵³

THE NEED TO STRENGTHEN PARTNERSHIPS

There is a need to strengthen networks, alliances, and partnerships around SRHR in humanitarian settings. Currently, the fields of human rights, development, and humanitarian response often operate in parallel, speaking different languages, using different legal and policy frameworks, and engaging in separate global and regional processes.

Moreover, the state obligations outlined by the human rights framework on sexual and reproductive rights are not sufficiently infused into discussions among non-governmental organizations, policymakers, or UN agencies focused on humanitarian settings. This has meant that human rights are often viewed as a distraction to the lifesaving focus of humanitarian responses rather than as supporting their effectiveness and creating lasting change, including by ensuring access to SRH information and services for all, the provision of survivor-centered services, and the participation of those affected in the development of service provision.⁵⁴

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III. Select Features of International Law and Mechanisms of Accountability

International Human Rights Law is applicable in *all* contexts, including during armed conflict.

The rights of civilian persons in humanitarian situations, including armed conflict, are protected by multiple branches of international law, including international humanitarian law, international human rights law, and international criminal law. This section reviews relevant underlying characteristics of each branch of law that help inform obligations on the provision of SRH information and services.

Ensuring accountability for violations of international law is an important legal obligation and a cornerstone of the human rights framework. Mechanisms for ensuring legal accountability are central to enforcing compliance with obligations. It is important to recognize that, as noted above, there are many other accountability frameworks in addition to legal accountability, such as social, and community accountability, and review and monitoring of relevant political commitments such as the SDGs.⁵⁵ Additionally, while reparations, rehabilitation, and restitution are part of the legal right to an effective remedy, these remedies can occur outside of formal legal mechanisms. That said, the discussion below focuses on legal accountability, setting forth some general parameters and avenues of accountability under the three aforementioned legal regimes. While issues of jurisdiction are important factors to keep in mind, given the scope of this paper, this section focuses on the nature of legal accountability generally, the various mechanisms available for such accountability, and standards on accountability.

International Human Rights Law

NATURE OF OBLIGATIONS

IHRL is applicable in all contexts, including during armed conflict.⁵⁶ Human rights treaties set forth states' obligations to act in certain ways or refrain from certain actions in order to protect the human rights of all persons within their territory and all persons subject to their jurisdiction, power, or effective control, including persons located outside any territory effectively controlled by the state.⁵⁷ States must respect human rights (refrain from interfering with their enjoyment), protect human rights (prevent others from interfering with their enjoyment), and fulfill human rights (adopt appropriate measures toward their full realization), including SRHR in humanitarian settings.⁵⁸

States are the primary duty bearers of IHRL, and the obligations under this branch of law apply to states independent of their division of responsibility or internal structure.⁵⁹ States are also responsible for acts carried out by non-state actors under certain circumstances, such as when a non-state actor is acting in support of the state or its agent in an armed conflict.⁶⁰ Moreover,

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the view is increasingly taken that **non-state actors, including armed groups, whether party to a conflict or not, also have some direct human rights obligations or responsibilities in line with factors such as their capacity or the nature of their control over the enjoyment of human rights by rights holders.**⁶¹ These responsibilities apply despite the limitations of many treaty-based legal accountability mechanisms.

As noted by the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, “Attributing certain human rights obligations to certain non-State actors does not nullify but complement States’ responsibilities.”⁶² The potential for accountability through other influential legal and non-legal avenues—such as political and intergovernmental engagement, commissions of inquiry, and other fact-finding mechanisms—is an important aspect of recognizing and enhancing the application of human rights to non-state actors.⁶³

While IHRL has the most robust protection of SRHR of all branches of international law, it also has constraints, including allowing for limitations on some rights, derogability, and reservations.

LIMITATIONS AND DEROGATIONS

Civil and Political Rights

IHRL allows for the imposition of restrictions or limitations from the exercise of some rights. States may place limits on some, but not all civil and political rights, for certain specified purposes, such as national security, public health, or public order, as set forth in the relevant treaty provisions.⁶⁴ However, any limitations are subject to a proportionality test.⁶⁵

Distinct from limitations on that may be allowed in normal times under some IHRL guarantees, is derogation from obligations in emergency situations, where rights may be subject to derogation in exceptional circumstances and only temporarily.⁶⁶ For example, article 4 of the International Covenant on Civil and Political Rights allows for derogation in time of public emergencies.⁶⁷

There are clear and narrow criteria controlling the scope of such derogation and the circumstances under which it may be permissible, including the application of the principle of proportionality.⁶⁸ For example, there are procedural and substantive requirements that must be respected, such as the requirement that derogations cannot be “inconsistent with their other obligations under international law and do . . . not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”⁶⁹

In addition, some rights do not allow for any limitations or derogations under any circumstances, including in emergencies, humanitarian contexts, or even during armed conflict. These are referred to as non-derogable rights. The Human Rights Committee’s General Comment 29 provides an explanation, noting that state parties may under no circumstances invoke article 4 of the International

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Covenant on Civil and Political Rights in a way that would result in derogation of a non-derogable right or as justification for violating humanitarian law, preemptory norms of international law, or ICL.⁷⁰ There are two non-derogable rights in UN treaties that are particularly important in the context of SRHR: the right to life and the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment.⁷¹

Economic Social and Cultural Rights

Under IHRL, the concept of progressive realization obliges states to take appropriate measures toward the full realization of economic, social, and cultural rights to the maximum extent of their available resources.⁷² This concept recognizes that the realization of these rights may be hindered by a lack of resources and can be achieved only over a period of time. However, states are restricted in their application of progressive realization and must take immediate action, irrespective of their resources, in the following areas: eliminating discrimination;⁷³ core obligations of the State to ensuring satisfaction of minimum essential levels of rights, including the right to SRH;⁷⁴ always “taking steps” toward the realization of rights; and respecting obligations of non-retrogression.⁷⁵

CESCR has noted that the progressive realization of rights cannot be justified exclusively on the basis of the existence of a crisis or conflict: states have to demonstrate that progressive realization was unavoidable and that all possible measures have been taken, such as seeking international cooperation and assistance to overcome the resource constraints, including in humanitarian settings⁷⁶ and including to fulfill the right to SRH.⁷⁷ The Committee has noted that “the duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.”⁷⁸

RESERVATIONS

States may also formulate reservations on the extent to which some provisions are applicable.⁷⁹ Reservations under IHRL are valid insofar as they respect article 19 of the Vienna Convention on the Law of Treaties, which permits reservations if the treaty in question allows for them or if the reservation is not incompatible with the purpose and the object of the treaty.⁸⁰ The Human Rights Committee has noted that reservations to certain provisions of the International Covenant on Civil and Political Rights (such as reservations on the arbitrary deprivation of life or on torture and other cruel, inhuman, or degrading treatment or punishment) may not be compatible with the treaty’s object and purpose and hence cannot be made.⁸¹ These provisions in the Covenant have been interpreted to include state obligations in relation to ensuring access to SRH information and services.

MECHANISMS OF ACCOUNTABILITY

States have a duty to take legislative, administrative, judicial, fiscal, and other measures to create conditions in which people under their effective control can realize their rights.⁸² They are also obligated to ensure that national legislation complies with obligations under international law and that there are measures in place to enforce this at the domestic level.⁸³

States are responsible for violations of IHRL and must provide effective remedies for individuals whose rights have been violated.⁸⁴ Violations should lead to compensation and timely, effective, and transformative reparations for survivors; guarantees of non-repetition; and the adoption of legal and other measures to prevent future violations and abuses.⁸⁵ They have a duty to investigate alleged violations of IHRL and hold those responsible to account, including by prosecuting and punishing the perpetrators, where appropriate.⁸⁶ Access to justice is a human right embedded in the IHRL framework.

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Effective and accessible national-level judicial and other legal mechanisms are central to ensuring legal accountability for human rights violations; such mechanisms include courts and national human rights institutions, among others.⁸⁷ International mechanisms for legal accountability include the individual complaint mechanisms of UN treaty monitoring bodies, as well as special inquiry procedures for collective complaints.⁸⁸ Meanwhile, regional human rights mechanisms include the African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, European Court of Human Rights, Inter-American Commission on Human Rights, and Inter-American Court of Human Rights.⁸⁹ These issues are also brought to the attention of UN human rights treaty bodies in the context of periodic reporting by state parties.⁹⁰

International Humanitarian Law

NATURE OF OBLIGATIONS

IHL applies only during armed conflict.⁹¹ The overarching purpose of IHL is to limit the effects of armed conflict by limiting the means and method of warfare and to protect persons who are not (or are no longer) actively participating in the armed conflict.⁹² This branch of law applies in both international and non-international armed conflicts.⁹³ It binds all parties to an armed conflict, including states that are party to the relevant treaties (for example, the Geneva Conventions), as well as non-state armed groups. It imposes certain obligations on state parties to the Geneva Conventions that are not parties to a conflict.⁹⁴ In addition, many provisions of IHL are accepted as customary law by which *all* states are bound.⁹⁵ IHL allows for no derogations or reservations.⁹⁶

IHL's basic rules cover matters including, but not limited to the protection of the sick and wounded, the humane treatment of prisoners of war, the prohibition of torture and degrading treatment, the prohibition on attacking medical and other civilian objects, and restrictions on the types of weapons and methods of warfare that can be used by combatants. While the Geneva Conventions of 1949 (as supplemented by the Additional Protocols of 1977 and 2005) are generally regarded as the most important source of IHL, certain rules of IHL are also derived from or supported by other treaties,⁹⁷ customary international law,⁹⁸ the general principles of law, and case law.⁹⁹

The ICRC is recognized by the Geneva Conventions and has a mandate to promote IHL and work for its application in an impartial manner as part of its humanitarian mission.¹⁰⁰

International
Humanitarian Law
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What Are Humanitarian Principles?

In contrast to IHL, “humanitarian principles” govern humanitarian action taken by the range of actors involved in response efforts. The core humanitarian principles of humanity, neutrality, impartiality, and independence are general in nature, not legally binding, and designed to guide the way that any humanitarian response is carried out (whether in the case of an armed conflict, natural disaster, or other crisis situation), including in the provision of SRH information and services. More specifically:

Humanity – humanitarian responders must treat all persons humanely, equally, and in a dignified and respectful manner, with a focus on saving lives and alleviating suffering.

- Neutrality – humanitarian responders must not take sides in a conflict or engage in controversies of a political, racial, religious, or ideological nature.
- Impartiality – humanitarian responders must provide assistance based on need alone (prioritizing the most urgent cases) and must not discriminate on the basis of gender, race, nationality, class, religion, political opinion, or other factors unrelated to need.
- Independence – humanitarian responders must establish and implement their policies in an autonomous manner in accordance with humanitarian principles and must remain independent of government policies and actions.¹⁰¹

These principles should be read in conformity with one another and, while not legally binding, should be read consistently with international law. For example, the fundamental guarantee of non-discrimination that is embedded in these principles and rooted in national, regional, and international human rights guarantees and in IHL is central to any humanitarian response and is also embedded in the general principle of “do no harm.”¹⁰² Consequently, the principle of neutrality, for example, cannot be used to undermine the guarantee of non-discrimination in humanitarian settings.

While humanitarian principles are not enforceable legal rules *per se*, the International Red Cross and Red Crescent Movement commit to act at all times in accordance with them.¹⁰³ The principles have also been recognized and adopted by key international bodies, such as the UN General Assembly¹⁰⁴ and the European Union,¹⁰⁵ and in the *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief*.¹⁰⁶

ACCOUNTABILITY UNDER IHL

Ensuring respect for IHL is contained in the Geneva Conventions, and every high contracting party has a duty, in some cases, to take action with regard to any other high contracting party that does not respect the law.¹⁰⁷ The non-derogability of IHL and the fact that many rules are considered customary international law (and therefore applicable to all parties to an armed conflict) mean that there are rules and standards governing the conduct of state and non-state armed forces and that violations of these rules incur responsibility.

Violations of IHL can result in the responsibility of the party to the conflict (state or non-state armed group or the UN), individual criminal responsibility, and other measures. Responsibility for violations of IHL is a norm of customary international law applicable in both international and non-international armed conflicts.¹⁰⁸ A state is responsible for violations of IHL attributable to it, including those committed by its organs (including armed forces), by persons or entities empowered to exercise an element of governmental authority, by persons or groups acting on

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state instructions or under the state's direction or control, and by private persons or groups who commit violations that the state acknowledges and adopts as its own conduct.¹⁰⁹ Under treaty obligations, States are required to cease to act, to offer appropriate assurances and guarantees of non-repetition, to offer reparations for violations of IHL, and to penalize a number of violations of the treaties.¹¹⁰ Responsibility for violations of IHL also extends to non-state armed groups, although the consequences of such responsibility are not always clear.¹¹¹ For example, there is little guidance under IHL on how states should ensure that non-state parties to a conflict fulfill the obligation of paying compensation.¹¹²

The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law note that states should adopt various measures of reparation and that there must be no discrimination on any grounds, without exception, in accessing the right to a remedy.¹¹³

MECHANISMS OF ACCOUNTABILITY

Legal accountability mechanisms for violations of IHL lie primarily at the national level (through courts and tribunals) and, if applicable, also under ICL and its mechanisms (see below). Individual victims are entitled to reparations for violations under IHL.¹¹⁴ There is no international accountability mechanism specific to ensuring compliance with the full range of IHL obligations, despite attempts to create one.¹¹⁵

Following a resolution adopted by the International Conference of the Red Cross and Red Crescent, between 2015 and 2019 Switzerland and the ICRC jointly conducted an intergovernmental process aimed at improving compliance with IHL. The main objective was to reach a consensus on the establishment of a forum for dialogue among states on improving compliance with IHL, and on ways to make better use of the International Conference of the Red Cross and Red Crescent and regional forums. However, in that existing multilateral environment, it was not possible to reach a consensus, and no mechanism was created.

Note on Non-state Armed Groups¹¹⁶

IHL applies to non-state armed groups that are party to a conflict. Determining whether a non-international armed conflict exists is based on a two-pronged test: the violence needs to have reached a certain intensity, and it must be between at least two organized parties or armed groups.¹¹⁷ The assessment of the intensity of violence, and whether an armed group has the required degree of organization to be a party to a conflict, will require analysis in each context. In some contexts, non-state armed groups may shift sides to join government forces from one day to the next, making it difficult to determine whether they are state or non-state actors. As such, it becomes challenging to use the distinction in certain contexts.

In addition, whether there is an armed conflict—a requirement for the application of IHL—is often difficult to assess on the ground, for a crisis's categorization as an armed conflict especially non-international armed conflicts, are often made retrospectively (after IHL should have been applying) and can fluctuate (for example, depending on ceasefire agreements). Furthermore, IHL does not apply in post-conflict scenarios, even though armed groups may remain in control and continue to commit human rights abuses.

For the purposes of the application of IHL, it would matter if the armed group is a party to the conflict and whether an armed conflict is classified as such.¹¹⁸ However, for the purposes of using international law as a leverage tool with non-state actors, these distinctions may be less germane than a general appeal to human rights and to humanitarian principles and humane treatment.

While IHL and IHRL are focused primarily on the actions of states and armed groups, ICL focuses on holding *individuals* accountable in conflict and other situations of violence

International Criminal Law

NATURE OF OBLIGATIONS

ICL is a branch of law designed to proscribe certain categories of conduct and to make persons who engage in such conduct criminally liable.¹¹⁹ Depending on the crime, it can apply during peacetime or during an armed conflict.¹²⁰ While IHL and IHRL are focused primarily on the actions of states and armed groups, ICL focuses on holding *individuals* accountable in conflict and other situations of violence.¹²¹ It establishes individual criminal responsibility for grave violations of international law, including certain gross or serious violations of IHL and IHRL.¹²² Individual criminal responsibility is important for ensuring accountability for violations of IHRL and IHL and for ensuring reparations for victims.¹²³

Sources of ICL include, but are not limited to, treaties such as the Geneva Conventions and their Additional Protocols; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Prevention and Punishment of the Crime of Genocide; customary ICL; general principles of law; and case law.¹²⁴ Examples of international crimes include genocide, war crimes, crimes against humanity, aggression, and (all detailed in the Rome Statute), and other crimes under international law (e.g., torture).¹²⁵ Thus, some aspects of humanitarian law and human rights law also constitute part of ICL. For example, serious violations of IHL constituting war crimes—including grave breaches of the Geneva Conventions and their Additional Protocols—are also part of ICL, as well as part of customary international law. This may include acts of sexual violence, including forced pregnancy and forced sterilization, committed in armed conflict which may constitute war crimes.¹²⁶ The Rome Statute, the treaty that established the International Criminal Court, includes definitions of crimes that reflect rules or customary international law.¹²⁷ Crimes against humanity, genocide, and war crimes are crimes under international law and exist regardless of whether the conduct is criminalized under national law.¹²⁸ For grave breaches, including in some cases where the crime includes rape, states have a legal obligation to exercise their jurisdiction.¹²⁹

MECHANISMS OF ACCOUNTABILITY

National courts are a primary mechanism for accountability under ICL.¹³⁰ In addition, the establishment of *ad hoc* international criminal tribunals, as well as the broader mandate set out in the Rome Statute, has given the international community direct mechanisms outside of national courts through which to punish individuals who have commanded, encouraged, or personally perpetrated international crimes, including sexual violations, in connection or not with an armed conflict.¹³¹

IV. International Legal Standards on Sexual and Reproductive Health

This section explores the standards under each of the aforementioned branches of law that support, or can potentially support, access to SRH information and services in humanitarian settings, including armed conflict.

International Human Rights Standards Relevant to the Provision of Sexual and Reproductive Health Services

Human rights relevant to the obligation to provide SRH information and services can be found in multiple and interdependent treaty provisions, including provisions on the right to life; the right to be free from torture and other ill-treatment; the right to health; the right to privacy; the right to decide the number, spacing, and timing of children; the rights to education and to information; and the prohibition of discrimination. **Of all the branches of international law, IHRL provides the most robust standards on SHRH, including access to SRH information and services. The detailed description that follows is necessary given that IHRL applies in all humanitarian settings, including armed conflict.** In addition, it is important to note that there is widespread recognition that various branches of international law apply concurrently and that their protections are complementary and not mutually exclusive.¹³² This means that IHRL's robust standards can be used as interpretative tool for gaps in IHL and ICL when possible, as has been the case in relation to other protections, such as the right to fair trial.¹³³

States' obligations under IHRL include ensuring the provision of SRH information and services and the removal of barriers to such services. States' obligations to respect, protect, and fulfill the right to SRH must be implemented in a way that ensures that all SRH information and services are available, accessible, acceptable, and of good quality.¹³⁴ The core obligation to ensure the satisfaction of minimum essential levels of the right to SRH includes the following duties:

- Guarantee universal and equitable access to affordable, acceptable, and quality SRH services, goods, and facilities, particularly for women and disadvantaged and marginalized groups.
- Ensure that all individuals and groups have access to comprehensive education and information on SRH, and ensure that it is non-discriminatory, non-biased, evidence based, and cognizant of the evolving capacities of children and adolescents.
- Repeal or eliminate laws, policies, and practices that criminalize, obstruct, or undermine an individual's or group's access to SRH facilities, services, goods, and information.
- Ensure access to effective and transparent remedies and redress for violations of the right to SRH.¹³⁵

The right to SRH is indivisible from and interdependent with other rights.¹³⁶ It extends beyond sexual and reproductive health care and services to include the underlying and social determinants of SRH.¹³⁷

Non-discrimination is a core principle of IHRL. In the context of SRHR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires states to address the specific health needs of women and girls, including in conflict and other humanitarian contexts, and has found that the failure to provide services that only women need to meet their reproductive health needs is a form of discrimination.¹³⁸

Equality and Non-discrimination

The rights to equality and non-discrimination are fundamental tenets of IHRL. Gender equality includes the right to de facto (or substantive) equality.¹³⁹ Realizing substantive gender equality requires addressing the historical roots of gender discrimination, gender stereotypes, and traditional understandings of gender roles that perpetuate discrimination and inequality.¹⁴⁰ UN treaty monitoring bodies have long used a substantive equality approach to ensure gender equality in the context of reproductive rights. They have called on states to ensure positive reproductive health outcomes, such as by fulfilling unmet needs for modern contraceptives, lowering rates of maternal mortality, and reducing rates of adolescent pregnancy.¹⁴¹ They have repeatedly condemned laws that restrict or prohibit health services primarily or exclusively needed by women, noting that such laws violate the rights to equality and non-discrimination.¹⁴² The Committee on the Elimination of Discrimination against Women (CEDAW Committee), for example, has stated that “it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.”¹⁴³

Gender stereotypes. Several treaty monitoring bodies, and the CEDAW Committee in particular, have regularly called on states to work to eradicate gender stereotypes, noting that patriarchal attitudes and stereotypes about women as mothers and caregivers, prejudices about sexual and reproductive health services, and taboos about sexuality outside of marriage all contribute to the lack of access to reproductive health information, goods, and services.¹⁴⁴ CESCR’s General Comment 22 also calls on states to eliminate discriminatory stereotypes, assumptions, and norms concerning sexuality and reproduction that underlie restrictive laws and undermine the realization of SRH.¹⁴⁵

