



**Submission to the United Nations Universal Periodic Review
United States of America
Third Cycle
Thirty-Sixth Session of the UPR
Human Rights Council April-May 2020**

Contact Information:

Susan Yoshihara, Ph.D.
Senior Vice President for Research
1934 Old Gallows Road
Tysons Corner, VA 22182
susan@c-fam.org
www.c-fam.org

EXECUTIVE SUMMARY

1. In the previous two cycles of the Universal Periodic Review (UPR), the United States of America (U.S.) received recommendations that it change its laws and policies regarding funding for foreign assistance in order to fund abortions in other countries. Such recommendations are not only inconsistent with U.S. law and policy, but also reflect a distorted understanding of both international human rights law and international humanitarian law, also known as the laws of war. This submission supports the position of the U.S. in rejecting such recommendations, and the faulty legal interpretations on which they are based, and encourages reviewing member States in the forthcoming UPR of the U.S. to reject any attempts to subvert human rights and humanitarian laws in order to promote abortion.¹

RECOMMENDATIONS TO THE U.S. REGARDING ABORTION IN THE UPR

2. In the first cycle of the UPR, during its review in January 2011, the U.S. received a recommendation from Norway calling for “The removal of blanket abortion restrictions on humanitarian aid covering medical care given women and girls who are raped and impregnated in situations of armed conflict.”² The U.S. responded that it could not support this recommendation, “due to currently applicable restrictions.”³
3. In the second cycle of the UPR, the U.S. received five recommendations pertaining to abortion, specifically in the case of rape in conflict, from the Netherlands, the United Kingdom, Belgium, France, and Norway.⁴ Again, they were not supported by the U.S., with the partial exception of the French recommendation: to “ensure that the United States international aid allows access to sexual and reproductive health services for women victims of sexual violence in conflict situations.” Here, the U.S. allowed for a more charitable interpretation, within reason: “We support this recommendation’s principle: addressing the needs of women who have been victims of sexual violence in conflict situations.”⁵
4. Both previous reviews of the U.S. in the UPR took place during the administration of President Barack Obama, who expressed support for abortion domestically, received endorsements from leading U.S. pro-abortion groups, and rescinded the Mexico City Policy which blocked U.S. funding to foreign organizations promoting or providing abortions. Nevertheless, the U.S. delegation rejected the recommendations to change U.S. law and policy on funding overseas abortions and did not support any suggestion that an international right to abortion exists, either in human rights law or humanitarian law. While the reference to “currently applicable” restrictions implies that a change could be forthcoming—and was taken as encouragement by organizations seeking to use the UPR process as a means to catalyze such a change⁶—the Obama administration ultimately declined to reinterpret the relevant law: the 1973 Helms Amendment to the Foreign Assistance Act.
5. The Helms Amendment has been U.S. law for over four decades without ever being called a violation of international humanitarian law.

NO RIGHT TO ABORTION IN INTERNATIONAL HUMANITARIAN LAW

6. There is no right to abortion in international humanitarian law, or the laws of armed conflict, despite an ongoing campaign to assert the existence of such a right. The Global Justice Center, an activist law firm based in New York, has spearheaded the campaign, arguing for over a decade that legal protections for the unborn child constitute torture, cruel, inhumane, and degrading treatment (see below). They also claim that such protections violate international humanitarian law.
7. The Global Justice Center claimed that the U.S.’s refusal to fund overseas abortion is a violation of Common Article 3 of the Geneva Conventions, which states, “the wounded and sick shall be collected and cared for.”⁷ This interpretation relies on the idea that pregnancy is a war wound, and that abortion is required to “heal” the wound, akin to the amputation of a gangrenous leg. This view is biologically dubious: pregnancy, distinct from the manner of conception, is the sustenance of a nascent life and not a wound or sickness. The argument of Janet Benshoof, founder of the Global Justice Center, is that the refusal to provide abortions to women raped in conflict is a form of discrimination against women because only women can become pregnant. This view is not supported by U.S. law, where the current legal right to abortion is not based on a standard of non-discrimination at all, but rather an interpretation of a right to privacy.
8. The Global Justice Center’s interpretation of the Geneva Conventions to support “humanitarian abortion” was contested by the European Commission, whose Director-General for Humanitarian Aid and Civil Protection wrote a letter including the following:

“Neither IHL [international humanitarian law] nor international human rights law explicitly refer to abortion rights and therefore the legal primacy of international frameworks on this issue is not clear. Even if IHL were to give unequivocal rights in this field (which does not currently appear to be the case), in many countries this law is only enforceable if integrated into domestic law. Generally speaking, our humanitarian partners advise their staff operating in country to abide by the laws of the land. Violating domestic law would carry the risk of prosecution, which would put humanitarian aid at risk.”⁸
9. The subversion of humanitarian law to include a right to abortion would dehumanize children born of war, inflict further harms on their mothers, and add to the potential danger faced by workers providing aid in settings of conflict by attaching a potentially stigmatizing label to them as potential providers of abortion. It would also further call into question the body of humanitarian law, already under assault, which fulfills a needed role in ensuring help for victims and ending impunity for perpetrators of war crimes.

