

RESEARCH PAPER

DOCUMENTING REPRODUCTIVE VIOLENCE

Unveiling Opportunities,
Challenges, and Legal Pathways
for UN Investigative Mechanisms

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UN WOMEN

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EXECUTIVE SUMMARY

Reproductive violence is a distinct form of sexual and gender-based violence (SGBV) targeting reproductive autonomy, a right protected under international law.¹ The impacts of reproductive violence can be as profound, damaging, and long-lasting as those accompanying other forms of violence, and can compound the pain of other forms of SGBV.

Yet recognition of reproductive violence as a distinct harm has historically been overlooked, including in international investigations of atrocities, conflict, humanitarian crises, or other instability.

International investigations often play a key role in guiding international responses to crises, and the omission of reproductive violence can thus have significant ripple effects. Victims may go un- or under-recognized; vital reproductive services may be absent from humanitarian responses; prevention efforts may fail to address the risks and inflammatory impacts of this violence; and justice, accountability, and reparations efforts may omit reproductive harms from consideration.

This paper analyzes the documentation of reproductive violence to date by UN-mandated fact-finding and other investigative mechanisms. To enhance documentation going forward, the paper also provides guidance on the international law governing reproductive harms. The guidance explains how international criminal, humanitarian, and human rights laws prohibit reproductive violence – including forced pregnancy, enforced sterilization, forced abortion, forced contraceptive use, restricting access to reproductive care, destroying essential reproductive healthcare infrastructure, and other forms of reproductive violence.

To understand the dynamics governing documentation of reproductive violence, individual interviews were conducted with current and former gender advisors to UN investigative mechanisms. Further interviews were conducted with members of civil society and academia to provide additional context. An in-person session was held in May 2024 in Geneva to present the initial findings and allow gender advisors, UN Women, the Office of the United Nations High Commissioner for Human Rights (OHCHR), and Justice Rapid Response (JRR) experts to provide feedback and further information. UN Women and OHCHR also reviewed multiple drafts of the paper to contribute further insights. Extensive desk research complemented the interview feedback and written inputs.

¹ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Judgement on Appeal, Appeals Chamber, ¶ 1055, fn. 2334 (Dec. 15, 2022); see also, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1249 UNTS 13, Arts. 10, 11, 12, 14, 16 (1981); Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 24 on Art. 12 of the Convention (Women and Health), A/54/38/Rev.1 (Aug. 20, 1999); CEDAW Committee, General Recommendation No. 19 on violence against women, A/47/38 (Feb. 1, 1992); International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, Art. 12 (1976); Covenant on Economic, Social and Cultural Rights (CESCR) Committee, General Comment No. 14 on Art. 12: the right to the highest attainable standard of health, E/C.12/2000/4 (Aug. 11, 2000); CESCR Committee, General Comment No. 22 on the right to sexual and reproductive health on Art. 12 of the Covenant, UN Doc. E/C.12/GC/22 (May 1, 2016); Convention on the Rights of the Child (CRC), 1577 UNTS 3, Art. 24 (1989); Committee on the Rights of the Child (CRC Committee), General Comment No. 13 on the right of the child to freedom from all forms of violence, CRC/C/GC/13 (Apr. 18, 2011); Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, Arts. 23(1)(b)-(c), 25 (2006); Committee Against Torture (CAT Committee), Conclusions and Recommendations: Chile (Jun. 14, 2004), CAT/C/CR/32/5; CAT Committee, Conclusions and Recommendations: Peru (Jul. 25, 2006), CAT/C/PER/CO/4; CAT Committee, General Comment No. 2: Implementation of Art. 2 by States Parties, CAT/C/GC/2 (2008); Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (1995); Human Rights Council, Resolution on Accelerating Efforts to Eliminate all Forms of Violence Against Women, A/HRC/29/L.16/Rev.1 (2015); Human Rights Committee, General Comment No. 28 on the equality of rights between men and women, CCPR/C/21/Rev.1/Add.10 (2000); African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art. 14 (2003); General Assembly of the Organization of American States (OAS), Social Charter of the Americas, Res AG/RES 2699 (XLII-O/12) (2012).

The research identifies three categories of facilitating factors that can foster effective documentation of reproductive violence: 1) structural elements, including the strength of a mechanism's mandate as well as adequate staffing and resourcing; 2) law and language related to reproductive violence, including emergent international jurisprudence; and 3) civil society and community participation.

The research further identifies four categories of barriers that can impede effective documentation: 1) stigmatization of reproductive autonomy; 2) structural and resource challenges including limited time, insufficiently gender sensitive terms of reference, the 'outsider' status of gender advisors, and a lack of specialized resources for victims; 3) perceived and actual limits in the law, such as differing standards for finding criminal law versus human rights law violations and national laws that restrict reproductive autonomy; and 4) analytical challenges including the linkages between underlying gender discrimination and acute acts of reproductive violence.

The research also establishes that documentation of reproductive violence is far from impossible. Several international mechanisms have successfully and powerfully documented it under international law. The paper presents numerous positive examples of this documentation and analysis, which can offer concrete guidance to future mechanisms. The paper also identifies some missed opportunities – in which fact patterns indicative of reproductive violence were not classified or analyzed as such – in order to build greater fluency in recognizing and analyzing reproductive violence in the future.

The report concludes with recommendations. When setting up mechanisms and their working methods, the establishing authorities should:

- Explicitly mandate the investigation and documentation of all gender-based violations, including reproductive violence, *and* documentation of gendered aspects of all violations, not only sexual violence.
- Mandate investigation and analysis of root causes of SGBV, particularly reproductive violence, to account for all violations and to understand patterns of violence.
- Ensure investigative mechanisms are provided with adequate resources, including sufficient time to conduct detailed analysis. Wherever possible, mandates should be for more than one year, and should be renewed readily as conditions require.

In the execution of these mandates, experts, coordinators, advisors, and mechanism and UN agency staff are recommended to adopt policies and procedures that have been demonstrated to support the documentation of reproductive violence. Where possible, they should likewise work to avoid or mitigate the effects of the barriers identified herein. Specifically, they should:

- Train all staff on gender analysis, including the documentation of reproductive violence.
- Consciously work to avoid preemptive self-censorship and resist external or internal pressure to avoid documentation of reproductive violence.
- Document the impacts of gender discrimination and other forms of inequality, including how pre-existing discrimination may intersect with crisis contexts.

- Ask follow-up questions related to reproduction in any cases of sexual violence, including sexual violence committed against men and boys.
- Attend to the rights of both direct victims of sexual violence and children born of sexual violence.
- Analyze how local laws may contribute to violations of sexual and reproductive health and rights, including abortion access, and take steps to mitigate these violations.
- Interview healthcare professionals and other relevant witnesses about sexual and reproductive health issues and SGBV.
- Consider the impact of other human rights violations on reproductive rights, such as hindering access to information or services through male guardianship and denial of access to education for women.
- Apply consistent standards of proof for assessing violations.
- Use direct and precise terminology when referring to SGBV, including abortion and reproductive violence.
- Engage with civil society in collecting, corroborating, and collating information on reproductive violence.
- Consult the legal guidance provided in this report for concrete information on forms and examples of reproductive violence which may be applicable to assessing harms in particular country situations.
- Continuously update legal guidance to reflect progressive developments in international standards.

Despite challenges, this report shows that there are reasons to be hopeful about the future of documentation of reproductive violence. Taken together, the recommendations and guidance pave the way for current and future investigative mechanisms to understand, record, analyze, and advance justice for this form of violence.

KEY TERMS

Gender-based violence: Violence directed against a person because of that person’s actual or perceived gender, or violence that affects persons of a particular gender disproportionately.²

Investigative mechanisms: Any institution, body, commission, committee, fact-finding mission, group of experts, or other collection of experts tasked by the Human Rights Council, UN General Assembly, Security Council, or other UN body with fact-finding, documentation, or the analysis of information and evidence in contexts of atrocities, conflict, humanitarian crises, or other instability in line with applicable national or international legal frameworks.³

Reproductive autonomy: The ability to make independent decisions about one’s reproduction free from coercion or violence, including if, how, and when to become pregnant, bear children, and engage in activities related to reproduction.⁴

Reproductive justice: The realization of all of the human rights that ensure and maintain bodily autonomy, the choice and ability to have children, not have children, and to parent the children one has in safe and sustainable communities.⁵

Reproductive violence: Acts or omissions that cause harm by interfering with reproductive autonomy and rights, or violence directed at people because of their actual or perceived reproductive capacity.⁶

Sexual autonomy: Sexual autonomy is the right of any person to make independent decisions about their own sexuality free from coercion and violence.⁷ This includes the decision of whether, when, with whom, and under what circumstances to engage in sexual acts.

2 What is gender-based violence?, EUROPEAN COMMISSION, [https://www.fidh.org/IMG/pdf/atoz_en_book_screen.pdf#page=44](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en#:~:text=gender%2Dbased%20violence-,Gender%2Dbased%20violence%20(GBV)%20by%20definition,of%20a%20particular%20gender%20disproportionately; Sexual and Gender-based Violence: A Guide from A to Z, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS 86–87 (Nov. 25, 2022), <a href=).

3 Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR) 7 (2015), https://www.ohchr.org/sites/default/files/Documents/Publications/CoI_Guidance_and_Practice.pdf#page=15; The role of UN-mandated investigative mechanisms in securing accountability for human rights violations at national, regional and international levels, OHCHR (Aug. 31, 2021), <https://www.ohchr.org/en/statements/2021/10/role-un-mandated-investigative-mechanisms-securing-accountability-human-rights>.

4 Rosemary Grey, Reproductive Crimes in International Criminal Law, in GENDER AND INTERNATIONAL CRIMINAL LAW 231–64, 235 (Indira Rosenthal, Valerie Oosterveld, & Susana SáCouto eds., Aug. 18, 2022).

5 See CEDAW Art. 16(1)(e), “States Parties shall take all appropriate measures to ... 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.” See also, About Us Page on Reproductive Justice, SISTERSONG, <https://www.sistersong.net/about-x2>.

6 Rosemary Grey, The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective, 15 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 905, 906 (2017).

7 Carmel Shalev, Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women, INTERNATIONAL CONFERENCE ON REPRODUCTIVE HEALTH (Mar. 18, 1998), [7](https://www.un.org/womenwatch/daw/csw/shalev.htm#:~:text=Autonomy%20means%20the%20right%20of,is%20the%20notion%20of%20choice; see also Dana-Sophia Valentiner, The Human Right to Sexual Autonomy, 22 GERMAN LAW JOURNAL 716 (2021).</p></div><div data-bbox=)

Sexual violence: Violence that involves any sexual act, attempt to obtain a sexual act, or other act directed against a person’s sexuality using coercion or without consent, by any person regardless of their relationship to the victim, in any setting.⁸

Violence: Intentional conduct causing harm, both physical and non-physical, including failures by duty-bearers to uphold protections of rights that they are legally obliged to respect, protect, and fulfill.⁹

8 Violence against Women, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/violence-against-women#tab=tab_1 (stating an act can be “sexual” even without physical contact, such as psychological violence that arises from threats of rape or genital mutilation). An act may be sexual regardless of whether sexual gratification was part of the intent or result. See The Civil Society Declaration on Sexual Violence, THE HAGUE PRINCIPLES ON SEXUAL VIOLENCE 25 (June 2013). Sexual violence can be committed by and against any person regardless of sex or gender. See Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶¶ 31–34 (Dec. 2023).

9 Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 1 fn.1 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>. (“For this purpose, the Office understands “violence” broadly to include intentional conduct causing harm, both physical and non-physical.”).

ACRONYMS

CAT: Convention Against Torture

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

CIDT: Cruel, inhuman or degrading treatment

COI: Commission of Inquiry

CRC: Convention on the Rights of the Child

CRSV: Conflict-related sexual violence

FFM: Fact-Finding Missions

GBV: Gender-based violence

HRC: Human Rights Council

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICL: International Criminal Law

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the former Yugoslavia

IHRL: International Human Rights Law

JRR: Justice Rapid Response

LRA: Lord's Resistance Army

OHCHR: The Office of the High Commissioner for Human Rights

OTP: Office of the Prosecutor of the International Criminal Court

SGBV: Sexual and gender-based violence

SRHR: Sexual and reproductive health and rights

UN: United Nations

UNAIDS: Joint United Nations Programme on HIV and AIDS

UNDP: United Nations Development Programme

UNFPA: United Nations Population Fund

UNICEF: United Nations Children's Fund

WHO: World Health Organization

INTRODUCTION

In Ethiopia, reproductive healthcare infrastructure has been destroyed by war, leaving patients, including rape survivors, without access to care.¹⁰ In North Korea, forcibly repatriated pregnant women have been subjected to brutal forced abortions.¹¹ In Myanmar, a campaign of rape against the Rohingya resulted in unwanted pregnancies, a spiking birth rate, and unsafe abortion practices when abortion services were not readily available.¹² In Syria, girls as young as 12 have become pregnant and given birth after being forced to marry.¹³ In Gaza, the destruction of water and healthcare infrastructure has forced women and girls to resort to makeshift alternatives to manage menstrual and reproductive health, while inadequate nutrition has led to widespread disruption of lactation.¹⁴

In each of these situations, the UN has mandated investigative mechanisms to conduct investigations into allegations of violations of international human rights law and international humanitarian law. Investigative mechanisms are also tasked with creating a record, assessing responsibility, and advancing accountability, including determining whether international crimes may have been committed. The findings of these mechanisms inform prevention efforts and guide reparations.

Over time, these types of mechanisms have broadened their scope to look beyond the most obvious forms of violence, seeking specifically to document previously neglected harms. For example, sexual violence in conflict often went undocumented unless it was so prominent or widespread that documenting it was unavoidable. Now, most investigative mechanisms have a dedicated advisor to document and analyze sexual and gender-based violence (SGBV).

Yet harms like those described above, each of which constitutes reproductive violence and a violation of

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- 10 Broken Promises: Conflict-Related Sexual Violence Before and After the Cessation of Hostilities Agreement in Tigray, Ethiopia, PHYSICIANS FOR HUMAN RIGHTS AND THE ORGANIZATION FOR JUSTICE AND ACCOUNTABILITY IN THE HORN OF AFRICA 7, 28 (Aug. 2023).
 - 11 Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, A/HRC/25/63, ¶ 42 (Feb. 7, 2014), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F25%2F63&Language=E&DeviceType=Desktop&LangRequested=False>.
 - 12 Beyond Killing: Gender, Genocide, and Obligations under International Law, GLOBAL JUSTICE CENTER 36 (Dec. 6, 2018); Shahanoor Akter Chowdhury, Lindsey Green, Linda Kaljee, Thomas McHale, & Ranit Mishori, Sexual Violence, Trauma, and Neglect: Observations of Health Care Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh, PHYSICIANS FOR HUMAN RIGHTS 11–12 (Oct. 22, 2020), https://phr.org/our-work/resources/sexual-violence-trauma-and-neglect-observations-of-health-care-providers-treating-rohingya-survivors-in-refugee-camps-in-bangladesh/?utm_term=hero; The Independent International Fact-Finding Mission on Myanmar concluded that “the sexual violence perpetrated against women and girls that began on 25 August 2017 was a sixth factor that indicated the Tatmadaw’s genocidal intent to destroy the Rohingya people...” and that “the Government bears State responsibility under the Genocide Convention for its failure to investigate and punish acts of genocide...”, Human Rights Council, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, A/HRC/42/CRP.4, ¶¶ 95–99 (Aug. 22, 2019), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/sexualviolence/A_HRC_CRP_4.pdf#page=24.
 - 13 Gendered Impact of the Conflict in the Syrian Arab Republic on Women and Girls, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC 12 (Jun. 12, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coisyrria/policypapersieges29aywar/2023-06-12-Gendered-impact-women-girls-%20Syria.pdf#page=13>.
 - 14 Human Rights Council, Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, AND ISRAEL, A/HRC/56/CRP.4, ¶¶ 323, 326, 328 (Jun. 10, 2024), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session56/a-hrc-56-crp-4.pdf#page=79>.

international human rights law, still largely elude documentation. As a result, the records created by mechanisms are too often incomplete, responsibility and liability for these harms are unclear, prevention efforts lack reproductive health components, and reparations are insufficient to address the full scope of victims'¹⁵ needs.

The documentation of reproductive violence as a distinct harm is an emerging and evolving enterprise. Human rights experts, criminal prosecutors, civil society, and academics are actively engaged in efforts to improve this documentation, as they were a generation ago when early efforts to document and seek justice for sexual violence coalesced.

This paper aims to equip those who conduct investigations with tools to identify, analyze, articulate, and document the full scope of reproductive violence in situations of atrocities, conflicts, humanitarian crises, or other instability.

The paper:

1. Analyzes factors that have so far fostered or impeded the documentation of reproductive violence by UN-mandated investigative mechanisms;
2. Outlines the international legal basis for documenting incidents, practices, or policies as reproductive violence, including both those previously documented by investigative mechanisms and those that have not been specifically recorded; and
3. Makes recommendations to ensure better documentation of all harms which constitute reproductive violence within investigative mechanisms' mandates.

The paper is based on interviews with investigators, including gender advisors who have served on UN investigative mechanisms, as well as members of civil society who document atrocities and academics who research SGBV. It also analyzes desk research, including reports from investigative mechanisms containing examples of both successful and less successful documentation of reproductive violence; civil society documentation; judgments of international and national judicial systems; and academic sources.

The research shows that there are many reasons for optimism about the capacity of investigative mechanisms to document reproductive violence. The institutions and practitioners involved identified numerous positive practices by investigative mechanisms and gender advisors that can be more widely emulated to bolster documentation. The research also surfaced constructive suggestions for overcoming identified barriers to documentation. The key barriers and opportunities are summarized in the paper's main text, but the full richness of the conversations with interviewees extended beyond its scope. Further information on these dynamics

¹⁵ The term "victim" is generally used to describe people whose human rights have been violated. For example, it is the term adopted in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Rome Statute of the International Criminal Court, Protocols Additional I and II to the Geneva Conventions, and the recently adopted Mutual Legal Assistance Convention. The term also recognizes that not all who are subject to violence survive. However, the term "survivor" better reflects the strength, agency, and resilience of people who have experienced violence and is often the preferred term for survivors of gender-based violence and gender justice activists. We thus use both in this paper, as does, for example, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in its preamble. While this paper uses both interchangeably, it is without prejudice to how any individual person identifies and is not meant to overrule a person's own experience of how they identify.

therefore appears in the Annex: Additional Details on Documentation Challenges.

Interviewees noted that legal and analytical hurdles are exacerbated by a lack of legal guidance available to investigators. Gender advisors expressed the need to develop and distribute such guidance to enable them to articulate the contours of reproductive violence clearly and persuasively to their teams.

The latter half of this paper is aimed at responding to that need. It provides an overview of the international standards applicable to a broad spectrum of reproductive violence. For each specific harm, the paper outlines the relevant international law, legal standards, and jurisprudence, discusses the complexities in interpretation or application, and provides concrete examples of effective documentation of reproductive violence by international mechanisms. It also identifies where additional research or analysis may have revealed incidents of reproductive violence that were not investigated or documented as such. This resource is not intended to be exhaustive, but rather to begin to fill the guidance gap identified by interviewees.

Reproductive Violence in Context

Sexual and reproductive rights are enshrined in international standards¹⁶ guaranteeing every individual's ability to decide freely whether, when, and how frequently to reproduce, as well as the relationship between their body and their potential child(ren).¹⁷ Reproductive and sexual rights are built upon a constellation of human rights, including the rights to life, health, privacy, freedom from torture and other cruel, inhuman, or degrading treatment, non-discrimination, access to information, and the right to family life, among others.¹⁸

Reproductive justice can be understood as the fulfillment of all of these rights simultaneously. Reproductive justice is defined as “the human right to maintain personal bodily autonomy, have children, not have children,

16 UN General Assembly, Universal Declaration of Human Rights 217 A (III), Art. 1 (1948); CEDAW Arts. 10–12, 14, 16; CEDAW Committee, General Recommendation No. 24 on Art. 12 of the Convention (Women and Health), A/54/38/Rev.1 (Aug. 20, 1999); CEDAW Committee, General Recommendation No. 19 on violence against women, A/47/38 (Feb. 1, 1992); ICESCR Art. 12; CESCR Committee, General Comment No. 14 on Art. 12: the right to the highest attainable standard of health, E/C.12/2000/4 (Aug. 11, 2000); CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22 (May 2, 2016); CRC Art. 24; CRC Committee, General Comment No. 13 on the right of the child to freedom from all forms of violence, CRC/C/GC/13 (Apr. 18, 2011); CRPD Arts. 23(1)(b)-(c); CAT Committee, Conclusions and Recommendations: Chile (Jun. 14, 2004), CAT/C/CR/32/5; CAT Committee, Conclusions and Recommendations: Peru (Jul. 25, 2006), CAT/C/PER/CO/4; CAT Committee, General Comment No. 2: Implementation of Art. 2 by States Parties, CAT/C/GC/2 (Jan. 24, 2008); Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women (1995); Human Rights Council Resolution on Accelerating Efforts to Eliminate all Forms of Violence Against Women (2015), A/HRC/29/L.16/Rev.1; Human Rights Committee, General Comment No. 28 on the equality of rights between men and women, CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art. 14 (2003); General Assembly of the Organization of American States (OAS), Social Charter of the Americas, Res AG/RES 2699 (XLII-O/12) (2012); Programme of Action adopted at the International Conference on Population and Development, Cairo 5–13, chapter VII (Sept. 1994); World Health Organization (WHO), “Sexual health, human rights and the law” (2015).