Realizing women’s rights and gender equality requires reforming discriminatory laws, policies, and practices and removing barriers that interfere with women’s access to comprehensive SRH services, goods, education, and information.¹⁴⁶ To achieve substantive equality, states must remedy entrenched discrimination by implementing a wide variety of legislative, executive, administrative, and other regulatory instruments, policies, and practices.¹⁴⁷ These measures should do the following:

Recognize difference. States should recognize that women and men experience different kinds of rights violations due to discriminatory social and cultural norms, including in the context of health.¹⁴⁸ Women may also face intersecting discrimination based on multiple grounds, including race, disability, age, socioeconomic status, or membership in other marginalized groups.¹⁴⁹ Measures to guarantee non-discrimination and substantive equality should address the exacerbated impact that intersectional discrimination has on the realization of the right to SRH.¹⁵⁰

Ensure equality of outcomes. Given that discrimination manifests itself differently between and among men and women, states should address these inequalities accordingly. States should focus on ensuring equal outcomes for women, including different groups of women, which may require them to take positive measures and mandate potentially different treatment for men and women, as well as between different groups of women, in order to overcome historical discrimination and ensure that institutions guarantee women’s rights.¹⁵¹

Address discriminatory power structures. States should examine and address current societal power structures, such as traditional family and workplace roles, and analyze the role that gender plays within them. Ensuring substantive equality requires states to change opportunities, institutions, and systems by ensuring that they are not grounded in patriarchal paradigms of power and life patterns.¹⁵²

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Multiple and intersectional forms of discrimination. CESCR's General Comment 22 provides a comprehensive explanation of non-discrimination, including multiple and intersecting grounds of discrimination, in relation to the right to SRH.¹⁵³ It notes:

*Individuals belonging to particular groups may be disproportionately affected by intersectional discrimination in the context of sexual and reproductive health. As identified by the Committee, groups such as, but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities, adolescents, lesbian, gay, bisexual, transgender and intersex persons, and people living with HIV/AIDS are more likely to experience multiple discrimination. . . . Also, women and girls living in conflict situations are disproportionately exposed to a high risk of violation of their rights, including through systematic rape, sexual slavery, forced pregnancy and forced sterilization. . . . Laws, policies and programmes, including temporary special measures, are required to prevent and eliminate discrimination, stigmatization and negative stereotyping that hinder access to sexual and reproductive health. Prisoners, refugees, stateless persons, asylum seekers and undocumented migrants, given their additional vulnerability by condition of their detention or legal status, are also groups with specific needs that require the State to take particular steps to ensure their access to sexual and reproductive information, goods and healthcare.*¹⁵⁴

Responsibility of Donor States and UN Entities in the Provision of SRH information and services under IHRL¹⁵⁵

IHRL provides some general guidance regarding the role of donor states and UN entities in ensuring the right to SRH, which is applicable during both conflict and non-conflict situations. CESCR's General Comment 22 recognizes that international cooperation and assistance are crucial for the realization of the right to SRH.¹⁵⁶ It places an obligation on states unable to realize the right to SRH to seek such cooperation and assistance and notes that states in a position to provide such assistance must respond in accordance with their international commitment.¹⁵⁷ The Committee also notes that:

[d]onor States and international actors have an obligation to comply with human rights standards, which are also applicable to sexual and reproductive health. To this end, international assistance should not impose restrictions on information or services existing in donor States . . . [or] reinforce or condone legal, procedural, practical or social barriers to the full enjoyment of sexual and reproductive health that exist in the recipient countries.¹⁵⁸

Further, CESCR notes that "national and donor States must refrain from censoring, withholding, misrepresenting or criminalizing the provision of information on sexual and reproductive health, both to the public and to individuals. Such restrictions impede access to information and services, and can fuel stigma and discrimination."¹⁵⁹ Meanwhile, the Human Rights Committee has noted that "States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life."¹⁶⁰ The CEDAW Committee, in its general recommendation on violence against women, also recognizes that "both international humanitarian law and human rights law have recognised the direct obligations of non-State actors, including as parties to an armed conflict, in specific circumstances. These include the prohibition of torture, which is part of customary international law and has become a peremptory norm (jus cogens)."¹⁶¹

Further, CESCR explicitly recognizes the important role that UN entities play in the realization of the right to SRH, and it encourages the UN to cooperate effectively with state parties in collaboration with civil society.¹⁶²

NON-DEROGABLE RIGHTS AND SRH INFORMATION AND SERVICES

Human rights bodies have found that certain violations related to access to SRH information and services implicate non-derogable rights, including the right to life and the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment.

The Right to Life

Treaty monitoring bodies have developed strong human rights standards on maternal health care, particularly on addressing maternal mortality, framing this issue within the right to life, among other rights. Numerous human rights bodies have set forth state obligations to prevent maternal mortality including through developing strategic plans and campaigns for improving access to treatments designed to reduce maternal mortality, such as ensuring access to emergency obstetric care and to skilled birth attendants.¹⁶³ In General Comment 36 on the right to life, the Human Rights Committee highlights states' obligations in relation to preventing maternal mortality resulting from restrictive abortion laws, such as obligations to decriminalize abortion as well as to protect against the mental and physical health risks associated with unsafe abortion by ensuring access to all, 'especially boys and girls, to quality and evidence-based information and education about sexual and reproductive health and to a wide range of affordable contraceptive methods, and prevent the stigmatization of women and girls seeking abortion.'¹⁶⁴ It notes that the regulation of abortion:

must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly.¹⁶⁵

Further, the Committee notes that the duty to protect life implies that states should take appropriate measures to address the general conditions in society that may prevent individuals from enjoying their right to life with dignity.¹⁶⁶ This obligation includes ensuring access to essential goods and services (such as health care), developing campaigns for raising awareness of gender-based violence and harmful practices, and improving access to medical examinations and treatments designed to reduce both maternal and infant mortality.

The Right to Be Free from Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Committee against Torture, the Human Rights Committee, and the CEDAW Committee have found that denying or delaying safe abortion or post-abortion care may amount to torture or cruel, inhuman, or degrading treatment.¹⁶⁷

For example, the Committee against Torture has expressed concern that complete bans on abortion may constitute torture or ill-treatment.¹⁶⁸ It has also urged states to ensure access to abortion for women whose health or life is at risk, who are the victims of sexual violence, or who are carrying nonviable pregnancies—all circumstances where a pregnancy may cause a woman severe physical or mental suffering.¹⁶⁹ Similarly, the Human Rights Committee has found that the denial of access to abortion services can lead to physical or mental suffering amounting to torture or ill-treatment in certain circumstances.¹⁷⁰ In its General Comment 36, the Committee reinforces this interpretation by noting that "restrictions on the ability of women or girls to seek abortion [on any ground] must not, inter alia,

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jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy.”¹⁷¹

In its views on individual complaints, the Human Rights Committee has consistently found that criminalizing abortion (and hence denying women access to abortion) constitutes a violation of the right to freedom from cruel, inhuman, or degrading treatment. For example, in *Mellet v. Ireland*¹⁷² and *Whelan v. Ireland*,¹⁷³ the Committee found that the prohibition and criminalization of abortion violated the rights to be free from cruel, inhuman, or degrading treatment, to privacy, and to equality before the law of a woman who wanted to end a pregnancy affected by a fatal fetal impairment. The Committee affirmed that prohibiting abortion can cause women severe mental suffering. Such suffering can be exacerbated by the inability to receive care from trusted health professionals in their own country and by the financial, psychological, and physical burdens imposed on them by having to travel abroad to access abortion care.¹⁷⁴ The Committee also outlined the state’s obligation to remedy these violations by reforming its laws on abortion and, if necessary, its constitution.¹⁷⁵

The Committee against Torture has also expressed concern regarding the availability and accessibility of emergency contraception to survivors of rape,¹⁷⁶ as well as abuses of women in health facilities.¹⁷⁷

CEDAW General Recommendation 30 on Women and Conflict

The CEDAW Committee, in its General Recommendation 30 on women and conflict, provides guidance on obligations under CEDAW in conflict settings, recommending that state parties:

[e]nsure that sexual and reproductive health care includes access to sexual and reproductive health and rights information; psychosocial support; family planning services, including emergency contraception; maternal health services, including antenatal care, skilled delivery services, prevention of vertical transmission and emergency obstetric care; safe abortion services; post-abortion care; prevention and treatment of HIV/AIDS and other sexually transmitted infections, including post-exposure prophylaxis; and care to treat injuries such as fistula arising from sexual violence, complications of delivery or other reproductive health complications, among others.¹⁷⁸

The Committee has called on states to prioritize the provision of SRH services, including safe abortion services, noting with concern the effects of conflict on SRHR and maternal mortality.¹⁷⁹ It has also urged states to ensure access to maternal health services, including antenatal care, skilled delivery services, the prevention of vertical transmission, and emergency obstetric care.¹⁸⁰ In particular, the Committee has noted that “[p]rotecting women’s human rights at all times, advancing substantive gender equality before, during, and after conflict, and ensuring that women’s diverse experiences are fully integrated into all . . . reconstruction processes are important objectives of the Convention.”¹⁸¹ The Committee urges states, rather than suspending rights protections, to “adopt strategies and take measures addressed to the particular needs of women in . . . states of emergency.”¹⁸²

Realizing SRHR in humanitarian settings requires, *inter alia*:

- Ensuring available, accessible, adequate, and quality services without discrimination.
- Ensuring that those who seek services are able to make informed and autonomous decisions without spousal, parental, or third-party consent.
- Establishing systems for maintaining privacy and confidentiality.
- Access to justice and effective remedies when individual rights are violated.¹⁸³

The CEDAW Committee and CESCR have noted that refugees, stateless persons, asylum seekers, and undocumented migrants are in a situation of vulnerability due to their legal status, which requires the state to take additional steps to ensure their access to affordable and quality SRH information, goods, and health care.¹⁸⁴

Select Regional Human Rights Law on SRH in Humanitarian Contexts

Regional instruments also address SRH in humanitarian settings, including armed conflict.

Article 9 of the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women* guarantees every woman the right to be free from violence in both the public and private spheres and places obligations on state parties to take measures to guarantee this right.¹⁸⁵ It also requires states to adopt measures for the special protection of women in armed conflict and categorizes migrant, refugee, and displaced women as among the most vulnerable persons in need of support by state parties.¹⁸⁶

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), in recognition of the rampant sexual and gender-based violence inflicted on women and girls during and after armed conflicts, seeks to address these violations in periods of peace and in periods of armed conflict.¹⁸⁷ Among the SRHR violations identified by the Istanbul Convention, the following practices are to be prohibited or criminalized by state parties: forced marriage, “honor crimes,” genital mutilation, sexual violence including rape, and forced abortion and forced sterilization.¹⁸⁸

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) is a binding regional treaty designed to combat the internal displacement of persons caused by conflicts and natural disasters.¹⁸⁹ Article 9 focuses on the obligations of state parties to protect displaced persons and requires that special provisions be made for the protection of the SRH of internally displaced women and for the delivery of psychological services to survivors of SGBV.¹⁹⁰

Spotlight: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

SRH in armed conflict is also addressed in the Maputo Protocol, the regional human rights instrument established by the African Union on the rights of women in Africa. Article 11 of the Maputo Protocol addresses the protection of women, specifically during armed conflicts, and requires compliance with international humanitarian law during such conflicts.¹⁹¹ It enumerates the women who are to be protected (asylum seekers, refugees, returnees, and displaced women), the crimes from which they are to be protected (violence, rape, and other forms of sexual exploitation), and the charges that perpetrators should face if they carry out these acts (war crimes, genocide, and crimes against humanity).¹⁹² It also prohibits the recruitment of child soldiers, particularly girls under the age of 18.¹⁹³

In addition, article 14 outlines the health and reproductive rights that must be respected and promoted by state parties. It notes that women’s right to health encompasses the right to control their fertility; the autonomy to decide whether to have children, how many children to have, and their spacing; the right to contraception of their choosing; the right to self-protection from sexually transmitted infections; the right to information on their health congruent with international best practices; and the right to educational family planning.¹⁹⁴ It also requires that states provide adequate, affordable, and accessible health services, such as information, education, and communication programs, with special attention paid to women in rural areas, and that states create or expand existing maternal health services.¹⁹⁵ Further, article 14 tasks states with addressing the nutritional needs of pregnant and nursing women and with authorizing abortion in cases of rape, sexual assault, incest, or when continuing the pregnancy endangers the life of the fetus, or risks the woman’s physical or mental health or life.¹⁹⁶

SELECT ANALYSIS OF IHRL

IHRL is an important branch of international law in this area, as it has more robust guarantees in relation to SRHR than any other branch of international law. In addition, **unlike IHL, which only applies during armed conflict, IHLR applies at all times, in all contexts, including armed conflict, and thus is critical for ensuring continuity of rights protections in humanitarian contexts, which can oscillate from fragile to crisis to conflict and back again.**

IHRL's potential as an effective tool for accountability is strong. While it has some constraints—such as the lack of universal ratification and the potential for limitations on some rights, derogability, and reservations—that are not present in IHL, these constraints may not necessarily be detrimental. **Almost all UN member states are party to at least one treaty that has a non-derogable right, such as the right to life and the right to be free from torture and other ill-treatment, which have been interpreted to create state obligations to ensure access to at least some SRH services, including maternal health care, abortion and emergency contraception. This means that states have a non-derogable obligation to be ensuring access to these services in accordance with these rights.** For example, the Human Rights Committee's General Comment 36 on the right to life reinforces the notion that restrictions on the ability of women or girls to seek abortion must not jeopardize their lives or subject them to physical or mental pain or suffering, including when the pregnancy is a result of rape, and additionally notes that states must not “regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly.”¹⁹⁷ This could include any law or regulation which does not allow abortion on request and which poses barriers to safe abortion in other ways. **Due to the deplorable conditions, dangers, and violence that persons face in many humanitarian settings,¹⁹⁸ any pregnancy in such a setting could lead to such pain or suffering for an individual that a denial of a request for an abortion could amount to cruel, inhuman, and degrading treatment and, given the lack of available SRH services in such settings, could also jeopardize the right to life, in violation of human rights obligations.¹⁹⁹** Finally, customary IHRL, which includes the right to be free from torture, applies to all countries, regardless of a treaty's ratification status.²⁰⁰

In the context of access to SRH information and services, however, the concrete application of IHRL in practice is rare, even by international and regional human rights bodies. Even where sexual violence is at issue—which is the most common claims of violations against women in humanitarian settings²⁰¹—accountability mechanisms have failed to effectively address the connection between sexual violence and SRH.²⁰² A recent decision by the CEDAW Committee in an individual complaint is illustrative.

Due to the deplorable conditions, dangers and violence that persons face in many humanitarian settings, a pregnancy in such a setting alone could lead to such pain or suffering for an individual that a denial of a request for an abortion or lack of availability or accessibility of abortion could amount to cruel, inhuman, and degrading treatment and could also violate the right to life, amongst other rights.

*S.H. v. Bosnia and Herzegovina*²⁰³
(CEDAW Committee, July 2020)

The claimant, S.H., was a survivor of rape perpetrated by a member of the Bosnian Serb forces in August 1995, during the conflict in the former Yugoslavia. The rape caused S.H. physical and psychological suffering, including problems with her thyroid gland and a major genital infection, for which she could not afford appropriate treatment. The infection later developed into a cervical disease and subsequently cervical cancer, resulting in the removal of her cervix. S.H.'s inability to engage in sexual intercourse with her husband after the rape also led to her divorce. She has been living below the poverty level since her divorce.

Shortly after the rape, S.H. filed a police report but was not notified that no investigation was opened, and the state party ignored S.H.'s requests for updates. It also failed to provide her with access to comprehensive social assistance until 2019 when the authorities eventually recognized her status as a victim of conflict-related sexual violence and granted her a monthly pension of about 67 Euros. After exhausting all domestic legal procedures and remedies to access justice and adequate financial support she filed a complaint to the CEDAW Committee.

In its decision, the CEDAW Committee found that the state's failure to provide an effective and timely investigation, as well as sufficient redress for the victim, amounted to multiple breaches of the Convention, including access to justice and equality before the law. It also found a violation of Article 12, on the right to health.²⁰⁴ Despite the Article 12 violation and the Committee's General Recommendation 30, which expressly sets forth state obligations to address the impact that sexual violence in conflict and post-conflict situations has on reproductive health,²⁰⁵ none of the recommendations, either those specific to the complainant or general ones, address the link between sexual violence and SRHR.

International Humanitarian Law Standards Relevant to the Provision of Sexual and Reproductive Health Services

IHL grants women the same protection as men, regardless of whether they are combatants, civilians, or *hors de combat* (combatants no longer able to fight).²⁰⁶ Under IHL, parties to a conflict must treat all civilians and persons who are *hors de combat* without "adverse distinction."²⁰⁷ This requires the taking of all feasible measures to remove and prevent the raising of any barriers that persons might face in gaining access to services or protection provided under IHL on par with other civilians and persons *hors de combat*.²⁰⁸

Despite the SRH-related guarantees in IHRL, ICL, and IHL outlined in this paper, accountability mechanisms have yet to effectively address the SRH needs of persons subject to SGBV, which is the most commonly cited violation against women in humanitarian settings, particularly in conflict situations.

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IHL expressly recognizes the specific needs that women face in armed conflict and sets out additional protections and rights in this regard,²⁰⁹ including the particular risks they may face in different scenarios, such as in detention.²¹⁰ While IHL does not address SRH in detail, it does contain important obligations regarding medical treatment and the treatment of civilian women, particularly pregnant women.

PROTECTION OF WOMEN AND THEIR HEALTH ASSISTANCE NEEDS

The rule requiring respect for the specific needs of women affected by armed conflict flows from provisions concerning both international and non-international armed conflicts and forms part of customary IHL.²¹¹ In international armed conflict, for example, the Geneva Conventions state that “women shall be treated with all consideration due to their sex.”²¹² Article 27 of the Fourth Geneva Convention grants special protection to women, stressing that “women shall especially be protected against any attack on their honour.”²¹³ Additional Protocol I provides that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”²¹⁴ Meanwhile, rule 134 of customary IHL provides that “[t]he specific protection, health and assistance needs of women affected by armed conflict must be respected” and references IHRL to support this, noting that the rule should be viewed in the light of the “prominent place of women’s rights in human rights law.”²¹⁵ This rule, which applies equally in international and non-international armed conflicts, notes that:

[w]hile common Article 3 of the Geneva Conventions and Additional Protocol II do not contain a general rule stating that the specific needs of women must be respected, they refer to specific aspects of this rule by requiring respect for the person and honour of each, prohibiting violence to life, health and physical and mental well-being, prohibiting outrages upon personal dignity, including humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, and requiring the separation of women and men in detention.²¹⁶

The breadth of this responsibility is also recognized in the ICRC’s 2016 Commentary, which notes that this norm encompasses “medical, psychological and social assistance,” including trauma treatment and counselling, and that special protection and care afforded to women must take into account “the distinct set of needs of and particular physical and psychological risks facing women, including those arising from social structures”; additionally, this norm requires “equal respect, protection and care based on all the needs of women.”²¹⁷

Customary IHL provides that “[t]he specific protection, health and assistance needs of women affected by armed conflict must be respected” and references IHRL to support this, noting that the rule should be viewed in the light of the “prominent place of women’s rights in human rights law. It also notes that care afforded to women must take into account “the distinct set of needs of and particular physical and psychological risks facing women, including those arising from social structures”; additionally, this norm requires “equal respect, protection and care based on all the needs of women.”

