

Submission to the Conflict Resolution Unit at the Department of Foreign Affairs and Trade, Ireland:

Developing a Second National Action Plan on Women, Peace and Security that Ensures the International Humanitarian Law Rights of Women and Girls Raped in Armed Conflict

Who We Are

The Global Justice Center (“GJC”) is a legal NGO that works to achieve sustainable justice, peace and security by building a global rule of law based on gender equality and universally enforced international human rights laws. As experts in human rights and international humanitarian law, the GJC advocates in the United States, the European Union (“EU”) and at the United Nations (“UN”) for the enforcement of international law including the Geneva Conventions’ gender equality guarantees and the UN Security Council resolutions on women, peace and security (“WPS”) in order to have a direct positive impact on the rights and lives of women and girls who have been subjected to or risk being subjected to rape and other forms of sexual violence in armed conflict. The Center provides a critical link between advocates on the ground in conflict, transitional settings and the international community and focuses on capacity-building in places such as Burma/Myanmar, Iraq, South Sudan and Sierra Leone.

I. Ireland Can and Must Ensure the Rights Female War Rape Victims under International Humanitarian Law

On the occasion of Ireland developing a second National Action Plan (“NAP”) on WPS the Global Justice Center encourages to continue its global leadership on the protection of women and girls raped in armed conflict by including explicit language in its NAP acknowledging its international humanitarian law (“IHL”) obligations to provide non-discriminatory medical care, justice, and reparations to victims of war rape.

The Global Justice Center applauds Ireland’s important work on gender equality and the promotion of UN Security Council resolution (“UNSCR”) 1325, the enforcement of IHL in the provision of humanitarian aid, and universal access to safe reproductive healthcare. Ireland can advance each of these objectives by explicitly addressing the fundamental and non-derogable IHL mandates that undergird the WPS agenda, including those prohibiting discrimination on the basis of sex and those requiring comprehensive medical care for the “wounded and sick” as well as justice and accountability for sexual violence crimes. This submission provides suggestions for more fully incorporating IHL into Ireland’s second NAP implementing UNSCR 1325.

II. National Action Plans and IHL

Women and girls raped in war are among the “wounded and sick,” therefore protected under IHL¹ by the absolute prohibition on adverse distinction, including on the basis of sex. The prohibition against adverse distinction applies to how all IHL rules are implemented—including those requiring justice and accountability for crimes of sexual violence and those requiring comprehensive medical care—and it is so fundamental that it constitutes customary international law.² Adverse distinction is interchangeable with the term “non-discrimination:” in all cases IHL cannot be implemented in ways that are “less favorable” for women than men.³ In reality, however, women and girls raped in war are regularly subjected to discrimination in the medical care they receive and in access to justice, accountability, and reparations.

In their NAPs implementing UNSCR 1325 and its subsequent resolutions 1820, 1888, 1889, 1960 2106, 2122 (“WPS Series”), States are bound to comply with their pre-existing, non-derogable duties under IHL, as articulated in the Geneva Conventions and customary international law. Each State’s obligation to comply with IHL—in each and every action that it takes—stems from common Article I (CAI) of the Geneva Conventions, which requires States “to respect and to ensure respect for these Conventions under all circumstances.” It is critical for States to recognize that, where the WPS Series sets out steps for carrying out pre-existing duties under IHL related to sexual violence in conflict, compliance with these duties is mandatory, not discretionary.

The WPS Series calls for the implementation of rights that fall into both international human rights law (“IHRL”) and IHL: the IHRL mandate to achieve gender equality and the IHL mandate to provide protection, medical care, and justice to women and girls affected by sexual violence in conflict. IHRL and IHL have distinct legal bases and distinct legal force. Many NAPs, when they don’t ignore the IHL prong altogether, fail to distinguish between these two legal regimes. When a NAP does not discuss IHL and its applicability to implementation of the WPS Series, compliance with IHL is highly unlikely. Furthermore, when the rights under IHRL and IHL are not distinguished from each other, this causes States to overlook the absolutely obligatory nature of their IHL obligations, including providing medical care and justice to female rape victims. In order to properly carry out States’ obligations under IHL, NAPs must explicitly state throughout under which regime a right is being enforced.

