



ICRC

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IS THERE A “RIGHT TO ABORTION” FOR WOMEN AND GIRLS WHO BECOME PREGNANT AS A RESULT OF RAPE?

A HUMANITARIAN AND LEGAL ISSUE

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The presentations of Professor Tigroudja and Mr Rycroft that we just had the privilege to listen made clear that rape and other forms of sexual violence are completely prohibited both under international humanitarian law (IHL) and human rights law. Moreover, all rape, as well as other forms of sexual violence that amount to serious violations of IHL, entail individual criminal responsibility and must be prosecuted. In addition to being awful crimes, they give rise to a number of consequences that constitute terrible humanitarian issues, as highlighted in the keynote speech of our Vice-President, Ms Beerli.

One of them is that women and girls who are raped may become pregnant as a result. These women and girls may face terrible choices and dilemmas and may seek unsafe practices to terminate their pregnancy, which may endanger their lives and health. My presentation will focus on this particular consequence of rape in armed conflicts and the related legal issue that has been raised by some human rights non-governmental organisations as well as States’ representatives alleging the existence of a “right to abortion” under existing international law and advocating for it.¹

¹ A non-governmental organization based in the United States of America and called the Global Justice Centre (GJC) has recently launched an advocacy campaign to fight against denial of abortions for women impregnated by rape. The GJC interprets international humanitarian law (IHL) as providing a “right to abortion” to women impregnated

Before digging into the legal analysis, I would like to start briefly by highlighting the humanitarian issue.

A. The Humanitarian Issue

Women and girls who become pregnant following rape in a situation of armed conflict face an extremely difficult and painful situation. Pregnancy often adds troubles to the suffering that they have already experienced. They need to make excruciating choices, and may face major challenges and risks to their health and survival.

In situations in which women and girls have continued with these pregnancies, some have abandoned their babies; some who kept them have faced ostracism and exclusion, have had to leave their family and community, and relocate in order for them and their child to survive. In other cases the woman and/or the child have been killed by their families. Children born of rape may also suffer health and developmental problems, related to the circumstances of their pregnancy, birth and the psychosocial trauma of their mothers. For many victims of sexual violence facing such prospects, continuing with their pregnancy is seen as emotionally, rationally and practically impossible to cope with, and they therefore choose to interrupt the pregnancy.

However, access to safe abortion care in situations of armed conflicts is not always available.

by rape and a corresponding obligation to provide abortions to rape victims; failure to do so would constitute notably a discriminatory treatment and an inhuman and degrading treatment and would violate common Article 3 to the 1949 Geneva Conventions, their Additional Protocols as well as customary IHL. See, for instance:

http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34

Discussions revolving around the issue of sexual violence, abortion and IHL made also their way in the debates of the United Kingdom's House of Lords and the House of Commons. In this context, the following positions have been recently held at the House of Lords: Baroness Kinnock of Holyhead: "I firmly reject the notion that dealing with rape is down to culture, custom and religion and that that somehow excuses the denial of the right to safe abortion for women who have often endured mass rape which has scarred them both physically and psychologically." (...) Baroness Northover: "The denial of abortion in a situation that is life threatening or causing unbearable suffering to a victim of armed conflict may (...) contravene Common Article 3 [to the Geneva Conventions]. Therefore an abortion may be offered despite being in breach of national law by parties to the conflict or humanitarian organisations providing medical care and assistance". Available on: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130109-0002.htm>

Lack of, or limited access to safe abortion care, including legal restrictions, leads many women and girls to induce an abortion themselves or seek an abortion from unskilled providers. Unsafe abortion² is a significant public health concern.³ There are many reasons for this lack of access to safe abortion care in armed conflicts.

First, access to safe abortion care is dependent on the legal status of abortion. This status varies between different countries and derives from various cultural, ethical and religious conceptions and convictions. In almost all countries, however, the law permits abortion to save a woman's life, and in the majority of countries abortion is allowed to preserve her physical and/or mental health.⁴ How these exceptions are interpreted, and the evidence and process required for permission being granted, varies from country to country and can provide a barrier to access for many victims. According to data on national laws collected in 2011 by the UN Department of Social and Economic Affairs, Population Division, abortion is specifically allowed in the case of pregnancy following rape in 51% of countries.⁵ This indicates that countries remain very much divided as to the necessity to allow abortion for women or girls who become pregnant as a result of rape.