PROTECTION OF PREGNANT WOMEN AND THE MOTHERS OF YOUNG CHILDREN

Customary IHL and provisions of IHL treaties require special care for pregnant women and mothers of young children with regard to the provision of food, clothing, medical assistance, evacuation, and transportation.²¹⁸ Additional Protocol I provides that the protection and care due to the wounded and sick also covers maternity cases.²¹⁹ Article 55 of the Fourth Geneva Convention also imposes a duty on occupying powers to ensure that the population has access to medical supplies (and affords those neutral states that are appointed as “protecting powers” the right to verify the state of such supplies).²²⁰

CARE FOR THE WOUNDED AND SICK

IHL establishes an affirmative duty to provide care for the “wounded and sick,” whether civilians or members of armed forces.²²¹ The cause of the illness or wound (for example, whether it results from an armed attack or from another source) is not to be taken into consideration.²²² Included in the protection of the wounded and sick is anyone in need of medical care. This includes “maternity cases” and “other persons who may be in need of immediate medical assistance or care, such as . . . expectant mothers.”²²³ Survivors of sexual violence, including rape, are also covered by the protections provided for the wounded and sick in armed conflict situations.²²⁴ Such persons are entitled to adequate medical care and priority in treatment based on medical grounds.²²⁵ Customary IHL rule 110 notes that this is an obligation of means, meaning that parties must make their “best efforts” to fulfill it, including by permitting humanitarian organizations to assist.²²⁶ The general obligation to respect and protect requires that the wounded and sick be treated humanely and cared for without adverse distinction,²²⁷ which has been interpreted to permit distinction only on the basis of medical need.²²⁸

PROHIBITION OF SEXUAL VIOLENCE

Customary IHL rule 93 prohibits sexual violence against any person, regardless of sex, in international and non-international armed conflicts.²²⁹ In non-international armed conflicts, sexual violence is prohibited by common article 3 of the Geneva Conventions; and in non-international armed conflicts to which Additional Protocol II applies, it is prohibited by article 4(2)(e) of this treaty. Common article 3 prohibits sexual violence in three ways: first, through its obligation of humane treatment;²³⁰ second, through its prohibition of violence to life and person (including mutilation, cruel treatment, and torture);²³¹ and third, via its prohibition of outrages upon personal dignity.²³² Additional Protocol II similarly prohibits sexual violence through its prohibition of outrages upon personal dignity, which it specifies as covering humiliating and degrading treatment, rape, enforced prostitution, and indecent assault.²³³

Further, article 27 of the Fourth Geneva Convention provides that, in addition to a general obligation to treat protected persons humanely and protect them from violence, “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”²³⁴ The article requires that all protected persons be treated with the same consideration regardless of their sex, among other classifications.²³⁵ These principles also form part of customary IHL and are applicable to non-state actors. The rules of customary IHL also identify a prohibition on rape and other forms of sexual violence as a standalone norm of customary IHL and a war crime.²³⁶

The ICRC’s 2016 Commentary confirms that sexual violence is absolutely prohibited in all armed conflicts, whether international or non-international, and that the range of prohibited actions includes not only rape and enforced prostitution but also sexual slavery, forced pregnancy, forced sterilization, forced public nudity or stripping, mutilation of sexual organs, forced marriage, forced inspections for virginity, sexual exploitation (such as obtaining sexual services in return for food or protection), forced abortions, and sex trafficking.²³⁷ The Commentary further notes that “there is a growing acknowledgement that women, men, girls and boys are affected by

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armed conflict in different ways” and that “[s]ensitivity to the individual’s inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment under common Article 3.”²³⁸

Customary IHL provides useful guidance on the scope of prohibited behaviors, which should not be limited to a mechanical description of objects and body parts but instead defined more broadly to include, for example, any physical invasion of a sexual nature that is committed on a person under coercive circumstances or other circumstances in which they are unable to give genuine consent.²³⁹ The rules of customary IHL further clarify that, under the ‘modern view’ (for example, as encapsulated in the Rome Statute), concepts related to sexual assault should be interpreted in a gender-neutral manner rather than merely covering male-to-female violence.²⁴⁰

Further, IHL places a duty on parties to an armed conflict to establish and recognize hospital and safety zones²⁴¹ and to respect and protect civilian hospitals²⁴² in order to protect maternity cases, among others.²⁴³ It also requires such parties to ensure the free passage of maternity and child supplies,²⁴⁴ as well as to make a good-faith effort to reach agreements on removing children and maternity cases from besieged and encircled areas and to facilitate the passage of medical personnel and equipment into such areas.²⁴⁵ In addition, rule 55 of customary IHL states that “the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.”²⁴⁶

Recent State Practice related to Accountability for SRHR in Humanitarian Contexts

State practice is important for the protection of SRHR, as it contributes to the creation of customary international law and its rules.²⁴⁷ Below are some examples of recent developments concerning SRHR in the context of conflict and post-conflict processes.

Colombia

The Colombian peace accord, signed in 2016, made it explicit that sexual violence is a crime for which there can be no amnesty. Three years after the peace agreement, a landmark judgment issued by the country’s Constitutional Court further recognized that forced contraception and forced abortion constitute violations of a woman’s SRHR and a form of sexual and gender-based violence in the context of IHL.²⁴⁸

In its judgment (SU-599 of 2019), the Constitutional Court established that ex-combatants’ status as victims should be recognized, and it ordered specific reparations for an ex-combatant woman, Helena, who had been the victim of numerous reproductive rights violations, including violence. Helena was 14 years old when she was forcibly recruited by the Revolutionary Armed Forces of Colombia. As a result of a consensual relationship, Helena became pregnant, and although she wished to carry the pregnancy to term, guerrilla commanders forced her to have an abortion, threatening to kill her if she refused. The procedure was performed in unsanitary conditions, leaving her with severe physical and psychological harm. She was also forced to use injectable contraceptives. Helena later managed to escape the guerrilla group but faced multiple barriers in seeking remedies and assistance.

In particular, the Victims’ Unit, an institution created in 2011 by the Victims’ Law, denied Helena’s request to be included in the Registry of Victims because she had been a combatant—a decision that effectively prevented her from accessing reparation measures. As a result of this denial, she filed a lawsuit before the Constitutional Court. In its ruling, the Court ordered the Victims’ Unit to include her in the Registry of Victims. Relying on state obligations under IHRL (including CEDAW and the regional human rights treaty on violence against women, the Belém do Pará Convention) and under IHL (the Geneva Conventions), as well as the case law of the International Criminal Court,²⁴⁹ it concluded that Helena had suffered grave violations of her human rights and that the state has a responsibility to ensure that victims of sexual and reproductive violence committed in the context of the Colombian conflict have

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access to reparation measures. The Court ordered that Helena be provided with both physical and psychological gender-sensitive support, both to help her recover from the sexual violence that she had suffered and to rebuild her mental and emotional well-being.²⁵⁰

Accordingly, Colombia's Commission for the Clarification of Truth, Coexistence, and Non-Repetition now has a mandate to address reparations for such violations, including for ex-combatants who have experienced SRHR violations.²⁵¹

Europe

The widespread use of rape as a weapon of war has raised issues concerning what medical treatment and care must be provided to survivors of rape, in particular whether the obligation to provide abortion services is included under IHL. This becomes especially relevant given the extent of restrictive abortion laws around the world—with many countries taking a grounds-based approach to abortion and some lacking an explicit rape exception or failing to interpret health or life exceptions broadly enough to include rape.²⁵²

The European Commission, France, the Netherlands, and the United Kingdom addressed this issue a few years ago, recognizing that IHL entails an obligation to provide abortion services to rape survivors in armed conflict situations, regardless of national laws.²⁵³ For example, a UK official stated: “where there is a direct conflict between national law and the fundamental obligation on parties to a conflict under Common Article 3 of the Geneva Convention, the obligation is to comply with Common Article 3. . . . The denial of abortion in a situation that is life threatening or causing unbearable suffering to a victim of armed conflict may therefore be offered despite being in breach of national law by parties to the conflict or humanitarian organisations providing medical care and assistance.”²⁵⁴

Reference can also be made here to the UN Security Council Resolution 2122, which recognizes the need to ensure that humanitarian aid and funding includes access to the “full range of sexual and reproductive health services, including in relationship to pregnancies resulting from rape, without discrimination.”²⁵⁵ In addition, UN Security Council Resolution 2467 has an express reference to CEDAW Committee's General Recommendation 30, which highlights states' obligations to provide access to SRH information and services, including safe abortion in crisis and conflict situations.²⁵⁶

SELECT ANALYSIS OF IHL

While it should be noted that protecting the health of female civilians was only one of many goals of the drafters of the Geneva Conventions,²⁵⁷ the potential utility of IHL in protecting SRHR generally has been enhanced in recent decades by the growing focus in international discourse on the prohibitions of sexual violence in IHL. For example, the ICRC,²⁵⁸ the UN Security Council,²⁵⁹ the UN Secretary-General,²⁶⁰ and other international and national bodies have increasingly acknowledged that sexual violence cannot be dismissed as “collateral damage” or an inevitable “by-product” of war. Rather, such violations are often integral to the strategy and tactics of warfare that are employed by aggressors, and they are a difficult obstacle to post-war social and political reconstruction, as well as an ongoing and powerful source of stigma for survivors.²⁶¹

However, in its current application, **IHL falls short in guaranteeing access to the full range of SRH information and services for all persons, including survivors of SGBV. This has fostered gaps in the provision of SRH information and services, even though more robust provisions guaranteeing access to SRH information and**

As stated in the Vienna Convention on the Law of Treaties, a state party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

services under IHRL apply during armed conflict. This could be due to numerous reasons, including that IHL’s obligation to provide medical care, broadly speaking, requires the kind of treatment that would be administered by a medical practitioner under the circumstances and in view of the person’s medical condition, and may differ from country to country.²⁶² However, the failure to provide medical care or the denial of or forced medical treatment may constitute a violation of international law. This would be the case if, for example, denying such health care violates the obligation of humane treatment or the prohibition of torture and other ill-treatment enshrined in IHL and IHRL. As stated in the Vienna Convention on the Law of Treaties, a state party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²⁶³

In this regard and in the context of abortion, the European Commission and some European countries, have recognized that IHL entails an obligation to provide abortion services to victims of rape in armed conflict situations, regardless of the content of national laws.²⁶⁴ This is an important step towards a more widely expressed state practice under IHL, and is consistent with obligations under IHRL.²⁶⁵ **A Commentary on the Geneva Conventions notes that the Conventions “do not prevent the interpretation of the notion of ‘medical care’ as including abortion.”**²⁶⁶ It also notes that the “provision of non-discriminatory treatment obliges states at a minimum to ensure that all victims have access to the full range of health services, and to refer them to alternative health providers if those services refuse, for moral or legal reasons to provide for abortion.”²⁶⁷ This approach is consistent with IHRL which recognizes that denial of reproductive health services that only women need is discriminatory and obligates states to provide safe, legal and effective access to abortion on grounds of rape, amongst other grounds, and in other cases “where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering.”²⁶⁸ In addition, states have an obligation under the right to life to ensure that *any* regulation of abortion does not force persons to resort to unsafe abortion, and have obligations to reform abortion laws accordingly. The CEDAW Committee supports this approach by calling on state parties to ensure access to “safe abortion services” in the context of conflict.²⁶⁹ without conditioning such services on a minimum grounds-based approach (e.g., life, health, rape, or severe fetal impairment) or to circumstances in which abortion services are legal.²⁷⁰ Hence, an interpretation of IHL that is consistent with IHRL obligations includes ensuring access to abortion on grounds of rape and in other cases, regardless of national law.

Numerous provisions of IHL raise concerns regarding gender stereotypes and outdated views of women’s role and position in society.²⁷¹ For

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example, the inclusion of pregnancy in the protection of the “wounded and sick” fosters wrongful notions that pregnancy is an illness. **In addition, the most express protections concerning the health of women under IHL focus on women’s**

role as mothers or on their health during pregnancy.²⁷² While such protections are crucial, the root of many barriers to comprehensive SRH care for women and persons of diverse SOGIESC lies in harmful gender stereotypes that see women’s primary roles as mother, child bearer, and caregiver and that perpetuate binary norms in the provision of SRH information and services.²⁷³

Similarly, IHL’s formulation of rape as an attack against women’s honor²⁷⁴ fails to view women as independent rights holders with the right to autonomy and bodily integrity:

Patriarchal societies generally attach a preeminent value to women’s chastity and reproductive capacity, seeing women’s reproduction as a way of guaranteeing the survival of both community and culture. A woman who is sexually violated, impregnated by enemies, or kidnapped into sexual and domestic enslavement is therefore often regarded as “disgracing family honor, being unclean or contaminated, [or] being a seductress.”²⁷⁵

As the Working Group on Discrimination against Women has recognized, “[p]atriarchal negation of women’s autonomy in decision-making leads to violation of women’s rights to health, privacy, reproductive and sexual self-determination, physical integrity and even to life.”²⁷⁶ In addition, stereotypes that pathologize individuals who deviate from traditional gender roles or that depict such individuals as abnormal work to deprive such persons of autonomy in decision-making in the health care context as well.²⁷⁷ While recent Commentaries on IHL and the rules of customary IHL are important steps away from these stereotypes, UN treaty bodies—particularly the CEDAW Committee—have long identified such stereotypes as being discriminatory and in need of reform.²⁷⁸

In addition, while IHL prohibits non-discriminatory treatment on the grounds of sex and “any other distinction founded on similar criteria,” the protection of persons of diverse SOGIESC is not expressly mentioned or generally recognized under IHL. That said, the ICRC’s 2020 Commentary on the Third Geneva Convention interprets some protections on the grounds of “gender” and “sexual and gender minorities.”²⁷⁹ While violence against all persons (which would include persons of diverse SOGIESC) is always prohibited under IHL, the generally binary construct in IHL (whereby individuals are either male or female) and the lack of robust interpretations that include persons of diverse SOGIESC lead to gaps in ensuring the full range of protection and redress for people who have experienced SGBV as a result of their gender expressions or identities during armed conflict.²⁸⁰

International criminal case law, in its understanding of reparations, has largely failed to ensure accountability for violations related to SRH.

International Criminal Law Standards Relevant to the Provision of Sexual and Reproductive Health Services

While ICL has limited scope for addressing access to SRH information and services, it does deal with aspects of SGBV and criminalizes some egregious reproductive rights violations, such as forced sterilization and forced pregnancy.²⁸¹ The establishment of *ad hoc* tribunals and the broader mandate set out in the Rome Statute of the International Criminal Court have given the international community a direct mechanism through which to punish individuals who have commanded, encouraged, or personally perpetrated international crimes, including sexual violations in connection with an armed conflict.²⁸² For example, the International Criminal Tribunal for the Former Yugoslavia has held that in certain circumstances, rape can amount to a war crime,²⁸³ a crime against humanity,²⁸⁴ and a form of torture.²⁸⁵ The International Criminal Tribunal for Rwanda has extended this principle even further, finding that rape and sexual violence can amount to genocide if committed with the specific intent to wholly or partially destroy a particular ethnic or racial group.²⁸⁶ The principles set out in these judgments have since been affirmed by the UN Security Council.²⁸⁷

Furthermore, sexual violence as such (“[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”) or as a form of inhumane act is recognized as a crime against humanity under the Rome Statute.²⁸⁸ It is also considered a war crime in both international and non-international armed conflicts under the Rome Statute, either as such²⁸⁹ or as a form of torture or ill-treatment.²⁹⁰ In addition, sexual violence can fall within the definition of acts of genocide (e.g., “causing serious bodily or mental harm to members of the group” and “imposing measures intended to prevent births within the group.”)²⁹¹

SELECT ANALYSIS OF ICL

Though the Rome Statute was the first international treaty to recognize rape and forced pregnancy as crimes against humanity and war crimes, its gender-specific verbiage and its definitions are limiting.²⁹² International criminal case law, in its understanding of reparations, has largely failed to ensure accountability for violations related to SRH²⁹³ with the following definitional restrictions limiting the ability of ICL to ensure accountability in this respect.

The definition of “forced pregnancy,” which hinges on the element of unlawful confinement or detainment,²⁹⁴ limits accountability for denial of SRH services. This restrictive definition shields from prosecution those perpetrators who commit this act without an element of “confinement.”²⁹⁵ The definition is reflective of the political compromises made to placate the Holy See and states concerned that their domestic anti-abortion laws would be at risk if a broader definition were adopted.²⁹⁶ It has been argued, however, that in some circumstances, the denial of abortion may also constitute a crime against humanity

In order to provide redress for all survivors subjected to rape and sexual violence, including ensuring appropriate SRH information and services when appropriate, ICL must adopt more gender-neutral and inclusive understandings that address the spectrum of abuses experienced by men and boys, women and girls, and persons of diverse SOGIESC.

IHL and ICL must better recognize that populations affected by armed conflict are diverse and that individuals' experiences are shaped by gender and sex and also by other factors such as age, disability, religion, race, and ethnicity. A more inclusive interpretation of IHL's guarantee of non-discrimination could lead to improved access to services and protection and redress for persons of diverse SOGIESC and others who are among the most marginalized in humanitarian settings.

(namely torture, persecution, or other inhumane act) or a war crime (namely torture or inhuman treatment),²⁹⁷ neither of which requires an element of confinement.

Other similar definitional challenges include the prohibition of “measures intended to prevent births within the group.” Although the definition rightfully targets the crimes of forced sterilization and forced abortion, it fails to address the full range of serious practices that should be encompassed within this provision, including measures causing infertility. Direct and indirect harm to fertility and reproductive capacity is a primary way that women and girls experience genocidal violence, reflecting women’s stereotypical role in society as, first and foremost, mothers and child bearers²⁹⁸ (men, meanwhile, typically experience genocide through mass killings).²⁹⁹ In the *Akayesu* judgment, the International Criminal Tribunal for Rwanda noted that measures intended to prevent births within a group include rape, sexual mutilation, forced sterilization, forced birth control, separation of the sexes, the prohibition of marriage, mental trauma resulting in a reluctance to procreate, and impregnation of a woman with the intent to have her give birth to a child who will consequently not belong to its mother’s group.³⁰⁰ Similarly, the Independent International Commission of Inquiry on the Syrian Arab Republic held that measures to prevent Yazidi children from being born constituted a form of genocide. These measures include the forced separation of Yazidi men and women, the systematic extermination of Yazidi men, and the multidimensional trauma experienced by rape survivors, which led to physical infertility and refusals to procreate.³⁰¹ Genocide is a process, and early attention to genocidal acts that prevent births or negatively affect fertility can be critical for preventing further escalation.³⁰²

In addition, the Rome Statute’s narrow definition of gender as male and female³⁰³ excludes persons of diverse SOGIESC, allowing other acts of sexual violence to be overlooked (see above analysis of IHL). This has the potential to obstruct access to justice for many survivors of sexual violence; indeed, the ICC’s focus has been largely on cisgender female-related sexual assault, excluding non-heteronormative persons from the narrative.³⁰⁴

In order to provide redress for all survivors subjected to rape and sexual violence, including ensuring appropriate SRH information and services when appropriate, ICL must adopt more gender-neutral and inclusive understandings that address the spectrum of abuses experienced by men and boys, women and girls, and persons of diverse SOGIESC.³⁰⁵ For example, the increased recognition of rape against men and boys in humanitarian settings challenges cultural assumptions about male vulnerability to such violence and can help focus more consistently on the gender-specific nature of sexual violence.³⁰⁶ This could enable an expanded understanding of SGBV, including against women, girls, and people of diverse SOGIESC, who are disproportionately affected by such violence in humanitarian settings.³⁰⁷

Finally, because the scope of punishment under ICL is limited to individuals and does not extend to states, and because the threshold for criminal sanctions is very high, this branch of law may be limited as a mechanism of accountability for

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ensuring access to the full range of SRH information and services in humanitarian settings.³⁰⁸ However, ICL remains useful as a means of attributing crimes to states when their agents are the ones convicted of violations of ICL and, in this respect, can facilitate state responsibility.³⁰⁹ It also plays an important role in deterring international crimes, including SGBV, that have implications for SRHR, which means that it has the potential to ensure some level of accountability for reparations in the area of access to SRH information and services.³¹⁰

V. Accountability through UN Inter-Governmental Bodies

UN political mechanisms include the Human Rights Council and the Security Council, which consist of member states. These intergovernmental bodies play an important role in holding states and other actors to account for human rights obligations, including violations of sexual and reproductive rights and of humanitarian law.³¹¹ This section explores how these two UN bodies have addressed the issues covered in this paper. It is followed by examples of human rights investigation mechanisms established by the UN bodies that have addressed SRHR issues in humanitarian settings.

