

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No. ICC-02/04-01/15 A  
Date: 15 November 2021

**THE APPEALS CHAMBER**

**Before:** Judge Luz del Carmen Ibáñez Carranza, Presiding  
Judge Piotr Hofmański  
Judge Solomy Balungi Bossa  
Judge Reine Alapini-Gansou  
Judge Gocha Lordkipanidze

**SITUATION IN UGANDA**

**IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN**

**Public**

**Request for Leave to File Amici Curiae Submissions on forced pregnancy by Dr. Rosemary Grey, Global Justice Center (GJC); Amnesty International (AI); and Women's Initiatives for Gender Justice (WIGJ) pursuant to Rule 103 of the Rules of Procedure and Evidence**

**Source:**

**Dr. Rosemary Grey  
Global Justice Center (GJC)  
Amnesty International (AI)  
Women's Initiatives for Gender Justice (WIGJ)**

## A. Introduction

[1]. In response to the Appeals Chamber’s order,<sup>1</sup> we respectfully seek leave to file *amicus curiae* observations on the Rome Statute’s definition of ‘forced pregnancy’, noting that this is the Appeals Chamber’s first opportunity to interpret this crime.

## B. Expertise

[2]. Dr Rosemary Grey (lecturer, Sydney University Law School) is an expert in gender issues in international criminal law. Her publications include 13 peer-reviewed journal articles and her monograph *Prosecuting Sexual and Gender-based Crimes at the International Criminal Court* (Cambridge University Press, 2019). From 8 June to 8 September 2015, she worked with the ICC Office of the Prosecutor through the Internship and Visiting Professional Programme, where she assisted with legal research on topics including forced pregnancy.<sup>2</sup> Women’s Initiatives for Gender Justice (WICJ) is an international women’s human rights NGO advocating for accountability for sexual and gender-based crimes through the ICC’s work, including with conflict affected communities in Uganda, since 2004. It is the successor of the Women’s Caucus for Gender Justice (1997-2003) that brought together over 300 women’s human rights advocates and organizations in the Rome Statute negotiations. Global Justice Center (GJC) is an international NGO advocating for justice and accountability for sexual and gender-based violence and violations of reproductive autonomy in situations including Syria, Myanmar, and others. Its 2018 report, *Beyond Killing: Gender, Genocide, & Obligations Under International Law*, was the first of its kind to offer a comprehensive gender analysis of the crime of, and international legal obligations surrounding, genocide. Amnesty International (AI) is a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected, with over 50 years’ experience documenting and campaigning against human rights violations around the world.

## C. First proposed argument: Irrelevance of national law

[3]. Art. 7(2)(f) of the Rome Statute states: “‘Forced pregnancy’ means 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. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.’

[4]. The Trial Chamber stated that the final sentence of Art. 7(2)(f) ‘does not add a new element to the offence – and is thus not reproduced in the Elements of Crimes – but allays the

<sup>1</sup> Ongwen, [Order inviting expressions of interest as amici curiae](#), ICC-02/04-01/15-1884, 25 October 2021, [14].

<sup>2</sup> The views expressed herein are Dr Grey’s own views, which have been developed independently of the OTP.

concern that criminalising forced pregnancy may be seen as legalising abortion.<sup>3</sup> Mr Ongwen appears to argue that the Trial Chamber erred by interpreting the crime of ‘forced pregnancy’ without analysis of abortion laws in the state where the crimes occurred (Uganda).<sup>4</sup> That argument is incorrect. National laws on abortion have no bearing on the Rome Statute’s definition of ‘forced pregnancy’. The second sentence of Art. 7(2)(f) does not make the ICC’s jurisdiction over ‘forced pregnancy’ dependent on national legislation, nor create an element of the crime. It simply affirms that the legality of the relevant conduct under national law is distinct from its legality under international law. This is true of all crimes in the Rome Statute, but was made explicit for forced pregnancy in order to satisfy states who were concerned that defining forced pregnancy as a crime in the Rome Statute would affect their legal ability to regulate abortion under national law.<sup>5</sup> Thus, regardless of whether conduct amounting to ‘forced pregnancy’ is consistent with national law, an individual who commits such conduct could be prosecuted for ‘forced pregnancy’ as a war crime and/or crime against humanity under the Rome Statute (if the contextual elements for were met, and subject to the ICC’s jurisdiction and admissibility rules). Victims in states with strict abortion laws do not enjoy lesser protections under the Rome Statute than those in states with more liberal abortion laws.