² "Unsafe abortion" is defined by the World Health Organization (WHO) as "a procedure for terminating an unintended pregnancy, carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both". See: "Safe abortion care: the public health and human rights rationale", in *Safe abortion: technical and policy guidance for health systems*, 2nd ed., WHO, Geneva, 2012, p. 18 (hereafter: WHO, "Safe Abortion care"). Available on: http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf

³ The WHO estimates that 22 million unsafe abortions take place around the world each year. Close to 50,000 pregnancy-related deaths are due to complications relating to unsafe abortion. One in four women and girls who undergo unsafe abortion are likely to develop temporary or lifelong disabilities requiring medical care. WHO, "Safe Abortion care", pp. 17-21. See also, *Beijing Declaration and Platform for Action*, 15 September 1995, para. 97: "Unsafe abortions threaten the lives of a large number of women, representing a grave public health problem as it is primarily the poorest and youngest who take the highest risk".

⁴ UN Department of Social and Economic Affairs, "World Abortion Policies 2013", available at: <http://www.un.org/en/development/desa/population/publications/policy/world-abortion-policies-2013.shtml>. According to the UN Department of Social and Economic Affairs, only six countries (Chile, Dominican Republic, El Salvador, Holy Sea, Malta and Nicaragua) completely prohibit abortion. In practice, however, a number of other countries tend to adopt a very restrictive interpretation of their laws even where it could allow abortion in some cases.

⁵ UN Department of Social and Economic Affairs, "World Abortion Policies 2013" (2013), available at: <http://www.un.org/en/development/desa/population/publications/policy/world-abortion-policies-2013.shtml>. The Centre for Reproductive Rights provides a map showing the status of the world's abortion laws, see: <http://worldabortionlaws.com/map/>

Besides legal restrictions, there are a number of other barriers to safe abortion care in situations of armed conflict. These can include:

- Lack of available health services and medical supplies – either as an endemic issue or as a consequence of the armed conflict;
- Distance from such services or impracticability of roads to reach such services – sometimes due to the situation of armed conflict;
- Lack of competence or training of health professionals;
- Negative attitudes by professionals in regard to sexual violence and pregnancy interruption;⁶
- Security and safety concerns;
- Medico-legal and forensic procedures required in order to prove a rape, combined with sometimes excessively restrictive definitions of rape;⁷
- Financial barriers. Sometimes due to the high price of abortion or of the medical certificate, rape victims do not have the means to get access to it;
- Fear of exclusion or stigmatization for having terminated a pregnancy. Sometimes, even fear of violence or even death if the family or community finds out about the termination of a pregnancy;
- Fear of reprisals, which prevent rape victims from denouncing the rape to the police and which in turn, impedes them to get access to abortion.

In brief, the humanitarian issue that we are discussing is much broader than the legal issue of the extent to which abortion is allowed for women and girls who have been raped in different countries. Practical, sociological and administrative barriers are as important as (or sometimes even more important than) legal barriers to the issue of safe access to abortion. In armed

⁶ See, for instance, Inter-American Commission on Human Rights, *Paulina del Carmen Ramírez Jacinto v. Mexico*, 9 March 2007 (friendly settlement): Case of a girl who became pregnant following rape and who could not have access to abortion because the public health institution denied her medical care, despite the fact that she got authorization from the Public Prosecutor to terminate the pregnancy.

⁷ K. Teklehaimanot and C. Hord Smith, "Rape as a Legal Indication for Abortion: Implications and Consequences of the Medical Examination Requirement", *Medicine and Law*, 2004, p. 91.

conflict situation in particular, ongoing violence, lack of security, destruction of roads, and lack of medical personnel constitute additional barriers.

With this overview in mind, let us see which response international law provides when it comes to abortion for women and girls who become pregnant as a result of rape. I will start by analysing IHL which provides the specific legal framework applicable in armed conflicts and then turn to human rights law and – very briefly – international criminal law.

B. The Legal Analysis

1) What does IHL say regarding abortion for victims of rape in armed conflicts?

A first observation that has to be made when looking at IHL treaties is that there is no reference to the issue of abortion at all. IHL treaties cannot be said, therefore, to provide a "right to abortion" or a universal obligation to provide abortions to rape victims.