UN Security Council

The UN Security Council, whose primary mandate is to maintain international peace and security, is an important mechanism for placing pressure on parties to a conflict. It aims to help parties settle their dispute by peaceful means, and recommending methods of adjustment or terms of settlement, through for example, resolutions.³¹² Although resolutions can be binding on all states, direct enforcement outside of further Security Council action, such as sanctions, is difficult. Under chapter VII of the UN Charter, the Security Council can dispatch peacekeeping operations, including situations that involve widespread sexual violence, with a mandate to protect civilians and with a human rights monitoring component.³¹³ The Security Council can also adopt mandatory coercive measures to maintain or restore international peace and security.³¹⁴

The primary enforcement mechanism used by the Council is sanctions, a number of which are designed to address conflict-related sexual violence.³¹⁵ The Security Council can apply sanctions against individuals and against states; for individuals, sanctions can take the form of travel bans and the freezing of assets, while for states, they can take the form of economic sanctions and arms embargos.³¹⁶ Five sanctions regimes (concrete cases of sanctions) have classified sexual and gender-based violations as sanctionable acts, though to varying degrees.³¹⁷ Individual sanctions have targeted perpetrators responsible for commanding or committing rape and other acts of sexual violence.³¹⁸ Importantly, however, it is recognized that sanctions that are not sufficiently targeted and do not have sufficient safeguards to protect the civilian population from adverse effects can lead to a degradation of human rights in the target state.³¹⁹

Security Council resolutions can provide guidance on the legal frameworks applicable to situations of armed conflict. In the context of the Women, Peace and Security (WPS) Agenda and, to a lesser extent, the Children in Armed Conflict Agenda, the Security Council has contributed substantially to a framework for preventing and ending impunity for international crimes related to sexual violence and has focused heavily on the use of sexual violence (particularly rape) as weapon of war.³²⁰ While general reference to IHRL has been articulated in WPS Agenda Security Council resolutions since 2000, SRHR was not explicitly included until the adoption of Resolution 1889 in 2009, which provides for the Security Council's most comprehensive language on SRHR to date:

Encourages Member States in post-conflict situations, in consultation with civil society, including women's organizations, **to specify in detail women and girls' needs and priorities and design concrete strategies, in accordance with their legal systems, to address those needs and priorities**, which cover inter alia support for greater physical security and better socio-economic conditions, **through education, income generating activities, access to basic services, in particular health services, including sexual and reproductive health and reproductive rights and mental health, gender-responsive law enforcement and access to justice**, as well as enhancing capacity to engage in public decision-making at all levels.³²¹

Intergovernmental bodies hold significant potential as tools for accountability for the SRHR of persons in humanitarian settings. Security Council Resolutions 2122 and 2467 on sexual violence in conflict, which are part of the Women, Peace and Security Agenda, and the Human Rights Council resolution on women and girls in humanitarian settings are a testament to states' continuing commitment to ensure that individuals can access the full range of SRH information and services, despite attempts to restrict SRHR in recent years.

With regard to SRHR services in conflict settings, Security Council Resolution 2106 “urges United Nations entities and donors to provide nondiscriminatory and comprehensive health services, including sexual and reproductive health” to survivors of sexual violence. Meanwhile, Resolution 2122 notes “the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination” for women affected by armed conflict. In addition to these specific references to SRHR, these resolutions affirm the underlying human rights principles of participation and accountability for addressing women and conflict.³²²

The IHRL guarantee of non-discrimination is also found in WPS Agenda resolutions adopted after 2009, including Security Council Resolutions 2106 and 2242. These resolutions address the importance of non-discrimination in the provision of medical, legal, and psychosocial services for survivors of sexual violence:

Recognizing the importance of providing timely assistance to survivors of sexual violence, urges United Nations entities and donors to provide non-discriminatory and comprehensive health services, including sexual and reproductive health, psychosocial, legal, and livelihood support and other multi-sectoral services for survivors of sexual violence, considering the specific needs of persons with disabilities.³²³

[F]urther recognizes the importance of integrating gender considerations across humanitarian programming by seeking to ensure the provision of access to protection and the full range of medical, legal and psychosocial and livelihood services, without discrimination, and through ensuring women and women’s groups can participate meaningfully and are supported to be leaders in humanitarian action.³²⁴

In addition to issuing resolutions, the Security Council has established a range of mechanisms to monitor, analyze, and report on conflict-related sexual violence so as to enable the Council to take timely action to prevent and respond.³²⁵ It has also enjoined the UN Secretary-General to mainstream sexual violence in armed conflict in all UN reports to the Security Council.³²⁶ The Council has often articulated accountability for sexual violence as the international criminal responsibility of individual perpetrators, as opposed to states or non-state armed groups. Security Council Resolutions 2242 and 2467, the most recent WPS Agenda resolutions, acknowledge these accountability deficits and urge the Secretary-General and other UN entities to address them.³²⁷

Recently, in the context of a growing trend across multilateral fora, the Security Council has faced significant opposition to gender equality, particularly to its historical consensus on SRH in conflict situations. For

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example, explicit reference to SRH services was eliminated during negotiations on Security Council Resolution 2467 in 2019 because of a veto threat by the United States.³²⁸ The adoption of this resolution represented the first time that a thematic resolution with the WPS Agenda was not adopted by consensus, with 13 out of 15 votes in favor and China and Russia in abstention. Nonetheless, the resolution's affirmation of the Council's commitment to the implementation of the eight preceding WPS resolutions ensured that previously agreed-on language regarding access to SRH services remained in place. Moreover, its inclusion of an explicit reference to CEDAW, its Optional Protocol, and the CEDAW Committee's General Recommendation 30 (which discusses states' obligation to provide access to SRH information and services, including safe abortion in conflict situations) ensured that SRHR remained within the WPS Agenda. It is relevant to note here that General Comment 30 also references the UN Security Council agenda, recognizing that Security Council resolutions find their expression in the substantive provisions of CEDAW and are premised on the model of substantive equality.³²⁹

A more recent attempt to undermine the WPS Agenda occurred in October 2020, when Russia proposed a draft resolution under the pretense of commemorating the 20th anniversary of the WPS Agenda at the Security Council. The proposed resolution sought to roll back legal guarantees protecting women's human rights by replacing previous references to IHRL with language separated from IHRL and void of any state accountability. In an unprecedented result, 10 Security Council members abstained from the final vote, preventing the resolution from being adopted while also avoiding a US veto on the issue of SRHR, which would have in and of itself been damaging to the WPS Agenda.

UN Human Rights Council

The Human Rights Council is an intergovernmental body responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations. It has the mandate to issue resolutions that promote human rights and that address violations.³³⁰ Numerous resolutions of the Human Rights Council address issues concerning women and girls in humanitarian settings.

In 2020, the Human Rights Council adopted by consensus its first resolution focusing on the rights of women and girls in humanitarian settings.³³¹ The resolution advances a comprehensive approach to promoting, protecting, and respecting women's and girls' human rights in humanitarian situations, including by recognizing the lack of accountability in this context and emphasizing the need to ensure the agency and experiences of women and girls as part of any humanitarian response. It recognizes that humanitarian situations may cause and exacerbate gender discrimination and existing inequalities, further undermining access to health care services, housing, water, sanitation, education, employment, and protection systems. It also recognizes that women and girls in humanitarian situations face increased barriers in accessing justice and remedies for human rights violations and abuses and emphasizes the importance of women's and girls' meaningful participation, empowerment, and

Through gender-sensitive and survivor-centered documentation, human rights investigations can fully capture the scope and impact of violations suffered by women and girls, while providing a critical analysis of human rights trends in humanitarian settings, including trends related to SRHR.

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leadership, including that of survivors, in preventing and addressing humanitarian emergencies. It acknowledges the interlinkages between and complementarity of IHRL and IHL, as well as the applicability of IHRL in humanitarian situations.³³² This resolution was adopted within a broader framework of growing momentum and political will around the issue of accountability for women's and girls' human rights in humanitarian settings.

In 2017, the Human Rights Council adopted a resolution on child, early, and forced marriage in humanitarian settings.³³³ This resolution addresses the underlying factors leading to higher rates of this kind of marriage in humanitarian situations and emphasizes that SRH is a basic need in such settings. While the provision of SRH information and services as a basic need has been acknowledged in other Council resolutions, this is the first time that this recommendation has been made in the context of preventing and responding to child marriage in humanitarian settings.

In 2018, the Council adopted, by consensus, a resolution on preventable maternal mortality and morbidity and human rights in humanitarian settings, including armed conflict.³³⁴ This resolution focuses on the disproportionately high maternal mortality and morbidity rates affecting women and girls in humanitarian settings and addresses the pre-existing patterns and structures of discrimination and inequalities (such as patriarchal values and norms) that are exacerbated by conflict and disasters and that contribute to the negative pregnancy-related outcomes for women and girls in these situations. It also focuses on sexual and reproductive rights violations faced by women and girls in humanitarian settings and the impact that the lack of access to SRH services, including abortion, has on women and girls.³³⁵ The resolution emphasizes the need for accountability for the full range of rights violations faced by women and girls in humanitarian settings, sending a clear message that states must take responsibility for ensuring women's and girls' right to an effective remedy, including reparation, and to guarantee non-recurrence in these settings.

These resolutions have created and built on global momentum to prioritize certain populations, especially women and girls, in humanitarian settings. They embrace a human rights perspective and go beyond the scope of criminal prosecution when addressing accountability, thus setting the stage for establishing accountability for women's and girls' rights in humanitarian settings as a stand-alone issue on the agenda of the Human Rights Council.

UN SPECIAL PROCEDURES

The Human Rights Council also has mechanisms known as Special Procedures, which are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.³³⁶ Below are some examples of how Special Procedures mandate holders have addressed issues relevant to this paper.

The Special Rapporteur on the situation of human rights defenders has highlighted that “defenders operating in conflict and post-conflict areas are protected under international human rights law, international humanitarian law (which is only applicable to situations of armed conflict, including occupation), international criminal law and international refugee law,” recalling that “international human rights law and international humanitarian law are mutually reinforcing and complementary, not mutually exclusive.”³³⁷ Importantly, the Special Rapporteur has reminded parties to armed conflicts, including occupying powers and non-state actors, of their obligations to uphold the protections afforded by these regimes, regardless of their position on their applicability.³³⁸ The Special Rapporteur has also noted that women human rights defenders are particularly exposed to SGBV and affected by the breakdown of health services, including SRH services.³³⁹

Meanwhile, the UN Special Rapporteur on the right to health has highlighted how intersectional discrimination needs to be taken into account in all humanitarian interventions and has emphasized that “the sustainability and efficacy of humanitarian responses should be prioritized, while charity-oriented models that fail to place individuals, communities and their collective rights at the centre of response mechanisms should be avoided.”³⁴⁰

UN HUMAN RIGHTS INVESTIGATIONS

Human rights investigations, including those conducted by commissions of inquiry and fact-finding missions, established by the Human Rights Council and other UN bodies are a vital step toward accountability for violations and toward addressing systemic issues that enable violations to persist, such as gender-based discrimination against women and girls.³⁴¹ Through gender-sensitive and survivor-centered documentation, human rights investigations can fully capture the scope and impact of violations suffered by women and girls, while providing a critical analysis of human rights trends in humanitarian crises, including trends related to SRHR. Such information and analysis is an important tool for ensuring accountability in humanitarian responses. Some examples of progresses in this regard include the following:

- The 2019 thematic report on sexual and gender-based violence issued by the Independent International Fact-Finding Mission on Myanmar documented intersecting human rights violations against Rohingya women and girls, including sexual and gender-based violence, against a backdrop of wide-ranging gender inequality; it also documented the denial of freedom of movement, reproductive health care, and other economic and social rights.³⁴² In the area of SRH services, the report recommended that the government “[e]nsure the availability of sexual and reproductive health services, as well as preventative and emergency healthcare, under the principles of inclusion and accessibility, to ethnic minority women and girls, including obstetric, prenatal and postnatal care, contraceptive information and services, emergency contraception, safe abortion and psychological health services, for victims and survivors of rape and other forms of sexual and gender-based violence, in a safe environment free of stigma and reprisals.”³⁴³ It also called on the government to “[e]nsure the participation of women and girls from ethnic minority groups in the development and implementation of programmes related to sexual and reproductive health services.”³⁴⁴
- In 2019, OHCHR reported on limited access to sexual and reproductive health goods and services in Venezuela, with zero contraceptives available in several cities, alongside severe restrictions on abortion, with an estimated 1 in 5 maternal deaths linked to unsafe abortions.³⁴⁵ Accordingly, it recommended that the government ensure the availability and accessibility of SRH services.³⁴⁶
- The 2020 report of the United Nations Commission on Human Rights in South Sudan reported that there was on average one health facility per 10,000 people in South Sudan and that many facilities did not have enough qualified personnel to treat survivors of sexual violence.³⁴⁷ The Mission in South Sudan and the Office of the High Commissioner for Human Rights in ‘Access to Health for Survivors of Conflict-Related Sexual Violence in South Sudan’ recommended that the government substantially increase funding for the public health sector, strengthening health facilities and health workers’ capacities, and improving access to sexual and reproductive care.³⁴⁸ The report was groundbreaking in that it went beyond a focus on criminal accountability for perpetrators and addressed the need to deliver quality SRH services comprehensively and sustainably as a step toward ensuring accountability for survivors of sexual violence.³⁴⁹

VI. Complementarity and Its Impact on Ensuring Accountability for the Provision of Sexual and Reproductive Health Services

The various branches of international law apply concurrently, and national courts and international and regional human right bodies have expressly recognized that their protections are complementary and not mutually exclusive.³⁵⁰ This section focuses primarily on complementarity between IHRL and IHL.

UN treaty monitoring bodies have consistently affirmed that IHRL applies in situations where IHL is also applicable,³⁵¹ with the relationship between the two spheres of law being described as “complementary, not mutually exclusive.”³⁵² CEDAW’s General Recommendation 30 states:

In all crisis situations, whether non-international or international armed conflict, public emergencies or foreign occupation or other situations of concern, such as political strife, women’s rights are guaranteed by an international law regime that consists of complementary protections under the Convention and international humanitarian, refugee and criminal law.³⁵³

In situations that meet the threshold definition of non-international or international armed conflict, the Convention and international humanitarian law apply concurrently, and their different protections are complementary, not mutually exclusive.³⁵⁴

In addition, some human rights treaties, such as the Convention on the Rights of Persons with Disabilities³⁵⁵ and the Convention on the Rights of the Child,³⁵⁶ contain explicit provisions that include obligations under IHL. Treaty monitoring bodies have also reminded states of their obligations under IHL and have interpreted relevant human rights standards in light of IHL.³⁵⁷

The UN Security Council and Human Rights Council have also recognized the relationship between the two branches of law in various ways. For example, as mentioned earlier, Security Council Resolution 2467 includes an explicit reference to CEDAW and its Optional Protocol.³⁵⁸ Meanwhile, Human Rights Council resolutions regarding the protection of women and girls in humanitarian settings recognize that IHRL is applicable in humanitarian settings including armed conflict, and that states have mutually reinforcing obligations under IHL.³⁵⁹ Resolutions have noted that all parties to an armed conflict have obligations to protect children and persons with disabilities under IHL and have urged them to comply with their obligations.³⁶⁰

The application of IHRL and IHL in a complementary and mutually reinforcing manner serves several purposes. For example, it prevents gaps in protection, where

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one branch of law may not be as robust as another on a given issue, such as in the case of SRHR. It also provides the necessary elements for national or international accountability mechanisms for violations committed during a conflict, providing a range of mechanisms for victims' ability to exercise their right to a remedy and reparation.³⁶¹ One scholar has argued that “the renewed interest in the relationship between humanitarian law and human rights law relates to victims' ongoing search for a forum in order to obtain remedies for violations of their rights during armed conflict.”³⁶²

It has been recognized, that in cases of conflict of norms, between different bodies of law that regulate the same issue in a different way, leading to different results, the *lex specialis* legal maxim could be applied, although the precise nature of the relationship and the application of the principle between IHL and IHRL is subject to debate.³⁶³ According to this principle, in such cases, the more specific law would apply.³⁶⁴ The International Law Commission has explained that the principle of *lex specialis* “does not admit of automatic application”³⁶⁵ and that “for the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”³⁶⁶ For example, *lex specialis* has been applied in the exceptional case concerning the regulation of the use of deadly force against persons in situations of armed conflict, which is regulated differently in IHL and IHRL.³⁶⁷

Complementarity: Two Examples

The relationship between IHRL and IHL can be found in two sets of rights and principles that are central for ensuring accountability for access to SRHR services in humanitarian settings: (1) the principle of no adverse distinction (IHL) and the right to non-discrimination (IHRL); and (2) the principle of humane treatment (IHL) and the right to be free from torture and other ill-treatment (IHRL). These two examples also illustrate the recognition in the ICRC's *Study on Customary International Humanitarian Law that IHRL instruments, documents, and case law support, strengthen, and clarify analogous principles of IHL*.³⁶⁸

IHL'S PROHIBITION OF ADVERSE DISTINCTION AND IHRL'S RIGHT TO NON-DISCRIMINATION

The ICRC describes IHL's approach to the prohibition of adverse distinction as similar to IHRL's approach to the prohibition of discrimination.³⁶⁹ Its *Study on Customary International Humanitarian Law* notes that:

adverse distinction in the application of international humanitarian law based on race, colour, sex language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria is prohibited. All protected persons, i.e.: prisoners of war, civilian internees, the wounded and sick and others who are *hors de combat* should be treated with the same consideration by parties to the conflict. Each and every person affected by armed conflict is entitled to his/her fundamental rights and guarantees, without discrimination.³⁷⁰

The prohibition of adverse distinction is found throughout the Geneva Conventions, and state practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.³⁷¹

The Geneva Conventions and their Additional Protocols are based on the principle that respect for, protection of, and care of the wounded and sick, which includes pregnant women, must be applied without adverse distinction on the basis of race, color, religion or faith, sex, birth or wealth, or any other similar criteria.³⁷² The notion of “adverse distinction” implies that while discrimination against persons is prohibited, “[t]he distinctions resulting from the *different statuses* IHL foresees (e.g. the difference between civilians and combatants or between civilians benefitting and not benefitting from protected person status) are not viewed as adverse distinctions.”³⁷³

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With regard to the treatment of the wounded and sick, this rule has been interpreted to permit distinction only on the basis of medical need.³⁷⁴ This means that every person not or no longer actively participating in the hostilities must be treated humanely and that any form of differentiation in treatment that is not justified by substantively different situations and needs is prohibited.³⁷⁵

Thus, IHL allows for treatment that meets a person's specific needs, including with regards to one's sex.³⁷⁶ The ICRC's 2016 Commentary notes that "sex is traditionally recognized as justifying, and in fact requiring, differential treatment."³⁷⁷ It also notes that social roles and stereotypes must be taken into consideration with regard to the prohibition of no adverse distinction:

Grounds for non-adverse distinction could also be found in an awareness of how the social, economic, cultural or political context in a society forms roles or patterns with specific statuses, needs and capacities that differ among men and women of different ages and backgrounds. Taking such considerations into account is no violation of the prohibition of adverse distinction, but rather contributes to the realization of humane treatment of all persons protected under common Article 3.³⁷⁸

ICRC describes the IHL principle of no adverse distinction as similar to the human rights principle of non-discrimination.³⁷⁹ This suggests that human rights law could provide additional guidance as to how this principle should be interpreted with respect to women's, girls', and persons of diverse SOGIESC's access to SRH information and services. In addition, the application and understanding of this principle is being expanded, indicating the potential to move beyond binary norms and address needs of all persons.

IHL'S OBLIGATION OF HUMANE TREATMENT AND IHRL'S RIGHT TO BE FREE FROM ILL-TREATMENT

The requirement of humane treatment for civilians and persons *hors de combat* is set forth in common article 3 of the Geneva Conventions, as well as in specific provisions of all four Conventions.³⁸⁰ This requirement is also recognized as a fundamental guarantee by Additional Protocols I and II.³⁸¹ It is considered a norm of customary international law from which there can be no derogation, applicable in both international and non-international armed conflict.³⁸² It requires that non-combatants, including the sick and wounded, be treated humanely in all circumstances and with respect for their person and honor, without any adverse distinction based on sex or other similar criterion.³⁸³ In addition, express prohibitions on "violence to life and person . . . mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment," are set out in rules on both international and non-international armed conflicts.³⁸⁴

ICRC Rules and Commentary recognize that while 'humane treatment' is not expressly defined in humanitarian treaty law, the rules under IHL *and* IHRL help in understanding its meaning, and like its analogous protection under IHRL—the right to be free from cruel, inhuman, or degrading treatment or punishment—its meaning is "context specific...taking into account both objective and subjective elements, such as the physical and mental condition of the person" and differences based on age and sex, as well as other factors.³⁸⁵ The ICRC's 2016 Commentary also notes that "[s]ensitivity to the individual's inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment under common Article 3."³⁸⁶ To qualify as cruel or inhuman treatment, an act must cause physical or mental suffering of a serious nature; ICRC draws on ICL and IHRL to help in understanding the definition of cruel treatment under IHL and references the lack of adequate medical attention, involuntary sterilization, and 'gender-based humiliation such as shackling women detainees during childbirth' as examples, amongst others, of violations of common Article 3.³⁸⁷

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ICRC has expressly stated that under customary IHL, “the detailed rules found in international humanitarian law and human rights law give expression to the meaning of ‘humane treatment’” and that “this notion develops over time under the influence of changes in society.”³⁸⁸ Therefore, for fundamental IHL guarantees, including humane treatment, human rights law and the interpretation of human rights bodies can interpret and clarify analogous IHL principles.³⁸⁹ In particular, interpretation and guidance from human rights law regarding SRHR violations as torture and other cruel, inhuman, or degrading treatment or punishment can define the contours of humane treatment obligations, both in and outside the context of SGBV.³⁹⁰ In addition, given that SGBV could violate guarantees of humane treatment, as well as other protections, under IHL and ICL, the SRH implications of such violence should also be included in such guarantees, as is similarly recognized under IHRL, where for example, rape and abortion on grounds of rape are protected under the right to be free inhuman and degrading treatment.³⁹¹

It is also useful to note that IHL’s prohibition of adverse distinction allows for differentiated treatment that in fact serves the purpose of realizing a person’s humane treatment. In relation to common article 3, for example, the 2016 Commentary notes that:

the ways to achieve such treatment must be adapted to a person’s specific needs. Humane treatment accorded to one person is not necessarily sufficient to constitute humane treatment for another person. Therefore, common article 3 does not prohibit differentiated treatment that is actually necessary in order to achieve humane treatment.³⁹²

This is an important recognition, particularly in the area of SRHR, given that some of the challenges concerning the availability and accessibility of SRH information and services exist because of sex, gender, and sexual orientation, as well as related harmful gender stereotypes. Thus, differentiated treatment based on these grounds to achieve humane treatment would be appropriate under IHL. This is also recognized in IHRL’s protection of the right to be free from inhuman treatment, whose authoritative interpretation (e.g., by UN treaty bodies), as noted above, serves to enhance understanding of IHL’s analogous guarantee of humane treatment. Sex, gender, and sexual orientation, among others, are considerations that human rights bodies have used to determine how states must fulfill their obligations and whether a violation of the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment has occurred.³⁹³ Under IHRL, this right also has a subjective component, which is similarly reflected in ICRC’s Commentary on IHL, noting that the ways to achieve humane treatment is person specific.³⁹⁴

Given the analogous protections of humane treatment under IHL and the right to be free from inhuman treatment under IHRL, and the approach to other IHL protections that are fleshed out by human rights standards, the obligation of humane treatment should be interpreted in a manner consistent with IHRL. This means that the obligation should encompass the range of reproductive rights protected under the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment.

