

**Draft Articles on Prevention and Punishment of Crimes Against Humanity  
Should Advance Justice for Reproductive Autonomy**

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## Overview

It is imperative that the 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity (the “Draft Crimes Against Humanity Convention”)<sup>1</sup> protect the value of “reproductive autonomy,” meaning the right of every individual to exercise agency over their fertility; their choice about whether, and in what circumstances, to reproduce.

Rights related to reproductive autonomy are protected in international and regional human rights instruments.<sup>2</sup> In addition, the International Criminal Court (ICC) Trial and Appeals Chambers have affirmed that reproductive autonomy is the distinct value protected by the crime against humanity of forced pregnancy,<sup>3</sup> demonstrating that this value is already embedded in international criminal law.

However, forced pregnancy is only one of many violations of reproductive autonomy that impinge upon a person’s physical integrity and offend their human dignity. To be relevant to the lived experience of people whose reproductive autonomy is imperiled, particularly women and girls, the Draft Crimes Against Humanity Convention should protect against such violations by:

- Amending draft Article 2(1)(g) to refer to: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual **or reproductive** violence” (proposed additional text bolded);
- Removing the redundant and potentially confusing reference to national laws from the existing definition of forced pregnancy in draft Article 2(2)(f); and

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<sup>1</sup> The International Law Commission’s 2019 Draft articles on the Prevention and Punishment of Crimes Against Humanity are draft articles that remain subject to state consideration and negotiation before forming the potential basis of a new international treaty on crimes against humanity. For the purposes of this brief, we use the term “Draft Crimes Against Humanity Convention” in reference to the fact that the ILC’s draft articles could form the basis of a future convention on crimes against humanity. Int’l L. Comm’n, Draft Articles on Prevention and Punishment of Crimes Against Humanity, in Int’l L. Comm’n, *Report of on the Work of Its Seventy-First Session*, UN Doc. A/74/10 (2019) [hereinafter “Draft Crimes Against Humanity Convention”].

<sup>2</sup> Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol), art.14(1) (2003), (“State Parties shall ensure that the health of women, including sexual and reproductive health is respected and promoted. This includes: a) the right to control their fertility; b) the right to decide whether to have children, the number of children and the spacing of children; c) the right to choose any method of contraception; d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; e) the right to be informed on one’s health status and on the health status of one’s partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices; g) the right to have family planning education.”); Convention on the Elimination of Discrimination Against Women, art. 16(1)(e), 1249 U.N.T.S 13, (Dec. 1979), (“State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: [...] The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”); International Covenant on Civil and Political Rights, Article 17, 999 U.N.T.S. 171, (Dec. 1966), (“No one shall be subjected to arbitrary or unlawful interference with his *privacy, family*, home or correspondence, nor to unlawful attacks on his honour and reputation.”) (emphasis added); Beijing Declaration and Platform for Action, ¶96 A/CONF.177/20 and A/CONF.177/20/Add.1 (1995) (“The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”); Proclamation of Teheran, art. 16, (1968) (“Parents have a basic right to determine freely and responsibly the number and spacing of their children.”).

<sup>3</sup> Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, ¶2717 (Feb. 4, 2021) [hereinafter “Ongwen Trial Judgment”]; Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2022-Red, Judgment on Appeal against Trial Judgment, ¶¶18, 1055, 1063 (Dec., 15, 2022) [hereinafter “Ongwen Appeal Judgment”].

- Using gender-inclusive language (“woman, girl, or other person” instead of “woman”) in the definition of forced pregnancy in draft Article 2(2)(f).

For each proposed revision, this brief first summarizes the issue at a high level, provides detail on the reasoning and related jurisprudence in the following section, and is followed by the proposed recommendation.

## I. Reproductive violence

### Issue

1. Mirroring the 1998 Rome Statute, the Draft Crimes Against Humanity Convention recognizes two acts relating to reproduction: “forced pregnancy” and “enforced sterilization.”<sup>4</sup> The distinct value protected by those two acts is reproductive autonomy.<sup>5</sup>
2. However, forced pregnancy and enforced sterilization are only two of many violations of reproductive autonomy that cause serious bodily and mental harm to individuals, and constitute a grave violation of human dignity. Other comparably grave violations of reproductive autonomy include, *inter alia*:
  - forcing people to reproduce<sup>6</sup> by forcing them to become pregnant<sup>7</sup> or to impregnate a third party;
  - forcing people to breastfeed, or to “wetnurse” another person’s infant;<sup>8</sup> and
  - preventing reproduction through forced abortion or forced contraception.<sup>9</sup>
3. Despite their prevalence and gravity, such violations of reproductive autonomy have seldom been investigated and prosecuted as crimes against humanity in national or international justice processes. Explicit reference to such violations, using the appropriately concise yet flexible term “reproductive violence” would seek to remedy this justice and accountability gap.