Distinguishing between which rights fall under which legal regime permits identification of (1) which body of law applies and (2) which governmental body or branch is responsible for enforcement of the right. The European Union Guidelines on Promoting Compliance with International Humanitarian Law is a prime example of policy guidance that distinguishes between the two legal regimes and identifies the responsible bodies.⁴ The Guidelines underline the importance of identifying “without delay” situations where IHL may apply and charges the responsible EU bodies with monitoring potential IHL situations within their authority and,

where appropriate, recommending action to promote compliance. It is imperative that NAPs take a similar approach to implementation of the WPS Series.

Following are descriptions of two specific IHL rights that NAPs should but generally do not identify:

❖ Prohibition on discrimination against female war rape victims in opportunities for justice, accountability, and reparations:

Women and girls raped in war must receive the full protection of IHL's framework for regulating the "means and methods" (weapons and tactics) of warfare. This framework, however, as currently implemented by States, fails to recognize and treat rape used as a tactic of warfare as it does all other unlawful weapons and tactics, such as chemical weapons, dum dum bullets or starvation. The fact that States recognize certain unlawful weapons and tactics, while they fail to recognize the illegality of an equally heinous and deadly tactic that disproportionately targets women and girls, violates IHL's absolute prohibition on discrimination. Treating the use of strategic rape as an unlawful tactic of war will provide war rape victims access to the same opportunities for justice, restitution, and reparations as are available to victims of other unlawful weapons or tactics.⁵

❖ Prohibition on discrimination against female war rape victims in medical care:

Female war rape victims have a right under the Geneva Conventions to comprehensive and non-discriminatory medical care.⁶ According to the former head of the legal division of the International Committee of the Red Cross, Professor Louise Doswald-Beck, "non-discrimination signifies that the outcome for each gender must be the same, not that the treatment must be identical. Therefore, as rape can result in additional consequences for women and girls compared to men and boys, most notably pregnancy, these additional consequences necessitate distinct medical care."⁷ Female war rape victims, like male war rape victims, must be provided all the necessary medical treatment required to restore their condition.

III. Ireland's 2011-2014 National Action Plan and IHL

While Ireland has made clear its dedication to "respect [...] and promote [...] the implementation of" IHL,⁸ its NAP provides no elaboration of the IHL requirements that apply to the implementation of UNSCR 1325. The NAP does cite 1325 language on "the need to implement international humanitarian and human rights laws that protect the rights of women and girls during and after conflicts" but does not specify the content of these legal

requirements, including the fundamental prohibition on non-discrimination on the basis of sex, or how Ireland intends to ensure compliance.⁹

As the Mid-Term Progress Report on the Implementation of Ireland’s NAP for UNSCR 1325 notes, one way to strengthen the NAP’s Pillar on “Protection from GBV and SEA and Other Violations of Women’s Human Rights and International Humanitarian Law” is to “include specific actions on International Humanitarian Law (IHL) standards in addition to Human Rights (HR) standards. In international conflict situations, IHL supersedes HR law and can provide mechanisms to protect women and increase the capacity of humanitarian organisations to understand women’s needs and monitor violations of their rights.”¹⁰ The Mid-Term Progress Report also notes, importantly, that “while Ireland is a solid advocate on human rights, actions in the NAP on applying International Humanitarian Law (IHL) could have been more specific, particularly where IHL relates to protection and justice.”¹¹

What follows are concrete recommendations for integrating the IHL rights of the “wounded and sick”—namely, women and girls raped in armed conflict—into Ireland’s second NAP.

IV. Recommendations for Integration of IHL into Ireland’s Second National Action Plan

- Distinguish between international humanitarian law and international human rights law
 - ✦ Delineate aspects of the NAP that are pre-existing duties under the IHL regime (e.g. responses to sexual violence in armed conflict),¹² distinguishing them from duties under the IHRL regime (e.g. measures to enhance gender equality). IHL is only mentioned in two contexts in Ireland’s 2011-2014 NAP: first, as part of a citation to UNSCR 1325, and second, as part of the title of “Pillar 3: Protection from GBV and SEA and other violations of women’s human rights and IHL.” The requirements of IHL, particularly as they relate to the rights of women and girls subjected to sexual violence in armed conflict, are not specified or discussed at all.
 - ✦ For instance, Ireland could add language to the Introduction explaining that certain mandates under the WPS Series are expressions of pre-existing duties under IHL, while other mandates articulate duties under IHRL. Ireland can lead the way for other States by recognizing and implementing not only the IHRL prong of the WPS series but also the IHL prong.
 - ✦ It would be useful to make the distinction between the IHL and IHRL prongs of the WPS series clear at the outset as well as throughout the NAP, including identifying which type of objectives fall underneath the IHL legal regime (e.g. responses to sexual violence in armed conflict) and

which fall under the IHRL legal regime (e.g. measures to enhance gender equality).