There are, however, a number of IHL provisions that are relevant and useful when it comes to the humanitarian issue faced by victims of rape. As highlighted earlier, rape is prohibited and constitutes an international crime that must be prosecuted. If IHL were fully respected, the humanitarian issue of women and girls who become pregnant as a result of rape committed in connection with the armed conflict would not exist. This is an important but not the only contribution of IHL to the issue.

In addition to this, IHL stipulates that belligerents must provide medical care to the wounded and sick without discrimination.⁸ Women and girls who have been raped – as well as all other

⁸ Article 3 common to the Geneva Conventions; Article 12, para. 2, and 15, para. 1, of the First Geneva Convention; Article 12, para. 2, and 18, para. 1, of the Second Geneva Convention; Article 16, para. 1, of the Fourth Geneva Convention; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005, Rule 110. On non-discrimination, see: Common Article 3; Article 14 of the Third Geneva Convention; Article 10 Additional Protocol I; Article 7 of Additional Protocol II; J.-M. Henckaerts

pregnant women and girls – are covered by IHL provisions protecting wounded and sick persons and must receive the medical care and attention required by their condition. This is evidenced, for instance, by Article 8, paragraph a, of Additional Protocol I to the Geneva Conventions which defines “wounded and sick” as “persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, ... persons who may be in need of immediate medical assistance or care, such as ... expectant mothers...”⁹

IHL treaties do not specify what kind of medical care and attention is required in each specific case, but there is no reason why abortion could not be included within the meaning of medical care under IHL. This means that, in countries where abortion is permitted in such situations, women and girls must have access to it if they so wish. It does not mean however that IHL imposes abortion in such situations independently of the choice of women and girls or independently of what domestic law provides. There are no international prescriptions providing that abortion is a required or adequate medical treatment in some cases. The World Health Organisation (WHO) can provide, however, useful guidance for States when adopting and revising domestic laws and policies in the field of health. In this domain, the WHO is of the view that the provision of abortion in cases of rape should be an option,¹⁰ but as mentioned earlier, States’ laws are not uniform, with only a little bit more than half of them envisaging abortion in cases of rape when there are no additional risks for the life or health of the mother or foetus.

The prohibition of discriminatory treatment in the provision of comprehensive medical care under IHL also means that denying abortions to certain raped women or girls (e.g. women or girls considered as belonging to the opponent in an armed conflict) while allowing it for other

and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005, rules 88 and 110.

⁹ See also: Article 16 of the Fourth Geneva Convention which specifies that “the wounded and sick ... and expectant mothers, shall be the object of particular protection and respect”.

¹⁰ WHO, “Safe Abortion care”, p. 69.

raped women or girls constitutes discriminatory treatment that is clearly prohibited under IHL. If abortion is legally available in case of rape, the State must ensure that all women and girls in this situation have access to it, and that, for instance, health service providers who refuse to perform such services based on conscientious objection, nevertheless refer these women and girls to alternative health providers.¹¹

Let us see now whether human rights law – which can usefully complement IHL – provides a “right to abortion” for women and girls who are pregnant as a result of rape.

2) What does human rights law say regarding abortion for victims of rape in armed conflicts?

As for IHL treaties, human rights treaties do not generally provide for an explicit “right to abortion” and do not refer to the issue of abortion either.

One exception in this latter respect being the "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2003), called the Maputo Protocol, which provides in Article 14, paragraph 2 c), that “States Parties shall take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, *rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus* (emphasis added).” This Protocol has been ratified by 28 States to date and is the only human rights treaty – to the best of our knowledge – which explicitly provides for a duty for States to take all appropriate measures to authorise medical abortions in some specific cases.

Although there is no “right to abortion” in human rights treaties, the key question – and in our view the more interesting question – is the following. Could denial of abortion lead to other human rights violations?

¹¹ Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 24, Women and health*, 5 February 1999, para. 11.

Could, for instance, refusing abortion to women or girls who are pregnant as a result of rape amount to cruel, inhuman or degrading treatment? To date, there is no consensus among States as regards the answer to this question and abortion issues in general, even for women impregnated by rape. Some States consider that denial of abortion in some cases – in particular when it is life-threatening or when the pregnancy is the result of rape – can be considered as a cruel, inhuman or degrading treatment because of the psychological and/or physical pain suffered by the pregnant woman.¹² Other States are of the view that it belongs to each State to decide how to regulate abortion in accordance with their populations' culture, religion or beliefs and that international law does not prevent States from outlawing or regulating abortions both in peacetime and in armed conflict situations.¹³

According to the WHO, however, “the protection of women from cruel, inhuman and degrading treatment requires that those who have become pregnant as the result of coerced or forced sexual acts can lawfully access safe abortion services.”¹⁴

Human rights practice in this respect is not completely straightforward although there is a tendency to consider denial of abortion in some cases as a cruel, inhuman or degrading treatment.