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<sup>4</sup> Rome Statute of the International Criminal Court, art. 7(1)(g), 2187 U.N.T.S 90 (1998) [hereinafter “Rome Statute”]; Draft Crimes Against Humanity Convention, art. 2(1)(g).

<sup>5</sup> In relation to forced pregnancy, see Ongwen Appeal Judgment, at ¶¶ 18, 1055, 1063. The crime of enforced sterilization is yet to be adjudicated by the ICC. However, as per the Ongwen Appeal Judgment (¶1053), both forced pregnancy and enforced sterilization were included in the Rome Statute to protect “reproductive integrity.”

<sup>6</sup> See Patricia Viseur Sellers and Jocelyn Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade*, in GENDER AND INTERNATIONAL CRIMINAL LAW 159-160, 167-168 (Indira Rosenthal, Valerie Oosterveld and Susana SáCouto, eds., 2022) [hereinafter Sellers and Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade*].

<sup>7</sup> Forcible impregnation, as referred to here, is distinguishable from “forced pregnancy,” as defined in Article 7(2) of the Rome Statute and Article 2(2)(f) of the Draft Crimes Against Humanity Convention because it does not require proof that the victim was unlawfully confined, nor that the perpetrator intended to affect the ethnic composition of any population or to carry out other grave violations of international law. It requires only that the victim was impregnated by force, threat, coercion, or deception.

<sup>8</sup> Sellers and Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade* at 166.

<sup>9</sup> For example, the Colombian Constitutional recognized forced abortion and forced contraception in Corte Constitucional de Colombia (Judgment) Case No SU-599/19 as war crimes. Corte Constitucional de Colombia (Judgment) Case No SU-599/19 (11 December 2019). [hereinafter “Colombian Constitution Court 2019 Judgment”]. Such conduct, if committed as part of a widespread or systematic attack against a civilian population, ought also to be regarded as a crime against humanity.

## Argument

4. The ICC Trial and Appeals Chambers have recognized reproductive autonomy as a distinct legal interest protected under the Rome Statute, as noted above.<sup>10</sup> The ICC made that finding in 2022, in relation to the war crime and crime against humanity of “forced pregnancy.”
5. Other recent judgments recognizing violations of reproductive autonomy as war crimes and/or crimes against humanity include: the Colombian Constitutional Court’s 2019 decision regarding the war crimes of forced abortion and forced contraception in the FARC;<sup>11</sup> the Colombian transitional justice system’s 2014 findings of forced sterilizations and forced abortions by paramilitary groups;<sup>12</sup> and the Argentinian federal court’s 2018 decisions relating to findings of crimes against humanity from the military dictatorship era, one regarding forced abortion,<sup>13</sup> and another on the removal of newborns from mothers detained in clandestine centers and the forced suppression of their lactation.<sup>14</sup> Moreover, in the Sepur Zarco case, a Guatemalan court found that forced contraception against victims of sexual slavery by Guatemalan military forces in the context of the civil war amounted to a violation of Guatemalan “crimes against the duties of humanity.”<sup>15</sup> Further, credible reports of an alleged campaign of forced abortions in Nigeria perpetrated by the military against women who had been held in captivity by Boko Haram<sup>16</sup> led the Nigerian Human Rights Commission to open an investigation in 2023.<sup>17</sup>
6. These recent precedents from the ICC and domestic justice processes demonstrate the severity of violations of reproductive autonomy, indicate that they are already being considered as crimes under international law, and recognize the specific and distinct harm that such violations cause to victims/survivors.

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<sup>10</sup> Ongwen Appeal Judgment, at 3.

<sup>11</sup> Colombian Constitution Court 2019 Judgment, at 9.