17 For example, whether and under what circumstances to have a C-section, whether to breastfeed, etc. Draft Articles on Prevention and Punishment of Crimes Against Humanity should advance Justice for Reproductive Autonomy, GLOBAL JUSTICE CENTER ¶ 27 (May 10, 2023), <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Reproductive-Autonomy-Expert-Brief.pdf#page=8>.

18 See, e.g., CEDAW Arts. 10–12, 14, 16; International Covenant on Civil and Political Rights (1976) 999 UNTS 171 (ICCPR) Arts. 3, 23; ICESCR Arts. 10, 12.

and parent the children we have in safe and sustainable communities.”¹⁹ Reproductive justice thus focuses not only on the rights that underlie and enable reproductive autonomy (*i.e.*, the ability and right to make reproductive decisions free from force or coercion), but also on the holistic conditions that make such decisions meaningful.²⁰ To that end, reproductive justice analyzes power structures, intersecting oppressions, and their impacts on the most marginalized while integrating State obligations to ensure access to an enabling environment (including access to information, services, and resources) where people can give effect to their decisions.²¹ The absence of reproductive justice – reproductive injustice – is the violation of one or more of the rights and conditions of reproductive justice.

Reproductive violence, accordingly, comprises intentional acts or omissions that cause harm by interfering with reproductive autonomy and rights, or violence directed at people because of their actual or perceived reproductive capacity.²² For the purposes of this analysis, “violence” is understood broadly to include intentional conduct causing harm, whether physical, non-physical, or both.²³ Examples of reproductive violence include forced pregnancy, forced abortion, enforced sterilization, forced contraception, interference with autonomy over breastfeeding, denial of access to abortion or information about sexual and reproductive health, or targeted attacks on reproductive healthcare facilities.

These harms may overlap with sexual violence, as in cases where rape results in pregnancy and the victim is forced to carry the pregnancy to term. However, reproductive violence does not necessarily require any sexualized contact. Forced contraception, for example, is a denial of reproductive autonomy that generally lacks a sexual component but nevertheless constitutes reproductive violence.²⁴ Likewise, there are instances of sexual violence

19 CEDAW Art. 16(1)(e): “States Parties shall take all appropriate measures to ... 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.” See also About Us Page on Reproductive Justice, SISTERSONG, <https://www.sistersong.net/about-x2>.

20 CEDAW Art. 16(1)(e): “States 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.”

21 About Us Page on Reproductive Justice, SISTERSONG, <https://www.sistersong.net/about-x2>.

22 Rosemary Grey, The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective, 15 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 905, 906 (2017). See also Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶¶ 35–36 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

23 Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 1 fn.1 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>. (“For this purpose, the Office understands “violence” broadly to include intentional conduct causing harm, both physical and non-physical.”).

24 The Hague Principles on Sexual Violence include reproductive violence under a larger umbrella of sexual violence. The Principles state that if an act, “while not necessarily sexual in itself, were intended to impact... the affected person’s reproductive capacity or reproductive autonomy”, that would be an indication that the act is sexual in nature and thus, if conducted without full consent, as sexual violence. However, for the purposes of discussing those acts and omissions that impact reproductive capacity and that have historically not been surfaced by discussions of sexual violence, we distinguish here between sexual violations (which may be committed for the sexual gratification of the perpetrator or a third party; target the victim’s sexual agency; prey upon sexual taboos to cause suffering, etc.) and reproductive violations, which are targeted at or impact upon reproduction specifically. The line between the two categories is porous, but in order to capture the full range of harms experienced by victims, it is instructive and necessary to distinguish the two categories while acknowledging their close relationship. The Civil Society Declaration on Sexual Violence, THE HAGUE PRINCIPLES ON SEXUAL VIOLENCE 14 (June 2013), <https://thehagueprinciples.org/>. See also Dieneke De Vos, Can the ICC Prosecute Forced Contraception? EUROPEAN UNIVERSITY INSTITUTE (Mar. 2016), <https://me.eui.eu/dieneke-de-vos/blog/can-the-icc-prosecute-forced-contraception/> (“The distinction [between reproductive violence and sexual violence] is therefore an arbitrary one, but one I am making here in order to examine the capacity of international criminal law as it stands to specifically capture and address reproductive violence such as forced contraception.”).

that do not necessarily impinge on reproductive autonomy (*e.g.*, some instances of sexual harassment).²⁵ Some acts constitute both sexual and reproductive violence.

Understanding reproductive violence as a distinct category can help to elucidate the full spectrum of SGBV, beyond sexual violence. For example, forced breastfeeding or “wet-nursing” constitutes a violation of reproductive autonomy by dictating how an individual uses their body to engage in or refrain from activities related biologically or socially to reproduction, independent of any sexual component.²⁶ An understanding of SGBV that focuses mainly or exclusively on sexualized conduct may miss the profound impacts of other gendered violence.

Zeroing in on reproductive violence as a specific type of harm enables a more nuanced analysis of patterns of impunity for SGBV under international human rights, humanitarian, and criminal law. It provides a framework in which to express the full gravity of these violations, to craft appropriate policies of prevention and redress, and to outline a more robust approach to accountability for these violations and crimes. Such a focus can also help to surface the normalization of control over reproductive capacity along gender lines and forms of violence that are perpetrated as a result of or to perpetuate this control. While women and girls represent the majority of survivors and victims of SGBV, including reproductive violence, examining reproductive violence can likewise surface harms and violence experienced by men, boys, and others in circumstances in which their reproductive capacity is attacked or manipulated.

Evolution in Documentation of Sexual and Gender-Based Violence

Atrocities, conflict, humanitarian crises, and other instability often occur amid disputes about the facts and contours of the situation and abuses that are committed. A number of investigative systems, including governmental, intergovernmental, and NGO-led efforts, have been established to attempt to clarify underlying facts in these situations.

Some of the most well-established and authoritative fact-finding bodies are UN investigative mechanisms, which have been established by the UN General Assembly, Human Rights Council (HRC), Security Council, Secretary General, or High Commissioner for Human Rights.²⁷ These mechanisms are tasked with documenting violations of international human rights, humanitarian, and criminal law. Early mechanisms did not necessarily have specific expertise on or pay adequate attention to gender-based violations, contributing to a systematic under-documentation of these harms, which was apparent across different investigation types, both UN-mandated

25 Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in *GENDER AND INTERNATIONAL CRIMINAL LAW* 231–64, 235 (Indira Rosenthal, Valerie Oosterveld, & Susana SáCouto eds., Aug. 18, 2022).

26 Wet-nursing is the practice of feeding an infant with the milk of someone other than their biological mother. It requires the individual acting as “donor” or source of milk to be lactating, usually because they have recently borne their own child. As a consequence, wet-nursing can impact upon a person’s reproductive autonomy, or ability to reproduce and care for their children as they see fit. This can take the form of impacting how much milk is available to the wet nurse’s own child, reducing the fertility of the wet nurse, or simply by requiring them to engage in an activity closely associated with reproduction on behalf of another. Historically, wet-nursing could exist along a spectrum from fully coerced to fully voluntary. Emily West and R.J Knight, *Mothers’ Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South*, 83 *JOURNAL OF SOUTHERN HISTORY* 37 (Feb. 2017).

27 *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR) 2 (2015), https://www.ohchr.org/sites/default/files/Documents/Publications/Col_Guidance_and_Practice.pdf.

and others. Some historical fact-finding reports completely lacked any analysis into SGBV, such as the report of the Group of Experts report on Cambodia in 1998²⁸ and the UN Security Council Report of the Mission to Abkhazia submitted in 1993,²⁹ both of which only cursorily recorded that rapes were committed along with other crimes without any further details of these crimes and their impact on victims.

Recognizing this gap, the HRC, the Office of the High Commissioner for Human Rights (OHCHR), and partner agencies have increasingly sought to integrate a gender perspective into the mandates and operations of investigative mechanisms.³⁰ Many now include explicit references to SGBV or gender-based discrimination. For example, the Group of Human Rights Experts on Nicaragua is mandated to “conduct thorough and independent investigations into all alleged human rights violations and abuses committed in Nicaragua since April 2018, including the possible gender dimensions of such violations and abuses, and their structural root causes.”³¹ The Independent International Commission of Inquiry on Ukraine is mandated to “collect, consolidate and analyse evidence of [human rights] violations and abuses, including their gender dimension...”³²

In addition, since 2009, nearly all UN investigative mechanisms have included at least one SGBV investigator and/or gender advisor to provide expertise on the impacts of each context on people of all genders.³³ Some of these are deployed by a joint partnership between the OHCHR, UN Women and Justice Rapid Response (JRR, an entity that offers technical expertise), drawn from a roster maintained by JRR, while others are hired directly by the OHCHR.

The systematic inclusion of this expertise represents vital progress toward capturing the breadth of harms that occur in situations of crisis, especially those harms, such as SGBV, that have historically been overlooked. The addition of specific SGBV focal points and/or gender advisors within UN investigative mechanisms has helped to mainstream the inclusion of gendered considerations and SGBV documentation across other documentation efforts. Nevertheless, reports by both UN-mandated and other mechanisms still largely omit specific documentation of reproductive violence. For instance, a report by the Commission of Inquiry for Syria recorded evidence of young girls giving birth in the context of forced marriages, but did not include any analysis of whether these instances may have constituted reproductive violence, such as forced pregnancy.³⁴

28 Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, ¶ 88 (1998).

29 UN Security Council Report of the Mission to Abkhazia Note transmitting “Report of the Secretary-General’s fact-finding mission to investigate human rights violations in Abkhazia, Republic of Georgia”, S/26795, ¶¶ 10, 22, 44 (Nov. 17, 1993).

30 Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice, OHCHR (2018), https://www.ohchr.org/sites/default/files/Documents/Publications/IntegratingGenderPerspective_EN.pdf.

31 Human Rights Council, Promotion and protection of human rights in Nicaragua, A/HRC/RES/49/3, ¶ 14(a) (Apr. 2024).

32 Human Rights Council, Situation of human rights in Ukraine stemming from the Russian aggression, A/HRC/49/1, ¶ 3 (Apr. 2022).

33 Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice, OHCHR 11 (2018), https://www.ohchr.org/sites/default/files/Documents/Publications/IntegratingGenderPerspective_EN.pdf#page=11.

34 Gendered Impact of the Conflict in the Syrian Arab Republic on Women and Girls, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC 12 (Jun. 12, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coisyria/policypapersieges29aywar/2023-06-12-Gendered-impact-women-girls-%20Syria.pdf#page=13>. Note that some other reports of the COI on Syria did include documentation of broader reproductive consequences of IHRL violations. See, e.g., Human Rights Council, The Siege and Recapture of Eastern Ghouta, A/HRC/38/CRP.3, ¶ 36 (Jun. 20, 2018), https://www.ohchr.org/sites/default/files/hrbodies/hrc/regularsessions/session38/documents/A_HRC_38_CRP_3_EN%20%281%29.pdf#page=10 (“Beyond the lack of access to adequate food and sanitation, others, primarily mothers, noted how supplies in dire need included diapers for infants. Residents ... recalled how children who spent more than a month and a half in basements were constantly crying due to hunger and lack of access to milk. Due to stress, one mother in Saqba described being unable to produce breast milk, and the consequent hunger pangs of her infant child.”).

The gaps are not unique to UN-mandated mechanisms. Rather, the lack of attention to reproductive violence within these mechanisms, despite their pioneering work to mainstream gender, suggests that a specific focal point within investigations may be insufficient to capture all forms of SGBV, particularly reproductive violence.

Instead, to recognize the full spectrum of harms, a range of additional measures are needed. These include increased understanding among mechanism members that their mandate includes documenting reproductive violence as a form of SGBV, as well as the provision of adequate financial and other resources dedicated to the collection and analysis of all forms of SGBV.

Why Does It Matter?

The express recognition of reproductive violence is important for a multitude of reasons. First, denials of reproductive autonomy may have uniquely personal and profound impacts, including permanently foreclosing a person's ability to have children, or coercing involuntary but permanent kin relationships.³⁵ These impacts compound the often severe physical harms and mental health consequences of the denial of reproductive autonomy, which can also impact community inclusion and belonging. Victims are entitled to recognition of and remedy for the harms.

Ensuring adequate identification and documentation of harms can also be vital for opening pathways for appropriate redress. For example, victims may be entitled to rehabilitation or other services, reparations, public apologies, or other forms of justice – but only if the harms they have suffered are recognized and documented. Entire categories of victims, such as people subjected to forced contraception, can be overlooked if reproductive violence is not appropriately documented.³⁶ Other victims, such as survivors of sexual violence that results in pregnancy, infertility, or other reproductive consequences, may receive insufficient reparations or inadequate rehabilitation services to account for the full range of violations.³⁷

The recognition of reproductive violence also has broad implications for gender equality.³⁸ At the most basic level, systematically overlooking harms that differentially and disproportionately impact women, girls, and others who

³⁵ See generally Kimberly Theidon, *LEGACIES OF WAR: VIOLENCE, ECOLOGIES, AND KIN* (July 2022).

³⁶ See, e.g., La JEP abre macrocaso 11, que investiga la violencia basada en género, incluyendo violencia sexual y reproductiva, y crímenes cometidos por prejuicio [The JEP opens Macro-Case 11, which investigates gender-based violence, including sexual and reproductive violence, and hate crimes], LA JURISDICCIÓN ESPECIAL PARA LA PAZ (Sept. 27, 2023), <https://www.jep.gov.co/Sala-de-Prensa/Paginas/-la-jep-abre-macrocaso-11-que-investiga-la-violencia-basada-en-genero-incluyendo-violencia-sexual-y-reproductiva-y-crimenes.aspx> (referencing so-called Macro-Case 11 in the Colombian justice and peace process, which recognizes individuals subjected to forced abortion and forced contraception as victims even when they were not subjected to sexual violence as well, where a narrow conception of SGBV initially threatened to exclude those subjected to forced contraception and forced abortion from recognition as victims of the armed conflict); Lara Loaiza, *Colombia Expands Investigation of Gender Violence in Its Armed Conflict*, INSIGHT CRIME (Sept. 29, 2023), <https://insightcrime.org/news/colombia-expands-investigation-role-gender-violence-armed-conflict/>.

³⁷ Indeed, recognizing reproductive violence is necessary in order to understand the full scope of harms to victims. Kimberly Theidon, *LEGACIES OF WAR: VIOLENCE, ECOLOGIES, AND KIN* 90, 91 (July 2022) (“The oppressive weight of hegemonic maternal scripts that place the burden to love on survivors of forced pregnancy and maternity should be considered as a potential form of gendered harm.”); This recognition requires a nuanced and sensitive approach to potential conflicts between the rights of particular victims. (“There are, at times, competing rights regimes that cannot be willed away, and to reject this as a false binary fails to consider that these fetuses and babies may be experienced as a form of harm to the women who birth them.”).

³⁸ Substantive equality, autonomy, and reproductive rights, CENTER FOR REPRODUCTIVE RIGHTS 1 (Nov. 2013), <https://reproductive-rights.org/wp-content/uploads/2020/12/Substantive-Equality-Autonomy-and-Reproductive-Rights.pdf#page=1>.

can become pregnant constitutes gender discrimination.³⁹ Additionally, neglect of reproductive violence against men echoes patterns of erasure of sexual violence against men, a pattern rooted in discriminatory myths about who can and cannot be victimized by sexual or reproductive violence.⁴⁰ Meanwhile, reproductive violence often targets and has particular impacts on individuals of diverse sexual orientations and gender identities because of their perceived transgression of gender norms and stereotypes.⁴¹ Accounting for these differentiated impacts is necessary to advance gender equality.

Moreover, biological and physical characteristics, including sex-specific needs, do not cease when social and physical infrastructure collapse. Women, girls, and other persons continue to become pregnant, give birth, and menstruate, among other biological processes. The systematic neglect by international mechanisms of these needs and violations related to them constitutes gender discrimination.⁴²

In addition, blind spots in investigative mechanisms' coverage of reproductive violence can have tangible, irreversible, and intergenerational impacts. For example, a failure or inability to document pregnancies resulting from conflict-related sexual violence (CRSV) may result in rebuilding priorities that neglect reproductive health, with impacts on maternal mortality, morbidity, and gender equality that last decades. Indeed, the absence of documentation of the reproductive needs of people impacted by conflict and atrocities has already contributed

39 See CEDAW Committee, General Recommendation 24 on Art. 12 of the Convention (Women and Health), A/54/38/Rev.1, chap. I, ¶¶ 6, 11–12 (Aug. 20, 1999); Alyne da Silva Pimentel Teixeira (deceased) v. Brazil, Comm. No. 17/2008, CEDAW/C/49/D/17/2008 ¶ 7.6 (Aug. 11, 2011); Rebecca J. Cook & Verónica Undurraga, Art. 12, THE UN CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 311, 326–27 (Marsha A. Freeman, Christine Chinkin, & Beate Rudolf eds., 2012); CESCR Committee, General Comment No. 22, ¶¶ 9–10, 28, 34 (May 2, 2016); Interim Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254, ¶¶ 16, 34 (2011); see also Declaration on Violence against Women, Girls and Adolescents and their Sexual and Reproductive Rights, ORGANIZATION OF AMERICAN STATES INTER-AMERICAN COMMISSION OF WOMEN, COMMITTEE OF EXPERTS OF THE FOLLOW-UP MECHANISM TO THE BELÉM DO PARÁ CONVENTION (MESECVI) 9 (Sept. 19, 2014), <https://www.oas.org/en/mesecvi/docs/DeclaracionDerechos-EN.pdf> (Affirming “That the negation of public policy and sexual and reproductive health services exclusively to women, through norms[,] practices, and discriminatory stereotypes, constitutes a systematic violation of their human rights and subjects them to institutional violence by the state, causing physical and psychological suffering.”).

40 See, e.g., Human Rights Council, Detailed Final Report of the Commission of Inquiry on Burundi, A/HRC/45/CRP.1, ¶ 449 (Sept. 16, 2020) (“This partial recognition - or lack thereof - of sexual violence committed by state agents against men and boys has multiple consequences. Indeed when the sexualized nature of the acts is obscured, there is little chance that the violence will receive any adequate and specific response, be it in the form of providing assistance to survivors, fighting impunity and preventing this type of violence or access to justice and reparations.”). Also, a review of research on male victims of sexual assault found a constellation of myths and misconceptions that lead to under-reporting and lack of social and policy attention to the issue. This constellation of beliefs originates in and perpetuates patriarchal structures that enable sexual and reproductive victimization of people of all genders. John C. Thomas & Jonathan Kopel, Male Victims of Sexual Assault: A Review of the Literature, 13 BEHAVIORAL SCIENCES 6 (Apr. 3, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10135558/pdf/behavsci-13-00304.pdf#page=6>.

41 See, e.g., documentation of rape and forced impregnation of lesbian women and trans men in Colombia, in part because of their sexual and gender identities. An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 25 (Jul. 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf#page=25>; see also UN Women, MADRE, CUNY School of Law, Human Rights and Gender Justice Clinic, IDENTIFYING GENDER PERSECUTION IN CONFLICT AND ATROCITIES A TOOLKIT FOR DOCUMENTERS, INVESTIGATORS, PROSECUTORS AND ADJUDICATORS OF CRIMES AGAINST HUMANITY IDENTIFYING GENDER PERSECUTION 12 (2021), <https://www.unwomen.org/sites/default/files/2022-01/Identifying-gender-persecution-in-conflict-and-atrocities-en.pdf>.

42 Carmel Shalev, Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women, INTERNATIONAL CONFERENCE ON REPRODUCTIVE HEALTH (Mar. 18, 1998), <https://www.un.org/womenwatch/daw/csw/shalev.htm> (“Failure to take into account the special health needs of women, so as to ensure their access to appropriate health information and services, constitutes discrimination... Failure to allocate resources or to ensure the provision of services for women’s special health needs, in addition to those common to women and men, is discriminatory.”).

to the systematic underfunding and under-prioritization of these issues in international response. This creates a vicious cycle of neglect: advocacy for increased resources is met with skepticism about the need for such resources, given a lack of documentation of these needs.⁴³ Ensuring adequate resources to respond to these needs requires concerted attention be paid to documenting them.

Documenting reproductive violence with specificity and analyzing it comprehensively is essential to fulfill the mandate of each investigative mechanism to establish a factual historical record.

In addition, documenting reproductive violence with specificity and analyzing it comprehensively is essential to fulfill the mandate of each investigative mechanism to establish a factual historical record. Not only are reproductive impacts central to the suffering of many victims, they also often form a core component of perpetrators' attacks, including the intent of the attack, its methods, or both. The separation of men and women to prevent births can be a key method for committing genocide, for example.⁴⁴ Territorial gains can be cemented through the suppression of reproduction among perceived enemies or, conversely, by recognizing children born of CRSV to invoke perceived duties of filial allegiance.⁴⁵ Historical accounts of the perpetration of atrocities are incomplete when these motives and tactics are not fully understood and documented.

Finally, specifically documenting and analyzing reproductive violence can help shape the progressive development of international law to capture gender-based harms. For example, the Rome Statute specifically lists a number of acts that constitute crimes against humanity, including some forms of reproductive violence (enforced sterilization and forced pregnancy). But the Statute also criminalizes "any other form of sexual violence of comparable gravity" and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."⁴⁶ These clauses provide essential flexibility in the law, allowing for its evolution as conditions change and preventing perpetrators from escaping justice based on narrow applications of the law. Yet the principle of legality⁴⁷ requires some guide to what conduct will be criminalized to allow individuals to understand what conduct is proscribed and to shape their behavior accordingly. The documentation of reproductive violence – as a category of harm that can cause serious suffering, irreversible injury to mental or physical health, or even death – can guide prosecutors to understand what other kinds of inhumane acts or forms of sexual violence might be of "a similar character" or "comparable gravity" but which are nevertheless not (yet) expressly identified in law.