Regarding denial of access to abortion for women impregnated by rape in countries where it is legal in such circumstances, there is binding case law and non-binding human rights practice

¹² NORAD Scoping Paper: *Sexual Violence in Conflict and the Role of the Health Sector*, n°21, 2011, p. 12: “The denial of abortion to women who become pregnant as a result of being raped has been considered to constitute torture or cruel, inhuman or degrading treatment. Consequently, the denial of the full range of medically appropriate care to victims of rape in situations of armed conflict constitutes a violation of their rights under applicable international law.” See also positions expressed in the United Kingdom’s House of Lords: Lord Lester of Herne Hill: “Denying a rape victim an abortion when there is medical need is also capable of amounting to a form of torture.”

Available on: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130109-0002.htm>

¹³ For instance, the Holy See and several Catholic and Arab countries advocated against the inclusion of forced pregnancy into the Rome Statute of the International Criminal Court fearing that the inclusion of this crime might be interpreted as imposing an obligation on national systems to provide forcibly impregnated women access to abortion. See C. Steains, “Gender Issues”, in R. S. Lee (ed. by), *The International Criminal Court: The Making of the Rome Statute. Issues – Negotiations – Results*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 366-367.

¹⁴ WHO, “Safe Abortion care”, p. 92.

indicating that this may amount to inhuman or degrading treatment.¹⁵ For instance, in the case *P. and S. v. Poland*, the European Court of Human Rights found a violation of Article 3 of the European Convention on Human Rights (inhuman or degrading treatment) because a girl of 14 years old who had been raped, and became pregnant as a result, did not have access to safe abortion and had been harassed by State authorities and anti-abortion activists despite the fact that Polish law allowed for abortion in case of rape.¹⁶

Regarding countries where abortion is completely outlawed or severely restricted, some human rights bodies have expressed concern in non-binding concluding observations or reports to the extent that it might lead to cruel, inhuman or degrading treatment in some circumstances.¹⁷ A good example of this trend is the 2013 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* of Juan E. Méndez, which interprets the practice of the Human Rights Committee as being that denial of access to safe abortions to

¹⁵ See *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, J. E. Méndez, 1 February 2013, UN Doc. A/HRC/22/53, para. 46: "International and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. Examples of such violations include (...) denial of *legally available health services such as abortion and post-abortion care* (emphasis added)." See also: Human Rights Committee (HRC), *Concluding Observations: Argentina*, 3 November 2000, UN Doc. CCPR/CO/70/ARG, para. 14: "On the issue of reproductive health rights, the Committee is concerned that the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, *inter alia* when there are clear health risks for the mother or when pregnancy results from rape of mentally disabled women."

¹⁶ See European Court of Human Rights (ECtHR), *P. and S. v. Poland*, 30 October 2012, paras 157-169. See also HRC, *Concluding Observation: Poland*, UN Doc. CCPR/CO/82/POL/Rev.1 (2004), para. 8.

¹⁷ See HRC, *General Comment n° 28: Equality of Rights between Men and Women*, 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add.10, which states that to assess compliance with Article 7 of the Covenant (prohibiting torture and cruel, inhuman or degrading treatment or punishment), the Committee "needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape" and that it also "needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape" (para. 11). It should be noted, however, that the Committee does not clearly contend that refusing abortion in cases of rape amounts to inhuman and degrading treatment. See also: Committee against Torture (CAT), *Concluding Observations: Peru*, 25 July 1996, UN Doc. CAT/C/PER/CO/4, para. 23: "Current legislation severely restricts access to voluntary abortion, even in cases of rape, leading to grave consequences, including the unnecessary deaths of women. According to reports received, the State party has failed to take steps to prevent acts that put women's physical and mental health at grave risk and that constitute cruel and inhuman treatment." See also: CAT, *Concluding Observations: Nicaragua*, 10 June 2009, UN Doc. CAT/C/NIC/CO/1, para. 16: "The Committee is deeply concerned by the general prohibition of abortion set forth in Articles 143-145 of the Criminal Code, even in cases of rape, incest or apparently life-threatening pregnancies that in many cases are the direct result of crimes of gender violence. (...) The Committee urges the State party to review its legislation on abortion ... and to consider the possibility of providing for exceptions to the general prohibition of abortion for cases of therapeutic abortion and pregnancy resulting from rape or incest".