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VII. Key Conclusions

IHRL, IHL, and ICL are complementary branches of international law that mutually strengthen accountability in humanitarian settings.

The various branches of international law apply concurrently, and their protections are complementary and not mutually exclusive, as has been expressly recognized by international and regional human right bodies and courts.³⁹⁵ Consequently, IHL, ICL, and IHRL can mutually strengthen accountability for SRHR in humanitarian settings and, in doing so, prevent gaps in protection where one branch of law is more robust than another, as is the case of SRHR under IHRL. Similarly, this complementarity also prevents accountability vacuums where states may undermine the legitimacy of IHRL, despite its actual applicability.³⁹⁶ The concurrent and complementary application of the various branches of international law also provides the necessary elements for national and international accountability mechanisms in a range of humanitarian settings, including armed conflict. Importantly, the complementary nature of all three regimes provides a range of mechanisms for survivors of violations to exercise their right to a remedy and reparation.

While IHL and ICL have the scope and potential to address some aspects of SRHR, they have largely been under-utilized and under-enforced. More generally, legal actions brought against a state for violations of IHL, for example, are not common, mainly due to jurisdictional questions and available forums, including a lack of a specific international accountability mechanisms for IHL. In addition, provisions to fully protect SRHR remain inadequate, outdated, and in need of revision. While IHL and ICL both include SRH-related provisions, their frameworks are less developed in setting forth duty bearers' obligations and in delineating reparations for violations related to SRH services. Accountability for access to SRH services needs to be strengthened for survivors of SGBV and needs to be expanded to include the SRH needs of *all* individuals including those who have not experienced SGBV and including persons of diverse SOGIESC.

IHRL is legally applicable in all contexts, including in humanitarian settings and including during armed conflict. This means that there is an obligation under international law to guarantee all persons their full range of human rights irrespective of the circumstances or context. As a result, IHRL can ensure continuity in accountability, even as a context might cycle from fragile to crisis to conflict and back again. Further, as noted above, IHRL standards apply not only to states but also to non-state actors, including armed non-state actors in certain circumstances, as well as to donor states and other actors.

IHRL mechanisms can play an important role in ensuring accountability for SRHR, including SRH information and services in humanitarian settings.

Indeed, international and regional human rights bodies, such as the Inter-American Court of Human Rights, have addressed IHL obligations in some cases,

Accountability for access to SRH services needs to be strengthened for survivors of SGBV and needs to be expanded to include the SRH needs of *all* individuals including those who have not experienced SGBV and including persons of diverse SOGIESC.

The continued applicability of IHRL in humanitarian settings, including armed conflict, means that states are obligated to take positive action to ensure that SRHR are respected, protected, and fulfilled and to do their utmost to mitigate the impacts of conflict on health systems.

even if not relating specifically to SRH services. As one scholar has noted, “the renewed interest in the relationship between humanitarian law and human rights law relates to victims’ ongoing search for a forum in order to obtain remedies for violations of their rights during armed conflict.”³⁹⁷

Sexual and reproductive health and rights are protected under IHRL protections that are exempt from derogation³⁹⁸ (e.g., the rights to life and to be free from torture and other cruel, inhuman, or degrading treatment or punishment);³⁹⁹ recognized as core obligations that states must ensure at minimum essential levels (e.g., the right to health);⁴⁰⁰ or subject to immediate and cross-cutting obligation (e.g., the right to non-discrimination).⁴⁰¹ Significantly, almost all UN member states are party to at least one treaty that has a non-derogable right that has been interpreted to create state obligations to ensure access to at least some SRH services, including abortion and emergency contraception. States have an obligation under IHRL to ensure that their laws, policies, and practices are in compliance with IHRL and should, at a minimum, be guaranteeing the provision of SRH information and services, including abortion, in accordance with IHRL obligations. In addition, retrogressive measures in the enjoyment of the core obligations to ensure economic and social rights, such as the right to SRH, cannot be justified exclusively on the basis of the existence of a crisis or conflict: states have to demonstrate that such retrogression was unavoidable and that all possible measures have been taken, including seeking international cooperation and assistance, to overcome the resource constraints.⁴⁰²

The continued applicability of IHRL in humanitarian settings, including armed conflict, means that states are obligated to take positive action to ensure that SRHR are respected, protected, and fulfilled and to do their utmost to mitigate the impacts of conflict on health systems. For example, the Human Rights Committee’s General Comment 36 reinforces the notion that restrictions on the ability of women or girls to seek abortion must not jeopardize their lives or subject them to physical or mental pain or suffering, the right to be free from torture and other ill-treatment, and notes that states must not “regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly.”⁴⁰³ This could include any law or regulation which does not allow abortion on request and which poses barriers to safe abortion in other ways. Additionally, due to the deplorable conditions, dangers and violence that persons face in many humanitarian settings, a pregnancy in such a setting alone could lead to such pain or suffering for an individual that a denial of a request for an abortion or lack of availability or accessibility of abortion could amount to cruel, inhuman, and degrading treatment and could also violate the right to life, amongst other rights. The CEDAW Committee sets forth an approach which supports this. It calls for state parties to ensure access to “safe abortion services,” in the context of conflict,⁴⁰⁴ without conditioning such services on a minimum grounds-

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based approach, (e.g., life, health, rape or severe fetal impairment), and like all human rights standards, never limits obligations under abortion to only circumstances in which abortion services are legal.

SRHR standards under IHRL are complementary to and mutually reinforcing of other branches of international law.

The strong standards for SRHR under IHRL are important both because of “complementarity”—an aspect of international law recognizing the mutually reinforcing and complementary nature of various branches of international law—and because the relevant standards of IHL and ICL should be interpreted in a manner consistent with IHRL.⁴⁰⁵

Under IHRL, two rights related to SRH are the right to be free from discrimination and the non-derogable right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. Analogous protections can be found in ICL, and in IHL in the rule of “no adverse distinction,” the guarantee of “humane treatment,” the prohibition of torture and other ill-treatment, and the prohibition of outrages upon personal dignity. While IHL and ICL have not applied these protections to the specific context of access to SRH information and services, relevant provisions in these branches of law should be read consistently with IHRL obligations.

Non-Discrimination and No Adverse Distinction

Reflecting the linkages between these guarantees, the relevant rule of IHL establishes, for example, that “no adverse distinction” should be interpreted consistently with state obligations recognized under the right to non-discrimination in IHRL.⁴⁰⁶ The IHRL guarantee of non-discrimination helps in understanding the scope and nature of state obligations to address the specific health needs of women, girls, and persons of diverse SOGIESC.⁴⁰⁷ For example, IHRL recognizes that the failure to provide women with the health services they need or to restrict or prohibit health services primarily or exclusively needed by women violates the right to non-discrimination, and it recognizes states’ obligation to address harmful gender stereotypes.⁴⁰⁸ It also recognizes that the protection of non-discrimination in access to SRH information and services and in general applies to persons with disabilities and persons of diverse SOGIESC, among others.⁴⁰⁹

It is important that IHL and ICL better align with IHRL obligations by eliminating the harmful gender stereotypes in their provisions that reflect women’s primary role as mother, child bearer, and caregiver and that portray women as upholders of “honor,”⁴¹⁰ while at the same time ensuring that women are given *full* protection under the law. IHL and ICL must better recognize that populations affected by armed conflict are diverse and that individuals’ experiences are shaped by gender and sex and also by other factors such as age, disability, religion, race, and ethnicity. A more inclusive interpretation of IHL’s guarantee of non-discrimination could lead to improved access to services and protection and redress for persons of diverse SOGIESC and others who are among the most marginalized in humanitarian settings.⁴¹¹

Right to be Free from Inhuman Treatment and Humane Treatment

Similarly, with regard to the interpretation of humane treatment, ICRC notes that “the detailed rules found in international humanitarian law and human rights law give expression to the meaning of humane treatment” and that “this notion develops over time under the influence of changes in society.”⁴¹² IHRL has recognized that state obligations to prevent cruel, inhuman, and degrading treatment include preventing forced sterilization, delays in and denials of safe abortion and post-abortion care, and the denial of emergency contraception to rape survivors.⁴¹³

Notably, despite the SRH-related guarantees in IHRL, ICL, and IHL outlined in this paper, accountability mechanisms under these branches of law have yet to effectively address the SRH needs of persons subject to SGBV, which is the most commonly cited violation against women in humanitarian settings, particularly conflict situations.⁴¹⁴ For

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example, in a recent CEDAW Committee case concerning a survivor of SGBV in conflict who faced cervical cancer and trauma as a result of the violence, the Committee rightly ordered a remedy for the state's failure to provide an effective and timely investigation of the sexual violence;⁴¹⁵ however, the decision did not directly discuss or address the impact on the claimant's SRHR, despite the Committee's own General Comment 30, outlining states' obligations to address the impact that sexual violence in conflict and post-conflict situations has on reproductive health.⁴¹⁶

Intergovernmental bodies and other mechanisms support legal accountability.

Like UN treaty monitoring bodies, UN intergovernmental bodies such as the Human Rights Council and the Security Council recognize various branches of international law as applying concurrently and as being complementary and mutually reinforcing.⁴¹⁷ These intergovernmental bodies hold significant potential as tools for accountability for the SRHR of persons in humanitarian settings. Security Council Resolutions 2122 and 2467 on sexual violence in conflict, which are part of the Women, Peace and Security Agenda,⁴¹⁸ and the Human Rights Council resolution on women and girls in humanitarian settings⁴¹⁹ are a testament to states' continuing commitment to ensure that individuals can access the full range of SRH information and services, despite attempts to restrict SRHR in recent years.⁴²⁰ Such resolutions can be used to enhance accountability in the intergovernmental sphere, and they also play an important role in ensuring that these commitments are translated into binding accountability norms.

In addition, mechanisms mandated by the Human Rights Council, such as commissions of inquiries and fact-finding missions, offer tools for documenting violations of the SRHR of women, girls, and persons of diverse SOGIESC, provided that their mandate explicitly includes such documentation. Documentation at this level can help support further accountability measures.⁴²¹ Through gender-sensitive and survivor-centered documentation, human rights investigations can fully capture the scope and impact of violations suffered by women and girls, while providing a critical analysis of human rights trends in humanitarian settings, including trends related to SRHR. This information is an important tool for accountability in humanitarian responses.

Conclusion

In recent years, there has been growing recognition of the need for SRH information and services for civilians in humanitarian settings. Such recognition has occurred in general comments and recommendations by UN treaty monitoring bodies, in ICRC Commentaries, in the resolutions of UN intergovernmental bodies, and in the decisions of international and regional courts. Despite this, accountability for obligations concerning SRH in humanitarian settings is focused mainly on sexual violence and the specific protection of mothers and pregnant women. While this recognition is critically important, it is not sufficient for addressing the full spectrum of SRHR, including the range of SRH information and services needed by all persons. By recognizing the concurrent application and the complementary and mutually reinforcing nature of IHL, IHRL, and ICL, this paper shows how these branches of international law, taken together, can strengthen legal accountability for access to SRH services in humanitarian settings.

Endnotes

¹ Between June and September 2020, the Center for Reproductive Rights held four convenings with legal experts who work across multiple branches of international law. These discussions, which helped shape the content of this paper and which are on file at the Center, are referred to as CENTER FOR REPRODUCTIVE RIGHTS (CRR), *Legal Expert Convenings on International Law in Humanitarian Settings*, June-Sept. 2020 [hereinafter CRR, *Expert Convenings 2020*].

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³ INTER-AGENCY WORKING GROUP ON REPRODUCTIVE HEALTH IN CRISES (IAWG), *Minimum Initial Service Package (MISP)*, in INTER-AGENCY FIELD MANUAL ON REPRODUCTIVE HEALTH IN HUMANITARIAN SETTINGS (2020) [hereinafter IAWG, *MISP on Reproductive Health*]; the terms 'humanitarian setting', 'humanitarian situation', 'humanitarian context' and, 'humanitarian crisis' are often used interchangeably by the U.N. and hence, in this paper. In addition, there is no one agreed upon definition of these terms, but see for example, UN Human Rights Council Resolution A/HRC/Res/45/29 (2020), which includes many of the elements of these terms; 'humanitarian situations, which include humanitarian emergencies, forced displacements, armed conflicts and natural disasters, including sudden onset natural disasters and slow-onset events.'

⁴ Committee on Economic, Social and Cultural Rights (CESCR), *Gen. Comment No. 22: On the right to sexual and reproductive health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter CESCR, *Gen. Comment No. 22*].

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⁶ Between June and September 2020, the Center for Reproductive Rights held four convenings with legal experts who work across multiple branches of international law. These discussions, which helped shape the content of this paper and which are on file at the Center, are referred to as CENTER FOR REPRODUCTIVE RIGHTS (CRR), *Legal Expert Convenings on International Law in Humanitarian Settings*, June-Sept. 2020 [hereinafter CRR, *Expert Convenings 2020*]; *Strengthening compliance with international humanitarian law: The work of the ICRC and the Swiss government (2012-2015)* (2016), <https://www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government> [hereinafter ICRC, *Work of the ICRC and Swiss government*].

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11; Human Rights Comm., *Gen. Comment No. 29: States of emergency (Art. 4 of the International Covenant on Civil and Political Rights)*, para. 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter Human Rights Comm., *Gen. Comment No. 29*]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J., para. 22 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J., para. 106 (July 9); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J., para. 216 (Dec. 19); Convention on the Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, art. 11, G.A. Res. A/RES/61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/61/611 (*entered into force* May 3, 2008) [hereinafter CRPD]; Convention on the Rights of the Child, *adopted* Nov. 20, 1989, arts. 22, 38, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (*entered into force* Jan. 3, 1976) [hereinafter CRC]; CRC Committee, *Gen. Comment No. 20, supra* note 58, paras. 79, 80; CESCR, *Gen. Comment No. 22, supra* note 4, paras. 30, 31.

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⁷² International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 2(1), G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]; CRC, *supra* note 58, art. 4; CRPD, *supra* note 58, art. 4(2); CESCR, *An evaluation of the obligation to take steps to the “Maximum of available resources” under an Optional Protocol to the Covenant*, para. 10(d), U.N. Doc E/C.12/2007/1 (2007) [hereinafter CESCR, *Maximum of available resources under OP*].

⁷³ CESCR, *Gen. Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2 of the International Covenant on Economic, Social and Cultural Rights)*, para. 2, U.N. Doc. E/C.12/GC/20 (2009) [hereinafter CESCR, *Gen. Comment No. 20*]; *see also* Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW].

⁷⁴ CESCR, *Gen. Comment No. 3, supra* note 58, paras. 1, 10; CESCR, *Gen. Comment No. 12: The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights)*, para. 6, U.N. Doc. E/C.12/1999/5 (1999) [hereinafter CESCR, *Gen. Comment No. 12*]; CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, para. 18, U.N. Doc. E/C.12/2001/10 (2001) [hereinafter CESCR, *Poverty and ICESCR*]; CESCR, *Gen. Comment No. 14, supra* note 58, para. 47; CESCR, *Gen. Comment No. 15: The Right to Water (Arts. 11, 12 of the International Covenant on Economic, Social and*

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Cultural Rights), para. 40, U.N. Doc E/C.12/2002/11 (2003) [hereinafter CESCR, *Gen. Comment No. 15*]; CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 49.

⁷⁵ OHCHR, *Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. E/2015/59 (2015) [hereinafter OHCHR, *Report of U.N. High Commissioner for Human Rights*]; CESCR, *Gen. Comment No. 3*, *supra* note 58, paras. 9, 13, 33, 38, 62.

⁷⁶ CESCR, *Gen. Comment No. 3*, *supra* note 58, paras. 9, 13; CESCR, *Maximum of available resources under OP*, *supra* note 72, para. 10(d); CESCR, *Gen. Comment No. 14*, *supra* note 58, para. 32; OHCHR, *Report of U.N. High Commissioner for Human Rights*, *supra* note 75, para. 21.⁷⁷ CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 33, 62.

⁷⁸ CESCR, *Gen. Comment No. 5: Persons with Disabilities*, para. 10, U.N. Doc. E/1995/22 (1994); CESCR, *Gen. Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, para. 17, U.N. Doc. E/1996/22 (1995) (“as the committee has previously stressed (general comment No. 3 (1990), para. 12), even in times of severe resource constraints, State parties have the duty to protect the vulnerable members of society”); CESCR, *Gen. Comment No. 3*, *supra* note 58, para. 12 (“the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes”).

⁷⁹ Vienna Convention on the Law of Treaties, art. 26, opened for signature May 23, 1969. 1155 U.N.T.S. 311 (*entered into force* Jan. 27, 1980) [hereinafter Vienna Convention].

⁸⁰ *Id.*, art. 19; see also CEDAW, *supra* note 73, art. 28 (2).

⁸¹ Human Rights Comm., *Gen. Comment No. 24: General Comment on issues relating to reservations made upon ratifications or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant*, paras. 6 – 20, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994); Similarly, CEDAW does not allow reservations to the elimination of discrimination against women as embodied in articles 2 or 16; CEDAW Committee, *Gen. Recommendation No. 24: Article 12 of the Convention (Women and Health)*, paras. 17, 26, U.N. Doc. A/54/38/Rev. 1 (1999) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].

⁸² See, e.g., Human Rights Comm., *Gen. Comment No. 31*, *supra* note 56, para. 7.

⁸³ See, e.g., CEDAW Committee, *Gen. Recommendation No. 33: On women’s access to justice*, paras. 19, 41, 42, 51, 63, 64, U.N. Doc. CEDAW/C/GC/33 (2015) [hereinafter CEDAW Committee, *Gen. Recommendation No. 33*]; CESCR, *Gen. Comment No. 3*, *supra* note 58, para. 10; Human Rights Comm., *Gen. Comment No. 31*, *supra* note 56.

⁸⁴ OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, at 27.

⁸⁵ CEDAW Committee, *Gen. Recommendation No. 33*, *supra* note 83, paras. 19, 51; CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, paras. 77, 78, 79.

⁸⁶ See, e.g., CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 57(f); Human Rights Comm., *Gen. Comment No. 29*, *supra* note 58, para. 18; CESCR, *Gen. Comment No. 3*, *supra* note 58, para. 26.

⁸⁷ See e.g., CEDAW Committee, *Gen. Recommendation No. 33*, *supra* note 83.

⁸⁸ See generally OHCHR, *Human Rights Bodies - Complaint Procedures*, <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#inquiries> (referencing all relevant UN treaties and Optional Protocols).

⁸⁹ OHCHR, *Websites Regional Human Rights Mechanisms and Arrangements*, <https://www.ohchr.org/EN/Countries/NHRI/Pages/Links.aspx>: providing a list of regional human rights and mechanisms and arrangements.

⁹⁰ See, e.g., CEDAW, *supra* note 73, arts. 18, 20; ICCPR, *supra* note 64, art. 40; ICESCR, *supra* note 72, art. 16; CRPD, *supra* note 58, arts. 35, 36; CRC, *supra* note 58, art. 44; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 19, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) [hereinafter CAT]; see generally OHCHR, *Monitoring Core International Human Rights Treaties*, <https://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx>.

⁹¹ See, e.g., ICRC ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW, *What is International Humanitarian Law?* (2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf [hereinafter ICRC, ADVISORY SERV., *What is IHL?*].