- ✦ Ireland would set a strong example for other States in terms of adherence to IHL if it acknowledges that it is legally bound—pursuant to common Article I to the Geneva Conventions—to carry out the WPS Series objectives that articulate pre-existing IHL duties.
- Ensure the right to non-discriminatory justice and reparations for women and girls raped in war
 - ✦ Affirm that rape used as a tactic of war to achieve military objectives is a prohibited tactic of war under the IHL framework regulating the means and methods of warfare.
 - ✦ Declare the use of sexual violence as a tactic of war a grave breach of the Geneva Conventions, which can be prosecuted using universal jurisdiction.
 - ✦ Commit to reforming domestic laws on rape such that they mirror the Rome Statute definition, and elements, of rape.
 - ✦ Commit to reforming domestic legislation on the means and methods of warfare and the implementation of IHL to integrate the prohibition of rape as an unlawful tactic of war.
 - ✦ Commit to encouraging and supporting national governments in conflict, transitional and post-conflict situations to reform their legislation on rape to align with the Rome Statute definition, and elements, of rape and their legislation on means and methods of warfare and implementation of IHL to integrate the prohibition of rape as an unlawful tactic of war.
 - ✦ Commit to seeking the amendment of the Rome Statute to include the use of rape as a tactic of war as one of the war crimes of using an unlawful weapon or tactic.
 - ✦ Recognize that States bear responsibility under IHL for the use of rape as an illegal tactic of war in their territories, including by their forces. This includes duties to cease such acts and to provide compensation and other forms of reparations.
 - ✦ Establish a process for researching and monitoring the injuries and deaths that result from rape, which is key to (1) jumpstarting the process of stigmatization that is critical to deterring the use of unlawful weapons and tactics under IHL, and (2) gathering information to update national medical protocols to provide better medical treatment for the specific and severe wounds that result from rape used as a tactic of war.¹³

- ✦ Commit to “address[ing] sexual violence as a method or tactic of conflict in peace agreements.” This will echo the language called for by the Secretary General in his 2013 report on conflict-related sexual violence in which he called on the Security Council, Member States and regional organizations to do so.¹⁴ This also supports the guidance put forth by the UN Department of Political Affairs (DPA) on addressing sexual violence in ceasefire and peace agreements, which states that a “recognition of sexual violence used in conflict as a method and tactic of war” is an essential provision to include in such agreements.¹⁵
- Ensure the right to non-discriminatory, comprehensive medical care
 - ✦ Declare the primacy of IHL over national laws in determining standards for treating victims of war rape, as was done in the Mid-Term Progress Report, where it was stated that “[i]n international conflict situations, IHL supersedes HR law and can provide mechanisms to protect women and increase the capacity of humanitarian organisations to understand women’s needs and monitor violations of their rights.” Recognize the obligation under IHL to provide comprehensive, non-discriminatory medical care to those raped in armed conflict, and ensure that their humanitarian aid implementing organizations comply with this mandate.
 - ✦ Implement and fully comply with the IHL mandates of UNSCR 2122, which Ireland supported and which urges Member States and United Nations entities to provide “access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination,” and UNSCR 2106, which Ireland co-sponsored and which 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. . .”
 - ✦ Reiterate Ireland’s policy, laid out in “One World, One Future: Ireland’s Policy for International Development,” to “promote universal access to reproductive healthcare, including ante-natal care and family planning services. Access to quality maternal and reproductive healthcare, supporting safe motherhood and allowing women to control their fertility, within the context of national legislative frameworks, is central to women’s empowerment and the health of nations.”¹⁶ Regarding situations of armed conflict, however, it should be made clear that such healthcare must be provided according to IHL’s comprehensive, non-discriminatory medical care mandate, which supersedes “national legislative frameworks.”