women who have become pregnant as a result of rape is a breach of Article 7 of the International Covenant on Civil and Political Rights (on cruel, inhuman or degrading treatment).¹⁸

It remains to be seen whether these evolutions in the human rights sphere will crystallize into an accepted interpretation of the prohibition of cruel, inhuman or degrading treatment, which could in turn have an influence on corresponding IHL provisions. Indeed, IHL also prohibits cruel, inhuman or degrading treatments and these concepts should be defined in light of the evolutions taking place both in the IHL and in the human rights spheres. In brief, what is cruel, inhuman or degrading treatment should be the same under both human rights law and IHL. In that respect, these two bodies of law definitely converge.

Some human rights bodies, especially the Committee on the Elimination of Discrimination against Women (CEDAW) and the Human Rights Committee (HRC),¹⁹ have also indicated in non-binding concluding observations that the complete prohibition and criminalization of abortion envisaging no exception, including where the mother's life is in danger or to safeguard her physical or mental health or in cases where the mother has been raped, constitute a violation of (or at least constitutes a potential risk to) the rights of women to health and life.²⁰ Regarding the right to life, it has been invoked in different ways notably by pro-abortion activists (who focus on the right to life of the mother) and anti-abortion activists (who focus on the right to life of the foetus); and there is no internationally agreed definition as to when life begins.²¹ In any

¹⁸ See also: *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, J. E. Méndez, 1 February 2013, UN Doc. A/HRC/22/53, para. 50.

¹⁹ See Center for Reproductive Rights, *Briefing Paper: Bringing Rights to Bear*, p. 16. Available on:

http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF

²⁰ See, for instance : CEDAW, *Concluding Observation : Colombia*, 20 August 1999, UN Doc. A/54/38/Rev. 1, para. 393. It is to be noted that Colombia modified its domestic laws related to abortion since then. Today, abortion is allowed if pregnancy is the result of rape notably. See also: HRC, *Concluding Observation : Chile*, 30 March 1999, UN Doc. CCPR/C/79/Add.104, para. 15; HRC, *Concluding Observation : Paraguay*, 24 April 2006, UN Doc. CCPR/C/PRY/CO/2, para. 10. See also, but in a more generic way: HRC, *General Comment n° 28: Equality of Rights between Men and Women*, 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add.10, para. 10.

²¹ For instance, the European Commission and Court of Human Rights have interpreted article 2 of the European Convention on Human Rights (right to life) as not including the unborn child. See: European Commission of Human Rights, *Paton v. United Kingdom*, 13 May 1980, para. 9; ECtHR, *Vo. v. France*, 8 July 2004, para. 84. By contrast, the American Convention on Human Rights considers life as having begun from the moment of "conception" (Article 4,

case, in the context of pregnancy following rape, the right to life of the mother is not necessarily pertinent, unless the pregnant woman or girl face health complications which would threaten her life. The right to health appears to be more relevant in case of pregnancy following rape, especially when not only physical, but also mental and social well-being is introduced in the analysis.²²

More broadly, a number of human rights bodies have expressed concern over extremely restrictive and punitive abortion laws and have called upon States to consider reviewing restrictive legislation to permit abortion in cases where the life of the pregnant woman is at risk and in cases of rape or incest.²³

In brief, one can say that the practice of human rights bodies shows that – despite the fact that no “right to abortion” has been recognized so far – a failure to ensure access to abortion when it is legal as well as highly restrictive abortion laws – even when the life or health of the women or girls are at risk – have been considered, at least, an issue of concern.

3) What does International Criminal Law say?

To conclude this legal analysis, let me briefly highlight that under international criminal law, forced pregnancy can amount to a war crime or a crime against humanity. However, forced

para. 1). In a recent case, the Inter-American Court of Human Rights has specified that, nowadays, “conception” must be understood as occurring at the moment when the embryo becomes implanted in the uterus (rather than at the moment of mere fertilization) and that the protection of the right to life of the implanted embryo and then foetus is not absolute, but rather “gradual and incremental according to its development”. See Inter-American Court of Human Rights, *Artavia Mutillo et al. v. Costa Rica*, 28 November 2012, para. 264.