43 Therese McGinn & Sarah E. Casey, S.E., Why don't humanitarian organizations provide safe abortion services?, 10 CONFLICT AND HEALTH 8 (Mar. 24, 2016), <https://doi.org/10.1186/s13031-016-0075-8>.

44 Beyond Killing: Gender, Genocide, and Obligations under International Law, GLOBAL JUSTICE CENTER 26 (Dec. 6, 2018); *Prosecutor v. Radislav Krstic*, Appeal Judgement, IT-98-33-A, ¶ 31 (Apr. 19, 2004); *Prosecutor v. Radovan Karadzic*, Trial Judgment, IT-95-5/18-T, ¶ 538 (Mar. 24, 2016).

45 For example, at least one commander in the Colombian context strategically 'legitimized' or recognized the children born by his rape victims to create kinship networks that extended throughout territory he sought to control and to evade accountability for the CRSV he committed. *Maternidades Forzadas: Realidades Ocultas de Violencia Reproductiva en el Conflicto Armado Colombiano [Forced Pregnancies: Hidden Realities of Reproductive Violence in the Colombian Armed Conflict]*, COMISIÓN PARA EL ESCLARECIMIENTO DE LA VERDAD, LA CONVIVENCIA Y LA NO REPETICIÓN 30 (Oct. 13, 2020) (on file with the authors).

46 Rome Statute of the ICC, 2187 UNTS 90 (hereafter Rome Statute of the ICC or Rome Statute), Art. 7(1)(g),(k) (adopted Jul. 17, 1998, entered into force Jul. 1, 2002). See also International Criminal Law Guidelines on Sexual Violence, THE HAGUE PRINCIPLES ON SEXUAL VIOLENCE 61–63, (June 2013), <https://thehagueprinciples.org/>.

47 Rule 101: The Principle of Legality, International Humanitarian Law Databases, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule101>.

The Value of a Gendered Lens

This research examines a wide range of conduct and contexts through a gendered lens to explore their reproductive connotations, motives, and consequences. One might query (as several gender advisors reported being asked), whether and why it is necessary to examine such a wide array of conduct through a gendered lens, particularly if applicable legal frameworks do not seem to explicitly require it. This paper answers that question by highlighting that all violations take place within their social context, which includes innumerable intersecting factors of gender, race, age, disability status, class, language, sexuality, and other categories into which societies place individuals. In that sense, reproductive consequences and contexts could potentially be identified for essentially all human rights violations, breaches of the laws of war, and international crimes.

Why enumerate these features if they are arguably present in nearly all violations?⁴⁸ In short, the pervasiveness of these impacts, rather than making them obvious, has rendered them largely invisible. One result of this invisibility is the tendency for prevention, reparations, and redress efforts to lack components that respond specifically to these violations, blunting the transformative potential of such interventions.

The aim of enumerating the reproductive consequences and intentions of violence is not to suggest that they hold more weight than other consequences and motives. Rather, it is to open the door to a fuller understanding of all kinds of harms, including those that, in part through their ubiquity, have been forgotten. Only when these harms are understood can cycles of violence and discrimination be broken.

METHODOLOGY

This research synthesizes the results of interviews with experts and desk research on existing international jurisprudence to identify and begin to address the gap in international fact-finding around reproductive violence. The analysis in this paper is based on:

- Individual interviews with previous and current gender advisors who have worked on past or ongoing investigative mechanisms;
- Individual interviews with experts from civil society and academia who work on reproductive violence;
- An in-person workshop of current and former gender advisors to present and receive feedback on the paper's initial findings;
- Desk research on reproductive violence under international law (international humanitarian law, international human rights law, and international criminal law), in theory and practice.

Seven individual interviews were conducted with current or former gender advisors. Two further interviews

⁴⁸ Note that there are also potential costs to directing specific, named, differential focus to harms that disproportionately impact individuals who deviate from a perceived default norm. See, *e.g.*, Kimberly Theidon, LEGACIES OF WAR: VIOLENCE, ECOLOGIES, AND KIN 80 (July 2022) (“[Differential focus] is admittedly well intentioned and informed by the politics of recognition and its ‘logic of enumeration,’ by which political and theoretical efficacy presumably exist only through naming each category of selfhood or experience. The problem is that it leaves certain people (light-skinned, heterosexual, able-bodied middle- or upper-class urban males) as the generic category of the ‘human’ against which others are marked and somehow deviate.”).

were conducted with representatives of UN Women and OHCHR – one joint interview with representatives of both and another individual interview with UN Women. Another four individual interviews were conducted with members of civil society, academic experts, and a domestic judge with experience adjudicating international crimes. Interviews were conducted between December 2023 and May 2024, either remotely via video call or in person. All interviews were conducted in English, using a semi-structured format that combined prepared questions with interviewee-led conversation. Each interview lasted approximately one hour and was conducted by the report’s co-authors.

Interviews with gender advisors focused on identifying barriers that have inhibited documentation of reproductive violence by international fact-finding mechanisms. Interviewees also shared practices and approaches that facilitate the documentation of reproductive harms by investigative mechanisms and engaged in substantive discussion of theoretical, legal, and practical questions regarding reproductive violence.

Interviews with civil society, governmental, and academic experts focused on the legal and practical landscape around reproductive violence and their experiences of barriers that limit the ability of external actors to provide this information to investigative mechanisms, document the information themselves, or support justice efforts to address the violence.

All interviews were conducted on condition that the identities of interviewees would not be disclosed.

The desk research focused on identifying the existing legal framework for reproductive violence and collating positive and negative examples of documentation of this harm in reports of fact-finding mechanisms (FFMs), commissions of inquiry (COIs), or other investigative mechanisms.

An in-person workshop was held to present the paper’s initial findings and recommendations to current and former gender advisors to UN investigative mechanisms for feedback. Participants included some advisors who were consulted in the drafting phases and others who were not, as well as UN Women, JRR, and OHCHR experts. Participants were provided with a draft of the paper in advance of the workshop and asked to assess the extent to which their experiences were reflected in its findings, analysis, and recommendations, as well as any gaps in the analysis. During the workshop, the participants reinforced the paper’s findings and suggested additional examples and areas of analysis. The final version of this paper incorporates their feedback, along with additional feedback on subsequent drafts provided by other gender experts and UN Women and OHCHR staff members, though some additional examples or analysis could not be included due to time constraints.⁴⁹

⁴⁹ The authors express their profound gratitude to all interviewees and participants in the workshop, to UN Women, OHCHR, and JRR for facilitating the research, and to all who provided their input and expertise throughout the research and drafting process.

FACILITATING FACTORS

There have been numerous promising practices and examples in past fact-finding efforts that foster effective documentation. These facilitating factors can be classified as: 1) structural elements, including the strength of a mechanism’s mandate as well as adequate staffing and resourcing; 2) law and language related to reproductive violence, including emergent international jurisprudence; and 3) civil society and community participation. This section and the following section on barriers are drawn directly from interviews,⁵⁰ except where otherwise noted.

Structural Elements

Success in documenting reproductive violence can be linked to the earliest phases of the investigative mechanism. This includes the specific language used by the mandating authority (often the HRC) when articulating the task of each mechanism. Ideally, this language includes specific calls for investigation of SGBV or, ideally, an open-ended obligation to adopt a gendered perspective or apply a gender lens to the investigation of all violations. For example, the mandate of the International Commission of Human Rights Experts on Ethiopia included an obligation to both “conduct a thorough and impartial investigation into allegations of violations and abuses of international human rights law and violations of international humanitarian law and international refugee law in Ethiopia...including the possible gender dimensions of such violations and abuses,” and “[t]o integrate a gender perspective and a survivor-centred approach throughout its work.”⁵¹

This robust language alerts all members of the mechanism to the requirement to address both gendered violations – which may include reproductive violence – and the gender dimensions of any violations. Interviewees explained that this type of specific language provides gender advisors a ‘hook’ within the mandate with which to advocate for documentation of reproductive violence. The same is true for the terms of reference that follow the mandate. Some interviewees noted that it is particularly helpful when the teams that draft the terms of reference have gender expertise and/or training on SGBV.

The broader obligation to integrate a gender perspective throughout the work, not just focus on SGBV, can counter some of the misperceptions that impede documentation of gendered harms beyond rape and sexual assault. Interviewees explained that essential progress made in the past 20 years in documenting sexual violence has not necessarily translated to a broader focus on gendered harms. Mechanisms’ mandates and terms of reference that specifically call for the use of a gender perspective and/or examination of the gendered dimensions of harms can provide a strong basis for gender advisors to push for documentation beyond sexual violence.

Interviewees identified the consistent deployment of gender advisors with every new mechanism as a positive feature by interviewees as it helps to set expectations that each report will include a section on SGBV, violations of women’s and girls’ human rights, and/or gendered impacts. They cited this expectation as creating an important opportunity for documentation of reproductive violence, even when sexual violence was not prevalent. Interviewees also noted that deploying gender advisors from each mechanism’s start is essential to

⁵⁰ Interview records on file with authors.

⁵¹ Human Rights Council, Situation of Human Rights in Ethiopia, A/HRC/RES/S-33/1, ¶¶ 9(a), (d) (Dec. 2021) (emphasis added)

ensuring their integration into the wider team. This also further strengthens the gender-responsiveness of the investigation across the board and helps to ensure that investigative priorities account for gendered harms, including reproductive violence.

Interviewees also noted the positive effects of UN Women's and OHCHR's shift toward deploying more senior gender advisors, which helps to ensure that their recommendations carry the weight of significant experience. Longer, fully-funded deployments were further cited as providing crucial stability for gender advisors, enabling them to engage robustly and consistently with their team members. Gender analysis takes time, and some found it necessary to insist on receiving sufficient time to review factual and legal findings to draw out the gendered elements of the findings. Receiving a mandate for more than one year facilitated such efforts, as did the deployment of multiple gender and/or SGBV experts within a single team. Others described the importance of building relationships with their colleagues as well as expert members of the team, to ensure that their analysis was included in the reports of the investigative body. Building gender expertise and sensitivity throughout the team, rather than concentrating such expertise solely in the gender advisor, was also identified as a key strategy.

Gender advisors' range of expertise can enhance effective documentation of reproductive violence. Interviewees noted that sexual violence expertise is not coextensive with broader gender expertise, which includes other forms of SGBV, knowledge of gender-competent analysis, and gender-sensitive investigations methodologies.⁵² Some interviewees suggested that gender advisors should conduct as much of the investigation and as many interviews as possible themselves to ensure that questions are asked appropriately and patterns of reproductive and other SGBV other than sexual violence are recognized.

However, interviewees cautioned that an expanded role for gender advisors in conducting investigations should not preclude the expansion of gender sensitivity throughout the team. Other investigators should be trained to conduct gender-competent interviews and analysis to complement the work of gender advisors and ensure consistency across investigations. Interviewees also recommended sensitizing organizations that refer victims to investigative mechanisms – such as medical or legal service providers – and colleagues to ensure that they document and report reproductive violence, as well as diversifying the sources from whom they receive referrals for investigation to include SRHR service providers.

Supportive infrastructure, including avenues for referring victims to services, is also important. Being able to refer victims to resources such as psychological support and medical care (including the full range of sexual and reproductive healthcare) enables investigators to probe more deeply in interviews to capture the full scope of harm suffered while maintaining a 'do no harm' approach that ensures appropriate treatment for trauma. Where such support and healthcare were not available, documenting violations that impact sexual and reproductive health can be especially challenging.

Lastly, full and predictable funding for gender adviser positions for the duration of the investigation, as well as dedicated resources, particularly translators/interpreters, were identified as fostering documentation of reproductive violence. Without dedicated personnel, gender advisors warned that they would have to 'compete' with other investigators for language services, thus impeding their ability to document the full range of violations. Interviewees noted that mandates greater than one year provide the stability needed for teams to

52 Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶¶ 23–26 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=20>.

build trust with victims, and with the community, legal, medical, or other resources to which victims can be referred for services.

Law and Language

Interviewees highlighted the importance of several legal and linguistic factors in their efforts to document reproductive violence. These included framing their arguments in legal terms, clarified by the emerging standards⁵³ and jurisprudence on reproductive violence, as well as the use of the term ‘reproductive violence’ itself.

Several interviewees emphasized that their ability to articulate reproductive harms as international law violations, especially international crimes, can increase the persuasiveness of their analysis within investigative teams. This perceived added weight and importance increases the likelihood of it being included in the final report.

Emerging jurisprudence and policies around reproductive autonomy, harms, and violence have also provided new essential tools for documentation. These include the ICC trial and appeals chambers’ decisions in the *Ongwen* case, which for the first time authoritatively identified reproductive autonomy as a value protected by international criminal law.⁵⁴ Other key resources include the ICC OTP’s new Policy on Gender-Based Crimes,⁵⁵ which consistently refers to “sexual, reproductive, and other gender-based violence.”⁵⁶ The Policy was praised as an essential resource as it consistently integrates reproductive violence into its analysis of gendered crimes and provides highly persuasive analysis and definitions.⁵⁷

Interviewees noted that investigators at UN mechanisms should, however, not unduly limit their investigations to international crimes as their mandates also call for documentation of IHRL and IHL violations. The International, Impartial, and Independent Mechanism’s (IIIM) Gender Strategy and Implementation Plan⁵⁸ was identified as providing a basis for broader gender analysis of IHL and IHRL violations that could reveal reproductive violence. However, the strategy itself only minimally references reproductive harms.

53 See generally Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice, A/HRC/32/44 (Apr. 8, 2016).

54 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2717 (Feb. 4, 2021).

55 Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

56 Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶¶ 47–50, 55–56, 58, 63, 66, 77, 84, 100 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

57 “Multiple crimes within the Court’s jurisdiction involve reproductive violence. Three are specifically enumerated in the Rome Statute: forced pregnancy as a crime against humanity and war crime (arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e) (vi)); enforced sterilization as a crime against humanity and war crime (arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi)); and genocide by imposing measures intended to prevent births within a national, ethnic, racial or religious group (art. 6(d)). Other acts of reproductive violence are not explicitly named as such in the Statute and yet could be charged, as and where appropriate, under different provisions. These acts might include forced use of contraception, forced abortion, forced breastfeeding, denial of essential reproductive healthcare or physical violence aimed at reproductive organs.” Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 37 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=24>. Interviewees noted that the Policy’s legal applicability is limited by the ICC’s jurisdiction, but nevertheless identified it as a key resource for advancing the conversation on reproductive violence.

58 IIIM Gender Strategy and Implementation Plan, UNITED NATIONS (Sept. 30, 2022), <https://iiim.un.org/wp-content/uploads/2022/10/Gender-Strategy-Implementation-AbridgedEnglish.pdf>.

All interviewees were asked what term they felt best captured the range of harms under discussion between ‘reproductive harms,’ ‘reproductive violations,’ and ‘reproductive violence,’ as well as other formulations. Interviewees shared differing views on the advantages and drawbacks of the varying terms, but a majority indicated that they preferred the term ‘reproductive violence,’ while also noting possible downsides. The richness of these conversations extends beyond the scope of this report, but key considerations are outlined below. Further reflections, analysis, and considerations can be found in the Annex.

Interviewees stressed that the experience of reproductive violence is often as traumatic and violent as sexual or other violence. The term ‘reproductive violence’ was felt to accurately capture the severity and immediacy of the trauma associated with these acts.

Interviewees also noted that there is a growing awareness and recognition of the term ‘reproductive violence,’⁵⁹ though more progress is needed. The parallels between the terms ‘sexual violence’ and ‘reproductive violence’ were found to be positive, given the growing recognition of both the historical neglect of sexual violence and the importance of remedying this exclusion. The phrase also allows reproductive violence to be included in legal frameworks for remedying or addressing these acts by situating it alongside violence against women and gender-based violence. Furthermore, using a term that mirrors sexual violence enables reproductive violence to be associated with robust survivor networks, resources, and public awareness around sexual violence.

Interviewees noted, however, that using the term ‘reproductive violence’ could replicate certain shortcomings of the term ‘sexual violence,’ namely, failing to highlight and address non-physical and indirect harms entailed by such violence. Nonetheless, interviewees generally agreed that ‘reproductive violence’ was the best option among the suggested terms: ‘violations’ was assessed to lack specificity and legal heft, while ‘harms’ was considered to elide the agency of perpetrators, thus concealing the acts and choices, including policy choices, that led to such harms.

Differentiating sexual violence from reproductive violence (rather than subsuming reproductive harms within sexual violence) can also help tease out gendered harms and violence that do not fit comfortably within the sexual violence paradigm. Opening up the category of violence against women or SGBV to include forms of violence beyond sexual violence could help investigators comprehend other violations that should be documented. However, interviewees cautioned that care should be taken not to suggest that reproductive violence is limited to the reproductive consequences of sexual violence (*e.g.*, pregnancy resulting from rape). Instead, investigators should understand reproductive violence as another form of SGBV, which can manifest alongside or independently from sexual or other violence. Understanding reproductive violence in this way was seen as essential for documenting the breadth and depth of these harms.

59 Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 14 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=23>. See generally Draft Articles on Prevention and Punishment of Crimes Against Humanity should advance Justice for Reproductive Autonomy, GLOBAL JUSTICE CENTER 2–5 (Oct. 5, 2023); Catalina Martínez Coral, An examination of Reproductive Violence against women and girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS (July 2020); Ciara Laverty & Dieneke de Vos, Reproductive Violence as a Category of Analysis: Disentangling the Relationship between ‘the Sexual’ and ‘the Reproductive’ in 15 Transitional Justice, INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 616 (Jul. 12, 2021). “Obstetric violence” is another emerging concept within reproductive violence, see Fionnuala Ní Aoláin, A Zone of Silence: Obstetric Violence in Gaza and Beyond, JUST SECURITY (Feb. 21, 2024).

Overall, interviewees emphasized that, while different terminology may illuminate different aspects of this conduct, debates about nomenclature should not distract from the overall goal of fully documenting these harms, violations, and violence.

Civil Society and Community Participation

Civil society actors play an important role in identifying, corroborating, and documenting reproductive violence. They can facilitate access for investigators – if and when investigators earn their trust – and provide additional information to verify, corroborate, or contextualize individual violations (while maintaining confidentiality). This can be particularly helpful in light of the imperative to ‘do no harm’ in investigations, given the risks of re-traumatizing victims with multiple interviews. Interviewees noted that cooperation can be challenging if partner agencies do not understand or feel confident in the firewalls between their clients’ confidentiality and the work of the investigative mechanism, but careful communication can overcome this hurdle.

Civil society, community organizations, or other international agencies can also bolster investigative mechanisms’ in-house expertise, such as by providing technical medical knowledge or skills, which can be necessary for unpacking the reproductive impacts of violations. Other interviewees explained that engagement with local communities can strengthen documentation by allowing for the co-creation of documentation and accountability processes in ways that both meet international standards and serve the needs of the community.

BARRIERS TO DOCUMENTATION

The research identified four primary barriers to effectively documenting reproductive violence. Set forth below is an overview of those barriers, which can be classified as: 1) stigmatization of reproductive autonomy; 2) structural and resource challenges including limited time, insufficiently gender sensitive terms of reference, the ‘outsider’ status of gender advisors, and a lack of specialized resources for victims; 3) perceived and actual limits in the law, such as differing standards for finding criminal law versus human rights law violations and national laws that restrict reproductive autonomy; and 4) analytical challenges including the linkages between underlying gender discrimination and acute acts of reproductive violence. Additional information about each of these and other barriers can be found in the Annex.

Stigmatization of Reproductive Autonomy

Interviewees reported that while discussion of sex and reproduction in any investigatory context can pose challenges due to the sensitivity of the topics, a more significant barrier was the stigmatization of these topics within investigations themselves. The expectation that sexuality and reproduction are uniquely sensitive or taboo can become a self-fulfilling prophecy, with investigators shying away from the issues due, in part, to their own discomfort or expectations. Interviewees noted that while there has been some progress – though not

enough – on destigmatizing discussions of sexual violence, there has been little to no corresponding progress with regard to reproductive violence. Sexual violence documentation is now a standard part of the conversation in any conflict or atrocity setting. But reproductive violence has not yet reached this level of recognition, which can impact the attention, time, comfort level, and knowledge of investigators, victims, and witnesses. Interviewees emphasized that additional attention and education is needed to destigmatize discussions of reproductive violence and reproductive autonomy within and outside of mechanisms.

Interviewees further explained that a common objection within mechanisms to efforts to document reproductive violence is ‘it’s cultural’ – an objection that suggests that issues of reproduction, sex, and sexuality are uniquely subject to culturally-relative standards that insulate them from analysis, documentation, or critique by mechanisms. This, in turn, can lead to mechanisms engaging in self-censorship by avoiding these topics altogether. Interviewees noted that the deference accorded to perceived cultural justifications for potential violations or international crimes is out of sync with international law.

Self-censorship can happen at all levels of investigations. Interviewees noted instances where they hesitated to ask questions on topics they perceived as too personal or sensitive, especially when they related to children born of violence or child victims. In some cases where information on reproductive violence was collected, the issue was framed in the final report as a consequence of other violations (such as sexual violence), rather than as a discrete violation – in part because using a more precise framing was perceived as too sensitive or political.