<sup>12</sup> *Colombia v. Salvatore Mancuso Gómez and others* (Judgment), Tribunal Superior de Bogotá, Sala de Justicia y Paz (Superior Tribunal of Bogotá, Justice and Peace Chamber) Case 11 001 22 52 000 2014 00027, ¶¶2142-2162, 8692-8693 (Nov. 20, 2014).

<sup>13</sup> *Argentina v. María Eva Aebi, Juan Calixto Perizzotti, Ricardo Silvio Ramón Ferreyra, Oscar Alberto Farina* (Judgment) Tribunal Oral en lo Criminal Federal de Santa Fe (Federal Criminal Oral Court of Santa Fe), Judgment number 101/18 pp. 2-3, 7-9, 63-67, 142-156 (Oct. 16 2018).

<sup>14</sup> *Argentina v. Bignone, Reynaldo Benito Antonio and others* (Judgment) Tribunal Oral en lo Criminal Federal 3 (Federal Criminal Oral Court 3), Case Number 9243/2007 (1818/15) pp. 620-627 (Oct. 30 2018). *See also* the 2023 conviction by a military tribunal in the Democratic Republic of Congo for forced pregnancy as a crime against humanity. *Democratic Republic of the Congo v. Muyolo Mbawo Ndarumanga* (Judgment), Tribunal Militaire de Garnison D’Uvira (Military Garrison Court Of Uvira), Judgment RP 168772022, p. 49-50, 75-76 (May 15, 2023); *DRC: Conviction for forced pregnancy and other crimes against humanity for warlord Ndarumanga*, TRIAL INTERNATIONAL (Aug. 23, 2023) <https://trialinternational.org/latest-post/drc-conviction-for-forced-pregnancy-and-other-crimes-against-humanity-for-warlord-ndarumanga/#:~:text=At%20the%20end%20of%20the%20trial%2C%20the%20court%20found%20Ndarumanga,was%20awarded%20to%20all%20victims.>

<sup>15</sup> *Guatemala v. Estelmer Francisco Reyes Girón, Heriberto Valdéz Asig* (Judgment) Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente (First Sentencing Tribunal on Criminal, Drug Trafficking and Environmental Offences), Case C-01076-2012-00021 pp.492-493 (Feb. 26, 2016).

<sup>16</sup> R. Levinson, *More women describe enduring forced abortions in Nigerian Army programme*, REUTERS (Apr. 19, 2023) <https://www.reuters.com/investigates/special-report/nigeria-military-forced-abortion/#:~:text=As%20a%20Nigerian%20human%20rights,military%20custody%20without%20the%20consent.>

<sup>17</sup> Nigerian National Human Rights Commission, “NHRC Will Probe Alleged Abortion of Pregnancies by Military” (Jan. 13, 2023), <https://www.nigeriarights.gov.ng/nhrc-media/news-and-events/403-nhrc-will-probe-alleged-abortion-of-pregnancies-by-military-ujukwu.html>.

7. Certain violations of reproductive autonomy can be prosecuted using acts already enumerated as crimes against humanity in the Draft Crimes Against Humanity Convention, such as enslavement, torture, other inhumane acts or “any other form of sexual violence of comparable gravity” [to rape, sexual slavery, enforced prostitution, forced pregnancy or enforced sterilization], *inter alia*. Specifically, violations of reproductive autonomy fall within the definition of sexual violence.<sup>18</sup> They may also be an underlying act of persecution, especially persecution on the grounds of gender, race, disability, and/or indigenous status.<sup>19</sup>
8. However, it would be remiss to forego this historic opportunity to expressly recognize grave violations of reproductive violence in the forthcoming Crimes Against Humanity Convention.
9. At a normative level, such language would express a strong commitment to reproductive autonomy and recognize the distinct harm that such violations cause to victims/survivors. At a practical level, it would ensure that this historically overlooked category of violations is visible to all actors working to prevent and punish crimes against humanity, including investigators, prosecutors, and judges in both international and national forums.
10. In criminal processes, clarity that violations of reproductive autonomy can be crimes against humanity would also reduce the need for time and resource-intensive litigation on this issue, which has benefits for trial efficiency and would reduce the likelihood of any inconsistent jurisprudence.
11. The most effective way to achieve this would be to amend Article 2(1)(g) as follows:  
“Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual **or reproductive** violence of comparable gravity.”  
(proposed additional text bolded)
12. Like the existing references in the Draft Crimes Against Humanity Convention to “any other form of sexual violence of comparable gravity”<sup>20</sup> and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,”<sup>21</sup> this phrasing is sufficiently flexible to be adapted to different contexts, while including a gravity threshold to provide sufficient parameters to decision-makers and satisfy the requirement of *nullum crimen sine lege*.
13. There is a precedent for this proposed amendment. In 1998, when negotiating the Rome Statute, states agreed that it would be beneficial to expressly articulate rape and other forms