#### **D. Second proposed argument: Elements of the crime**

[5]. The terms used in the Rome Statute indicate that: material element is the unlawful confinement of the victim in a particular circumstance (when the victim has been ‘forcibly made pregnant’);<sup>6</sup> the mental element is that the perpetrator meant to engage in the specified conduct (unlawful confinement) with knowledge of the specified circumstance (that the victim had been ‘forcibly made pregnant’);<sup>7</sup> and the perpetrator must have committed the unlawful confinement with one of two alternative special intents: ‘affecting the ethnic composition of any population’ or ‘carrying out other grave violations of international law’. The Pre-Trial and Trial Chamber correctly identified these elements.<sup>8</sup> No other elements need be established. In particular, it need not be shown that the perpetrator unlawfully confined the victim *with intent to keep that victim pregnant*. This is evident from the terms used in the Rome Statute and Elements of Crimes, and from the drafting history of the latter, which

<sup>3</sup> Ongwen, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021 (‘Ongwen Trial Judgment’), [2721].

<sup>4</sup> Ongwen, [Public Redacted Version of “Defence Appeal Brief Against the Convictions Judgment of 4 February 2021”, filed on 21 July 2021](#), ICC-02/04-01/15-1866-Red, 19 October 2021 (‘Ongwen Appeal Brief’), [962].

<sup>5</sup> C. Steains, ‘Gender Issues’, in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 357–390 at 368.

<sup>6</sup> Rome Statute, Art. 7(2)(f).

<sup>7</sup> Ibid, Art. 30(2)(a) and 30(3).

<sup>8</sup> Ongwen, [Decision on the confirmation of charges](#), ICC-02/04-01/15-422-Red, 23 March 2016, [97]-[101]; Ongwen Trial Judgment (note 3), [2723]-[2729].

shows that states considered but rejected a proposal to add words to that effect.<sup>9</sup>

[6]. The special intent requirement was crucial to obtaining support from states with concerns about the crime's relationship with restrictions on abortion under domestic law.<sup>10</sup> The first special intent option was a response to the Bosnian war, where Serb forces had reportedly raped and detained non-Serb women so that they would bear so-called 'Serb babies'.<sup>11</sup> The second option was included because some states saw the focus on ethnic cleansing as 'too restrictive'.<sup>12</sup> The phrase 'other grave violations of international law' must include all crimes within the ICC's jurisdiction, which states have termed 'the most serious crimes of concern to the international community as a whole'.<sup>13</sup> Guided by international human rights law, which is relevant to the interpretation of the Rome Statute by virtue of Art. 21(3), this phrase must also include violations of reproductive rights e.g. the rights: to life and freedom from torture (which include reproductive rights);<sup>14</sup> to decide, freely and responsibly, the number and spacing of one's children, without discrimination based on sex;<sup>15</sup> to the highest attainable standard of health, of which 'the right to sexual and reproductive health is an integral part';<sup>16</sup> to freedom from interference with privacy and family life,<sup>17</sup> and to control one's fertility.<sup>18</sup>

### **E. Third proposed argument: Reproductive autonomy**

[7]. The Trial Chamber stated: '[t]he crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family'.<sup>19</sup> The appeal brief asserts that this finding 'brings forced pregnancy into the political and ideological debate on women's personal and reproductive autonomy and the right to family, which the State Parties hoped to avoid through passionate debate and cautious safeguards.'<sup>20</sup> Here, the Defence introduces political concerns without cause. The notion that all people including women are entitled to personal and reproductive autonomy enjoys substantial support from states. That many states pressed for the inclusion of 'forced pregnancy' in the Rome Statute even when the negotiations became difficult, and that the states parties ultimately included this crime, is

<sup>9</sup> E. La Haye, 'Article 8(2)(b)(xxii)', in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 184, at 192.