Interviewees also recounted situations where reproductive violence documentation in draft reports was reframed or curtailed at the request of investigative mechanisms’ leadership. Interviewees explained that stigmatization of reproductive autonomy, combined with the precarity of investigative missions overall, can result in requirements for higher levels of certainty regarding events and intent to include reproductive violence in reports, compared to other crimes or violations. Interviewees acknowledged the genuinely difficult contexts in which mechanisms operate, where political, logistical, and financial support can be in question. Yet the effect of reframing or minimizing findings on reproductive violence is to preemptively acquiesce to the stigmatization of these topics, which further reinforces barriers to accurately documenting and redressing the harms.

Additional challenges may exist where cooperation is needed between UN investigative mechanisms and UN agencies or State governments. For example, data collected or managed by UN agencies is often relevant to documentation. Yet these agencies may hesitate to share data when they perceive that doing so may jeopardize their access to territory and populations that require their services. Although these dynamics can impact information-sharing on violations of all kinds, when combined with the perceived sensitivity of SGBV and particularly reproductive violence, this dynamic particularly impedes the full documentation of reproductive violence.

The gendered and sensitive nature of reproductive roles, due in part to the outsized impact it can have in determining or maintaining a person’s social status and position within their community, can also make it more difficult for victims and survivors to discuss. For example, one investigator described a context where the ability to reproduce, and specifically to father children, was determinative of a person’s social standing. In that context, investigating reproductive violence that led to male infertility was complicated by the potential social impact of victims’ experiences being made public. Similarly, victims of forced impregnation or forced pregnancy may

reasonably fear the potential social consequences of sharing this information.⁶⁰ Messaging around who can and cannot, should or should not impregnate particular individuals can contribute to sensitivity around reproductive capacity, which in turn complicates the investigation of violations related to this capacity.⁶¹ At the same time, these sensitivities are not unique to SGBV and international mechanisms routinely investigate sensitive subjects without self-censorship. Interviewees encouraged other investigators to take the same undaunted approach with regard to reproductive violence.

Structure and Resources of Mechanisms

Interviewees observed that besides gender-specific positions, the recruitment processes for other roles within mechanisms do not sufficiently require gender expertise as a criterion, despite requiring some gender competence in some terms of reference. This can result in limited consideration of gender-expertise at the overall team composition and design stage, or can lead to the priorities and analysis of gender advisors being overruled or deprioritized. These dynamics negatively impacted their ability to document less-widely-understood gendered harms, such as reproductive violence. In addition, if the mandate contains limited or no references to SGBV, it will be difficult to justify allocating resources to investigating it.

All interviewees agreed that a dedicated gender advisor on each team is essential. However, the lack of other specialized 'outsider' advisors on each team can result in the gender advisor being seen as uniquely extrinsic, which can impact their ability to share their expertise with the team.

Interviewee Insight:

Gender expertise should be more thoroughly mainstreamed throughout UN mechanisms by strengthening the capacity of the team as a whole to analyze social and political contexts and situations through a gender perspective. This will enable gender advisors to effectively intervene within a team to document the full spectrum of gendered harms, including reproductive violence. Ensuring gender expertise extends beyond the gender advisor to the rest of the team is important to ensure that the right questions are asked and that the answers are understood within their context.

Several interviewees also noted the need to expand the availability of specific expertise and services to which

60 Similar dynamics also accompany sexual violence; however, our interviewees repeatedly stressed that concerted efforts to raise awareness around sexual violence have reduced shame and stigma around these violations to some extent. However, the relative lack of attention to reproductive violence and reproductive rights continues to leave this form of violation shrouded in stigma and misunderstanding.

61 It is important to note that perceptions of who should and should not reproduce, and in what circumstances, may be informed by norms that do not depend on or recognize reproductive autonomy, nor prioritize victims'/survivors' rights. The interplay between these factors and the rights of individuals is fraught. Practitioners emphasized that human rights standards apply cross-culturally in order to protect rights of individuals, including against discrimination within their own communities. See, *e.g.*, Theidon on genocidal rape, which may operate in part through patriarchal theories of ethnic identity that negate the contribution of the mother to her child's identity: "We may not endorse this patriarchal understanding of genetic descent, but if it is operative for the women being raped and for their families and communities, then we must acknowledge its influence and critique how it works to the detriment of the women and any babies they may birth." Kimberly Theidon, LEGACIES OF WAR: VIOLENCE, ECOLOGIES, AND KIN 42 (July 2022); Siobhan K. Fisher, Occupation of the Womb: Forced Impregnation as Genocide, 46 DUKE LAW JOURNAL 91, 124 (1996), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3320&context=dlj#page=34>.

they can refer victims – whether psychologists, counselors, medical providers, or practical support. Without accessible support services to help victims process interviews, some investigators reported hesitating to ask the kinds of detailed, difficult questions that are necessary to document reproductive violence.

Perceived and Actual Limits in the Law

Another challenge is the limited existing jurisprudence on reproductive violence. Although particular conduct might be proscribed in law, a lack of international jurisprudence and/or limited applications by human rights bodies can lead documenters to hesitate to characterize the conduct as a violation. Gender advisors reported challenges to convincing colleagues of the status of these violations without clear jurisprudence on the topic. One interviewee stated that, in their experience, gender was seen as the most controversial topic in each investigation, leading teams they had been part of to adopt more cautious interpretations of gender-related violations compared to other types of violations.

Interviewees further raised the difficulties of documenting and analyzing reproductive violence (and other forms of violence) under various bodies of law which, at times, have different definitions and requirements to establish violations. For example, to establish forced pregnancy under ICL, investigators must establish unlawful confinement,⁶² an element that is not required to find violations of rights to, *inter alia*, health, privacy, or to make decisions on family life – rights which together make up a right to be free from forced impregnation or pregnancy under IHRL. Interviewees noted that some experts or staff may prioritize one body of law (e.g., ICL) over others, leading to deprioritization of reporting on violence that does not fit into the preferred body of law. Documentation compiled by experts primarily trained in one body of law thus might not adequately capture relevant information to meet the requirements under others.⁶³

In other cases, the specificity and certainty required to establish liability can clash with the long-term or slow-to-manifest consequences of sexual, reproductive, and other violence. For example, one interviewee described cases of prolapsed uterus manifesting in rape survivors decades after the assaults – a length of time that can impede efforts to assign causation. Frameworks that focus on immediate harm may not always capture the full severity or types of long-term harm. In addition, international criminal liability generally requires proof of “intent,” and it can be difficult to prove intent for harms that arise over time.

National laws can also limit investigators’ ability to document reproductive violence under international law. Interviewees identified several examples, such as legal limits to accessing reproductive health services (i.e., abortion restrictions or bans), immigration laws that bar access to health or justice services for irregular

62 Rome Statute of the ICC, Art. 7(2)(f).

63 Likewise, experts noted distinctions among the legal definitions of ‘reproductive autonomy,’ a term used in both the ICL context and the human rights context. For example, in *Prosecutor v. Dominic Ongwen*, Appeal Judgment, Appeals Chamber, ¶ 1055 (Dec. 15, 2022), the Appeals Chamber found that the definition of forced pregnancy within the Rome Statute, and the fact that it was criminalized separately from other related crimes such as rape and imprisonment, “imply that this crime intends to protect a woman’s reproductive rights, including the right to be pregnant and to *autonomously determine the way in which she carries out her pregnancy*.” (emphasis added). In the Inter-American Court Human Rights case of *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, Series C No. 257 (Nov. 28, 2012), the Court made reference to Art. 16(e) of CEDAW, which provides that women enjoy the right “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights.” The latter’s emphasis on access to information and means to enact reproductive decisions may go beyond the meaning of reproductive autonomy as referenced in *Ongwen’s* articulation of ICL.

migrants, or laws criminalizing extramarital sex. In essence, the legal vulnerability of victims and witnesses in their national contexts can inhibit their ability to speak to investigators about their experiences and can cause reproductive harm in itself.⁶⁴

Analytical Challenges

A final category of barriers includes analytical hurdles. One hurdle is the thorny issue of differentiating background conditions from discrete violations that come within the ambit of an international investigation. Another is the difficulty of identifying and articulating the best legal categories under which to place reproductive violence. The guidance provided in the subsequent section aims to equip mechanisms with additional resources to navigate these challenges.

Interviewees described the challenge of differentiating gender discrimination that predates – and underpins – the discrete violations that are the immediate focus of their mandates. Some interviewees observed that mechanisms have historically avoided documenting ‘background’ human rights violations, including gender discrimination, opting instead to focus on the atrocity conditions considered most blatant or acute. This focus can imply that the situation preceding a particular conflict or atrocity context constitutes the norm against which aberrations ought to be judged, regardless of whether the ex-ante situation entailed human rights violations.

Some mechanisms have tended to only focus on ICL violations, omitting IHRL violations unless they also amount to international crimes. However, this distinction is untenable in the context of SGBV. To understand SGBV, including that which constitutes an international crime, it is necessary to document and unpack the underlying framework of gender-based discrimination and existing harmful norms. It is often precisely these pre-existing norms, assumptions, and patterns that dictate both how international crimes and human rights violations are carried out, as well as their impacts.⁶⁵ In this context, prioritizing the investigation of ICL offenses leaves reproductive harms systematically under-documented because a relatively limited subset of reproductive violence is explicitly criminalized under ICL.

A Continuum of Gender-Based Violence: From Discrimination to Genocide

In Iraq, the UN Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD) documented the ways in which reproductive and other SGBV were used to commit genocide against the Yazidis.⁶⁶ The SGBV closely followed the contours of pre-existing patterns of discrimination and gender norms within both

⁶⁴ One interviewee gave the example of a CRSV victim who was arrested when she visited a hospital to give birth because of her irregular immigration and unmarried status. In the context of restrictions on reproductive healthcare, interviewees stated that even discussing abortion or other services could expose victims or witnesses to legal risks or other harms.

⁶⁵ For related discussion in the context of gender persecution, see UN Women, MADRE, CUNY School of Law, Human Rights and Gender Justice Clinic, IDENTIFYING GENDER PERSECUTION IN CONFLICT AND ATROCITIES A TOOLKIT FOR DOCUMENTERS, INVESTIGATORS, PROSECUTORS AND ADJUDICATORS OF CRIMES AGAINST HUMANITY IDENTIFYING GENDER PERSECUTION 12 (2021), <https://www.unwomen.org/sites/default/files/2022-01/Identifying-gender-persecution-in-conflict-and-atrocities-en.pdf> (“accountability for gender persecution requires recognition and understanding of the discrimination that underlies the crime. It is not enough to hold perpetrators accountable for crimes that take place during atrocities; justice also requires understanding how perpetrators justify such acts, if we are to eliminate discrimination and break cycles of violence.”).

⁶⁶ While UNITAD was established by and reported to the Security Council, rather than the Human Rights Council, unlike the majority of the mechanisms discussed herein, many of the practices and hurdles of documentation are common to both forms.

the victims' and perpetrators' communities.⁶⁷ Younger women and girls were enslaved because of their perceived sexual and reproductive capacities; the youngest girls were also “forced to undertake domestic work—cooking and cleaning ...which is to say, work compatible with their perceived gender roles.”⁶⁸ Older women were either enslaved as domestic labor or killed, reflecting the perpetrators' perception of the limits of their “usefulness” as defined by their gender.⁶⁹ Young boys were trained as fighters, and any gender non-conforming individuals were either killed or forcibly assigned gender roles.⁷⁰ Meanwhile, men and older boys were considered potential military and reproductive threats and executed, which also served, within the context of their communities, to reinforce the perpetrators' dominance.⁷¹

The perceived reproductive capacities of each segment of the targeted population dictated, in part, whether they lived or died, were seen as a threat or a resource. It is therefore impossible to exclude the background discriminatory context from the documentation of severe human rights violations and international crimes committed against the Yazidis.⁷² Moreover, understanding the background context, including its discriminatory elements, is necessary to design and support redress and prevention efforts.⁷³

Interviewees also described the complex challenges of documenting violations that fall within a continuum of social activities. They alluded to the need for a more radical conversation that would convey the full meaning of violations within people's lives. Questions implicated by investigation of violations within this continuum include: What is the role of women in society? How are they defined by their positions as mothers, child bearers, and child rearers? How does culture dictate or limit human rights, particularly in relation to sex and reproduction?

67 See generally Report on sexual violence against women and girls committed by ISIL in Iraq, INVESTIGATIVE TEAM TO PROMOTE ACCOUNTABILITY FOR CRIMES COMMITTED BY DA'ESH/ISIL (UNITAD) (Dec. 3, 2023), https://www.unitad.un.org/sites/www.unitad.un.org/files/scgb_report_e-report_en-.pdf.

68 Sareta Ashraph, Acts of Annihilation, The role of gender in the commission of the crime of genocide, 103 CONFLUENCES MÉDITERRANÉE 15, 24 (2017).

69 Alexandra Lily Kather & Alexander Schwarz, Intersecting Religious and Gender-Based Persecution in Yazidi Genocide Case: A Request for an Extension of Charges, JUST SECURITY (Feb. 24, 2021), <https://www.justsecurity.org/74943/intersecting-religious-and-gender-based-persecution-in-yazidi-genocide-case-a-request-for-an-extension-of-charges/>.

70 Amie Bishop, I Need to be Free: What it Means to be a Queer Woman in Today's Iraq, OUTRIGHT ACTION INTERNATIONAL & IRAQUEER 7 (Mar. 2022), https://outrightinternational.org/sites/default/files/Iraq_EnglishLowRes.pdf.

71 Sareta Ashraph, Acts of Annihilation, The role of gender in the commission of the crime of genocide, 103 CONFLUENCES MÉDITERRANÉE 15, 19 (2017) (“Males, particularly men and adolescent boys, are targeted because they occupy gendered roles that genocide's perpetrators find particularly threatening: those of community leaders, political figures, and fighters...Moreover, in patriarchal cultures where men hold the dominant positions ... in private life, killing males is the ultimate assertion of dominance over the women and children belonging to the same group.”).

72 Gina Vale, Liberated, not free: Yazidi women after Islamic State captivity, 31 SMALL WARS & INSURGENCIES 511 (Apr. 13, 2020).

73 Sareta Ashraph, Acts of Annihilation, The role of gender in the commission of the crime of genocide, 103 CONFLUENCES MÉDITERRANÉE 15, 26 (2017) (“ISIS's on-going attack has enabled Yazidis to set aside many of the expected social consequences of being a victim of sexual violence. Yazidis seem to recognize that as a strategy of genocide, the assaults on women and girls are acts of violence against the group rather than against females as individuals. As a result, in most cases, no shame or blame is projected on to the victim. Their religious leaders have stated that the survivors of sexual slavery remain Yazidi and are to be accepted by the community.”). See also Susannah George, Yazidi Women Welcomed Back to the Faith, UNHCR UK (Jun. 15, 2015), <http://www.unhcr.org/uk/news/stories/2015/6/56ec1e9611/yazidi-women-welcomed-back-to-the-faith.html>; and “They came to destroy”: ISIS Crimes Against the Yazidis, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, A/HRC/32/CRP.2, ¶¶ 79–80 (Jun. 16, 2016), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf.

Snapshot: Framing Reproductive Violence in Colombia's Domestic Transitional Justice Process

In many contexts, reproductive violence is not recognized as robustly as sexual violence. In the Colombian context, this compelled civil society documentors as well as investigators for the Special Jurisdiction for Peace (JEP) and the Constitutional Court to frame reproductive rights violations as sexual violence to ensure it is covered by relevant laws.⁷⁴ In particular, they have relied on Articles 7(1)(g) and 8(2)(e)(vi) of the Rome Statute to categorize reproductive violence as “any other form of sexual violence of comparable gravity.”⁷⁵ However, reliance on this framing has led to significant violations being elided or mischaracterized.⁷⁶ In at least one case, a victim expressed that the characterization of crimes committed against her – in this case, forced abortion – failed to capture the nature and gravity of the violation. She asked her lawyer why she was called a sexual violence victim when she instead identified as a victim of reproductive violence.⁷⁷

In some cases, gender or SGBV advisors stated that they could benefit from more focused training to cultivate their abilities to conceptualize, identify, and categorize reproductive violence. This is especially true in contexts where reproductive violence and violations overlap with specialized regimes of law, such as laws of war or occupation.⁷⁸

Finally, several interviewees expressed challenges categorizing violence against cisgender men, boys, and others assigned male at birth⁷⁹ as reproductive violence (or even sexual violence). The complexities of documenting sexual or reproductive violence against men are well-known and equally apply to this context.⁸⁰ In addition, interviewees observed that the reproductive consequences of violence against men and boys can be more difficult to surface, in part because men tend to be viewed as reproductive agents as opposed to victims. Patriarchal notions of who can be victimized by and who can perpetrate certain types of harm continue to influence some investigations, hindering accurate documentation of reproductive violence committed by or against non-normative perpetrators or victims. However, reproductive violence against men can be a widespread, intentional, and strategic tool in the commission of atrocities. Cumulative charging can help to fill in some gaps in a criminal context where reproductive violence may overlap with sexual violence and/or torture – but only if documenters are equipped to see the full scope of the violation, understand the context, and include evidence of the specifics of the crimes in their reports.

74 Angelica Cocomá Ricaurte & Juliana Laguna Trujillo, Reproductive violence: a necessary category of analysis in transitional justice scenarios, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Jun. 24, 2020), <https://blogs.lse.ac.uk/wps/2020/06/24/reproductive-violence-a-necessary-category-of-analysis-in-transitional-justice-scenarios/>.

75 Angelica Cocomá Ricaurte & Juliana Laguna Trujillo, Reproductive violence: a necessary category of analysis in transitional justice scenarios, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Jun. 24, 2020), <https://blogs.lse.ac.uk/wps/2020/06/24/reproductive-violence-a-necessary-category-of-analysis-in-transitional-justice-scenarios/>.

76 See Indira Rosenthal, Valerie Oosterveld, & Susana SáCouto, What Is ‘Gender’ in International Criminal Law?, GENDER AND INTERNATIONAL CRIMINAL LAW 11, 34 (Indira Rosenthal, Valerie Oosterveld, & Susana SáCouto eds., Aug. 18, 2022).

77 See Trujillo v. UARIV, Sentence SU599/19, ¶ 1.8 (Dec. 11, 2019), <https://www.corteconstitucional.gov.co/Relatoria/2019/SU599-19.htm>. Victim’s statement, as conveyed by her lawyer in an interview with authors (record on file with the authors).

78 A full analysis of reproductive violence and rights violations under particular *lex specialis* such as the law of occupation was beyond the scope of this analysis.

79 This section includes all those assigned male at birth, recognizing that cisgender men and boys as well as those of diverse sexual orientation and gender identities can face discrimination, barriers to reporting, and targeting for violence on the basis of their assigned or perceived sex and gender identities.

80 Rose Khan, Male Victims and Female Perpetrators of International Crimes, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Jul. 20, 2022), <https://blogs.lse.ac.uk/wps/2022/07/20/male-victims-female-perpetrators-of-international-crimes/#:~:text=At%20the%20ICC%2C%20in%20the,forced%20circumcision%20and%20penile%20amputation.>

LEGAL GUIDANCE

Filling the Legal Guidance Gap

Across almost all interviews, interviewees identified the lack of accessible, dedicated resources to guide the investigation of reproductive violence as a major barrier to its effective documentation. While resources are now available to guide sexual violence investigations, similar resources are not widely available to guide the investigation, documentation, legal analysis, and accountability for reproductive violence specifically.

The new ICC Office of the Prosecutor's (OTP) Policy on Gender-Based Crimes is a notable positive step. However, it does not entirely fill the gap. While the Policy provides a definition of reproductive violence and gives examples, it can potentially still be misread as collapsing the categories of sexual and reproductive violence. Additionally, the Policy only covers violations that amount to crimes under the Rome Statute. Moreover, as a policy document for the ICC OTP, it provides useful guidance but is not tailored for the work of UN-mandated mechanisms.

The following sections aim to fill this gap. While non-exhaustive, these sections aim to detail the harms that may constitute reproductive violence, how they can manifest, the law applicable to each form of harm, relevant jurisprudence, practical examples, areas of legal uncertainty or development, and key factors that documenters must consider as they analyze these harms. This guidance can help all investigators, including non-gender specialists, to recognize and document reproductive violence.

Across almost all interviews, interviewees identified the lack of accessible, dedicated resources to guide the investigation of reproductive violence as a major barrier to its effective documentation.

Reproductive Violence and Reproductive Autonomy in International Law

Reproductive violence is prohibited across various bodies of law relevant to investigative mechanisms. ICL imposes individual criminal liability for some of these acts, while IHL and the Genocide Convention prohibit many of the same acts (imposing both personal and State responsibility). IHL guarantees the right to bodily integrity and to be free from violence. It also recognizes reproductive autonomy through the protection of a range of rights, including rights to health, privacy, family life, equality and non-discrimination, freedom from torture and other cruel, inhuman or degrading treatment, and access to information.