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Geneva Conventions I-IV, Common Art. 1: *Respect for the Convention* (Aug. 12, 1949) [hereinafter Common Art. 1 to the Conventions]; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, art. 1, para. 154 (2nd ed. 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> [hereinafter ICRC, *2016 Commentary on Geneva Convention I*] (“This duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage nor aid or assist in violations of the Convention by parties to a conflict. Under the positive obligations, they must do everything reasonably in their power to prevent and bring such violations to an end”); see also article 41, which notes that “States shall cooperate to bring to

an end through lawful means any serious breach within the meaning of article 40 (peremptory norm).” State practice with regard to this obligation has primarily taken the form of diplomatic protests and collective measures, such as resolutions, conferences, investigations, sanctions, and the creation of *ad hoc* tribunals; ICRC, Customary IHL Database, *supra* note 96, rule 144. With regard to the UN and its entities, the obligations under IHL are more complex; however, humanitarian principles play an important role in guiding any humanitarian response, including in the provision of SRH services; see, e.g., Hans-Peter Gasser, *The United Nations and International Humanitarian Law: The International Committee of the Red Cross and the United Nations’ involvement in the implementation of international humanitarian law* (1995) ICRC, <https://www.icrc.org/en/doc/resources/documents/misc/57jmuk.htm>; WHO, *Sexual reproductive health and rights in emergencies*, <https://www.who.int/health-cluster/about/work/other-collaborations/sexual-reproductive-health-rights/en/>; UNFPA, *Humanitarian Action 2019*, *supra* note 9.⁹⁵ ICRC, Customary International Humanitarian Law Database, *Rule 193*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32 [hereinafter ICRC, Customary IHL Database]; see, e.g., ICRC, ADVISORY SERV., *What is IHL?*, *supra* note 91.

⁹⁶ ICRC, Customary International Humanitarian Law Database, *Introduction to Fundamental Guarantees*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_intofugu [hereinafter ICRC, Customary IHL Database, *Fundamental Guarantees*].⁹⁷ See, e.g., CRC, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, adopted May 25, 2000, U.N. Doc. A/RES/54/263 (entered into force Feb. 12, 2002).

⁹⁸ ICRC, Customary International Humanitarian Law Database, *Introduction*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in [hereinafter ICRC, Customary IHL Database, *Introduction*]; ICRC, *Customary Law* (2010), <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>.

⁹⁹ ICRC, “Fundamentals of IHL” in *How Does Law Protect in War? Volume I: Outline of International Humanitarian Law* (2011), <https://casebook.icrc.org/law/fundamentals-ihl>.

¹⁰⁰ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, para. 2, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; ICRC, “Introduction” in *How Does Law Protect in War?*, <https://casebook.icrc.org/law/icrc>.

¹⁰¹ See, e.g., ICRC, *The Fundamental Principles of the International Red Cross and Red Crescent Movement* (2014), <https://shop.icrc.org/the-fundamental-principles-of-the-international-red-cross-and-red-crescent-movement-pdf-en>.

¹⁰² UNHCR, *Emergency Handbook: Humanitarian Principles* (2021), <https://emergency.unhcr.org/entry/44765/humanitarian-principles>.

¹⁰³ International Conference of the Red Cross and Red Crescent, *Statutes of The International Red Cross and Red Crescent Movement*, art. 1(2), <https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf>.

¹⁰⁴ U.N. General Assembly Res. 46/182, Annex, paras. 1, 2, U.N. Doc. A/RES/46/182 (1991); U.N. General Assembly Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147 (2006) [hereinafter U.N. General Assembly Res. 60/147]; U.N. General Assembly Res. 58/114, *Strengthening of the coordination of emergency humanitarian assistance of the United Nation*, 1, U.N. Doc. A/RES/58/114 (2004).

¹⁰⁵ European Parliament and European Commission, *Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council*, OJ C 25, 30.1.2008, [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1431445468547&uri=CELEX:42008X0130\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1431445468547&uri=CELEX:42008X0130(01)).

¹⁰⁶ ICRC, *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief* (1994), <https://www.icrc.org/en/doc/resources/documents/publication/p1067.htm>.

¹⁰⁷ Common Art. 1 to the Conventions, *supra* note 94; ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 1, para. 154 (“This duty to ensure respect by others compromises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage nor assist in violations of the Convention by parties to a conflict. Under the positive obligations, they must do everything reasonably in their power to prevent and bring such violations to an end”); see also ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 41 (“States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 (peremptory norm)”); ICRC, Customary IHL Database, *supra* note 95, rule 144.

¹⁰⁸ ICRC, Customary IHL Database, *supra* note 95, rule 149.

¹⁰⁹ OXFORD UNIVERSITY PRESS, *THE 1949 GENEVA CONVENTIONS, A COMMENTARY*, 1286, paras. 50-53 (Andrew Clapham, Paola Gaeta, Marco Sassoli, eds. 2015) [hereinafter OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY]; ICRC, Customary IHL Database, *supra* note 95, rule 149.

¹¹⁰ ICRC, Customary IHL Database, *supra* note 95, rules 149, 150.

¹¹¹ ICRC, Customary IHL Database, *supra* note 95, rule 149; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 428, para. 58; Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, paras. 55-59, U.N. Doc. A/68/297 (2013)

¹¹² See CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* (2012), <http://www.corteidh.or.cr/tablas/r31595.pdf> [hereinafter C. Evans, *THE RIGHT TO REPARATION*].

¹¹³ U.N. General Assembly Res. 60/147, art. XI, *supra* note 104.

¹¹⁴ ICRC, Customary IHL Database, *supra* note 95, rule 150.

¹¹⁵ Red Cross and Red Crescent, *Compliance with IHL*, *supra* note 6; ICRC, *Work of the ICRC and Swiss government*, *supra* note 6; see also OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, paras. 51-53 (also referencing the Compensation Commission established by the Security Council regarding claims and awards to women who suffered sexual assault arising from the 1990-1991 Gulf Conflict).

¹¹⁶ The information in this box is taken primarily from CRR, *Expert Convenings 2020*, *supra* note 1.

¹¹⁷ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3.

¹¹⁸ *Id.*

¹¹⁹ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2nd ed. 2008) [hereinafter A. CASSESE, ICL]; Rome Statute of the International Criminal Court, art. 25, U.N. Doc. A/CONF.183/9 (1998) (*entered into force* July 1, 2002) [hereinafter Rome Statute].

¹²⁰ A. CASSESE, ICL, *supra* note 119; LEILA NAYDA SADAT, *Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement*, EMORY INTERNATIONAL LAW REVIEW, VOL. 31 (2017); VINCENT BERNARD, HELEN DURHAM, *Editorial: Sexual Violence in Armed Conflict: From Breaking the Silence to Breaking the Cycle*, INTERNATIONAL REVIEW OF THE RED CROSS, VOL. 96, 894, 431-432 (2014) [hereinafter V. Bernard, *Sexual Violence in Armed Conflict*].

¹²¹ V. BERNARD, *Sexual Violence in Armed Conflict*, *supra* note 120, at 431-432.

¹²² See OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, at 73-75; Rome Statute, *supra* note 119, art. 25.4 (individual criminal responsibility does not, however, exonerate the state from international responsibility, and vice versa).

¹²³ OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, at 74.

¹²⁴ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2nd ed. 2008).

¹²⁵ *Id.*

¹²⁶ See ICRC, Customary IHL Database, *supra* note 95, rule 156; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 1288, para. 56 (states are also allowed to criminalize under national law other violations of IHL not listed in Geneva Conventions as grave breaches or in the ICC Statute as war crimes). Note: acts of sexual violence may also be considered crimes against humanity, or a constitutive act of genocide, regardless of whether they are committed in connection with an armed conflict.

¹²⁷ A. CASSESE, ICL, *supra* note 119; See also, INTERNATIONAL LAW COMMISSION, *Chapter 7: Crimes against Humanity*, in REPORT OF THE INTERNATIONAL LAW COMMISSION, 54 U.N. Doc. A/70/10 (2015).

¹²⁸ A. CASSESE, ICL, *supra* note 119.

¹²⁹ CAT, *supra* note 90, arts. 5-9; AMNESTY INTERNATIONAL, *Universal Jurisdiction: The duty of states to enact and enforce legislation*, ch. 5 (2001).

¹³⁰ A. CASSESE, ICL, *supra* note 119.

¹³¹ See, e.g., GLORIA GAGGIOLI, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, INTERNATIONAL REVIEW OF THE RED CROSS, VOL. 96, 894 (2014) [hereinafter G. GAGGIOLI, *Sexual violence a violation of IHL and IHRL*].

¹³² ICRC, Customary IHL Database, *Fundamental Guarantees*, *supra* note 96; see also generally Vienna Convention, *supra* note 79, art. 31(3)(c); Human Rights Comm., *Gen. Comment No. 31*, *supra* note 56, para. 11; CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, paras. 19-24; CESCRC, *Gen. Comment No. 12*, *supra* note 74, para. 6; CESCRC, *Poverty and ICESCR*, *supra* note 74, para. 18; Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 64.

¹³³ AMNESTY INTERNATIONAL, *Fair Trial Manual* (2nd ed. 2014), <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>.

¹³⁴ CESCRC, *Gen. Comment No. 22*, *supra* note 4, paras. 12-21; CESCRC, *Gen. Comment No. 14*, *supra* note 58, paras. 40, 65.

¹³⁵ CESCRC, *Gen. Comment No. 22*, *supra* note 4, para. 49.

¹³⁶ *Id.*, *supra* note 4, para. 10.¹³⁷ *Id.*, *supra* note 4, paras. 7, 8.

¹³⁸ CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 81, para. 14; CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30.

¹³⁹ Human Rights Comm., *Gen. Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) [hereinafter Human Rights Comm., *Gen. Comment No. 23*]; Human Rights Comm., *Gen. Comment No. 18: Non-discrimination*, 26, U.N. Doc. HRI/GEN/1/Rev.1 (1994); CESCRC, *Gen. Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the International Covenant on Economic*,

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Social and Cultural Rights), U.N. Doc. E/C.12/2005/4 (2005) [hereinafter CESCR, *Gen. Comment No. 16*]; CESCR, *Gen. Comment No. 20*, *supra* note 73, paras. 8, 9, 39; CEDAW Committee, *Gen. Recommendation No. 25: On Temporary Special Measures (Art. 4 of the Convention on the Elimination of All Forms of Discrimination against Women)*, U.N. Doc. A/59/38 (2004) [hereinafter CEDAW Committee, *Gen. Recommendation No. 25*].¹⁴⁰ CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 27.¹⁴¹ CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 81, para. 21; CESCR, *Gen. Comment No. 16*, *supra* note 139, para. 29; see also Human Rights Comm., *Concluding Observations: Rwanda*, U.N. Doc. CCPR/C/RWA/CO/4 (2016); CEDAW Committee, *Concluding Observations: Argentina*, paras. 34-35, U.N. Doc. CEDAW/C/ARG/CO/7 (2016); CEDAW Committee, *Concluding Observations: Thailand*, para. 39, U.N. Doc. CEDAW/C/THA/CO/6-7 (2017); CEDAW Committee, *Concluding Observations: Congo*, para. 36(f), U.N. Doc. CEDAW/C/COG/CO/6 (2012); CRC Committee, *Concluding Observations: Central African Republic*, para. 55, U.N. Doc. CRC/C/CAF/CO/2 (2017); CEDAW Committee, *Concluding Observations: Nigeria*, paras. 37-38, U.N. Doc. CEDAW/C/NGA/CO/7-8 (2017); CEDAW Committee, *Concluding Observations: Namibia*, para. 65(a), U.N. Doc. E/C.12/NAM/CO/1 (2016).¹⁴² CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 22-28; CRC, *Gen. Comment No. 20*, *supra* note 58, para. 59; Alyne da Silva Pimentel Teixeira v. Brazil, CEDAW Committee, Commc'n No. 17/2008, paras. 7.6-7.7, U.N. Doc. CEDAW/C/49/D/17/2008 (2011).¹⁴³ CEDAW Committee, *Gen. Recommendation No. 33*, *supra* note 83, paras. 47, 51(l); CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 81, para. 11.¹⁴⁴ CEDAW Committee, *Gen. Recommendation No. 35: On gender-based violence against women, updating Gen. Recommendation No. 19*, paras. 26(c), 37(a), 38(a), U.N. Doc. CEDAW/C/GC/35 (2017) [hereinafter CEDAW Committee, *Gen. Recommendation No. 35*]; CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 27, 35; CESCR, *Gen. Comment No. 16*, *supra* note 139, para. 5; CRC Committee, *Gen. Comment No. 20*, *supra* note 58, para. 28; CRC Committee, *Gen. Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health (Art. 24)*, para. 9, U.N. Doc. CRC/C/GC/15 (2013) [hereinafter CRC Committee, *Gen. Comment No. 15*]; Human Rights Comm., *Gen. Comment No. 23*, *supra* note 139, para. 5; CEDAW Committee, *Concluding Observations: Iraq*, paras. 42-43, U.N. Doc. CEDAW/C/IRQ/CO/4-6 (2014); CEDAW Committee, *Concluding Observations: Bangladesh*, para. 35(b), U.N. Doc. CEDAW/C/BGD/CO/8 (2016).¹⁴⁵ CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 27, 35, 36.¹⁴⁶ *Id.*, paras. 22-28; CESCR, *Gen. Comment No. 16*, *supra* note 139, para. 29.¹⁴⁷ CEDAW Committee, *Gen. Recommendation No. 25*, *supra* note 139.¹⁴⁸ CRC Committee, *Gen. Comment No. 15*, *supra* note 144, para. 9.¹⁴⁹ CEDAW Committee, *Gen. Recommendation No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, para. 18, U.N. Doc. CEDAW/C/GC/28 (2010) [hereinafter CEDAW Committee, *Gen. Recommendation No. 28*]; CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 3, 30-31; Human Rights Comm., *Gen. Comment No. 23*, *supra* note 139, para. 30; Committee on the Rights of Persons with Disabilities, *Gen. Comment No. 3 (2016) On women and girls with disabilities*, paras. 3, 4(c), 39, U.N. Doc. CRPD/C/GC/3 (2016).

¹⁵⁰ CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 30.¹⁵¹ CEDAW Committee, *Gen. Recommendation No. 25*, *supra* note 139, paras. 8-10; CESCR, *Gen. Comment No. 3*, *supra* note 58, para. 10; Human Rights Comm., *Gen. Comment No. 23*, *supra* note 139, para. 3; CEDAW Committee, *Gen. Recommendation No. 28*, *supra* note 149, para. 20.¹⁵² CEDAW Committee, *Gen. Recommendation No. 25*, *supra* note 139, paras. 7-8; CEDAW Committee, *Gen. Recommendation No. 28*, *supra* note 149, para. 9; CESCR, *Gen. Comment No. 20*, *supra* note 73, paras. 8, 9, 39; CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 35.

¹⁵³ CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 22-24.

¹⁵⁴ *Id.*, paras. 30-31.

¹⁵⁵ While there are numerous non-state actors involved in the provision of services (including SRH services) in conflict settings, this section focuses solely on donor states and UN entities. See generally Andrew Clapham, *Human Rights Obligations for Non-State-Actors: Where Are We Now?*, in *DOING PEACE THE RIGHTS WAY: ESSAYS IN INTERNATIONAL LAW AND RELATIONS IN HONOUR OF LOUISE ARBOUR* (Fannie Lafontaine and François Larocque eds. 2019); see also OHCHR, *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* (2011) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

¹⁵⁶ CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 50-53; See also, Article 32 of the Convention on the Rights of Persons with Disabilities includes express obligations on states parties in the context of international cooperation, CRPD, *supra* note 58, art. 32.

¹⁵⁷ *Id.*, para. 50.

¹⁵⁸ *Id.*, para. 52; see also, Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 70 (b), U.N. Doc. A/68/297 (2013).

¹⁵⁹ *Id.*, para. 41.

¹⁶⁰ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, paras. 2, 10, 64.

¹⁶¹ CEDAW Committee, *Gen. Recommendation No. 35*, *supra* note 144, para. 25.

¹⁶² CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 53.

¹⁶³ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 26; CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 28, *Alyne da Silva Pimentel Teixeira v. Brazil*, CEDAW Committee, Commc'n No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (2011).

¹⁶⁴ *Id.*, para. 8.

¹⁶⁵ *Id.*, para. 8.

¹⁶⁶ *Id.*, para. 26.

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¹⁶⁷ Committee against Torture (CAT Committee), *Concluding Observations: Poland*, para. 33(d), U.N. Doc. CAT/C/POL/CO/7 (2019) [hereinafter CAT Committee, CO: Poland]; CAT Committee, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, para. 46, U.N. Doc. CAT/C/GBR/CO/6 (2019) [hereinafter CAT Committee, CO: U.K. of Great Britain]; Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8.

¹⁶⁸ CAT Committee, *Concluding Observations: El Salvador*, para. 23, U.N. Doc. CAT/C/SLV/CO/2 (2009); CAT Committee, *Concluding Observations: Nicaragua*, para. 16, U.N. Doc. CAT/C/NIC/CO/1 (2009).¹⁶⁹ CAT Committee, *Concluding Observations: Peru*, para. 15(a), U.N. Doc. CAT/C/PER/CO/5-6 (2013); CAT Committee, CO: U.K. of Great Britain, *supra* note 167, para. 46.¹⁷⁰ Mellet v. Ireland, Human Rights Comm., Commc'n No. 2324/2013, paras. 7.6, 7.7, 7.8, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) [hereinafter Mellet v. Ireland, 2016 Commc'n]; Whelan v. Ireland, Human Rights Comm., Commc'n No. 2425/2014, paras. 7.7-7.9, 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017) [hereinafter Whelan v. Ireland, 2017 Commc'n]; K.L. v. Peru, Human Rights Comm., Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).¹⁷¹ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8. Decisions from the European Court of Human Rights reinforce this analysis of international human rights bodies: P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R. (2008); R.R. v. Poland, No. 27617/04 Eur. Ct. H. R. (2011).¹⁷² Mellet v. Ireland, 2016 Commc'n, *supra* note 170.

¹⁷³ Whelan v. Ireland, 2017 Commc'n, *supra* note 170.

¹⁷⁴ Mellet v. Ireland, 2016 Commc'n, *supra* note 170, paras. 7.6, 7.7, 7.8.

¹⁷⁵ Whelan v. Ireland, 2017 Commc'n, *supra* note 170, paras. 7.7, 7.8, 7.9, 7.12.

¹⁷⁶ See, e.g., CAT Committee, *Concluding Observations: Greece*, paras. 24, 25, U.N. Doc. CAT/C/GRC/7 (2018) [hereinafter CAT Committee, CO: Greece].¹⁷⁷ See e.g., CAT Committee, *Concluding Observations: Ireland*, paras. 29-30, U.N. Doc. CAT/C/IRL/CO/2 (2017).

¹⁷⁸ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c) (the CEDAW Committee's guidance does not condition the provision of safe abortion services to circumstances in which abortion services are legal).

¹⁷⁹ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30; CEDAW Committee, *Concluding Observations: Central African Republic*, para. 40(b), U.N. Doc. CEDAW/C/CAF/CO/1-5 (2014); see also CEDAW Committee, *Concluding Observations: Democratic Republic of the Congo*, paras. 35-36, U.N. Doc. CEDAW/C/COD/CO/5 (2006).

¹⁸⁰ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c).

¹⁸¹ *Id.*, para. 2.

¹⁸² CEDAW Committee, *Gen. Recommendation No. 28*, *supra* note 149, para. 11.

¹⁸³ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c); CEDAW Committee, *Gen. Recommendation No. 33*, *supra* note 83.

¹⁸⁴ CESCR, *Concluding Observations: Czech Republic*, U.N. Doc. E/C.12/CZE/CO/2 (2014); CESCR, *Concluding Observations: Slovakia*, U.N. Doc. E/C.12/SVK/CO/3 (2019); CEDAW Committee, *Concluding Observations: Lithuania*, U.N. Doc. CEDAW/C/LTU/CO/4 (2008); Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, G.A. Res. 2106, Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969).

¹⁸⁵ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, *opened for signature* June 9, 1994, 33 I.L.M. 1534, chs. II, III.

¹⁸⁶ *Id.*, art. 9.

¹⁸⁷ Convention on Preventing and Combating Violence against Women and Domestic Violence, *opened for signature* May 11, 2011, art. 2.3, C.E.T.S. No. 210 (2014) [hereinafter Istanbul Convention].

¹⁸⁸ *Id.*, arts. 32, 36, 38, 39, 42.

¹⁸⁹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Special Summit of the Union, African Union, *adopted* Oct. 23, 2009, art. 2 (*entered into force* Dec. 6, 2012).

¹⁹⁰ *Id.*, arts. 9.1(e), 9.2(d).

¹⁹¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, *adopted* July 11, 2003, arts. 11.1, 11.2, CAB/LEG/66.6 (*entered into force* Nov. 25, 2005).

¹⁹² *Id.*, art. 11.3.

¹⁹³ *Id.*, art. 11.4.