NO RIGHT TO ABORTION IN INTERNATIONAL HUMAN RIGHTS LAW

10. Just as there is no right to abortion in international humanitarian law, there is no international human right to abortion.⁹ While the phrases “sexual and reproductive health” and “reproductive rights” are often used to imply abortion—and therefore remain controversial in negotiations by UN member States—these terms have been defined once, at the 1994 International Conference on Population and Development (ICPD) to include abortion only where legal, and established no new international right to abortion, leaving it solely in the hands of national governments.

11. No binding international human rights treaty—those ratified by the U.S. or not—includes any human right to abortion, nor any language that could reasonably be interpreted to imply such a right.
12. Despite this clear rejection by member States of any internationally agreed right to abortion, treaty monitoring bodies have pursued a decades-long campaign to pressure member States who have ratified their respective treaties to liberalize their abortion laws.¹⁰
13. Even if one advocates the use of UN human rights treaties to interpret the Geneva Conventions, the fact remains that not a single UN human rights treaty mentions abortion. To the contrary, nations continually oppose any assertion that abortion is part of "sexual and reproductive health" when it is presented during negotiations and at the UN General Assembly. Claims that there is a positive or customary international law right to abortion are thus not founded but merely represent the aspirations of the claimants.

NO RIGHT TO ABORTION IN THE SECURITY COUNCIL’S WOMEN, PEACE, AND SECURITY AGENDA

14. The Women, Peace, and Security Agenda at the UN Human Rights Council recently became another venue for controversial claims regarding abortion. The Global Justice Center claims that the U.S. restrictions on abortion funding violate resolutions 2106, 2122 and 2242.¹¹ None of these resolutions mention abortion explicitly, and references to “sexual and reproductive health” services must be understood in the context of ICPD, where this term was defined as only including abortion where legal, and not as a human right.

THE IMPACT OF U.S. AID FUNDING AND GLOBAL LEADERSHIP

15. The U.S. is one of the largest funders of foreign aid in the world, in addition to providing technical expertise and promoting long-term economic growth, resilience, and ultimately, self-reliance.¹² The American people, whose taxes enable the U.S. government to provide this much-needed aid, have elected members of Congress who have passed laws restricting the use of that aid funding for abortions. They also, more recently, elected President Donald Trump, who from the earliest days of his administration has signaled his commitment to keep abortion out of U.S. health assistance. Not only did he reinstate the Mexico City Policy, but expanded it to cover more areas of funding, under the new name, “Protecting Life in Global Health Assistance.” Despite attempts to mischaracterize this policy as a cut to health assistance funding, it merely redirected existing funding to organizations reflected those of the U.S. government in that they did not promote or provide abortion.

CONCLUSION

16. The United States has justifiably refused to support or act on recommendations received in the previous two iterations of the UPR regarding its restrictions on funding for

abortion. Moreover, it should continue to do the same, as there is no binding standard in humanitarian law or human rights law that creates such an obligation.

17. The credibility of the UPR process depends, at least in part, on the nature of the recommendations being made within it: as a mechanism for promoting human rights, it should be a venue for upholding internationally agreed human rights and the obligations undertaken by member States by ratifying binding human rights treaties. The use of this venue to promote things such as abortion, which are not human rights or humanitarian obligations, erodes the credibility of both categories of law and of the UPR system as a way of promoting them. The rejection of such spurious recommendations by the U.S. could be seen as a defense of the integrity of these systems.

¹ Yoshihara, Susan, Abortion and the Laws of War: Subverting Humanitarianism by Executive Edict. University of St. Thomas Journal of Law & Public Policy, Volume IX, Number 1. Fall, 2014.

² Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. January 4, 2011. Doc. A/HRC/16/11

³ Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, U.N. Doc. A/HRC/16/11/Add.1

⁴ Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. May 11, 2015. Doc. A/HRC/30/12

⁵ Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, U.N. Doc. A/HRC/30/12/Add.1

⁶ Global Justice Center Legal Update: US Position on Imposing Abortion Restrictions on Victims of War Rape is Weakening. Global Justice Center. Available at <http://globaljusticecenter.net/documents/UPRUpdate.pdf>

⁷ International Committee of the Red Cross. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949: Conflicts not of an international character. Article 3. Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66>

⁸ Letter from Claus Sorensen, Director General, European Commission, to Janet Benshoof, President, Global Justice Center (Oct. 10, 2012), available at [http://globaljusticecenter.net/documents/Commissioner%20Response%20to%20GJC%2012%2020%2012%20\(2\).pdf](http://globaljusticecenter.net/documents/Commissioner%20Response%20to%20GJC%2012%2020%2012%20(2).pdf)

⁹ The San Jose Articles, 2011. Available at <https://sanjosearticles.com/>

¹⁰ Sylva, Douglas A., and Susan Yoshihara. Rights By Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion; International Organizations Research Group White Paper Number 8, second edition, 2009.

¹¹ Global Justice Center. United States of America UPR Mid-Term Submission to the UN Human Rights Council, February 2018

¹² USAID: The Journey to Self-Reliance, available at <https://www.usaid.gov/selfreliance>