Despite this legal protection, historically, international jurisprudence has neglected reproductive violence and reproductive autonomy. The conflict in Bosnia first brought the issue to worldwide attention when, as part of the genocide of Bosnian Muslims in 1992-1995,⁸¹ Muslim women were captured, raped, and detained

81 Florence Hartmann, Bosnia, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW*, 52 (Roy Gutman & David Rieff eds., 1999); UN Security Council, *The Situation of Human Rights in the Territory of the Former Yugoslavia*, Note by the Secretary General, A/48/92 (Feb. 26, 1993).

once they were pregnant until it became too late for medical intervention or abortions.⁸² Despite significant evidence of these crimes being committed, prosecutors before the ICTY did not bring specific charges for forced pregnancy.⁸³ The Rome Statute adopted in 1998 was the first international instrument that expressly recognized forms of reproductive violence as criminal violations – specifically, forced pregnancy and enforced sterilization. Nonetheless, it was only in 2021 that Dominic Ongwen became the first person convicted of, among other crimes, forced pregnancy as a crime against humanity and war crime.⁸⁴

In the trial and appeals judgments of the *Ongwen* case, the ICC provided the first analysis of reproductive autonomy as a protected legal interest under ICL. The Appeals Chamber found that the crime of forced pregnancy is grounded in rights to personal and reproductive autonomy and to family.⁸⁵ It interpreted the inclusion of an independent crime of forced pregnancy under the Rome Statute, in addition to rape and imprisonment, as protecting “a woman’s reproductive rights, including the right to be pregnant and to autonomously determine the way in which she carries out her pregnancy.”⁸⁶ The Appeals Chamber confirmed that the crime refers not only to attacking the victim’s autonomy over whether to become or remain pregnant, but also encompasses all decisions about the circumstances in which to carry out a pregnancy and the right to access pregnancy-related healthcare. The Chamber further confirmed that reproductive autonomy under the Rome Statute includes the ability of an individual to decide how they wish to approach their own physical and mental health during pregnancy.⁸⁷

Thus, the Trial and Appeals Chambers recognized that the crime of forced pregnancy offends a particular right – reproductive autonomy – that is protected in international law.⁸⁸ The ICC reached this conclusion by analyzing various international human rights that together comprise reproductive autonomy⁸⁹ and found that the core harm of the crime of forced pregnancy is the denial of autonomy over one’s reproduction.⁹⁰ This recognition by

82 Beverly Allen, Rape Warfare: The Hidden Genocide in Bosnia–Herzegovina and Croatia, 3(1) THE BROWN JOURNAL OF WORLD AFFAIRS 313, 315 (1996); Kelly Dawn Askin, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 282 (1997); Thom Shanker, Sexual Violence, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 232 (Roy Gutman & David Rieff eds., 1999); Soh Sie Eng Jessie, Forced Pregnancy: Codification In The Rome Statute And Its Prospect As Implicit Genocide, 4 NZJPI 311, 313–15 (2006); see R. Copelon, Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law, 5 HASTINGS WOMEN’S LAW JOURNAL 243, 263 (1994); R Charli Carpenter, Assessing and Addressing the Needs of Children Born of Forced Maternity, INTERNATIONAL CONFERENCE ON WORLD AFFECTED CHILDREN (Sept. 11, 2000).

83 See Rosemary Grey, Reproductive Crimes in International Criminal Law, in GENDER AND INTERNATIONAL CRIMINAL LAW 231–64, 232 (Indira Rosenthal, Valerie Oosterveld, & Susana SáCouto eds., Aug. 18, 2022).

84 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, (Feb. 4, 2021).

85 *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶ 1063 (Dec. 15, 2022).

86 *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶ 1055 (Dec. 15, 2022).

87 *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶ 1055, fn. 2334 (Dec. 15, 2022); the court cited *Amici Curiae* Observations on the Rome Statute’s definition of ‘forced pregnancy’, ROSEMARY GREY, GLOBAL JUSTICE CENTER, WOMEN’S INITIATIVES FOR GENDER JUSTICE, AND AMNESTY INTERNATIONAL 15 (Dec. 23, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_11914.PDF#page=15, “[t]he focus on reproductive autonomy distinguishes ‘forced pregnancy’ from related crimes such as rape, enslavement or imprisonment. The harm recognised by the crime of forced pregnancy is therefore not forcing the victim to give birth but violating the victim’s personal, sexual, and reproductive autonomy by unlawfully confining them, including by preventing them from accessing an abortion. Unlawful confinement can impact upon reproductive rights even in States where abortion is partially or completely criminalized or otherwise restricted. It obstructs access to essential services that the victim may otherwise have accessed (even if restricted under domestic law).”

88 This reasoning was recognized by the ICC in *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2722 (Feb. 4, 2021).

89 *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶¶ 1056–60 (Dec. 15, 2022).

90 *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶ 1055 (Dec. 15, 2022); Forced Pregnancy: a commentary on the crime in International Criminal Law, AMNESTY INTERNATIONAL 9–10 (June 2020), <https://www.amnesty.org/en/wp-content/uploads/2021/05/IOR5327112020ENGLISH.pdf#page=9>.

the ICC provides a crucial link between IHRL analysis and ICL prosecutions, laying the groundwork for further documentation of denials of reproductive autonomy as violations of international law.⁹¹

The following sections detail a non-exhaustive list of harms that can amount to reproductive violence and the legal elements required to demonstrate these violations. Some harms that are detailed are more widely understood as reproductive violence, while others are often overlooked. Together, these sections provide an overview of the most important legal provisions implicated by each kind of violation, detailed analysis of the nuances of each harm and how they have been documented in the past, and suggestions for further progress.

Forced Pregnancy

Forced pregnancy may amount to a war crime⁹² and/or a crime against humanity,⁹³ depending on the circumstances. Article 7(2)(f) of the Rome Statute defines forced pregnancy as:

[T]he 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.⁹⁴

Applicable provisions

ICL

- Article 7(2)(f), Rome Statute

IHL

- Common Article 3, Geneva Conventions

IHRL

- Article 16(1)(e), CEDAW
- Article 12, ICESCR
- Articles 17 and 23(1), ICCPR
- Articles 19(1), 34 and 37(a), CRC

91 For further discussion of this connection, see generally *Amici Curiae* Observations on the Rome Statute’s definition of ‘forced pregnancy’, ROSEMARY GREY, GLOBAL JUSTICE CENTER, WOMEN’S INITIATIVES FOR GENDER JUSTICE, AND AMNESTY INTERNATIONAL 15 (Dec. 23, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_11914.PDF#page=15.

92 To meet the legal definition of forced pregnancy as a war crime in a non-international armed conflict, it must satisfy the elements as per ICC Elements of Crimes: “The conduct took place in the context of and was associated with an armed conflict of a non-international character. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.” ICC, Elements of Crimes, Art. 8(2)(e)(vi)-4 (2013), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>; Rome Statute of the ICC, Art. 8.

93 To meet the legal definition of forced pregnancy as a crime against humanity, it must satisfy the elements as per the ICC Elements of Crimes: “The conduct was committed as part of a widespread or systematic attack directed against a civilian population. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.” ICC, Elements of Crimes, Art. 7(1)(g)-4 (2013); Rome Statute of the ICC, Art. 7.

94 Rome Statute of the ICC, Art. 7(2)(f). The definition has since been included in the African Union’s Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and the International Law Commission’s Draft Articles on the Prevention and Punishment of Crimes against Humanity. See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Art. 28C(2)(f) (Jun. 27, 2014); International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, Art.2(2)(f) (2019). It was also included as a crime against humanity and war crime in United Nations Transitional Administration in East Timor’s Regulation 2000/15 on the establishment of Panels with exclusive jurisdiction over serious criminal offences, applying the ICC Statute’s definition. Sections 5.1(g), 5.2(e), 6.1(b)(xxii), 6.1(e)(vi); Forced pregnancy was included as a crime against humanity in the Statute of the Special Court for Sierra Leone and as a crime against humanity and war crime under customary international law in the Republic of Kosovo’s Law No.5/L-053 on Specialist Chambers and Specialist Prosecutor’s Office without a definition. See Statute of the Special Court for Sierra Leone, Art. 2(g) (2000); Republic of Kosovo’s Law No.5/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, Arts. 13.1(g), 14.1(b)(xxii), 14.1(d)(vi); Forced Pregnancy: A Commentary on the Crime in International Criminal Law, AMNESTY INTERNATIONAL 6 (Jun. 30, 2020). Note that the ICC Trial Chamber ruled that “This final sentence does not add a new element to the offence – and is thus not reproduced in the Elements of Crimes – but allays the concern that criminalizing forced pregnancy may be seen as legalising abortion.” *Prosecutor v. Dominic Ongwen*, Trial Judgement, Trial Chamber IX, ¶ 2721 (Feb. 4, 2021). The Appeals Chamber affirmed this understanding. *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶ 1065 (Dec. 15, 2022).

The ICC has further clarified that the person who confines the victim need not be the one who impregnated them – the victim could have been impregnated by a third person, consensually or non-consensually.⁹⁵ Additionally, the confinement need not be done with the intention to impregnate the victim or to keep them pregnant; rather, the unlawful confinement must be done with one of two alternative intents: “affecting the ethnic composition of any population *or* carrying out other grave violations of international law.”⁹⁶ Other grave violations could include “confining a woman with the intent to rape, sexually enslave, enslave and/or torture her.”⁹⁷ The intent element can be satisfied by, for example, a showing that the perpetrator confined the victim with the “intent of sustaining the continued commission of other crimes found, in particular of forced marriage, torture, rape and sexual slavery.”⁹⁸ Notably, the act of confinement does not need to reach a certain level of severity or duration.⁹⁹ Additionally, the Rome Statute definition of forced pregnancy does not require the victim to give birth or to have been confined for the whole duration of the pregnancy.¹⁰⁰

The Geneva Conventions (IHL) do not specifically enumerate forced pregnancy as a violation of the laws of war, but the Commentaries to the Geneva Conventions¹⁰¹ note that sexual violence, as well as torture or other cruel, inhumane, or degrading treatment are prohibited.¹⁰² The Commentaries also interpret sexual violence to include the crime of forced pregnancy.¹⁰³ Moreover, the unlawful confinement required for charges of forced pregnancy under ICL would, under an IHL analysis, give rise to an additional violation: the Geneva Conventions explicitly outline the circumstances under which an individual may be denied their liberty during an armed conflict,¹⁰⁴ and any form of detention that does not conform to the strict rules amounts to a grave breach of the Fourth Geneva Convention.¹⁰⁵ Therefore, IHL can be an additional legal framework for experts to delve deeper into forced pregnancy as it arises in conflict situations.

95 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2723 (Feb. 4, 2021); *Amici Curiae* Observations on the Rome Statute’s definition of ‘forced pregnancy’, ROSEMARY GREY, GLOBAL JUSTICE CENTER, WOMEN’S INITIATIVES FOR GENDER JUSTICE, AND AMNESTY INTERNATIONAL ¶ 23 (Dec. 23, 2021); T. Altunjan, REPRODUCTIVE VIOLENCE AND INTERNATIONAL LAW 230 (2021).

96 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶¶ 2726–29 (Feb. 4, 2021) (emphasis added).

97 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2727 (Feb. 4, 2021).

98 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 3061 (Feb. 4, 2021); *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶ 1101 (Dec. 15, 2022).

99 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2724 (Feb. 4, 2021); *Amici Curiae* Observations on the Rome Statute’s definition of ‘forced pregnancy’, ROSEMARY GREY, GLOBAL JUSTICE CENTER, WOMEN’S INITIATIVES FOR GENDER JUSTICE, AND AMNESTY INTERNATIONAL ¶ 21 (Dec. 23, 2021).

100 *Amici Curiae* Observations on the Rome Statute’s definition of ‘forced pregnancy’, ROSEMARY GREY, GLOBAL JUSTICE CENTER, WOMEN’S INITIATIVES FOR GENDER JUSTICE, AND AMNESTY INTERNATIONAL ¶ 21 (Dec. 23, 2021).

101 International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, Art. 3, ¶ 698 (Aug. 12, 1949) (elaborating on the application of common guarantee of humane treatment and prohibition of cruel treatment, torture and outrages upon personal dignity to several forms of sexual and gender-based violence found in Art. 3).

102 International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, Art. 3, ¶ 696 (Aug. 12, 1949) (elaborating on the application of common guarantee of humane treatment and prohibition of cruel treatment, torture and outrages upon personal dignity to several forms of sexual and gender-based violence found in Art. 3).

103 International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, Art. 3, ¶ 698 (Aug. 12, 1949).

104 Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Art. 42 (Aug. 12, 1949), https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf#page=21.

105 Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Art. 147 (Aug. 12, 1949), https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf#page=23; Rule 99: Deprivation of Liberty, International Humanitarian Law Databases, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule99>.

The crime of forced pregnancy also violates IHRL. Article 16(1)(e) of CEDAW guarantees all women the right 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.¹⁰⁶ Further, Article 12(1) of the ICESCR obligates States to recognize the right of everyone to enjoy the highest attainable standard of physical and mental health,¹⁰⁷ which includes sexual and reproductive health.¹⁰⁸ The UN Committee on Economic, Social and Cultural Rights has stated that the right to sexual and reproductive health includes the freedom to make decisions concerning one's body and sexual and reproductive health.¹⁰⁹ The right further includes “unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health.”¹¹⁰

As referenced above, the conviction of Dominic *Ongwen* was the first international criminal conviction for forced pregnancy. In this case, *Ongwen*, a commander with the Lord's Resistance Army (LRA) in Uganda, was convicted for the crime of forced pregnancy, among others. The LRA routinely abducted women and girls from northern Uganda and enslaved them as ‘wives’ and domestic servants of those in the leadership.¹¹¹ The women and girls were confined as part of their enslavement, and in some cases, they became pregnant.¹¹² *Ongwen* was convicted of the crime of forced pregnancy in relation to two women who had been made forcibly pregnant as a result of rape by *Ongwen*, and then unlawfully confined with the intent of continuing to subject them to rape and other Rome Statute crimes.

The *Ongwen* case provided the first modern example of an international criminal prosecution specifically for a crime of reproductive violence. Crucially, the Appeals Chamber concurred with the Pre-Trial Chamber's finding that the essence of the crime of forced pregnancy is not the physical pain or hardship of pregnancy or childbirth, but rather that the victim is placed “in a position in which she cannot choose *whether to continue* the pregnancy.”¹¹³ The Chamber thus centered the reproductive autonomy of the victim as the core interest protected

106 CEDAW Art. 16(1)(e): “States 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.”

107 ICESCR Art. 12(1): “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

108 CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22 (May 2, 2016).

109 CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 5 (May 2, 2016).

110 CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 5 (May 2, 2016). Note that to the extent IHRL is concerned with looking at rights-holders (individuals) vis-a-vis duty-bearers (States), COIs/FFMs that are investigating violations committed by non-State armed groups may encounter gaps between the duty-bearer(s) and the perpetrators of human rights abuses (assuming the State(s) in question do not have control over the perpetrators). Emergent scholarship suggests that there may be conditions in which non-State armed groups are bound by human rights law; this discussion is beyond the scope of this paper. See, e.g., Jean-Marie Henckaerts & Cornelius Wiesener, Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice, in INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS: DEBATES, LAW AND PRACTICE 195 (Heffes, Kotlik, & Ventura eds., 2020), https://link.springer.com/chapter/10.1007/978-94-6265-339-9_8.

111 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 212 (Feb. 4, 2021).

112 *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶¶ 3056–62 (Feb. 4, 2021).

113 *Prosecutor v. Dominic Ongwen*, Judgement on Appeal, Appeals Chamber, ¶ 1055 (Dec. 15, 2022) (emphasis added); *Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic *Ongwen*, Pre-Trial Chamber II, ¶ 99 (Mar. 23, 2016). The Trial Chamber further noted that in cases where children were born out of forced marriages or as a result of forced pregnancy, there would be “even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and childbearing,” but the charge of forced pregnancy does not require that a pregnancy be carried to term to be sustained. *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2748 (Feb. 4, 2021).

by the charge.

In other instances, forms of SGBV that can overlap with forced pregnancy have been recorded by investigative mechanisms, but not analyzed as forced pregnancy. The lack of specific analysis means it is unclear if all elements of the crime were present, despite indications of forced pregnancy.

For example, in Syria, the Independent International Commission of Inquiry on the Syrian Arab Republic noted that there was evidence of 12-year-old girls giving birth, as well as a 19–20-year-old giving birth for the fifth time, which may indicate incidents of forced pregnancy.¹¹⁴ The COI also documented an increase in forced marriages. But there was no discussion or investigation of whether these pregnancies may have constituted forced pregnancy under either ICL or IHRL or were accompanied by other reproductive violence.¹¹⁵ More in-depth inquiry would have been necessary to establish forced pregnancy under ICL, particularly to confirm whether there was unlawful confinement. The mechanism could also have investigated and reported on why such young girls were pregnant and giving birth, the circumstances in which they carried out their pregnancies, the impact on their physical and mental health throughout the pregnancies, and the extent to which they had any ability to make choices about how and whether to continue the pregnancies. Given the coercive contexts in which these pregnancies occurred, the combination of forced marriage and pregnancy may have constructively confined these girls in violation of ICL. Even without documenting conditions of unlawful confinement, the circumstances of these cases may have constituted forced pregnancy under IHRL by violating the victims' rights to health, bodily autonomy, and to determine the number and spacing of children.¹¹⁶ The lack of documentation of these elements may result in victims receiving insufficient or inappropriate justice and reparations measures.

In Ethiopia, conflict has caused widespread destruction of hospitals, schools, factories, and other civilian infrastructure by Ethiopian federal forces, regional militias, and by Eritrean armed forces.¹¹⁷ There is evidence of widespread SGBV, including rape and potentially forced pregnancy. For example, a woman was told before being raped that if she were a man, she would have been killed, "but girls can make Amhara babies."¹¹⁸ Depending on other facts, this statement could provide evidence of the first special intent under forced pregnancy – that is, the intent to change the ethnic composition of a population. In another case, a 16-year-old girl was abducted and

114 Gendered Impact of the Conflict in the Syrian Arab Republic on Women and Girls, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC 12 (Jun. 12, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coisyria/policypapersieges29aywar/2023-06-12-Gendered-impact-women-girls-%20Syria.pdf#page=13>.

115 Gendered Impact of the Conflict in the Syrian Arab Republic on Women and Girls, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC 12 (Jun. 12, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coisyria/policypapersieges29aywar/2023-06-12-Gendered-impact-women-girls-%20Syria.pdf#page=13>.

116 CEDAW Art. 16(1)(e): "States 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."; CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 5 (May 2, 2016).

117 Tigray Conflict, HUMAN RIGHTS WATCH, <https://www.hrw.org/tag/tigray-conflict>.

118 Submission to the International Commission of Human Rights Experts on Ethiopia: Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 14 (July 2022) (on file with the author); "I Always Remember That Day": Access to Services for Survivors of Gender-Based Violence in Ethiopia's Tigray Region, HUMAN RIGHTS WATCH (Nov. 2021), <https://www.hrw.org/report/2021/11/09/i-always-remember-day/access-services-survivors-gender-based-violence-ethiopia>; Ethiopia: I Don't Know If They Realized I Was a Person: Rape and Other Sexual Violence in the Conflict in Tigray, AMNESTY INTERNATIONAL 18, 20 (Aug. 11, 2021), <https://www.amnesty.org/en/documents/afr25/4569/2021/en/>.

held captive by the military where she was “used...for sex.”¹¹⁹ During this time, she became pregnant and by the time she could escape and reach a hospital, the pregnancy was too advanced to terminate.¹²⁰ In this incident, the special intent required for forced pregnancy may have been met by the intent to commit other grave violations of international law such as rape and/or sexual slavery, while the element of unlawful confinement was also present, given her abduction and captivity. It is also important to note that while forced pregnancy can result from sexual violence, the conduct of forced pregnancy – focused on unlawful confinement – is independent and separate from the *actus reus* of rape, constituting a separate harm that is specifically criminalized.¹²¹

Forced pregnancy has also been used against lesbian women (or others perceived as gender non-conforming) as a ‘corrective’ tool. For example, Colombian armed groups allegedly used ‘corrective violence’ against lesbian women, forcibly impregnating them and then coercing them into motherhood as a punishment for defying gender stereotypes.¹²² Some of these instances of forced impregnation resulting in forced motherhood may constitute crimes against humanity, depending on whether the conditions amounted to unlawful confinement and the practice was widespread.¹²³

Forced pregnancies can also occur within the context of other grave international crimes such as forced marriage and slavery. Controlling reproduction and reproductive autonomy lies at the core of these other international crimes. Therefore, when investigating situations of forced marriage or slavery, it is imperative to investigate whether forced pregnancy has also occurred. Similarly, situations of forced pregnancy may involve forced marriage or slavery. Recognizing the larger context of these crimes may assist in documenting the resulting impact, harms, and trauma more accurately and comprehensively.¹²⁴

119 Ethiopia: I Don’t Know If They Realized I Was a Person: Rape and Other Sexual Violence in the Conflict in Tigray, AMNESTY INTERNATIONAL 16 (Aug. 11, 2021), <https://www.amnesty.org/en/documents/afr25/4569/2021/en/>.

120 Ethiopia: I Don’t Know If They Realized I Was a Person: Rape and Other Sexual Violence in the Conflict in Tigray, AMNESTY INTERNATIONAL 16 (Aug. 11, 2021), <https://www.amnesty.org/en/documents/afr25/4569/2021/en/>.

121 As the ICC established, “It is not enough to punish [forced pregnancy] as a combination of other crimes (*e.g.*, rape and unlawful detention), or subsumed under the generic ‘any other form of sexual violence’. The crime of forced pregnancy depends on the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy,” *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2722 (Feb. 4, 2021); Rosemary Grey, Reproductive Crimes in International Criminal Law, in GENDER AND INTERNATIONAL CRIMINAL LAW 231–64, 233–34 (Indira Rosenthal, Valerie Oosterveld, & Susana SáCouto eds., Aug. 18, 2022).