<sup>10</sup> Steains (note 5), 367-368.

<sup>11</sup> Ibid, 366; P. Kirsch and J.T. Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference' 36 *Canadian Yearbook of International Law* (1999) 3-39 at 15.

<sup>12</sup> Steains (note 5), 368.

<sup>13</sup> Rome Statute, Art. 5.

<sup>14</sup> Human Rights Committee, *General Comment 36* (2018), [8]; [Amicus brief by Mr. Juan Mendez et al.](#) 2016.

<sup>15</sup> Proclamation of Teheran, adopted at the International Conference on Human Rights, Teheran, 22 April-13 May 1968, Art. 16; Convention on the Elimination of All forms for Discrimination Against Women, Art. 16(1)(e).

<sup>16</sup> Committee on Economic, Social and Cultural Rights, *General Comment 22* (2016), [1].

<sup>17</sup> International Covenant on Civil and Political Rights, Art. 17.

<sup>18</sup> Protocol to the African Charter on Human and Peoples' Rights (Rights of Women in Africa), Art. 14(1)(a).

<sup>19</sup> *Ongwen* Trial Judgment (note 3), [2717].

<sup>20</sup> *Ongwen* Appeal Brief (note 4), [961].

evidence. So is the fact that states have recognized rights pertaining to reproductive autonomy in international and regional human rights instruments (see para. 6 above). Also, human rights bodies have interpreted internationally recognized human rights as including reproductive rights, and expert bodies monitoring compliance with the core human rights treaties have recommended the liberalization of abortion.<sup>21</sup> To the extent that states involved in the Rome Statute negotiations had political or ideological misgivings about ‘forced pregnancy’, these were limited to the crime’s relationship with national abortion laws. However, such misgivings were resolved, to the satisfaction of the states concerned, by the inclusion of the special intent and the reference to national laws in Article 7(2)(f). Neither the official records of the Rome Conference nor firsthand accounts of the negotiations indicate that any state was opposed to criminalising forced pregnancies of the type for which Mr Ongwen was convicted.

[8]. Many states involved in the Rome Conference viewed the crime of ‘forced pregnancy’ as necessary to address a harm that was not addressed by existing crimes, nor by the Holy See’s proposed crime of ‘forced impregnation.’ For these states, forced pregnancy involved more than forcible impregnation; it involved restricting the victim’s ability to decide whether to proceed with a pregnancy initiated by force (the detention of raped women in Bosnia was a widely-cited example, but states were careful not to limit the definition to that one scenario).<sup>22</sup> The Trial Chamber’s phrase ‘personal and reproductive autonomy’<sup>23</sup> aptly expresses this idea, using terms more widely used in international law today. The focus on reproductive autonomy distinguishes ‘forced pregnancy’ from related crimes such as rape or imprisonment.

[9]. As the ICTY Trial Chamber has observed, ‘[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender.’<sup>24</sup> Reproductive autonomy is a key aspect of human dignity.<sup>25</sup> The ICC is justified in referring to this important concept. Declining to do so is not a ‘neutral’ approach; it is a regressive and politically significant choice.



Rosemary Grey,  
Sydney, 13 Nov. 2021



Akila Radhakrishnan (GJC)  
New York, 12 Nov. 2021



Melinda Reed (WIGJ)  
Helena, 14 Nov. 2021



Matt Cannock (AI)  
The Hague, 15 Nov. 2021

<sup>21</sup> [https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_Abortion\\_WEB.pdf](https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf); see also [Brief of Amici Curiae Human Rights Watch, Global Justice Center, and Amnesty International in Support of Respondents, Dobbs v. Jackson Women’s Health Organization](#), United States Supreme Court (2021) at 30.

<sup>22</sup> Steains (note 5), 366.

<sup>23</sup> *Ongwen* Trial Judgment (note 3), [2717]. See also [2722].

<sup>24</sup> *Furundžija*, [Trial Judgment](#), 10 December 1998, [183].

<sup>25</sup> Human Rights Committee, *General Comment 36* (2018), [3] read together with [8]; Report of the Special Rapporteur on the right to health, [UN Doc. A/66/254](#), 3 August 2011, [15].