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<sup>18</sup> The Hague Principles on Sexual Violence 18 (2019), <https://4genderjustice.org/wp-content/uploads/2020/02/MASTER-DOC-The-Hague-Principles-on-Sexual-Violence.pdf>.

<sup>19</sup> See Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in GENDER AND INTERNATIONAL CRIMINAL LAW 231-265 (Indira Rosenthal, Valerie Oosterveld and Susana SáCouto, eds., 2022); Regarding the crime against humanity of “other forms of sexual violence,” see also *Civil Society Declaration on Sexual Violence*, WOMEN’S INITIATIVE FOR GENDER JUSTICE, Part 2(6), <https://4genderjustice.org/wp-content/uploads/2019/11/English-Civil-Society-Declaration-on-Sexual-Violence.pdf> (“Each of the following indicia suggests that an act is sexual in nature [...] The act involved use, interference, control, or degradation of fluids or tissue associated with sexual and reproductive capacity, including semen, vaginal fluids, menstrual blood, breast milk, or placenta.”).

<sup>20</sup> Draft Crimes Against Humanity Convention, art. 2(1)(g).

<sup>21</sup> *Id.*, art. 2(1)(k).

of sexual violence as war crimes and crimes against humanity, even though such acts could be prosecuted using existing war crimes and crimes against humanity such as torture, enslavement, and other inhumane acts. This explicit language was seen as important, given that despite being theoretically prosecutable, sexual crimes had historically been overlooked in the enforcement of international criminal law and international humanitarian law. It was understood that more explicit language around sexual violence would help to break that pattern by foregrounding this type of violence in the minds of investigators, prosecutors, and judges, and would send a strong signal that such violence offended international norms. The Rome Statute’s reference to “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” was included for those reasons.<sup>22</sup>

14. Likewise, an explicit reference to “reproductive violence” in the Draft Crimes Against Humanity Convention can incentivize accountability for a historically under-prosecuted type of violence, provide a more specific deterrent to potential offenders, and have important expressive value.

### Recommendation

15. Amend Article 2(1)(g) to refer to:  
“Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual **or reproductive** violence of comparable gravity.” (proposed additional text bolded)

## **II. Forced Pregnancy**

### Issue

16. Draft Article 2(1)(g) recognizes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>23</sup> Draft Article 2(2)(f) defines “forced pregnancy” 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. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”<sup>24</sup> (emphasis added)

17. The second sentence of this draft article is unnecessary language—which was a bare political compromise and has no legal purpose—replicated from the Rome Statute. As detailed below, it should be removed from the definition of forced pregnancy for multiple reasons.

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<sup>22</sup> Regarding the arguments for expressly enumerating rape and other forms of sexual violence in the Rome Statute, see Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law* (2000) 46 MCGILL LAW JOURNAL 217-240 (2000). Regarding the possibility of prosecuting rape and other forms of sexual violence using previously recognized war crimes and crimes against humanity such as torture, enslavement, and other inhumane acts, see SERGE BRAMMERTZ AND MICHELLE JARVIS, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (2016).

<sup>23</sup> Draft Crimes Against Humanity Convention, art. 2(1)(g).

<sup>24</sup> *Id.*, art. 2(2)(f).

18. In addition, the word “woman” in the first sentence should be revised to “woman, girl, or other person.” It is now recognized that persons other than cisgender women can become pregnant (including transgender men, intersex persons, and non-binary/gender non-conforming persons). This simple change is imperative to ensure that the Draft Crimes Against Humanity Convention is inclusive, non-discriminatory, and in line with international human rights.