²² See the definition of health by the WHO: “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Preamble to the Constitution of the WHO as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the WHO, n°2, p. 100) and entered into force on 7 April 1948.

²³ See, for instance : Committee on the Rights of the Child (CRC), *Concluding Observation : Chile*, 23 April 2007, UN Doc. CRC/C/CHL/CO/3, para. 56; CEDAW, *Concluding Observation: Peru*, 2 February 2007, UN Doc. CEDAW/C/PER/CO/6, para. 25; HRC, *Concluding Observation : Chile*, 30 March 1999, UN Doc. CCPR/C/79/Add.104, para. 15; HRC, *Concluding Observation: Kenya*, 29 April 2005, UN Doc. CCPR/CO/83/KEN, para. 14; HRC, *Concluding Observation: Panama*, 17 April 2008, UN Doc. CCPR/C/PAN/CO/3, para. 9; Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observation: Chile*, 26 November 2004, UN Doc. E/C.12/1/Add.105, para. 53; CESCR, *Concluding Observation: Nepal*, 24 September 2001, UN Doc. E/C.12/1/Add.66, para. 55; CESCR, *Concluding Observation: Costa Rica*, 4 January 2008, UN Doc. E/C.12/CRI/CO/4, paras 25 and 46.

pregnancy is strictly defined by the Statute of the International Criminal Court as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” The Statute of the International Criminal Court further highlights that: “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”²⁴

To the extent that denial of abortion could amount to cruel, inhuman or degrading treatment in some specific circumstances, it would constitute a serious violation of IHL in armed conflict situations and would also entail individual criminal responsibility. So far, however – and to the best of our knowledge – there has been no international prosecution on this basis at the international level.

Finally, as mentioned earlier, international criminal law already criminalizes rape and other forms of sexual violence. Together with the prohibition of these crimes under IHL and human rights law, sanction has a preventive effect.

C. The ICRC’s approach to the humanitarian issue

Due to the considerable suffering faced by women and girls who become pregnant as a result of rape in armed conflict, and because of the risks to their life and health as a result of unsafe abortion, the ICRC is firm in its commitment to ensure that these victims have access to comprehensive health care, including access to safe abortion care in compliance with the applicable law.

The ICRC recognizes the urgent need to ensure that rape victims receive quality medical care and that in many countries this is lacking because access to functioning health facilities with trained staff and appropriate and reliable medical supplies is a major problem. The ICRC endeavours to support national medical services and medical personnel throughout the world in

²⁴ See Article 7, para. 2 f), of the Statute of the International Criminal Court. See also Article 8, para. 2 b) xxii and Article 8, para. 2 e) vi) of the Statute of the International Criminal Court.

their efforts to provide appropriate care for victims of armed conflict.

Access to safe abortion care, with caring support, including sympathy and professional counselling, allows the pregnant victim of rape to make an enlightened and informed choice regarding termination of pregnancy according to national laws. The ICRC will endeavour to support all victims of rape throughout the process of seeking appropriate medical care and other needs which are a consequence of sexual violence in armed conflict and other situations of violence.

This being said, the ICRC has to abide by the national laws of the country in which it operates wherever it carries out its activities. In countries where access to abortion is restricted and there is no special provision allowing abortion for rape victims, raped women and girls seeking abortion care could be subject to prosecution and sanction. Any violation of domestic law could also lead to judicial proceedings against ICRC staff (whether expatriate or resident). Any such incident would jeopardize the ICRC's humanitarian work, in particular its ability to access, assist and protect victims of armed conflict and other situations of violence, including victims of sexual violence.

In each context the ICRC needs to assess the national law and the practical impediments to the ability of rape victims to access medical care. Where appropriate, the ICRC can intervene on a case by case basis, and with the express consent of the victim of rape, with the authorities on a confidential basis to raise the issue of rape and ensure better access to medical care, including abortion. When States are committed to improve access to comprehensive medical services but have either not adapted their legislative provisions or failed to set in place supportive systems for victims, the ICRC can also support authorities in improving their legal frameworks, health practices and procedures.