¹⁹⁴ *Id.*, art. 14.1.

¹⁹⁵ *Id.*, art. 14.2.

¹⁹⁶ *Id.*, art. 14.2.

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¹⁹⁷ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8.

¹⁹⁸ JOHN ZAROCOSTAS, *Humanitarian crises: needs grow as health funding falls*, THE LANCET (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30153-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30153-7/fulltext); THE LANCET, *Humanitarian Crises in a global pandemic* (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31749-9/fulltext?rss=yes](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31749-9/fulltext?rss=yes).

¹⁹⁹ See also CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c) (implicitly recognizing this by acknowledging states' obligation to provide safe abortion services, without referring to any grounds for abortion); A. RADHAKRISHNAN, *Protecting safe abortion*, *supra* note 28

²⁰⁰ See Statute of the International Court of Justice, June 26, 1945, 59 Stat., T.S. No. 993 (1945), art. 38.1.b; OHCHR, *Applicable International Human Rights and Humanitarian Law Framework*, in MANUAL ON HUMAN RIGHTS MONITORING, 10-11 (2011), <https://www.ohchr.org/Documents/Publications/Chapter05-MHRM.pdf>.

²⁰¹ CRR, *Expert Convenings 2020*, *supra* note 1; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 1287, para. 54 ("Human Rights instruments, which offer complaint mechanisms that are more accessible to individuals alleging a violation of a human right, have been used to deal with violations of the aforementioned rules"); see also OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, EN 133 ("The author of this commentary is unaware of cases that examine violations of women's rights in armed conflict other than relating to sexual offences").

²⁰² CRR, *Expert Convenings 2020*, *supra* note 1.

²⁰³ CEDAW Committee, *S.H. v Bosnia and Herzegovina*, *Views adopted by the Committee under article 7(3) of the Optional Protocol, concerning communication No. 116/2017*, U.N. Doc. CEDAW/C/76/D/116/2017 (2020) [hereinafter CEDAW Committee, *S.H v Bosnia and Herzegovina (2020)*].

²⁰⁴ *Id.*, paras. 9 -10

²⁰⁵ *Id.*, para. 10; CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 81(g).

²⁰⁶ See generally Françoise Krill, *The Protection of Women in International Humanitarian Law*, INTERNATIONAL REVIEW OF THE RED CROSS, <https://www.icrc.org/en/doc/resources/documents/article/other/57jmfj.htm> (1985); ICRC, "Hors de Combat" in *How Does Law Protect in War? Glossary*, <https://casebook.icrc.org/glossary/hors-de-combat>.

²⁰⁷ Geneva Conventions I-IV, Common Art 3: *Conflicts not of an International Character* (Aug. 12, 1949) [hereinafter Common Art. 3 to the Conventions]; Geneva Convention I, *supra* note 100, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 3, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, 75 U.N.T.S. 287 (Aug. 12, 1949) [hereinafter Geneva Convention IV]; see also Geneva Convention IV, art. 27(4); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 75(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(1), June 12, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; ICRC, "Adverse Distinction" in *How Does Law Protect in War? Glossary*, <https://casebook.icrc.org/glossary/adverse-distinction> [hereinafter ICRC, "Adverse Distinction"].

²⁰⁸ See, e.g., ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, paras. 573-578.

²⁰⁹ ICRC, Customary IHL Database, *supra* note 95, rule 134; See also in relation to SRHR, A. RADHAKRISHNAN, *Protecting safe abortion*, *supra* note 28.

²¹⁰ CRR, *Expert Convenings 2020*, *supra* note 1.

²¹¹ ICRC, Customary IHL Database, *supra* note 95, rule 134.

²¹² Geneva Convention I, *supra* note 100, art. 12, para. 4 ; Geneva Convention II, *supra* note 207; Geneva Convention III, *supra* note 207, art. 14(2).

²¹³ Geneva Convention IV, *supra* note 207, art. 27, para. 2.

²¹⁴ ICRC, Customary IHL Database, *supra* note 95, rule 134; Additional Protocol I, *supra* note 207, art. 76.

²¹⁵ ICRC, Customary IHL Database, *supra* note 95, rule 134.

²¹⁶ *Id.*

²¹⁷ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 12, paras. 1428-1430.

²¹⁸ ICRC, Customary IHL Database, *supra* note 95, rule 134; ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 12, paras. 1429-1430.

²¹⁹ Additional Protocol I, *supra* note 207, art. 8(a).

²²⁰ Geneva Convention IV, *supra* note 207, arts. 55 (art. 56 imposes a further duty on occupying powers to maintain hospital establishments and services and public health and hygiene in the occupied territory).

²²¹ *Id.*, art. 16, para. 1.

²²² See ICRC, *2020 Commentary on Convention (III) relative to the Treatment of Prisoners of War*, art. 3 (2020), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096#_Toc44265155 [hereinafter ICRC, *2020 Commentary*]; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 761, para. 19 (“it is worth recalling there that the Geneva Conventions address acts and omissions, including with regard to the wounded and sick, only where there is a nexus to the conflict”).

²²³ ICRC, Customary IHL Database, *supra* note 95, rule 109; Additional Protocol I, *supra* note 207, art. 8(a); ICRC, Customary IHL Database, *supra* note 95, rule 134.

²²⁴ OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 7623, para. 26.

²²⁵ ICRC, Customary IHL Database, *supra* note 95, rules 110, 134.

²²⁶ *Id.*, rule 110.

²²⁷ *Id.*, rule 110; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 784, para. 10.

²²⁸ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 12, paras. 1392-1396.

²²⁹ ICRC, Customary IHL Database, *supra* note 95, rule 93; see also Additional Protocol I, *supra* note 207, art. 75 (2)(b); Additional Protocol II, *supra* note 207, art. 4(2)(e).

²³⁰ See, e.g., Geneva Convention IV, *supra* note 207, art. 3; see also ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 701 (noting that rape, enforced prostitution, and indecent assault are expressly identified as inhumane in article 27 of Geneva Convention IV and accordingly violate the obligation of humane treatment in common article 3 to the Conventions).

²³¹ See, e.g., Geneva Convention IV, *supra* note 207; see also *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96–23 & 23/A (ICTY, June 12, 2002) [Appeals Chamber Judgment], para. 150 (characterizing sexual violence as an act of torture); *Prosecutor v. Jadranko Plić et al* IT-04-74-T (ICTY, 29 May 2013) (Trial Chamber Judgment) para. 116 (finding sexual violence as inhuman treatment (synonymous with “cruel treatment” prohibited by common article 3 to the Conventions)).

²³² See, e.g., Geneva Convention IV, *supra* note 207; see also ICRC, *2020 Commentary*, *supra* note 222, art. 3, paras. 705-707 (noting, *inter alia*, that article (4)(2)(e) of Additional Protocol II explicitly lists some acts of sexual violence—namely “rape, enforced prostitution and any form of indecent assault”—as outrages upon personal dignity). International tribunals have held multiple types of sexual violence to be outrages upon personal dignity; see, e.g., *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Chamber Judgment and Sentence (2008), para. 2254 (finding the defendant guilty of rape and, in turn, “guilty of outrages against personal dignity as violation of Common Article 3 and of Additional Protocol II”).

²³³ Additional Protocol II, *supra* note 207, art. 4(2)(e).

²³⁴ Geneva Convention IV, *supra* note 207, art. 27.

²³⁵ *Id.*, art. 27.

²³⁶ ICRC, Customary IHL Database, *supra* note 95, rule 156.

²³⁷ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94.

²³⁸ *Id.*, art. 3, para. 553, art. 12, para. 1427.

²³⁹ ICRC, Customary IHL Database, *supra* note 95, rule 93; see also International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), para. 582 (Sept. 2, 1998) [hereinafter *Prosecutor v. Jean-Paul Akayesu*].

²⁴⁰ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94; CRR, *Expert Convenings 2020*, *supra* note 1.

²⁴¹ Geneva Convention IV, *supra* note 207, arts. 14, 15.

²⁴² *Id.*, arts. 18, 20.

²⁴³ *Id.*, arts. 14, 15, 18, 20.

²⁴⁴ *Id.*, art. 23; see also ICRC, Customary IHL Database, *supra* note 95, rule 134.

²⁴⁵ *Id.*, art. 23; see also ICRC, Customary IHL Database, *supra* note 96, rule 134; Geneva Convention IV, *supra* note 207, art. 55 (imposing a duty on occupying powers to ensure that the population has access to medical supplies, and affording those neutral states that are appointed as “protecting powers” the right to verify the state of such supplies); Geneva Convention IV, *supra* note 207, art. 56 (imposing a further duty on occupying powers to maintain hospital establishments and services and public health and hygiene in the occupied territory).

²⁴⁶ ICRC, Customary IHL, *supra* note 95, rule 55 (noting that there is practice to support the interpretation of this obligation as creating a right of the civilian population to receive humanitarian relief).

²⁴⁷ ICRC, Customary IHL Database, *Introduction*, *supra* note 98.

²⁴⁸ Corte Constitucional [C.C.] [Constitutional Court] diciembre 11, 2019, Sentencia SU 599–19 (Colom.) (dealing with victims of sexual violence in armed conflict) [hereinafter C.C., SU 599-19].

²⁴⁹ *Id.* The judgment has a specific section (2.11) on international law as it relates to women’s human rights and SGBV. In this section, the Court references the Geneva Conventions, the International Criminal Court’s ruling in *Prosecutor v. Thomas Lubanga Dyilo*, and its own jurisprudence on the application of international law to the armed conflict in Colombia. It also takes into account recommendations from the CEDAW Committee and the Convention of Belém do Pará.

²⁵⁰ C.C., SU 599-19, *supra* note 248.

²⁵¹ See CENTER FOR REPRODUCTIVE RIGHTS, *Reproductive Violence in the Armed Conflict of Colombia* (Spanish language only), sec. 4 “Reparación de la violencia reproductiva,” <https://reproductiverights.org/document/violencia-reproductiva-en-el-conflicto-armado-colombiano>.

²⁵² Abortion Law Map Web Version: *The World’s Abortion Laws 2011*, CENTER FOR REPRODUCTIVE RIGHTS (2020), <http://worldabortionlaws.com/index.html>.

²⁵³ A. RADHAKRISHNAN, *Protecting safe abortion*, *supra* note 28; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, pp. 762-765; CRR, *Expert Convenings 2020*, *supra* note 1

²⁵⁴ GLOBAL JUSTICE CENTER, *Reference Language on Abortion and IHL (2017)*, <https://www.globaljusticecenter.net/files/ReferenceLanguage.1.20.2017.pdf> [hereinafter GJC, *Reference Language*] See also OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, pp 762-765 and CRR, *Expert Convenings 2020*, *supra* note 1

²⁵⁵ U.N. SCOR, *Security Council Resolution 2122 (2013)*, U.N. Doc. S/Res/2122 (2013).

²⁵⁶ U.N. SCOR, *Security Council Resolution 2467 (2019)*, U.N. Doc. S/Res/2467 (2019) [hereinafter U.N. SCOR, *Resolution 2467*].

²⁵⁷ For a criticism of the Geneva Conventions on this basis, see, e.g., JUDITH GARDAM, *Women, Human Rights and International Humanitarian Law*, INTERNATIONAL REVIEW OF THE RED CROSS, 324 (1998).

²⁵⁸ V. BERNARD, *Sexual Violence in Armed Conflict*, *supra* note 120, at 427-434.

²⁵⁹ U.N. SCOR, *Resolution 2106 (2013)*, U.N. Doc. S/RES/2106 (2013).

²⁶⁰ U.N. Secretary-General, *Report of the Secretary-General on Conflict-related Sexual Violence*, para. 14, U.N. Doc. S/2017/249 (2017).

²⁶¹ *Id.*

²⁶² ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 764; Additional Protocol I, *supra* note 207, art. 10; Additional Protocol II, *supra* note 207, art. 7 (referring to “generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure”).

²⁶³ Vienna Convention, *supra* note 79, art. 27; Human Rights Comm., *Gen. Comment No. 31*, *supra* note 56, para. 4.

²⁶⁴ A. Radhakrishnan, *Protecting safe abortion*, *supra* note 28; GJC, *Reference Language*, *supra* note 254; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, pp 762-765; See also CRR, *Expert Convenings 2020*, *supra* note 1.

²⁶⁵ CRR, *Expert Convenings 2020*, *supra* note 1; *L.C. v. Peru*, Commc’n, No. 22/2009, para. 7.7, U.N. Doc. CEDAW/C/50/D/22/2009 (2011) (CEDAW) [hereinafter *L.C. v. Peru*, Commc’n, No. 22/2009]; Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8; CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c).

²⁶⁶ OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 765, para. 33; see also A. Radhakrishnan, *Protecting safe abortion*, *supra* note 28 and . CRR, *Expert Convenings 2020*, *supra* note 1

²⁶⁷ *Id.*; see also OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 1287, para. 53 (noting that the Geneva Conventions “aim at protecting women from the effects of armed conflict and not at eliminating discrimination”).

²⁶⁸ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8; CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 81, para. 14

²⁶⁹ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c).

²⁷⁰ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c); see also Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8.

²⁷¹ See generally NOELLE QUENIVET, *A (Wo)Man’s honour: Have the Geneva conventions lost their gender?* (2019) UWE BRISTOL RESEARCH REPOSITORY, <https://uwe-repository.worktribe.com/output/848973> [hereinafter N. QUENIVET, *A (Wo)Man’s Honour*].

²⁷² ICRC, Customary IHL Database, *supra* note 95, rule 134; ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 12, paras. 1429-1430.

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- ²⁷³ OHCHR, *Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights: A review of the case law* (2018), https://www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes_EN.pdf; Rebecca J. Cook and SIMONE CUSACK, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010); *Mellet v. Ireland*, 2016 Commc'n, *supra* note 170, paras. 14-15 (Cleveland S., concurring); ANAND GROVER, *Interim Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 59, U.N. Doc. A/66/254 (2011) [hereinafter ANAND GROVER, *Interim Report of the SR*].
- ²⁷⁴ Geneva Convention IV, *supra* note 207, art. 27; ICRC, Customary IHL Database, *supra* note 95, rule 109; Additional Protocol I, *supra* note 207, art. 8(a).
- ²⁷⁵ RUTH RUBIO-MARIN, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, WILLIAM AND MARY JOURNAL OF RACE, GENDER, AND SOCIAL JUSTICE, Vol. 19, at 75 (2013) [hereinafter RUTH RUBIO-MARIN, *Reparations for Conflict-Related Violence*].
- ²⁷⁶ U.N. HRC, *Report of the UN Working Group on the issue of discrimination against women in law and in practice*, para. 63, U.N. Doc. A/HRC/32/44 (2016).
- ²⁷⁷ See, e.g., CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 58; Dainius Pūras, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 94, U.N. Doc. A/HR/C/32/32 (2016); Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment*, para. 78, U.N. Doc. A/HRC/22/53 (2013); ANAND GROVER, *Interim Report of the SR*, *supra* note 273.
- ²⁷⁸ N. QUENIVET, *A (Wo)Man's Honour*, *supra* note 271; CEDAW, *supra* note 73, arts. 2(f), 5(a); CEDAW Committee, *Gen. Recommendation No. 28*, *supra* note 149; CEDAW Committee, *Summary of the inquiry concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, para. 42, U.N. Doc. CEDAW/C/OP.8/PHL/1 (2015); *Mellet v. Ireland*, 2016 Commc'n, *supra* note 170, para. 3.19; *L.C. v. Peru*, Commc'n, No. 22/2009, *supra* note 265; see also CRPD, *supra* note 58, art. 8.1(b); see also Istanbul Convention, *supra* note 187, art. 42 (prohibiting "unacceptable justifications for crimes, including crimes committed in the name of so-called 'honour'").
- ²⁷⁹ See, ICRC, *2020 Commentary*, *supra* note 222, art. 14, para. 1864 ("Studies have found much higher rates of sexual violence against sexual and general minorities than against the general population of incarcerated persons"); GABRIEL ARKLES, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW, Vol. 18, No. 2, at 515-560, 517, 526 (2009); TASHA HILL, *Transgender Military Inmates' Legal and Constitutional Rights to Medical Care in Prisons: Serious Medical Need versus Military Necessity*, VERMONT LAW REVIEW, Vol. 39, No. 2, at 411-459, 426 (2014).
- ²⁸⁰ LISA DAVIS AND JESSICA STERN, *WPS and LGBTI Rights*, THE OXFORD HANDBOOK OF WOMEN, PEACE, AND SECURITY (2018) [hereinafter L. Davis, *WPS and LGBTI Rights*].
- ²⁸¹ See, e.g., *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/05, Trial Judgment (Feb. 4, 2021).
- ²⁸² See, e.g., G. GAGGIOLI, *Sexual violence a violation of IHL and IHRL*, *supra* note 131.
- ²⁸³ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), para. 71 (Oct. 2, 1995).
- ²⁸⁴ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac and Others*, Case No. IT-96-23&23/1 (Trial Chamber) (Feb. 22, 2001).
- ²⁸⁵ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić and Others (Celebici case)*, Case No. IT-96-21, Judgment (Trial Chamber) (Nov. 16, 1998); see also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundzija*, Case. No. IT-95-17/1, Judgment (Trial Chamber) (Dec. 10, 1998).
- ²⁸⁶ *Prosecutor v. Jean-Paul Akayesu*, *supra* note 239.
- ²⁸⁷ U.N. SCOR, *Resolution 1820 (2008) on women, peace and security*, para. 4, U.N. Doc. S/RES/1820 (2008).
- ²⁸⁸ Rome Statute, *supra* note 119, arts. 7(1)(g), 7(1)(k).
- ²⁸⁹ *Id.*, arts. 8(2)(b)(xxii), 8(2)(vi).
- ²⁹⁰ *Id.*, arts. 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(b)(xxi), 8(2)(c)(ii); see also V. Bernard, *Sexual Violence in Armed Conflict*, *supra* note 120, at 431-443.
- ²⁹¹ *Id.*, art.6(b)(d); Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, art. II(b)(d), G.A. Res. 260 A, U.N. Doc. A/RES/3/260 (*entered into force* Jan. 12, 1951).
- ²⁹² VALERIE OOSTERVELD, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice*, HARVARD HUMAN RIGHTS JOURNAL, Vol. 18 [hereinafter V. OOSTERVELD, *Gender in the Rome Statute*]; see also Rosemary Grey ET AL., *Gender-based Persecution as a Crime Against Humanity: The Road Ahead*, 17 OXFORD UNIVERSITY PRESS (2019) [hereinafter R. Grey, *Gender-based Persecution*]; SHAYNA ROGERS, *Article: Sexual violence or rape as a*

constituent act of genocide: lessons from the ad hoc tribunals and a prescription for the international criminal court, GEORGE WASHINGTON INTERNATIONAL LAW REVIEW, VOL. 48, at 265 (2016) [hereinafter S. ROGERS, *Sexual violence or rape as genocide*].

²⁹³ CRR, *Expert Convenings* 2020, *supra* note 1; see also RUTH RUBIO-MARIN, *Reparations for Conflict-Related Violence*, *supra* note 275.

²⁹⁴ Rome Statute, *supra* note 119, art. 7.2(f); *Prosecutor v. Dominic Ongwen*, ICC-02/02-01/15, Decision on the Confirmation of the Charges, 954, para. 2722 (Trial Judgment) (Feb. 4, 2021).

²⁹⁵ AMNESTY INTERNATIONAL, *Forced Pregnancy a Commentary on the Crime in International Criminal Law* (2020), <https://www.amnesty.org/download/Documents/IOR5327112020ENGLISH.pdf>.

²⁹⁶ SOH SIE ENG JESSIE, *Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide* (2006), https://genderandsecurity.org/sites/default/files/Eng_-_Forced_Pregnancy.pdf.

²⁹⁷ See AMNESTY INTERNATIONAL, *Amnesty International's Policy on Abortion: Explanatory Note*, 80 (2020).

²⁹⁸ GLOBAL JUSTICE CENTER, *Beyond Killings: Gender, Genocide, and Obligations Under International Law* (2018) [hereinafter GJC, *Beyond Killings*].

²⁹⁹ SARETA ASHRAPH, AKILA RADHAKRISHNAN, *Beyond Killing: The Critical Role Gender in the Recognition, Prevention and Punishment of Genocide*, JUST SECURITY (2018).

³⁰⁰ *Prosecutor v. Jean-Paul Akayesu*, *supra* note 286, para. 507; see also GJC, *Beyond Killings*, *supra* note 298.

³⁰¹ U.N. HRC, "They came to destroy": *ISIS Crimes Against the Yazidis*, paras. 142-146, U.N. Doc. A/HRC/32/CRP.2 (2016).

³⁰² GJC, *Beyond Killings*, *supra* note 298, at 47.

³⁰³ Rome Statute, *supra* note 119, art. 7.3; V. Oosterveld, *Gender in the Rome Statute*, *supra* note 292; see also R. Grey, *Gender-based Persecution*; S. Rogers, *Sexual violence or rape as genocide*, *supra* note 292.