### Argument

#### *Unnecessary national laws sentence should be removed*

19. The ILC Special Rapporteur on crimes against humanity acknowledged that, while several formulations of crimes against humanity exist, the “most widely accepted” is Article 7 of the Rome Statute.<sup>25</sup> Thus, the definition of crimes against humanity from the Rome Statute was copied verbatim into the Draft Crimes Against Humanity Convention (other than three non-substantive changes).<sup>26</sup> Accordingly, the definition of forced pregnancy in draft Article 2(2)(f) is reproduced verbatim from the definition of forced pregnancy from Article 7(2)(f) of the Rome Statute.

20. While the Rome Statute defines eight of the Article 7 acts that constitute crimes against humanity,<sup>27</sup> forced pregnancy is the *only* one for which there is a sentence referring to national legislation. Scholars have noted that the deference to national laws on forced pregnancy is in “stark contrast to how other crimes are prosecuted by the ICC,” which generally applies domestic law only as a last resort.<sup>28</sup>

21. The drafting history of the Rome Statute shows that there was no functional or legal reason for this second sentence regarding national laws. Rather, this sentence was inserted as a political compromise to accommodate concerns by some states that identifying forced pregnancy as a war crime and crime against humanity in the Rome Statute would necessarily nullify restrictions on abortion under national law.<sup>29</sup> Those concerns were manifestly

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<sup>25</sup> Int’l L. Comm’n, First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/680, ¶121 (Feb. 17, 2015).

<sup>26</sup> The three non-substantive changes to the definition of crimes against humanity from article 7 of the Rome Statute to the Draft Crimes Against Humanity Convention are: (i) replacing “For the purpose of this Statute” with “For the purpose of the present draft articles” in article 2(1); (ii) making the same change in what was formerly draft article 3(3) (which contained the definition of gender and was subsequently removed by the ILC); and (iii) replacing the language in article 7(1)(h) of the Rome Statute which criminalized acts of persecution when undertaken “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court” to “in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes.” ILC, *Report on the work of the sixty-ninth session*, at 23.

<sup>27</sup> Rome Statute, art. 7(2). The Rome Statute contains specific definitions for the acts of extermination, enslavement, deportation or forcible transfer of population, torture, forced pregnancy, persecution, apartheid, and enforced disappearance of persons.

<sup>28</sup> Milan Markovic, *Vessels of Reproduction: Forced Pregnancy and the ICC*, 16 MICH ST. J. INT’L L. 439, 448 (2007).

<sup>29</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Rome, 15 June - 17 July 1998, Official Records Vol. II available at <http://legal.un.org/icc/rome/proceedings/contents.htm> [hereinafter Rome Conference Official Record, Vol. II]; Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 368 (Roy S. Lee ed., 1999) (“The rather curious second sentence [of Article 7(2)(f)] was inserted as an additional measure to reassure the Catholic and Arab countries that the inclusion of forced pregnancy would not interfere in the legal right of States to regulate nationally with respect to pregnancy anti-abortion laws.”); see also Christopher K. Hall, Joseph Powderly and

unfounded: the Rome Statute's definition of forced pregnancy already excluded ordinary restrictions on abortion under national law, due to its requirements that the victim must have been forcibly impregnated, that the victim was subjected to unlawful confinement, *and* that such confinement was committed with the specific intent of either "affecting the ethnic composition of a population" or "carrying out either grave violations of international law." In addition, the *chapeau* elements for either war crimes or crimes against humanity must also be met. Nonetheless, to put an end to the debate and secure agreement by the conclusion of the Rome Conference, the reference to national laws was included to appease the states concerned.<sup>30</sup>

22. Thus, the second sentence of the Rome Statute's definition of forced pregnancy is merely stating the obvious: the ICC has no authority to directly amend, nullify or void national legislation.<sup>31</sup>
23. In the 2022 *Ongwen* appeal judgment, the ICC Appeals Chamber affirmed that this second sentence on national laws was a political compromise that has no legal impact on the Rome Statute's definition of forced pregnancy. Specifically, the Appeals Chamber confirmed that the second sentence "was inserted to alleviate the concerns raised by some States that the forced pregnancy provision might be interpreted as interfering with the States' approach to abortion"<sup>32</sup> and does not add an additional element to the crime.<sup>33</sup>
24. Given that the sentence has no legal utility, it need not be retained in the Draft Crimes Against Humanity Convention. It only adds confusion to an already long and intricate definition and gives undue influence to religious and ideological concerns about control over women's bodies, rather than addressing the grave violation that the crime seeks to remedy.<sup>34</sup>
25. Further, as explained above, the compromise language is superfluous because the crime against humanity of forced pregnancy envisages a very particular and grave set of circumstances that are so specifically defined, it could not on its own implicate national abortion legislation.
26. Further, the national laws sentence has not been replicated in the legislation of other international and internationalized criminal courts or in many national laws defining the crime.<sup>35</sup> This affirms the fact that the sentence is an unnecessary appendage to the crime of