122 Hay Futuro si hay Verdad, Informe Final. Hallazgos y Recomendaciones de la Comisión de la Verdad en Colombia [There is Future if there is Truth, Final Report. Findings and Recommendations from the Truth Commission in Colombia], COMISIÓN PARA EL ESCLARECIMIENTO DE LA VERDAD, LA CONVIVENCIA Y LA NO REPETICIÓN 559 (Aug. 2022); see An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 25 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf#page=25>.

123 Report on the Situation in Colombia, INTERNATIONAL CRIMINAL COURT: OFFICE OF THE PROSECUTOR ¶ 6 (Nov. 30, 2023), <https://www.icc-cpi.int/sites/default/files/2023-11/2023-11-30-otp-report-colombia-eng.pdf#page=4>; La JEP abre macrocaso 11, que investiga la violencia basada en género, incluyendo violencia sexual y reproductiva, y crímenes cometidos por prejuicio [The JEP opens Macro-Case 11, which investigates gender-based violence, including sexual and reproductive violence, and hate crimes], LA JURISDICCIÓN ESPECIAL PARA LA PAZ (Sept. 27, 2023), <https://www.jep.gov.co/Sala-de-Prensa/Paginas/-la-jep-abre-macrocaso-11-que-investiga-la-violencia-basada-en-genero-incluyendo-violencia-sexual-y-reproductiva-y-crímenes.aspx>.

124 For instance, the *Ongwen* Trial Chamber held “[t]o the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and childbearing.” *Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX, ¶ 2748 (Feb. 4, 2021).

Enforced Sterilization

Applicable provisions

ICL

- Article 7(1)(g), Rome Statute
- Article 8(2)(b)(xxii), Rome Statute

IHL

- Common Article 3, Geneva Conventions

IHRL

- Article 2 (b) and (d), Genocide Convention
- Article 12, ICESCR
- Article 7, ICCPR
- Article 16, CEDAW
- Articles 19(1), 23(1), 24, CRC

Enforced sterilization may amount to a crime against humanity¹²⁵ or a war crime¹²⁶ under the Rome Statute when the contextual requirements of either are met.¹²⁷ The ICC’s Elements of Crimes explains that the crime entails: i) the deprivation of biological reproductive capacity (excluding birth control measures which have a non-permanent effect in practice); and ii) conduct that was not justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.¹²⁸ Additionally, the ICC Elements of Crimes require that “the conduct” – the acts resulting in deprivation of biological reproductive capacity – meet the contextual elements of war crimes or crimes against humanity. For example, for enforced sterilization to constitute a crime against humanity, the act must form part of a widespread or systematic attack upon a civilian population, and the perpetrator must be aware of or intend that it form part of such an attack.

Some forms of enforced sterilization do not require any physical or sexual contact whatsoever.

Enforced sterilization has been enumerated as a form of cruel treatment under IHL provisions.¹²⁹ Enforced sterilization also violates a range of human rights. OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, and

¹²⁵ Rome Statute of the ICC, Art. 7(1)(g), (“For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ... enforced sterilization...”).

¹²⁶ Rome Statute of the ICC, Art. 8(2)(b)(xxii), (“For the purpose of this Statute, “war crimes” means: ... Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ... committing ... enforced sterilization...”).

¹²⁷ Enforced sterilization can also be a form of an underlying act of genocide: “imposing measures intended to prevent births among the group.”

¹²⁸ ICC Elements of Crimes, Art. 7(1)(g)-5, Art. 8(2)(b)(xxii)-5; Submission to the International Commission of Human Rights Experts on Ethiopia: Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 14 (July 2022).

¹²⁹ International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, Art. 3, ¶ 621 (Aug. 12, 1949).

WHO noted in a joint statement that the practice of enforced sterilization entails extensive IHRL violations.¹³⁰

Enforced sterilization sometimes entails physical contact between the perpetrator and the victim, such as forcible castration, other forms of genital mutilation, or injuries from rape. However, some forms of enforced sterilization do not require any physical or sexual contact whatsoever. For example, enforced sterilization can be caused by “... use of medication, [or] exposure to certain chemicals or radioactive substances.”¹³¹ Enforced sterilization may also result from “injuries from rape and other forms of sexual violence intentionally inflicted to deprive a person of biological reproductive capacity.”¹³² This form of violence is particularly associated with conflict, where sexual violence may be deliberately employed as a weapon to render members of an opposing group infertile. This could be achieved through “exceedingly vicious rapes, multiple rapes, gang rapes, rapes of young children, rapes committed with foreign objects, and rapes perpetrated in unsanitary conditions which promote infections or disease.”¹³³ Where enforced sterilization is motivated by national, racial, ethnic, or religious

¹³⁰ The statement reads, in part: “Sterilization without full, free and informed consent has been variously described by international, regional and national human rights bodies as an involuntary, coercive and/or forced practice, and as a violation of fundamental human rights, including the right to health, the right to information, the right to privacy, the right to decide on the number and spacing of children, the right to found a family and the right to be free from discrimination.... Human rights bodies have also recognized that forced sterilization is a violation of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment... International human rights bodies and professional organizations have explicitly condemned coercive population policies and programmes, noting that decisions about sterilization should not be subject to arbitrary requirements imposed by the government... and that states’ obligations to protect persons from such treatment extend into the private sphere, including where such practices are committed by private individuals, such as health-care professionals... Coerced and/or forced sterilization of women has also been characterized as a form of discrimination and violence against women.... Any form of involuntary, coercive or forced sterilization violates ethical principles, including respect for autonomy and physical integrity, beneficence and non-maleficence.” Eliminating forced, coercive and otherwise involuntary sterilization, OHCHR, UN WOMEN, UNAIDS, UNDP, UNFPA, UNICEF, WHO (2014), https://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf; see also Human Rights Committee, General Comment No. 28 on the Equality of rights between men and women, CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); Guidelines on ethical issues in the management of severely disabled women with gynecological problems, INTERNATIONAL FEDERATION OF GYNECOLOGY AND OBSTETRICS (2011); WMA Statement on Forced and Coerced Sterilisation, WORLD MEDICAL ASSOCIATION (WMA) (2012), <https://www.wma.net/policies-post/wma-statement-on-forced-and-coerced-sterilisation/>; CEDAW Committee, General Recommendation No. 19 on violence against women, A/47/38, ¶¶ 22, 24 (1992); CEDAW Committee, General Recommendation No. 24 on Art. 12: women and health, A/54/38/Rev.1, Chapter I, ¶ 22 (1999); UN General Assembly, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo, A/67/227, ¶¶ 28, 31, 36 (2012); UN Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Radhika Coomaraswamy, E/CN.4/1999/68/Add.4, ¶¶ 51–56 (1999); CAT Committee, Conclusions and recommendations of the Committee against Torture: Peru, CAT/C/PER/CO/4, ¶ 23 (2006); CESCR Committee, Concluding observations of the Committee on Economic, Social and Cultural Rights: China, E/C.12/1/Add.107, ¶ 36 (2005); CEDAW Committee, Views on communication 4/2004: Ms. A.S. v. Hungary, CEDAW/C/36/D/4/2004 (2006); Committee on the Rights of Persons with Disabilities (CRPD Committee), Concluding observations on the initial report of China, adopted by the Committee at its eighth session (Sept. 17–18, 2012), CRPD/C/CHN/CO/1, ¶¶ 33–34 (2012); CRPD Committee, Concluding observations: Argentina, CRPD/C/ARG/CO/1, ¶¶ 31–32 (2012); CRC Committee, Concluding observations: Australia, CRC/C/AUS/CO/4 (2012); Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), Concluding observations: Slovakia, CERD/C/SVK/CO/6–8, ¶ 18 (2010); UN General Assembly, Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, A/63/175, ¶ 60 (2008).

¹³¹ Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 61 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=34>; see also Mark Klamburg ed., COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT, TOAEP, fn. 56 (2017), <https://www.legal-tools.org/doc/aa0e2b/pdf/#page=96>.

¹³² Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 61 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=34>.

¹³³ Submission to the International Commission of Human Rights Experts on Ethiopia: Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 15 (July 2022) (on file with the author); Kelly Dawn Askin, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 91–92 (1997).

animus, it may overlap with the crime of genocide in the form of imposing measures intended to prevent births.¹³⁴

The war crime and crime against humanity of enforced sterilization need not be motivated by racial, ethnic, or other group-based animus, nor by a desire to punish individuals or groups. It can also be a result of “forced prostitution” or other violations because of the consequences of these acts upon a person’s capacity and willingness to subsequently procreate.¹³⁵ However, the perpetrator(s) must have intended or known that the consequences “will occur in the ordinary course of events” for such conduct to constitute enforced sterilization under the Rome Statute.¹³⁶ Enforced sterilization as a human rights violation can even be motivated by supposedly altruistic intentions.¹³⁷

In Peru, a campaign of mass sterilizations was carried out by the Fujimori government. While the program was purported to be a tool for family planning allowing women to make free choices about their lives, in reality this campaign targeted rural indigenous women and the procedures were often carried out without consent.¹³⁸ The Inter-American Commission of Human Rights found this practice to have violated the human rights of the victims of enforced sterilization.¹³⁹ The Commission further recommended that the State provide reparations to the victims, illustrating the value of documenting cases of reproductive violence, such as enforced sterilization, as human rights violations in addition to (where appropriate) ICL violations.¹⁴⁰ The Commission’s characterization of the acts as human rights violations established the State’s responsibility for the violations – and for providing reparations.

Examples of enforced sterilization may range from obvious to subtle. During armed conflict in Colombia, women were taken to local hospitals “under threat and against their will” where they were subjected to forced sterilization

134 Rome Statute of the ICC, Art. 6(d); see also *Beyond Killing: Gender, Genocide, and Obligations under International Law*, GLOBAL JUSTICE CENTER 10, 26–27 (Dec. 6, 2018).

135 Submission to the International Commission of Human Rights Experts on Ethiopia: Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 15 (July 2022) (on file with the author); Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 91–92 (1997).

136 Rome Statute of the ICC, Art. 30(2)(b).

137 IACHR Files Case Concerning Peru with IA Court on Sterilization without Consent, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (Aug. 18, 2023), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/186.asp; H.E. Alberto Fujimori, Speech Given by the President of the Republic of Peru, THE IV WORLD CONFERENCE ON WOMEN (Sept. 15, 1995). Some forced sterilizations may be carried out for purportedly altruistic reasons. For example, forced sterilization of socioeconomically marginalized people carried out purportedly to ‘save’ these individuals from the economic costs of having children. However, these sterilizations carried out without full and informed consent violate the right to reproductive autonomy and reflect discrimination on the basis of socioeconomic status, among others.

138 Ñusta Carranza Ko, Forcibly sterilized during Fujimori dictatorship, thousands of Peruvian women demand justice, THE CONVERSATION (Mar. 3, 2021), <https://theconversation.com/forcibly-sterilized-during-fujimori-dictatorship-thousands-of-peruvian-women-demand-justice-155086>.

139 Esterilizaciones forzadas: Las víctimas exigen la ejecución de sentencia que ordena al MINJUSDH repararlas integralmente [Enforced sterilizations: Victims demand execution of the sentence ordering MINJUSDH to provide full compensation], ESTUDIO PARA LA DEFENSA DE LOS DERECHOS DE LA MUJER (DEMUS) (Feb. 20, 2024), <https://www.demus.org.pe/esterilizaciones-forzadas-las-victimas-exigen-la-ejecucion-de-sentencia-que-ordena-al-minjusdh-repararlas-integralmente/>; IACHR Files Case Concerning Peru with IA Court on Sterilization without Consent, IACHR (Aug. 18, 2023), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/186.asp.

140 Víctimas de esterilización forzada tendrán audiencia ante CIDH [Victims of enforced sterilization will have a hearing before IACHR], DEMUS (Feb. 16, 2024), <https://www.demus.org.pe/victimas-de-esterilizacion-forzada-tendran-audiencia-ante-cidh/>; IACHR Files Case Concerning Peru with IA Court on Sterilization without Consent, IACHR (Aug. 18, 2023), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/186.asp.

“with the aim of preventing reproduction in that town.”¹⁴¹

Other examples may be harder to recognize without careful analysis, such as situations where victims may be coerced by context into sterilization procedures. For instance, in Venezuela, where abortion is illegal except in very limited circumstances and heavily criminalized, the economic crisis caused the cost of contraceptives to increase exponentially.¹⁴² This led some young women

and girls, sometimes as young as 14-19, to perceive no other options to avoid unwanted pregnancies than to undergo sterilization procedures under the government’s free sterilization scheme, originally intended for women over the age of 35.¹⁴³ These circumstances should be analyzed carefully to assess how the combination of legal and economic policies and structures might amount to enforced sterilization as an IHRL or, in some cases, an ICL violation.

These cases underscore the need to investigate the reproductive consequences – including enforced sterilization – of sexual and non-sexual violence to ensure complete documentation of all harms.

In Ethiopia, the rape and torture of Tigrayan women has included in some cases rape with or insertion of foreign objects into their bodies, with the aim of making them infertile¹⁴⁴ and thus unable to give birth to “Woyane” [derogatory term used to refer to the Tigrayan People’s Liberation Front] children.¹⁴⁵ The stated goal of some of these attacks was to ensure that the women’s “womb[s] never [give] birth.”¹⁴⁶ In this context, acts that might facially be categorized as (only) sexual violence also constitute acts of reproductive violence (as well as potentially acts of genocide).¹⁴⁷ These cases underscore the need to investigate the reproductive consequences – including enforced sterilization – of sexual and non-sexual violence to ensure complete documentation of all harms.

141 Superior Court of Bogotá, Justice and Peace Chamber, Reporting Judge Léster M. González R 2158 (Nov. 20, 2014), <https://www.ramajudicial.gov.co/documents/6342228/o/SALVATORE+MANCUSO+Y+OTROS+%2820+11+2014%29.pdf/2e8bbe27-4994-4393-bc9f-bc0cc12ffed3>; An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 23 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf#page=25>.

142 Bianca M. Stifani et al., Contraception and abortion in times of crisis: results from an online survey of Venezuelan women, FRONTIERS IN GLOBAL WOMEN’S HEALTH (Sept. 18, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10545839/>.

143 Lou Marillier & Daisy Squires, Lacking Birth Control Options, Desperate Venezuelan Women Turn to Sterilization and Illegal Abortion, THE INTERCEPT (Jun. 10, 2018), <https://theintercept.com/2018/06/10/venezuela-crisis-sterilization-women-abortion/#:~:text=t%20have%20happened.%E2%80%9D-.%E2%80%9CSome%20patients%20got%20sterilized%20at%2018%20or%2019%20years%20old,to%20500%20women%20were%20sterilized.>

144 The Commission reported: “In one case...perpetrators...inserted a plastic bag, pins, and a nail cutter into a survivor’s genital organs after raping her. The doctor who removed the items found a message written on a piece of paper in the Tigrinya language which described the “sons of Erena” who are “the heroes of Asmara” – a reference to Eritrea. The note goes on to state: “What you already did in the 90’s we haven’t forgotten about it even now. From now on, no Tigrayan woman will give birth from a Tigrayan man.” Human Rights Council, Comprehensive investigative findings and legal Determinations of the International Commission of Human Rights Experts on Ethiopia, A/HRC/54/CRP.3, ¶ 139 (Oct. 13, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/chreetiopia/a-hrc-54-crp-3.pdf#page=26>.

145 Lucy Kassa, ‘A Tigrayan womb should never give birth’: Rape in Tigray, ALJAZEERA (Apr. 21, 2021), <https://www.aljazeera.com/news/2021/4/21/a-tigrayan-womb-should-never-give-birth-rape-in-ethiopia-tigray>.

146 Submission to the International Commission of Human Rights Experts on Ethiopia: Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 14 (July 2022) (on file with the author); see Lucy Kassa, ‘A Tigrayan womb should never give birth’: Rape in Tigray, ALJAZEERA (Apr. 21, 2021), <https://www.aljazeera.com/news/2021/4/21/a-tigrayan-womb-should-never-give-birth-rape-in-ethiopia-tigray>.

147 Beyond Killing: Gender, Genocide, and Obligations under International Law, GLOBAL JUSTICE CENTER 18–20 (Dec. 6, 2018).

Preventing Births

Preventing births through acts or omissions can constitute a violation of reproductive autonomy as it interferes with an individual's ability to decide freely whether, when, and how to reproduce and violates their human right to determine the number and spacing of children, among other rights. Preventing births may also amount to an international crime in some cases.

Imposing measures intended to prevent births on a national, religious, ethnic, or racial group with a genocidal intent amounts to genocide under Article 2(d) of the Genocide Convention.¹⁴⁸ The ICTR in *Akayesu* became the first international court to conclude that genocide had been committed by imposing measures to prevent births. The Court held that in social contexts where the identity of the father determines the membership of a child in a group, cases of rape and deliberate impregnation by men of other groups would constitute 'preventing births within the group,' as the child born would not be a part of the mother's group.¹⁴⁹ Similar evidence had also been recorded by the ICTY in *Kunarac*, the first judgment convicting Serbian men for raping Bosnian women, where the court took note of instances of Bosnian Muslim women being told that they would give birth to Serbian babies.¹⁵⁰

The ICC Elements of Crimes enumerate the elements of acts of genocide committed by imposing measures to prevent births:

1. The perpetrator imposed certain measures upon one or more persons.
2. Such a person or persons belonged to a particular national, ethnical, racial, or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial, or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹⁵¹

Preventing births can include a wide variety of acts, many of which, such as enforced sterilization, may also amount to a war crime or a crime against humanity as discussed above. The ICC's Elements of Crimes for enforced sterilization clarify that it does not "include birth-control measures which have a non-permanent effect in practice."¹⁵² However, acts that may not meet the threshold of enforced sterilization but that have the non-permanent effect of preventing births – such as segregation of populations or forced use of contraception

Applicable provisions

ICL:

- Article 6(d), Rome Statute

IHRL:

- Article 2(d), Genocide Convention
- Article 16(1)(e), CEDAW
- Article 12, ICESCR
- Article 19, 24, 34, 37, CRC

¹⁴⁸ The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Art. 2(d).

¹⁴⁹ *Prosecutor v. Akayesu*, Judgment, ICTR-96-4, ¶ 507 (Sept. 2, 1998).

¹⁵⁰ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, & Zoran Vukovic*, Judgment, IT-96-23-T & IT-96-23/1-T, ¶ 654 (Feb. 22, 2001), <https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf#page=223>; Andrew Osborn, Mass rape ruled a war crime, THE GUARDIAN (Feb. 22, 2001), <https://www.theguardian.com/world/2001/feb/23/warcrimes>; Anthony Marino, Bosnia v. Serbia and the Status of Rape as Genocide under International Law, 27 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 205 (2009).

¹⁵¹ ICC Elements of Crimes, Art. 6(d).

¹⁵² ICC Elements of Crimes, Art. 7(1)(g)-5(1) n. 19.

– could qualify as measures imposed to prevent births depending on the perpetrators’ intent.¹⁵³

Violence that targets the reproductive capacity of the group can also provide evidence of genocidal intent – specifically, intent to biologically destroy the targeted group.

In some cases, mental suffering that has reproductive consequences, such as “when the person raped refuses subsequently to procreate,” may also amount to measures imposed to prevent births.¹⁵⁴ For example, a court in Guatemala dealing with the genocide committed by the Ríos Montt regime on the Indigenous Ixil people found that sexual and reproductive violence were “measures aimed at preventing births within the group,” not only because of the physical harm to reproductive organs but also because of the resultant trauma, terror, and ostracism which “creat[ed] social and personal constraints that prevented [the group’s] reproduction.”¹⁵⁵ Other acts such as “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages,” can amount to the prevention of births in a genocide context.¹⁵⁶

Violence that targets the reproductive capacity of the group can also provide evidence of genocidal intent – specifically, intent to biologically destroy the targeted group.¹⁵⁷ Conduct aimed at biological destruction encompasses instances where members of the targeted group are deliberately subjected to sexual violence of such intensity and/or duration that they can no longer contemplate or tolerate a procreative relationship, even if they survive, retain physical reproductive capacity, and are able to rejoin their group.¹⁵⁸ Other demonstrations of genocidal intent to biologically destroy a group might also include targeting pregnant women or children, killing large numbers of men, or the deliberate invocation of social stigma to prevent subsequent reproduction

153 “They came to destroy”: ISIS Crimes Against the Yazidis, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, A/HRC/32/CRP.2, ¶¶ 142, 146 (Jun. 16, 2016), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf (Finding that ISIS instituted measures intended to prevent births among the Yazidi, including “rape; sexual mutilation; the practice of sterilisation; forced birth control; separation of the sexes; prohibition of marriages; impregnation of a woman to deprive group identity; and mental trauma resulting in a reluctance to procreate.”).

154 *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, ¶¶ 507–8 (Sept. 2, 1998).

155 Sentencia C-01076-2011-00015, Guatemala, 184 (Sept. 26, 2018) (author’s translation).

156 *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, ¶¶ 507–8 (Sept. 2, 1998).

157 In their joint intervention to the ICJ case *The Gambia v. Myanmar*, Canada, Denmark, France, Germany, the Netherlands, and the United Kingdom contend that “the fact that sexual and gender-based violence is not capable of advancing any military objective means that it can provide compelling evidence of specific intent to destroy a protected group.” They also state “The continuum of a planned system of widespread sexual violence — from the fear it generates, to the physical and psychological scars it causes, and from the pregnancies it may induce, to the stigma it generates amongst victims — can serve to demonstrate the perpetrators’ intent to both physically and biologically destroy a protected group.” Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, in the case of *The Gambia v. Myanmar* ¶¶ 63–66 (Nov. 15, 2023), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf#page=15>.