³⁰⁴ PATRICIA VISEUR SELLERS, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, OHCHR (n.d.), at 7 [hereinafter P. Sellers, *Prosecution of Sexual Violence*].

³⁰⁵ PATRICIA VISEUR SELLERS, (Re)Considering Gender Jurisprudence, THE OXFORD HANDBOOK OF GENDER AND CONFLICT (2017) [hereinafter P. Sellers, *Gender Jurisprudence*]; Claire Bradford Di Caro, *Call it what it is: genocide through male rape and sexual violence in the former Yugoslavia and Rwanda*, DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW, Vol. 30 (2019); CRR, *Expert Convenings* 2020, *supra* note 1.

³⁰⁶ CRR, *Expert Convenings* 2020, *supra* note 1; see also P. Sellers, *Gender Jurisprudence*, *supra* note 305.

³⁰⁷ Ministry of Foreign Affairs Sweden et al., *Report Summary International Expert Meeting: "Gender Perspectives on International Humanitarian Law"* (2007), https://www.icrc.org/en/doc/assets/files/other/ihl_and_gender.pdf; see, e.g., Mike Isaac, *The Prosecution of Sexual Violence against Men in International Criminal Law*, INTLAWGRRRLS (2016), <https://ilg2.org/2016/02/11/the-prosecution-of-sexual-violence-against-men-in-international-criminal-law/>; P. Sellers, *Prosecution of Sexual Violence*, *supra* note 304; see also *Prosecutor v. Ranko Cesic*, Sentencing Judgment, Case No. IT-95-10/1-S (Mar. 11, 2007), paras. 13, 14.

³⁰⁸ CRR, *Expert Convenings* 2020, *supra* note 1.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ UMESH PALWANKAR, *Measures available to States for fulfilling their obligations to ensure respect for international humanitarian law*, INTERNATIONAL REVIEW OF THE RED CROSS, 298 (1993).

³¹² U.N., *Charter of the United Nations*, 1945, 1 U.N.T.S. XVI, ch. V [hereinafter U.N. *Charter*]; U.N. Security Council, *formed Oct. 24, 1945*, <https://www.un.org/securitycouncil/>.

³¹³ U.N. *Charter*, *supra* note 312, ch. VII; CRR, *Expert Convenings* 2020, *supra* note 1.

³¹⁴ U.N. *Charter*, *supra* note 312, ch. VII.

³¹⁵ WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, *Security Council Resolution 1960* (2016).

³¹⁶ U.N. SCOR, *Security Council Committee pursuant to resolutions 1267 (1999) 1998 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individual groups, undertakings and entities*, <https://www.un.org/securitycouncil/sanctions/1267>.

³¹⁷ SOPHIE HUVÉ, *The Use of Sanctions to Address Conflict Related Sexual Violence at the United Nations Security Council*, GEORGETOWN INSTITUTE FOR WOMEN, PEACE AND SECURITY, 6 (2018), <https://giwps.georgetown.edu/wp-content/uploads/2018/03/Use-of-UN-Sanctions-to-Address-Conflict-related-Sexual-Violence.pdf> [hereinafter SOPHIE HUVÉ, *Use of Sanctions to Address Conflict*].

³¹⁸ SOPHIE HUVÉ, *Use of Sanctions to Address Conflict*, *supra* note 317, at 10, 23; U.N. SCOR, *Simon Gatwech Dual* (July 1, 2015), <https://www.un.org/securitycouncil/sanctions/2206/materials/summaries/individual/simon-gatwech-dual>.

- ³¹⁹ THE GRADUATE INSTITUTE GENEVA, *UN Targeted Sanctions* (2014), [https://www.graduateinstitute.ch/sites/internet/files/2019-10/TSC%20Qualitative%20Database%20\(June%202014\).pdf](https://www.graduateinstitute.ch/sites/internet/files/2019-10/TSC%20Qualitative%20Database%20(June%202014).pdf).
- ³²⁰ SOPHIE HUVÉ, *Use of Sanctions to Address Conflict*, *supra* note 317; U.N. SCOR, *Resolution 1261* (1999), U.N. Doc. S/RES/1261 (1999).
- ³²¹ U.N. SCOR, *Resolution 1889, OP 10* (2009), U.N. Doc. S/Res/1889 (2009) (second emphasis added).
- ³²² U.N. SCOR, *Resolution 2122* (2013), U.N. Doc. S/Res/2122 (2013).
- ³²³ U.N. SCOR, *Resolution 2106* (2013), para. 19, U.N. Doc. S/Res/2106 (2013) (emphasis added).
- ³²⁴ U.N. SCOR, *Resolution 2242* (2015), para. 16, U.N. Doc. S/Res/2242 (2015) [hereinafter U.N. SCOR, *Resolution 2242*].
- ³²⁵ OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 1289, para. 58.
- ³²⁶ *Id.*
- ³²⁷ U.N. SCOR, *Resolution 2242*, *supra* note 324, paras. 4, 14; U.N. SCOR, *Resolution 2467*, *supra* note 256, paras. 1, 3, 15, 31.
- ³²⁸ U.N. SCOR, *Resolution 2467*, *supra* note 256; CHRISTINE CHINKIN, MADELEINE REES, *Commentary on Security Council Resolution 2467*, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM (2019) https://www.wilpf.org/wp-content/uploads/2019/07/19_0496_WPS_Commentary_Report_online.pdf [hereinafter C. CHINKIN AND M. REES, *Commentary on SCOR Resolution 2467*].
- ³²⁹ U.N. SCOR, *Resolution 2467* (2019), *supra* note 328; C. CHINKIN AND M. REES, *Commentary on SCOR Resolution 2467*, *supra* note 328; CEDAW Committee *Gen. Recommendation No. 30*, *supra* note 30, paras. 2, 26, 28(a), 77.
- ³³⁰ U.N. General Assembly Res. 60/251, *Human Rights Council*, U.N. Doc. A/Res/60/ 251 (2006).
- ³³¹ U.N. HRC, *Resolution adopted by the Human Rights Council on 7 October 2020* (45th Sess., 2020), U.N. Doc. A/HRC/RES/45/29 (2020) [hereinafter U.N. HRC, *Resolution on 7 October 2020*].
- ³³² *Id.*
- ³³³ U.N. HRC, *Child, early and forced marriage in humanitarian settings* (35th Sess., 2017), U.N. Doc. A/HRC/Res/35/16 (2017) [U.N. HRC, *Child, early and forced marriage*].
- ³³⁴ U.N. HRC, *Preventable maternal mortality and morbidity and human rights in humanitarian settings* (39th Sess., 2018), U.N. Doc. A/HRC/39/10 (2018) [hereinafter U.N. HRC, *Preventable maternal mortality*].
- ³³⁵ *Id.*
- ³³⁶ OHCHR, *Special Procedures of the Human Rights Council*, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.
- ³³⁷ U.N. HRC, *Human Rights Defenders Operating in Conflict and Post-Conflict situations*, para. 13, U.N. Doc. A/HRC/43/51 (2019).
- ³³⁸ *Id.*
- ³³⁹ *Id.*, para. 28.
- ³⁴⁰ U.N. Secretary-General, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/73/216 (2018).
- ³⁴¹ CRR, *Expert Convenings 2020*, *supra* note 1.
- ³⁴² U.N. HRC, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, paras. 58, 64, 96, 98 (42nd Sess., 2019), U.N. Doc. A/HRC/42/CRP.4 (2019) [hereinafter U.N. HRC, *Sexual and gender-based violence in Myanmar*].
- ³⁴³ *Id.*
- ³⁴⁴ *Id.*
- ³⁴⁵ U.N. HRC, *Human rights in the Bolivarian Republic of Venezuela*, para. 18 (45th Sess., 2019), U.N. Doc. A/HRC/41/18 (2019).
- ³⁴⁶ *Id.*, paras. 20, 81(a).
- ³⁴⁷ OHCHR, *Access to Health for Survivors of Conflict-Related Sexual Violence in South Sudan* (May 2020), https://www.ohchr.org/Documents/Countries/SS/access_to_health_for_survivors_of_conflict-related_sexual_violence_in_south_sudan.pdf [hereinafter OHCHR, *Access to Health for Survivors*].
- ³⁴⁸ *Id.*, paras. 4, 37, 69-72.
- ³⁴⁹ *Id.*, para. 4.
- ³⁵⁰ The complementary and mutually reinforcing protection of IHRL and IHL, has been expressly recognized by the International Court of Justice, the European Court of Human Rights, and the Inter-American Commission on Human Rights, as well as by UN

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organs, such as the Human Rights Council, Special Procedures, and treaty bodies, see, e.g., OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, at 118.

³⁵¹ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 64; Human Rights Comm., *Concluding Observations: United States of America*, para. 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006); CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, paras. 19-24; CESCR, *Gen. Comment No. 12*, *supra* note 74, para. 6; CESCR, *Poverty and ICESCR*, *supra* note 74, para. 18.

³⁵² Human Rights Comm., *Gen. Comment No. 31*, *supra* note 56, para. 11; Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 64.

³⁵³ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 19.

³⁵⁴ *Id.*, para. 20.

³⁵⁵ CRPD, *supra* note 58, art. 11.

³⁵⁶ CRC, *supra* note 58, arts. 22(1), 38.

³⁵⁷ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 65 (“lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant”); CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 21 (“International humanitarian law also imposes obligations upon occupying powers that apply concurrently with the Convention and other international human rights law. International humanitarian law also prohibits a State from transferring part of its own civilian population into the territory that it occupies. Under international humanitarian law, women under occupation are entitled to general protections and the following specific protections: protection against rape, forced prostitution or any other form of indecent assault; free passage of consignments of essential clothing intended for expectant mothers and maternity cases; safety or neutralized zones that may be established to shield the civilian population, including in particular expectant mothers and mothers of children under 7 years of age; and detention in separate quarters from men and under the immediate supervision of women. Women civilian internees must receive sanitary conveniences and be searched by women”); CESCR, *Gen. Comment No. 15*, *supra* note 74, para. 22 (“The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water”); CESCR, *Gen. Comment No. 14*, *supra* note 58, para. 34 (“States should also refrain from . . . limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law”).

³⁵⁸ U.N. SCOR, *Resolution 2242*, *supra* note 324; U.N. SCOR, *Resolution 2467*, *supra* note 256. Likewise, CEDAW General Recommendation 30 references the UN Security Council agenda. In General Recommendation 30, CEDAW notes that Security Council resolutions find their expression in the substantive provisions of the Convention and are premised on the model of substantive equality. It calls for the need for a “concerned and integrated approach that places the implementation of the Security Council agenda on women, peace and security into the broader framework of the implementation of the Convention and its Optional Protocol.” CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, paras. 2, 26, 28(a), 77.

³⁵⁹ U.N. HRC, *Resolution on 7 October 2020*, *supra* note 331; U.N. HRC, *Preventable maternal mortality*, *supra* note 334, para. 14; U.N. HRC, *Child, early and forced marriage*, *supra* note 333, para. 4; see also U.N. HRC, *Resolution 9/9: Protection of the human rights of civilians in armed conflict*, U.N. Doc. A/HRC/RES/9/9 (2008).

³⁶⁰ U.N. HRC, *Rights of the child: protection of the rights of the child in humanitarian situations* (37th Sess., 2018), para. 4, U.N. Doc. A/HRC/37/20 (2018) (recalling states’ obligation to protect children under IHL); U.N. HRC, *The rights of persons with disabilities in situations of risk and humanitarian emergencies* (31st Sess., 2016), U.N. Doc. A/HRC/RES/31/6 (2016).

³⁶¹ OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, at 118.

³⁶² C. EVANS, THE RIGHT TO REPARATION, *supra* note 112, at 33.

³⁶³ ICRC, “Lex Specialis” in *How Does Law Protect in War? Glossary* (2011), <https://casebook.icrc.org/glossary/lex-specialis> [hereinafter ICRC, Lex Specialis]; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 48, para. 74.

³⁶⁴ ICRC, Lex Specialis, *supra* note 363.

³⁶⁵ Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, para. 58, U.N. Doc. A/CN.4/L.682 (2006).

³⁶⁶ OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, p. 54-64; INTERNATIONAL LAW COMMISSION, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 140, para. 4, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

³⁶⁷ See, e.g., Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 64; OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, at 64-67; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para. 106, 2004 I.C.J. (July 9). The International Court of Justice, in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, affirmed that Israel had obligations toward individuals living in the occupied Palestinian territory under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, stating that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.” The Court followed this advisory opinion in its judgment in *Democratic Republic of the Congo v. Uganda Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, paras. 216, 217, I.C.J. Reports 2005 (Dec. 19).

³⁶⁸ ICRC, Customary IHL Database, *Fundamental Guarantees*, *supra* note 96; see also generally Vienna Convention, *supra* note 79, art. 31(3)(c).

³⁶⁹ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 578.

³⁷⁰ ICRC, Customary IHL Database, *supra* note 95, rule 88; see also ICRC, “Adverse Distinction,” *supra* note 207.

³⁷¹ ICRC, Customary IHL Database, *supra* note 95, rule 88.

³⁷² Geneva Convention I, *supra* note 100, art. 3; see also ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3.

³⁷³ ICRC, “Adverse Distinction,” *supra* note 207 (emphasis added).

³⁷⁴ ICRC, Customary IHL Database, *supra* note 95, rules 88, 110.

³⁷⁵ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 567.

³⁷⁶ *Id.*, art. 3, paras. 575-576.

³⁷⁷ *Id.*, art. 3, para. 577.

³⁷⁸ *Id.*, art. 3, para. 578; see also P. Sellers, *Gender Jurisprudence*, *supra* note 305.

³⁷⁹ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 578 (2nd ed. 2016) (“In permitting and in fact requiring distinction that is not adverse but favourable to the persons concerned, so that they fully benefit from humane treatment, humanitarian law is not dissimilar to human rights law in its approach to non-discrimination”).

³⁸⁰ ICRC, Customary IHL Database, *supra* note 95, rule 87.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ Common Art. 3 to the Conventions, *supra* note 207; see also Geneva Convention I, *supra* note 100, art. 12; Geneva Convention II, *supra* note 207, art. 12; Geneva Convention IV, *supra* note 207, arts. 5, 27; Additional Protocol I, *supra* note 207, art. 75(1); Additional Protocol II, *supra* note 207, art. 4(1).

³⁸⁴ Common Art. 3 to the Conventions, *supra* note 207; Additional Protocol I, *supra* note 207, art. 75.

³⁸⁵ ICRC, Customary IHL Database, *supra* note 95, rule 87; ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 553; A. Radhakrishnan, *Protecting safe abortion*, *supra* note 28.

³⁸⁶ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para 553. .

³⁸⁷ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, paras. 618-621.

³⁸⁸ ICRC, Customary IHL Database, *supra* note 96, rule 87.

³⁸⁹ ICRC, Customary IHL Database, *Fundamental Guarantees*, *supra* note 96; ICRC, Customary IHL Database, *supra* note 95, rule 87.

³⁹⁰ See, e.g., CORDULA DROEGE, “*In truth the leitmotiv*: the prohibition of torture and other forms of ill-treatment in international humanitarian law, INTERNATIONAL REVIEW OF THE RED CROSS, VOL. 89, at 515, 517 (2007) <https://www.icrc.org/eng/assets/files/other/irrc-867-droege.pdf> (noting that “the notions of ill-treatment are so similar” in IHL and IHRL “that the interpretation of one body of law influences the other and *vice versa*”); see also MANFRED NOWAK, RALPH JANIK, *Torture, Cruel, Inhuman, or Degrading Treatment or Punishment*, in OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 320 (describing the different types of ill-treatment under IHRL, IHL, and ICL and noting that there are some differences in the definition and interpretation of these terms among different bodies and courts).

³⁹¹ CRR, *Expert Convenings 2020*, *supra* note 1; Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para.8.

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- ³⁹² ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 576.
- ³⁹³ See, e.g., JUAN E. MÉNDEZ, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment report on the gendered aspects of torture*, U.N. Doc. A/HRC/31/5 (2016).
- ³⁹⁴ ICRC, *2016 Commentary on Geneva Convention I*, *supra* note 94, art. 3, para. 576.
- ³⁹⁵ See, e.g., OHCHR, INTERNATIONAL LEGAL PROTECTION, *supra* note 59, at 11; CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, paras. 19-24; ICRC, *IHL and IHRL*, *supra* note 56.
- ³⁹⁶ See, e.g., U.N. HRC, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, U.N. Doc. A/HRC/28/45 (2015); CRR, *Expert Convenings 2020*, *supra* note 1.
- ³⁹⁷ C. EVANS, *THE RIGHT TO REPARATION*, *supra* note 112, at 33.
- ³⁹⁸ Human Rights Comm., *Gen. Comment No. 29*, *supra* note 58.
- ³⁹⁹ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 2; Human Rights Comm., *Gen. Comment No. 29*, *supra* note 58, para. 7; see also OHCHR, *Core Human Rights*, *supra* note 71.
- ⁴⁰⁰ CESCR, *Gen. Comment No. 14*, *supra* note 58, para. 32; CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 49.
- ⁴⁰¹ CESCR, *Gen. Comment No. 20*, *supra* note 73; see also CEDAW, *supra* note 73; Human Rights Comm., *Gen. Comment No. 29*, *supra* note 58, paras. 11, 15.
- ⁴⁰² OHCHR, *Report of U.N. High Commissioner for Human Rights*, *supra* note 75; CESCR, *Gen. Comment No. 14*, *supra* note 58, para. 32; see also CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 37.
- ⁴⁰² CESCR, *Gen. Comment No. 22*, *supra* note 4, para. 37.⁴⁰³ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8.
- ⁴⁰⁴ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 52(c); Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8.
- ⁴⁰⁵ Human Rights Comm., *Gen. Comment No. 31*, *supra* note 56, para. 11; Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, paras. 64-65; CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30, para. 20.
- ⁴⁰⁶ ICRC, *Customary IHL Database*, *supra* note 95, rule 87.
- ⁴⁰⁷ CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 22-24.
- ⁴⁰⁸ See e.g., CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 81, para. 14; CEDAW, *supra* note 73, art. 5(a); CEDAW Committee, *Gen. Recommendation No. 35*, *supra* note 144, para. 30; CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 35-36.⁴⁰⁹ See, e.g., CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 22-24.
- ⁴¹⁰ See e.g., CEDAW, *supra* note 73, art. 5(a); CRPD, *supra* note 58, art. 8.1(b); CESCR, *Gen. Comment No. 22*, *supra* note 4, paras. 27, 31, 35, 36.
- ⁴¹¹ L. DAVIS, *WPS and LGBTI Rights*, *supra* note 280.
- ⁴¹² ICRC, *Customary IHL Database*, *supra* note 95, rule 87.
- ⁴¹³ Human Rights Comm., *Gen. Comment No. 36*, *supra* note 57, para. 8; CAT Committee, *CO: Greece*, *supra* note 176, paras. 24, 25; CAT Committee, *CO: Poland*, *supra* note 167, para. 33(d); CAT Committee, *CO: U.K. of Great Britain*, *supra* note 167, para. 46.
- ⁴¹⁴ CRR, *Expert Convenings 2020*, *supra* note 1; OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, at 1287, para. 54 (“Human Rights instruments, which offer complaint mechanisms that are more accessible to individuals alleging a violation of a human right, have been used to deal with violations of the aforementioned rules”); see also OXFORD, 1949 GENEVA CONVENTIONS COMMENTARY, *supra* note 109, EN 133 (“The author of this commentary is unaware of cases that examine violations of women’s rights in armed conflict other than relating to sexual offences”).
- ⁴¹⁵ CEDAW Committee, *S.H v Bosnia and Herzegovina (2020)*, *supra* note 203.
- ⁴¹⁶ CEDAW Committee, *Gen. Recommendation No. 30*, *supra* note 30 paras. 38(g), 81(g).
- ⁴¹⁷ See, e.g., U.N. HRC, *Resolution on 7 October 2020*, *supra* note 331; U.N. SCOR, *Resolution 1325 (2000)*, U.N. Doc. S/Res/1325 (2000).
- ⁴¹⁸ U.N. SCOR, *Resolution 2122 (2013)*, U.N. Doc. S/Res/2122 (2013); U.N. SCOR, *Resolution 2467*, *supra* note 328.
- ⁴¹⁹ U.N. HRC, *Resolution on 7 October 2020*, *supra* note 331.
- ⁴²⁰ C. CHINKIN AND M. REES, *Commentary on SCOR Resolution 2467*, *supra* note 328.
- ⁴²¹ U.N. HRC, *Human rights in the Bolivarian Republic of Venezuela (45th Sess., 2019)*, U.N. Doc. A/HRC/41/18 (2019); OHCHR, *Access to Health for Survivors*, *supra* note 347; U.N. HRC, *Sexual and gender-based violence in Myanmar*, *supra* note 342, paras. 58, 64, 96, 98.