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Niamh Hayes, *Article 7*, in *THE ROME STATUTE: A COMMENTARY*, 275 (O. Triffterer and K. Ambos eds., 2016). Note that the inclusion of forced pregnancy "made some delegations fear that national law prohibiting abortion would have to be deemed being in violation of international law."

<sup>30</sup> Carmela Beuhler, *War crimes, crimes against humanity and genocide: The crime of forced pregnancy in the nascent system of supranational criminal law* 5 NEMESIS, at 161, 162, (2002). ("Alongside the Vatican, some predominantly Catholic and Muslim States were in harsh opposition, driven by the fear that a provision on forced pregnancy could interfere with national abortion legislation in that it might oblige states to provide forcibly impregnated women access to abortion.... As a result of a compromise the second sentence of Article 7.2(f) was included...").

<sup>31</sup> See analysis in *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15 A A2, Amici Curiae Observations on the Rome Statute's definition of "forced pregnancy" by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International ¶¶5-16 (Dec. 23, 2021).

<sup>32</sup> *Ongwen* Appeal Judgment, at 1065.

<sup>33</sup> *Id.* at 1066.

<sup>34</sup> Soh Sie Eng Jessie, *Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide*, 4 NZJPIL 311 (2006).

<sup>35</sup> *Forced pregnancy: a commentary on the crime in international criminal law*, AMNESTY INTERNATIONAL 22 (JUN. 30, 2020) <https://www.amnesty.org/en/documents/ior53/2711/2020/en/> [hereinafter "*Forced pregnancy: a commentary on the crime in*



forced pregnancy. For example, statutes for international courts concluded after the Rome Statute excluded the national laws language, including the 2002 Statute of the Special Court for Sierra Leone<sup>36</sup> and the 2003 Statute of the Iraqi Special Tribunal.<sup>37</sup> A range of domestic penal codes have also codified forced pregnancy without the national laws language, including states such as France,<sup>38</sup> the Republic of Congo,<sup>39</sup> the Czech Republic<sup>40</sup>; Finland<sup>41</sup>; Georgia<sup>42</sup>; Lithuania<sup>43</sup>; Montenegro<sup>44</sup>; and Serbia<sup>45</sup>. Even countries with restrictions on abortion—those for which the sentence is purportedly most relevant—have opted to forgo such a provision.<sup>46</sup>

27. In addition, the national law sentence stands in contrast to the very values being protected by the crime. Affirmed by the Appeals Chamber in *Ongwen*, the protected value of the crime of forced pregnancy is reproductive autonomy.<sup>47</sup> Specifically, the Appeals Chamber held that the main focus of the crime is to “protect a woman’s reproductive autonomy,” “reproductive health,” “reproductive rights, including the right to be pregnant and to autonomously determine the way in which she carries out her pregnancy,” and “the right to family planning.”<sup>48</sup>
28. The Appeals Chamber’s finding echoes the progression of reproductive rights in human rights law. Leading international experts and treaty bodies have found that restrictions on access to abortion, including those imposed through national legislation, constitute violations of the rights to health,<sup>49</sup> to life,<sup>50</sup> to non-discrimination, and to be free from torture. For example, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that “[h]ighly restrictive abortion laws that prohibit abortions even in cases

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*international criminal law*”]. Though, the sentence was retained in the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes, and Other International Crimes, art. 5(3)(f) (May 2023).

<sup>36</sup> Statute of the Special Court for Sierra Leone, art. 2(g), 2178 U.N.T.S. 317 (2010).

<sup>37</sup> Statute of the Iraqi Special Tribunal, arts. 12(a)(7), 13(b)(22), 13(d)(6) (2003).

<sup>38</sup> France, Code pénal, art. 212-1(7) (1994).