158 *Beyond Killing: Gender, Genocide, and Obligations under International Law*, GLOBAL JUSTICE CENTER 35 (Dec. 6, 2018).

by victims.¹⁵⁹ Thus, reproductive violence can be both an underlying act of genocide and evidence of genocidal intent.

These examples illustrate how a deeper examination of conflict-related harms can reveal less well-understood or recognized reproductive violence occurring alongside other, more widely recognized violence. Assessing, for example, segregation of populations through a reproductive violence lens can bring to light specific reproductive harms resulting from these practices, and potentially reveal additional ICL charges and/or IHRL violations.

Forced Abortion and Forced Contraception

Applicable provisions

ICL:

- Article 8(2)(a)(ii)-(iii), Rome Statute
- Article 8(2)(a)(xxi), Rome Statute
- Article 8(2)(a)(xxii), Rome Statute
- Article 8(2)(c)(i)-(ii), Rome Statute
- Article 7(1)(f), (g), (k), Rome Statute

IHL:

- Common Article 3, Geneva Conventions
- Article 27, Geneva Convention (IV)
- Article 76, Additional Protocol (I) to the Geneva Conventions

IHRL:

- Article 2(d), Genocide Convention
- Article 2, CAT
- Article 7, ICCPR
- Article 16(1)(e), CEDAW
- Article 12, ICESCR
- Articles 19(1), 23(1), 24(1) and (2), 34, 37(a), CRC

¹⁵⁹Human Rights Council, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, A/HRC/42/CRP.4, ¶ 96 (Aug. 22, 2019), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/sexualviolence/A_HRC_CRP_4.pdf#page=24 (citing “widespread and systematic killing of women and girls, the systematic selection of women and girls of reproductive ages for rape, attacks on pregnant women and on babies, the mutilation and other injuries to their reproductive organs, the physical branding of their bodies by bite marks on their cheeks, neck, breast and thigh, and so severely injuring victims that they may be unable to have sexual intercourse with their husbands or to conceive and leaving them concerned that they would no longer be able to have children” as “indicat[ing] the Tatmadaw’s genocidal intent to destroy the Rohingya people.”); *Prosecutor v. Radovan Karadzic*, Trial Judgment, IT-95-5/18-T, ¶ 5671 (Mar. 24, 2016), (“Viewing the evidence in its totality, the Chamber considers that the Bosnian Serb Forces must have been aware of the detrimental impact that the eradication of multiple generations of men would have on the Bosnian Muslims in Srebrenica in that the killing of all able-bodied males while forcibly removing the remainder of the population would have severe procreative implications for the Bosnian Muslims in Srebrenica and thus result in their physical extinction. The Chamber therefore finds beyond reasonable doubt that these acts were carried out with the intent to destroy the Bosnian Muslims in Srebrenica as such.”); *Prosecutor v. Radislav Krstic*, Appeal Judgement, IT-98-33-A, ¶ 28 (Apr. 19, 2004) (“Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.”).

Forced abortion can be defined as the intentional termination of a pregnancy, at any gestational age and by any means, without the consent of the pregnant person.¹⁶⁰ Forced contraception includes “all nonconsensual actions intended to prevent [a person] from reproducing biologically,”¹⁶¹ specifically those with non-permanent effects (to distinguish this act from enforced sterilization).

Forced abortion and forced contraception constitute distinct violations of reproductive autonomy. This report deals with these forms of violence jointly because, in practice, existing documentation on these forms of violence reveals that they often coincide. For example, in Syria, both forced contraceptive use and forced abortion were used to ensure that Yazidi women and girls enslaved by ISIS were not pregnant when they were slave traded.¹⁶² Both forced contraception and forced abortion were also used in Colombia to prevent or terminate pregnancies among fighters. However, these practices may not always coincide, and each must be considered as an independent form of reproductive violence in documentation.

Though forced abortion is not explicitly criminalized or prohibited under international law, it can be classified as a war crime or crime against humanity under the Rome Statute’s residual provisions. Specifically, forced abortion can constitute the following war crimes depending on the methods employed and their impact:

- Torture or inhuman treatment, including biological experiments;¹⁶³
- Wilfully causing great suffering, or serious injury to body or health;¹⁶⁴
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;¹⁶⁵
- Any other form of sexual violence also constituting a grave breach of the Geneva Conventions;¹⁶⁶ or
- Violence to life and person, in particular ... mutilation, cruel treatment and torture or outrages upon personal dignity, in particular humiliating and degrading treatment, in non-international armed conflict.¹⁶⁷

Likewise, forced abortion could potentially be classified as a crime against humanity if, meeting the other contextual elements, it amounts to either torture or other CIDT, “any other form of sexual violence of comparable gravity,” or “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹⁶⁸

Forced abortions do not, in most cases, qualify as instances of enforced sterilization, as they generally do not

160 An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 26 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf#page=28>.

161 An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 22 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf#page=24>.

162 “They came to destroy”: ISIS Crimes Against the Yazidis, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, A/HRC/32/CRP.2, ¶¶ 69, 75 (Jun. 16, 2016), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf.

163 Rome Statute of the ICC, Art. 8(2)(a)(ii).

164 Rome Statute of the ICC, Art. 8(2)(a)(iii).

165 Rome Statute of the ICC, Art. 8(2)(a)(xxi).

166 Rome Statute of the ICC, Art. 8(2)(a)(xxii).

167 Rome Statute of the ICC, Art. 8(2)(c)(i)-(ii).

168 Rome Statute of the ICC, Art. 7(1)(f), (g), (k).

result in permanent “deprivation of biological reproductive capacity,” as required under the ICC Elements of Crimes.¹⁶⁹ However, in cases where forced abortion results in infertility, the act could be criminalized under international law as an instance of enforced sterilization.

Forced abortion entails clear violations of a range of human rights, including the rights to health, privacy, dignity, liberty and security of the person, bodily integrity, equality and non-discrimination, and to decide freely on the number and spacing of children.¹⁷⁰ Forced abortions can also violate rights to life, freedom from torture and other CIDT, and access to information in some instances.¹⁷¹

As with enforced sterilization, there is very little international case law on forced abortion. However, some investigative mechanisms have documented forced abortion as a crime against humanity by characterizing it as a form of sexual violence.¹⁷²

In North Korea, “[t]he State imposes a virtually absolute ban on ordinary citizens traveling abroad.”¹⁷³ Persons who manage to leave are often forcibly repatriated. The Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea found that:

*Repatriated women who are pregnant are regularly subjected to forced abortions, and babies born to repatriated women are often killed. These practices are driven by racist attitudes towards interracial children of Koreans, and the intent to punish further women who have left the country and their assumed contact with Chinese men.*¹⁷⁴

The Commission likewise found that reproductive violence is a frequent occurrence in political prison camps in North Korea, where forced abortion and infanticide are common practices.¹⁷⁵ Overall, the Commission

169 The elements specify that the charge of enforced sterilization excludes “birth control measures which have a non-permanent effect in practice.” ICC Elements of Crimes, fn. 19.

170 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2004/49, ¶ 25 (Feb. 16, 2004); Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Note by the Secretary-General, A/66/254, ¶ 12 (Aug. 3, 2011); Sexual and reproductive health and rights, OHCHR, <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights>; Policy on Abortion: Explanatory Note, AMNESTY INTERNATIONAL, (Sept. 28, 2020), <https://www.amnesty.org/en/wp-content/uploads/2021/05/POL3028472020ENGLISH.pdf>.

171 CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, ¶ 18 (Jul. 26, 2017); Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57 (Jan. 5, 2016); CEDAW Committee, *L.C. v. Peru*, communication No. 22/2009, ¶ 8.18 (Oct. 17, 2011); Human Rights Committee, *Mellet v. Ireland*, communication No. 2324/2013, ¶ 7.4 (Mar. 31, 2016), Human Rights Committee, *Whelan v. Ireland*, communication No. 2425/2014 (Mar. 17, 2017).

172 Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, A/HRC/25/63, ¶¶ 75–76 (Feb. 7, 2014), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F25%2F63&Language=E&DeviceType=Desktop&LangRequested=False>.

173 Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, A/HRC/25/63, ¶ 42 (Feb. 7, 2014), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F25%2F63&Language=E&DeviceType=Desktop&LangRequested=False>.

174 Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, A/HRC/25/63, ¶ 42 (Feb. 7, 2014), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F25%2F63&Language=E&DeviceType=Desktop&LangRequested=False>.

175 Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, A/HRC/25/63, ¶ 60 (Feb. 7, 2014), <https://documents.un.org/doc/undoc/gen/g14/108/66/pdf/g1410866.pdf?token=HMzcDynAX60Evn9Dag&fe=true>.

documented acts of “extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence...”¹⁷⁶ and characterized all of these acts, including forced abortions, as crimes against humanity.

This report is a strong example of documentation that conveys the specificity and gravity of reproductive violence. By investigating and documenting the intent of the practices of forced abortion (*i.e.*, discrimination against interracial children and punishment for assumed sexual contact with outsiders), the report sheds light on how this harm differs from other forms of violence (sexual and non-sexual) that may co-occur. This approach also provides a potential pathway for international criminal accountability by characterizing the reproductive violence as a form of sexual violence amounting to a crime against humanity.

The careful documentation of the intent behind forced abortions in North Korea may suggest other pathways for understanding forced abortion as a crime against humanity, depending on the details of subsequent cases. For example, the discriminatory and punitive motivations of the conduct in this case could enable classifying the conduct as persecution and/or torture, in addition to sexual violence.¹⁷⁷ In short, the North Korean example demonstrates the importance of careful attention to all details of reproductive violence.

Forced Abortions as “Other Sexual Violence” in Nigeria

The applicability of the characterization of forced abortion as “other sexual violence” may be limited depending on the specifics of particular forced abortions. For example, some public reporting has indicated that the military in Nigeria imposed mass forced abortions on women rescued from Boko Haram captivity.¹⁷⁸ More than 10,000 women have allegedly been forced to undergo abortion procedures. According to public reports, procedures were carried out without some women’s knowledge or consent by making the victims believe that they were receiving medication or injections for other diseases such as malaria. In other cases, women were allegedly held at gunpoint or beaten as a means of forcing them to undergo surgical abortions.¹⁷⁹

While the results of investigations on these specific allegations are not yet public, they present an example of the challenges that might attend the characterization of forced abortion as sexual violence. In cases involving manual

¹⁷⁶ Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, A/HRC/25/63, ¶ 76 (Feb. 7, 2014), <https://documents.un.org/doc/undoc/gen/g14/108/66/pdf/g1410866.pdf?token=HMzcDynAX6oEvn9DAg&fe=true>.

¹⁷⁷ Karim A.A. Khan KC, Office of the Prosecutor: Policy on the Crime of Gender Persecution, INTERNATIONAL CRIMINAL COURT ¶¶ 7, 65 (Dec. 2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf#page=9>.

¹⁷⁸ Ciara Laverty and Dienneke de Vos, Forced Abortion as an International Crime: Recent Reports from Northern Nigeria, JUST SECURITY (Dec. 23, 2022), <https://www.justsecurity.org/84524/forced-abortion-as-an-international-crime-recent-reports-from-northern-nigeria/>; Lauren Aarons, Akila Radhakrishnan, & Osai Ojigbo, Nigeria’s Alleged Forced Abortion Campaign Demands Action, FOREIGN POLICY (Feb. 9, 2023), <https://foreignpolicy.com/2023/02/09/nigeria-forced-abortion-campaign-military-report-amnesty-international-action/>.

¹⁷⁹ Ciara Laverty and Dienneke de Vos, Forced Abortion as an International Crime: Recent Reports from Northern Nigeria, JUST SECURITY (Dec. 23, 2022), <https://www.justsecurity.org/84524/forced-abortion-as-an-international-crime-recent-reports-from-northern-nigeria/>.

vacuum aspiration or dilation and curettage¹⁸⁰ – which involve physical penetration of the pregnant person’s body – the conduct may, in the absence of specific criminalization for forced abortion or reproductive violence, be investigated and/or prosecuted as rape or sexual violence because of the penetration element.¹⁸¹

In cases of forced abortion involving medication, however, characterization as sexual violence may be challenged by defendants, given the absence of penetration, physical contact, or sexualized context.¹⁸²

In Colombia, women who were part of the FARC-EP were told that “women are not here to have children” and were forced to undergo abortions. In one case, Helena (a pseudonym) was recruited at the age of 14 by the FARC and was subjected to reproductive planning policies designed to ensure that female members of the group could continue in fighting roles. When Helena was six months pregnant, she refused to comply with her commanders’ instructions to have an abortion despite death threats. Eventually, she was forced to swallow some pills including an abortion-inducing drug. Helena lost substantial blood and suffered serious health problems as a result.

The Colombian Constitutional Court held that the forced abortion and contraception constituted a violation of Helena’s sexual and reproductive rights, and also SGBV under IHL amounting to war crimes.¹⁸³ The Court found that sexual and reproductive violence during the conflict was directed not only at civilians but also within armed groups against their own members “in a habitual, widespread, and systematic manner.”¹⁸⁴ Indeed, these practices were carried out in various ways as a matter of policy across all sides of the conflict in Colombia. Abortions were carried out even when they endangered the life of the woman, sometimes without medical

¹⁸⁰ Paul Carsten, Reade Levinson, David Lewis, & Libby George, *The Abortion Assault: Nigerian Military Ran Secret Mass Abortion Programme in War Against Boko Haram*, REUTERS (Dec. 7, 2022), <https://www.reuters.com/investigates/special-report/nigeria-military-abortions/>; Ciara Lavery and Dienneke de Vos, *Forced Abortion as an International Crime: Recent Reports from Northern Nigeria*, JUST SECURITY (Dec. 23, 2022), <https://www.justsecurity.org/84524/forced-abortion-as-an-international-crime-recent-reports-from-northern-nigeria/>.

¹⁸¹ For example, in *Furundzija*, the ICTY defined rape and other serious sexual assaults as “the sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person.” *The Prosecutor v. Anto Furundzija* JL/PIU/372-E, ¶ 185 (Dec. 10, 1998). While not limited to physical penetration, the 2002 World Health Organization definition of sexual violence focuses on acts directed against a victim’s sexuality, which might be interpreted to exclude forced abortions administered by pill or injection. See also *The Bharatiya Nyaya Sanhita*, 2023, s.63 (2023) (which has replaced the Indian Penal Code (1860), s. 375), https://www.indiacode.nic.in/show-data?abv=CEN&statehandle=123456789/1362&actid=AC_CEN_5_23_00048_2023-45_1719292564123§ionId=90428§ionno=63&orderno=63&orgactid=AC_CEN_5_23_00048_2023-45_1719292564123.

¹⁸² Paul Carsten, Reade Levinson, David Lewis, & Libby George, *The Abortion Assault: Nigerian Military Ran Secret Mass Abortion Programme in War Against Boko Haram*, REUTERS (Dec. 7, 2022), <https://www.reuters.com/investigates/special-report/nigeria-military-abortions/>; Lauren Aarons, Akila Radhakrishnan, & Osai Ojigbo, *Nigeria’s Alleged Forced Abortion Campaign Demands Action*, FOREIGN POLICY (Feb. 9, 2023), <https://foreignpolicy.com/2023/02/09/nigeria-forced-abortion-campaign-military-report-amnesty-international-action/#:~:text=The%20Nigerian%20military%2C%20a%20Reuters,army%20has%20also%20massacred%20children>.

¹⁸³ Dienneke De Vos, *Colombian Constitutional Court Recognises Victims of Reproductive Violence in Conflict*, INTLAWGRRLS (Jan. 11, 2020), <https://ilg2.org/2020/01/11/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/>; Ciara Lavery and Dienneke de Vos, *‘Ntaganda’ in Colombia: Intra-Party Reproductive Violence at the Colombian Constitutional Court*, OPINIO JURIS (Dec. 23, 2022), <https://opiniojuris.org/2020/02/25/ntaganda-in-colombia-intra-party-reproductive-violence-at-the-colombian-constitutional-court/>.

¹⁸⁴ See *Case of Trujillo v. UARIV and Capital Salud E.P.S.*, Judgment of Dec. 11, 2019, Constitutional Court of Columbia, Section 3.2 (stating that “From the stance adopted internationally, it can be concluded that forced contraceptive use and forced abortion constitute a violation of women’s sexual and reproductive rights, as well as sexual and gender-based violence within the framework of IHL.” (Gabriela Rivera, Trans.)), https://www.corteconstitucional.gov.co/Relatoria/2019/SU599-19.htm#_ftnref198.

supervision.¹⁸⁵ Paramilitary groups also forced women who became pregnant as a result of sexual slavery to undergo abortions.¹⁸⁶

The JEP's analysis in the Colombian context, while not originating in a UN-mandated mechanism, provides a strong example of how documentation and analysis of contextual factors can contribute to a fuller picture of reproductive violence, leading to more complete accountability. In other cases, however, limitations in the investigation stages can impede justice. For example, in relation to armed conflict in Congo, the ICC recorded evidence of widespread sexual abuse by commanders and soldiers as well as abortions carried out under coercive conditions, which may have amounted to forced abortions.¹⁸⁷ However, no one was prosecuted in relation to either the sexual or reproductive violence, as the prosecution failed to include sexual violence charges.¹⁸⁸ This omission was purportedly a result of prosecutorial and investigative priorities.¹⁸⁹

Forced contraception is another way in which victims are prevented from exercising their reproductive autonomy. The imposition of contraception may be used as a method to maintain and deepen control over a victim's body, often in order to facilitate its continued use by the perpetrator. For instance, the Colombian Truth Commission in 2022 noted widespread reproductive violence of this form within the guerrilla groups to control reproduction because maternity was deemed "'incompatible' with the political and military objectives of the armed groups."¹⁹⁰ The desire to "standardize the bodies taking part in the war"¹⁹¹ led armed actors to mandate the use of contraception by women and girls in their ranks through a variety of means including "pharmacological, surgical, and 'unconventional methods,'" sometimes in unsafe circumstances.¹⁹² Where contraception methods failed and pregnancies occurred, the guerrilla groups often imposed forced abortions.¹⁹³

185 An Examination of Reproductive Violence Against Women and Girls During the Armed Conflict in Colombia: An Overview From a Gender and Reproductive Rights Perspective, CENTER FOR REPRODUCTIVE RIGHTS 26 (Jul. 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>.

186 An Examination of Reproductive Violence Against Women and Girls During the Armed Conflict in Colombia: An Overview From a Gender and Reproductive Rights Perspective, CENTER FOR REPRODUCTIVE RIGHTS 26 (Jul. 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>.

187 Prosecutor v. Thomas Lubanga Dyilo, Trial Judgment, Trial Chamber I, ¶ 890 (Mar. 14, 2012). ("According to the evidence of [witness], all the girls she met at the demobilisation centres, except for a few who had been protected by certain women in the camps, told the witness that they had been sexually abused, most frequently by their commanders but also by other soldiers. Some fell pregnant, resulting in abortions; and there were instances of multiple abortions.")

188 Prosecutor v. Thomas Lubanga Dyilo, Trial Judgment, Trial Chamber I, ¶¶ 890–96. (Mar. 14, 2012).

189 Susana SáCouto & Katherine Cleary, Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court, 17 no. 2 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 337, 342–43 (2009), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=jgspl>.

190 Hay Futuro si hay Verdad, Informe Final. Hallazgos y Recomendaciones de la Comisión de la Verdad en Colombia, COMISIÓN PARA EL ESCLARECIMIENTO DE LA VERDAD, LA CONVIVENCIA Y LA NO REPETICIÓN, [There is Future if there is Truth, Final Report. Findings and Recommendations from the Truth Commission in Colombia] 557 (Aug. 2022), https://www.comisiondelaverdad.co/sites/default/files/descargables/2022-08/FINAL%20CEV_HALLAZGOS_DIGITAL_2022.pdf.

191 An Examination of Reproductive Violence Against Women and Girls During the Armed Conflict in Colombia: An Overview From a Gender and Reproductive Rights Perspective, CENTER FOR REPRODUCTIVE RIGHTS 22 (Jul. 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>.

192 Hay Futuro si hay Verdad, Informe Final. Hallazgos y Recomendaciones de la Comisión de la Verdad en Colombia, COMISIÓN PARA EL ESCLARECIMIENTO DE LA VERDAD, LA CONVIVENCIA Y LA NO REPETICIÓN, [There is Future if there is Truth, Final Report. Findings and Recommendations from the Truth Commission in Colombia] 557 (Aug. 2022), https://www.comisiondelaverdad.co/sites/default/files/descargables/2022-08/FINAL%20CEV_HALLAZGOS_DIGITAL_2022.pdf.

193 An Examination of Reproductive Violence Against Women and Girls During the Armed Conflict in Colombia: An Overview From a Gender and Reproductive Rights Perspective, CENTER FOR REPRODUCTIVE RIGHTS 26 (Jul. 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>.

Another example of forced contraception to ensure the ‘suitability’ of victims’ bodies for certain purposes includes the policies of ISIS in Syria. Some Yazidi women and girls enslaved by ISIS were forced to take birth control in order to ensure their continued ‘availability’ for rape because, under ISIS’s official policies, an enslaver could not have sex with a newly acquired slave until it was ascertained that she was not pregnant.¹⁹⁴ Women and girls were pressured or forced to have abortions for the same reason.¹⁹⁵

Even where a victim of forced contraception might have elected, if given the choice, to use contraception in order to avoid pregnancy under conditions of war, rape, and/or enslavement, its forcible administration constitutes reproductive violence.¹⁹⁶ Forced contraception subjects victims to multiple violations, including the profound loss of autonomy inherent in forced medical treatment and continued exposure to the violence or use of their bodies that motivates the perpetrators’ forcible administration of contraception.