- ✦ Affirm that war rape can constitute torture and cruel, inhuman and degrading treatment, prohibited by international human rights law and common Article 3 the Geneva Conventions, and that its victims have a right to relief, recovery and rehabilitation in the form of comprehensive, non-discriminatory medical care.
- ✦ As IHL requires, encourage the provision of reparations to female war rape victims that have been denied comprehensive, non-discriminatory medical care and acknowledge that rape may entail different harms for men and women. Ensure that reparations take into account the costs of the physical, psychological, and economic consequences of rape and its injuries including, but not limited to, unwanted pregnancy and raising children born of rape.

¹ In addition, sexual violence in conflict implicates the prohibition on torture and cruel treatment. See Common Article 3, sub-para. 1, to all four Geneva Conventions of 12 August 1949.

² Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War common art. 3, 12 Aug. 1949, 75 U.N.T.S. 287. For a full discussion, see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. 1: RULES 308 (2005) (“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 on any other similar criteria is prohibited.”).

³ Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 14, 12 Aug. 1949, 75 U.N.T.S. 135. (“Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.”); see also Françoise Krill, *The Protection of Women in International Humanitarian Law*, INT’L REV. RED CROSS, 249 (31 Dec. 1985).

⁴ Updated European Union guidelines on promoting compliance with IHL (2009/C 303/06) (15 Dec. 2009), Section II, ¶ 12.

⁵ For further information on this legal argument, please see Janet Benshoof, *The Other Red Line: The Use of Rape as an Unlawful Tactic of Warfare*, 5(2) GLOBAL POLICY 146 (2014), available at <http://www.globalpolicyjournal.com/articles/conflict-and-security/other-red-line-use-rape-unlawful-tactic-warfare>; Global Justice Center, *Rape as an Illegal Tactic of War*, Research Overview and Frequently Asked Questions (June 2014), available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=416&cf_id=34; Global Justice Center, *Fact Sheet: Stopping the Use of Rape as a Tactic of War: A New Approach* (June 2014), available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=412&cf_id=34.

⁶ Global Justice Center, *The Right to an Abortion for Girls and Women Raped in Armed Conflict* (February 2011), available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34.

⁷ Letter from Prof. Louise Doswald-Beck, Former Head, Legal Division, International Committee of the Red Cross, to President Obama (10 Apr. 2013), at 2, available at http://www.globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=321&cf_id=34.

⁸ Irish Aid, *Humanitarian Relief Policy* (2009), at 10.

⁹ See Irish Department of Foreign Affairs and Trade, *Ireland's National Action Plan for Implementation of UNSCR 1325, 2011-2014*.

¹⁰ Bronagh Hinds and Karen McMinn, *Mid-Term Progress Report: Implementation of Ireland's National Action Plan for UNSCR 1325, 2011 – 2014*, at 23.

¹¹ Bronagh Hinds and Karen McMinn, *Mid-Term Progress Report: Implementation of Ireland's National Action Plan for UNSCR 1325, 2011 – 2014*, at 36.

¹² The IHL legal framework applies in situations of armed conflict and supersedes any contrary national law. It is absolute and non-derogable. In contrast, the IHRL legal framework is more limited in its application and is “less obligatory” than that of IHL.

¹³ For further information on this legal argument, please see Janet Benshoof, *The Other Red Line: The Use of Rape as an Unlawful Tactic of Warfare*, 5(2) GLOBAL POLICY 146 (2014), available at <http://www.globalpolicyjournal.com/articles/conflict-and-security/other-red-line-use-rape-unlawful-tactic-warfare>; Global Justice Center, *Rape as an Illegal Tactic of War, Research Overview and Frequently Asked Questions* (June 2014), available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=416&cf_id=34; Global Justice Center, *Fact Sheet: Stopping the Use of Rape as a Tactic of War: A New Approach* (June 2014), available at http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=412&cf_id=34.

¹⁴ United Nations, Report of the Secretary General on Sexual Violence in Conflict, ¶129, U.N. Doc. S/2013/149 (Mar. 14, 2013).

¹⁵ United Nations Department of Political Affairs, *Guidance for Mediators: Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements* (2012), at 8.

¹⁶ Government of Ireland, *One World, One Future: Ireland's Policy for International Development*, at 22.