<sup>39</sup> Republic of Congo, Loi N°8-98, art. 6(g) du 31 octobre 1998.

<sup>40</sup> Czech Republic, Criminal Code, sec. 401(1)(d) (2009).

<sup>41</sup> Finland, Criminal Code, Chapter 11 (War Crimes and Crimes against Humanity), sec. 3(4)(1889).

<sup>42</sup> Georgia, Criminal Code, art. 408 (1999).

<sup>43</sup> Lithuania, Criminal Code, art. 100 (1968).

<sup>44</sup> Montenegro, Criminal Code, art. 427 (2003).

<sup>45</sup> Serbia, Criminal Code, art. 371 (2005).

<sup>46</sup> See, e.g., Burkina Faso, Code pénal, art. 422-1 (1996).

<sup>47</sup> In its 2021 judgment, the Trial Chamber found that the enumeration of the crime of forced pregnancy in the Rome Statute protects the distinct legal interest of personal and reproductive autonomy. The Trial Chamber found that the crime is “grounded in the woman’s right to personal and reproductive autonomy and the right to family.” *Ongwen* Trial Judgment, at ¶2717. The Defence challenged that finding, asserting that the Trial Chamber brought “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.” *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Defence Appeal Brief Against the Convictions in the Trial Judgment, ¶961 (Oct. 19, 2021).

<sup>48</sup> The Appeals Chamber concluded this on the basis that article 7(2)(f) of the Statute defines forced pregnancy as “the unlawful confinement of a woman forcibly made pregnant” and that it was criminalized separately from other crimes listed in article 7(1) of the Statute, such as rape and imprisonment. *Ongwen* Appeal Judgment, at ¶¶1055, 1063.

<sup>49</sup> Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/66/254 (Aug. 3, 2011).

<sup>50</sup> Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/35/23 (Jun. 6, 2017).

of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women's right to be free from torture and ill-treatment.”<sup>51</sup>

29. UN treaty bodies and independent experts have also increasingly criticized abortion laws that restrict and undermine pregnant people's reproductive autonomy and their right to make decisions about their pregnancy, noting that restrictive abortion policies “negate [women's] autonomy in decision-making about their own bodies.”<sup>52</sup>
30. The status of abortion as a recognized fundamental right has evolved significantly since 1998 when the Rome Statute was adopted, and there is no question that at a minimum, abortion is considered a fundamental right in cases of sexual violence. Accordingly, there is no justification to permit this regressive (and superfluous) language in a new draft international crimes against humanity treaty that suggests that states' national laws could provide an exception to forced pregnancy.

#### *Forced pregnancy definition should utilize gender-inclusive language*

31. Finally, forced pregnancy is a gender-specific crime that, by its nature, only affects persons with the capacity to become pregnant. However, the current language of the definition of forced pregnancy uses the limited term “woman” to describe the victim of this crime, and thus impermissibly excludes entire categories of persons who could be subjected to the harm of forced pregnancy, including transgender men, intersex persons, or non-binary/gender non-conforming persons who are biologically capable of becoming pregnant.
32. Indeed, as the essence of the crime is the denial of autonomy over a pregnancy by means of unlawful confinement, as the *Ongwen* Appeals Chamber found, then the crime must be applied to *all* pregnant persons subjected to such treatment.<sup>53</sup> To do otherwise would be discriminatory.<sup>54</sup>

#### Recommendation

33. The definition of forced pregnancy in draft Article 2(2)(f) should be revised to (i) remove the unnecessary language on national laws relating to pregnancy in the second sentence, and (ii) add the words “girl, or other person” to the word “woman,” as follows:

“the unlawful confinement of a woman, **girl, or other person** 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.~~”<sup>55</sup> (proposed additional text bolded)

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<sup>51</sup> Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57 (Jan. 5, 2016) ¶43.

<sup>52</sup> UN Office of the High Commissioner for Human Rights, “‘Unsafe abortion is still killing tens of thousands of women around the world’ – UN rights experts warn” (Sept. 28, 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E>.

<sup>53</sup> *Forced pregnancy: a commentary on the crime in international criminal law*, 35.

<sup>54</sup> *Id.*

<sup>55</sup> Draft Crimes Against Humanity Convention, art. 2(2)(f). [emphasis added]