Likewise, in situations where forced abortions follow sexual violence, the forced abortion is a harm in itself, separate from and in addition to the other sexual violence. The imposition of a particular reproductive outcome – whether terminating an existing pregnancy or forcibly preventing one – violates the victim’s rights to reproductive autonomy, magnifying the denial of sexual autonomy inherent in sexual violence. Practices of forced abortion or other violence against pregnant people also have an impact on the wider community. For example, in Colombia’s cultural context, where (as is true in many places) the “mother” figure holds a significant social position, attacking pregnant women’s bodies sent a warning to the entire population that there were no limits to who could be annihilated.¹⁹⁷

In sum, regardless of the cause of pregnancy (whether failure of contraception, rape, exercise of reproductive autonomy, or any other constellation of factors), forced abortion and forced contraception constitute distinct harms characterized by the denial of reproductive autonomy, which require specific redress.

¹⁹⁴ “They came to destroy”: ISIS Crimes Against the Yazidis, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, A/HRC/32/CRP.2 ¶¶ 69, 75 (Jun. 16, 2016), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf. See also, Rukmini Callimachi, To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control, NEW YORK TIMES (Mar. 12, 2016), <https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html#:~:text=%E2%80%9CISIS%20took%20our%20girls%20as,force%20young%20women%20to%20abort>.

¹⁹⁵ Rukmini Callimachi, To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control, NEW YORK TIMES (Mar. 12, 2016), <https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html#:~:text=%E2%80%9CISIS%20took%20our%20girls%20as,force%20young%20women%20to%20abort> (“More than three dozen Yazidi women...described the numerous methods the fighters used to avoid pregnancy, including oral and injectable contraception, and sometimes both. In at least one case, a woman was forced to have an abortion in order to make her available for sex, and others were pressured to do so.”).

¹⁹⁶ For instance, one Yazidi woman forced to supervise the administration of contraception to women and girls enslaved by ISIS, including her own daughter, indicated conflicted relief that some pregnancies were averted through the forced contraceptive use: “ISIS took our girls as slaves, only for sex ...No one wants to carry the child of their enemy.” Women subjected to pregnancy tests before being slave traded reportedly “awaited their results with apprehension: A positive test would mean they were carrying their abuser’s child; a negative result would allow Islamic State fighters to continue raping them.” Rukmini Callimachi, To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control, NEW YORK TIMES (Mar. 12, 2016), <https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html#:~:text=%E2%80%9CISIS%20took%20our%20girls%20as,force%20young%20women%20to%20abort>.

¹⁹⁷ An Examination of Reproductive Violence Against Women and Girls During the Armed Conflict in Colombia: An Overview From a Gender and Reproductive Rights Perspective, CENTER FOR REPRODUCTIVE RIGHTS 27 (Jul. 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>.

Torture and Other CIDT Targeting Reproductive Capacity

Applicable provisions

ICL:

- Article 7(1)(f), (g), (k), Rome Statute
- Article 8(2)(a)(ii)-(iii), Rome Statute

IHL:

- Common Article 3, Geneva Conventions
- Article 12, Geneva Convention (I)
- Article 12, Geneva Convention (II)
- Article 17, 87, Geneva Convention (III)
- Article 32, Geneva Convention (IV)
- Article 76, Additional Protocol (I) to the Geneva Conventions

IHRL:

- Article 2, 4, CAT
- Article 7, ICCPR
- Article 16(1)(e), CEDAW
- Article 12, ICESCR
- Articles 19(1), 37(a), CRC

Torture and other CIDT are prohibited under international law as crimes against humanity, war crimes, and human rights violations.¹⁹⁸ Torture analysis is often relevant in cases where reproductive organs are attacked, given the attendant level of suffering. In addition, applying a reproductive violence lens to acts of torture or other CIDT may also uncover specific reproductive impacts, intents, and implications.

Reproductive violence against men is often categorized as a form of torture, CIDT, or “other inhumane acts,”¹⁹⁹ sometimes obscuring the reproductive or sexual elements of the offense. For example, in the *Kenyatta* case,²⁰⁰ which related to post-election violence in Kenya in 2007, forced circumcision using broken bottles and pieces of glass was categorized and charged as ‘inhumane acts’ under Article 7(1)(k) of the Rome Statute by the Pre-Trial Chamber.²⁰¹ Forcible circumcision, however, is not merely a physical harm but also an attack on the victim’s sexuality and reproduction, especially in patriarchal contexts where any attack on a man’s penis is seen as an attack on his masculinity and status in society,²⁰² and where group membership can be determined by

198 Rome Statute of the ICC, Arts. 7(1)(f), 8(2)(a)(ii)-(iii); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Dec. 10, 1984), Arts. 2, 4.

199 Rome Statute of the ICC, Art. 7(1)(k).

200 Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muihai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, International Criminal Court ¶¶ 260–66 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF.

201 Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muihai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, International Criminal Court ¶ 270 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF.

202 Rosemary Grey, Conflicting interpretations of ‘sexual violence’ in the International Criminal Court, 81 AUSTRALIAN FEMINIST STUDIES 273, 281 (Oct. 23, 2014), <https://www.tandfonline.com/doi/full/10.1080/08164649.2014.958123?scroll=top&needAccess=true>.

circumcision status.²⁰³ While forced circumcision should have been at a minimum characterized as an “other form of sexual violence” under Article 7(1)(g) of the Rome Statute, a careful analysis would also highlight the reproductive harm involved. This can include impacts on a victim’s ability to maintain community membership and to father children who are also considered part of the community, given the role that circumcision can play in identity formation and group membership.²⁰⁴

More broadly, violence directed at a victim’s genitals – regardless of sex or gender – can be expected to produce sexual and reproductive consequences for the victim, including adversely impacting their ability to engage in future sexual or reproductive activities. The ICC Pre-Trial Chamber in *Kenyatta* asserted “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence.”²⁰⁵ This may be true, but the facts of the case indicate that the motives of ethnic hatred and cultural rivalry, in the relevant context, support an interpretation of such crimes as sexual violence – contrary to the Chamber’s implication that such motives foreclose interpretation of the crimes as sexual violence.²⁰⁶ Evidence across numerous situations establishes that the nature and motives for violence targeting genitals must be assessed in their full context to determine its status as sexual and/or reproductive violence.²⁰⁷

For example, the Commission of Inquiry on Burundi documented various forms of torture including violence targeting victims’ genitals, forced nudity, rape, forced perpetration of rape on other detainees, and sexualized insults. The Commission noted that: “The analysis of the modus operandi of this sexual violence reveals that the sexual organs and sexuality of men were strategically and deliberately targeted...”²⁰⁸ In one case, a man subjected to violence targeting his genitals stated:

As soon as the [SNR agents] entered [the dungeon] they began to hurl insults at us, saying: ‘You Tutsis, you want us to return where we came from [the bush] ... And now we are going to do something for you to make sure

203 Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution’s Application for Notice to be Given under Regulation 55(2) with Respect to Certain Crimes Charged, ICC 01/09 02/11, International Criminal Court ¶ 19 (Jul. 3, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07189.PDF; Kenya: Trial Chamber V denies Kenyatta’s Application to Send Case Back to Pre-Trial Chamber, WOMEN’S INITIATIVES FOR GENDER JUSTICE, <http://www.iccwomen.org/news/docs/WI-LegalEye8-13/LegalEye8-13.html>.

204 See, e.g., Sandile Prusente et al., Exploring factors influencing integration of traditional and medical male circumcision methods at Ingquza Hill Local Municipality, Eastern Cape: A socio-ecological perspective, 11 AFRICAN JOURNAL OF PRIMARY HEALTH CARE & FAMILY MEDICINE 1, 7–8 (Aug. 6, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6739517/pdf/PHCFM-11-1948.pdf#page=7>.

205 Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muihai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, International Criminal Court ¶ 265 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF#page=95.

206 Rosemary Grey, Conflicting interpretations of ‘sexual violence’ in the International Criminal Court, 81 AUSTRALIAN FEMINIST STUDIES 273, 281 (Oct. 23, 2014), <https://www.tandfonline.com/doi/full/10.1080/08164649.2014.958123?scroll=top&needAccess=true> (describing the submission of the victims’ legal representative, which asserted, “sexual violence may be motivated less by sexual gratification than by an attempt to exert power and dominance over the victim and potentially the victim’s community, and explained that the forced circumcisions had impacted detrimentally on the victims’ ability to have sexual intercourse and had a severe effect on their masculinity and sense of manhood.”) (internal quotes excluded).

207 See, e.g., The Civil Society Declaration on Sexual Violence, THE HAGUE PRINCIPLES ON SEXUAL VIOLENCE 28 (June 2013), <https://4genderjustice.org/ftp-files/publications/The-Hague-Principles-on-Sexual-Violence.pdf#page=28>; Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶¶ 31–37 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=22>.

208 Human Rights Council, Detailed Final Report of the Commission of Inquiry on Burundi, A/HRC/45/CRP.1, ¶ 457 (Sept. 16, 2020).

*that you do not have children who are going to come and cause us problems. We are also going to ensure you are never going to want a girl'... Every one of them repeated the same thing every time.*²⁰⁹

This case highlights the links between violence targeting genitals and sexual and/or reproductive intent and/or consequences. In general, it should be presumed that violence deliberately targeting genitals or other sexualized body parts (breasts, buttocks) will have both sexual and reproductive impacts, which are usually foreseeable by the perpetrator. Documentation of torture should include these impacts.

In other cases, investigators have noted the reproductive consequences of sexualized torture of men without explicitly describing the treatment as reproductive violence or highlighting the reproductive consequences. For instance, the Commission on Human Rights in South Sudan documented sexual violence against men in detention. It noted that “[m]en’s sexual organs are often targeted for beating or electric shock, in some instances with the intent of ensuring that the victim will no longer be able to reproduce.”²¹⁰ Such cases should be analyzed as instances of reproductive violence in addition to sexual violence.

It is also important to analyze cases of torture of women that may entail reproductive violence. For example, in Ethiopia, there were reports of militia members committing brutal rapes using foreign objects, with the articulated specific intent to attack the victims’ reproductive capacity. Objects such as nails, rocks, and shrapnel were inserted into the victims’ genitals after rapes. In one case, a plastic bag, pins, and a nail cutter were inserted into a woman’s genitals. The doctor who removed these objects found with them a note stating: “What you already did in the 90’s we haven’t forgotten about it even now. From now on, no Tigrayan woman will give birth from a Tigrayan man.”²¹¹ Such acts not only cause victims immediate physical pain and suffering, but may also lead to long-term irreparable damage such as permanent disabilities and/or loss of fertility.²¹² This suffering undoubtedly meets the threshold of torture;²¹³ it should also be understood as reproductive violence, with attention to victims’ specific needs arising from each different aspect of the harm.

In addition, there is a growing body of law (discussed further below) finding that denials of abortion can amount

209 Human Rights Council, Detailed Final Report of the Commission of Inquiry on Burundi, A/HRC/45/CRP.1, ¶ 480 (Sept. 16, 2020) (emphasis added).

210 Human Rights Council, Report of the commission of inquiry on human rights in Eritrea, A/HRC/32/47 ¶ 49 (May 7, 2016), <https://documents.un.org/doc/undoc/gen/g16/o93/42/pdf/g16o9342.pdf>.

211 Human Rights Council, Comprehensive Investigative Findings and Legal Determinations by International Commission of Human Rights Experts on Ethiopia, A/HRC/54/CRP.3 ¶ 139 (Oct. 13, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/chreethiopia/a-hrc-54-crp-3.pdf#page=26>.

212 Submission to the International Commission of Human Rights Experts on Ethiopia, Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 12 (July 2022); Ethiopia: I Don’t Know If They Realized I Was a Person: Rape and Other Sexual Violence in the Conflict in Tigray, AMNESTY INTERNATIONAL 16 (Aug. 11, 2021), <https://www.amnesty.org/en/documents/afr25/4569/2021/en/>.

213 Note that torture has slightly different elements under differing legal regimes, with IHL and IHRL requiring, in addition to a threshold of severity, a finding that the perpetrator had a “prohibited purpose” (e.g., to obtain a confession, to punish or coerce, or “for any reason based on discrimination of any kind.) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Dec. 10, 1984), Art. 1. Many of the examples of reproductive violence described herein show indicia of being motivated by discrimination on the basis of race, sex, gender or perceived gender, or other prohibited grounds, in addition to causing severe suffering. These acts may therefore meet the IHRL and IHL definitions of torture, in addition to the ICL definition (see ICC Elements of Crimes, Art. 7(1)(f), fn. 14, noting “It is understood that no specific purpose need be proved for this crime.”).

to torture or other CIDT.²¹⁴ Analyzing denials of abortion care under the framework of reproductive violence may therefore reveal previously unexamined or undocumented war crimes and/or crimes against humanity of torture, CIDT, or other inhumane acts.

Overall, many acts of violence committed against men that are categorized as torture may also, upon deeper analysis, reveal reproductive harms suffered by the victims.²¹⁵ Similarly, sexual violence against women may fit within the legal frameworks of both torture and reproductive violence, but have historically been classified only as sexual violence. It is therefore important to conduct a full analysis of the harms that may result from particular acts of violence, as they may fall within multiple legal categories of torture and/or SGBV, including reproductive violence.²¹⁶

Denial of Abortion Care

Denial of abortion in conflict situations is a violation of both IHL and IHRL. In conflict contexts, cases of victims who would have terminated their pregnancies – whether the pregnancy resulted from sexual violence or not – but who are forced to remain pregnant and give birth should be presumptively analyzed as instances of reproductive violence.

Under IHL, the Geneva Conventions require that the wounded and sick in conflict situations must be cared for and provided adequate medical treatment.²¹⁷ The ‘wounded and sick’ include “maternity cases, new-born babies and other persons...such as the infirm or expectant

Applicable provisions

IHL:

- Common Article 3, Geneva Conventions
- Article 8(a), Protocol Additional (I) to the Geneva Conventions

IHRL:

- Articles 6, 7, 9, 10, 17 and 23(1), ICCPR
- Article 2, CAT
- Article 16(1)(e), CEDAW
- Article 12, ICESCR
- Articles 24(1) and (2), 37(a), CRC

²¹⁴ CEDAW Committee, General Comment No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, ¶ 18 (Jul. 26, 2017); Human Rights Council, Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, ¶¶ 49–50 (Feb. 1, 2013); Human Rights Council, Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, ¶ 43 (Jan. 5, 2016).

²¹⁵ See, e.g., Human Rights Council, Detailed Conclusions of the Commission of Inquiry on Burundi, A/HRC/45/CRP.1, ¶ 446 (Sept. 16, 2020). The Commission of Inquiry on Burundi noted that cultural dynamics within both Burundi and among international investigators and civil society can impede documentation of SGBV against men, and lead to such violence being characterized as torture only, rather than torture and SGBV: “...due to the gender roles and norms that prevail in Burundi, as in most societies, which associate masculinity to strength and power, men and boys are particularly reluctant to report the violence which they have been subjected to as sexual violence and would rather speak of torture. Indeed, as a result of sexual violence, men feel diminished or stripped of their virility and masculinity, and they call into question their ability to procreate and their role in the family and the community.”

²¹⁶ See also Philipp Schulz, Conflict-Related Sexual Violence against Men: A Global Perspective, in MALE SURVIVORS OF WARTIME SEXUAL VIOLENCE: PERSPECTIVES FROM NORTHERN UGANDA 26, 34 (2021), <https://www.jstor.org/stable/j.ctv1f884s7.8?seq=9> for analysis of the complex dynamics that may influence the characterization of SGBV against victims of various gender identities, and the impacts of such characterizations on victims, communities, and efforts at redress.

²¹⁷ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 12 (Aug. 12, 1949), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.30_GC-I-EN.pdf#page=8; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 16 (Aug. 12, 1949), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf#page=13.

mothers,”²¹⁸ and the determinative factor is “always whether a person is in need of medical assistance or care.”²¹⁹ Pregnant people in armed conflict are individuals in need of medical care and thereby fall within this protection.²²⁰ Additionally, the type of medical treatment is determined by the individual’s condition.²²¹ In assessing the necessary treatment for any condition, the ICRC has recognized that “[w]omen, men, boys and girls of different ages and backgrounds can have different medical needs, be exposed to different risks hindering equal care, or face different social stigma connected to being wounded or sick.”²²² Accordingly, a person’s specific circumstances – including medical, psychological, social, economic, or other risks associated with pregnancy within a conflict or atrocity context – must be taken into account when determining the treatment they are entitled to receive to ameliorate their medical condition(s). Pregnant people who find themselves in a conflict setting are “entitled to any and all of the medical care that they may need, whether that be safe and quality maternal care or, for those who wish to terminate their pregnancy, safe abortion services.”²²³

The Geneva Conventions also prohibit discrimination on the basis of sex in providing humane treatment to the wounded and sick.²²⁴ Non-adverse distinction (based strictly on the differing needs of different patients) is permitted, meaning that the care provided must be driven by individual patient needs.²²⁵ Denying requested abortion care to pregnant women and girls in armed conflict can thus also constitute a violation of IHL’s protections against adverse discrimination on the basis of sex if needed medical care (in this case, abortion services) is denied for any reason other than patient health and wellbeing, including assumptions about gender roles or other sex- or gender-based discrimination.²²⁶

Denial of abortion care can also constitute a violation of human rights, such as the victim’s rights to health,

218 Protocol Additional (I) of the Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts, (adopted Nov. 30 1993, entered into force Mar. 1 1994) Art. 8(a) - General protection of civilian objects, https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc_002_0321.pdf#page=17.

219 International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field (Geneva, Aug. 12, 1949), ¶ 742, Art. 3.

220 Akila Radhakrishnan, Elena Sarver, & Grant Shubin, Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers, 25 REPROD. HEALTH MATTERS 40, 41 (2017), <https://www.tandfonline.com/doi/epdf/10.1080/09688080.2017.1400361?needAccess=true>.

221 Akila Radhakrishnan, Elena Sarver, & Grant Shubin, Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers, 25 REPROD. HEALTH MATTERS 40, 41 (2017), <https://www.tandfonline.com/doi/epdf/10.1080/09688080.2017.1400361?needAccess=true>; International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field (Aug. 12, 1949), Art. 3, ¶¶ 762, 764, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=undefined>.

222 International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field (Aug. 12, 1949), Art. 3, ¶ 766, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=undefined>.

223 Akila Radhakrishnan, Elena Sarver, & Grant Shubin, Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers, 25 REPROD. HEALTH MATTERS 40, 41 (2017), <https://www.tandfonline.com/doi/epdf/10.1080/09688080.2017.1400361?needAccess=true>.

224 Common Art. 3 to the Four Geneva Conventions, 6 UNTS 31, (Aug. 12, 1949).

225 International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field (Aug. 12, 1949), Art. 3, ¶ 576.

226 Akila Radhakrishnan, Elena Sarver, & Grant Shubin, Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers, 25 REPROD. HEALTH MATTERS 40, 41–42 (2017), <https://www.tandfonline.com/doi/epdf/10.1080/09688080.2017.1400361?needAccess=true>.

including sexual and reproductive health,²²⁷ life, liberty and security of person, privacy, non-discrimination, bodily integrity, and freedom from torture or other CIDT.²²⁸ Along these lines, the UN Committee against Torture has found that abortion bans may constitute cruel and inhumane treatment as they may lead to unnecessary deaths of women and put women's physical and mental health at grave risk.²²⁹ Human rights treaty bodies have long acknowledged that, in certain cases, denial of abortion services through criminalization of abortion and/or barriers to and delays in access to lawful services constitutes CIDT and may also amount to torture.²³⁰ The UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment has also noted that abuse of reproductive freedom, including denial of abortion, leads to "tremendous and lasting physical and emotional suffering,"²³¹ which is one element of torture under the Convention Against Torture.²³²

Denial of abortion can also amount to a violation of the rights to family life,²³³ to determine the number and

227 "The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the [ICESCR]" CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C/12/GC/22, ¶ 5 (May 2, 2016).

228 Human Rights Committee, *K.L. v Peru*, Comm. No. 1153/2003, CCPR/C/85/D/1153/2003 (2005); CEDAW Committee, General Recommendation No. 35: gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, ¶ 18 (Jul. 26, 2017); CEDAW Committee, General Recommendation No. 24: Art. 12 of the Convention (Women and Health), A/54/38/Rev.1, chap. 1, ¶¶ 11, 14, 17 (1999); CEDAW Committee, Report of the Committee on the Elimination of Discrimination against Women on its twentieth session, A/54/38/Rev.1, Part one (1999); Human Rights Committee, *Mellet v Ireland*, Comm. No. 2324/2013, CCPR/C/116/D/2324/2013, ¶¶ 7.6, 7.7, 7.8 (2016); Human Rights Committee, *Whelan v Ireland*, Comm. No. 2425/2014, CCPR/C/119/D/2425/2014, ¶¶ 7.7, 7.8, 7.9, 7.12 (2017).

229 CAT Committee, Conclusions and Recommendations: Peru, CAT/C/PER/CO/4, ¶ 23 (Jul. 25, 2006), <https://documents.un.org/doc/undoc/gen/go6/432/46/pdf/go643246.pdf>; the 2016 Commentary on the Geneva Conventions states that sexual violence which encompasses forced pregnancy (International Committee of the Red Cross, 2016 Commentaries to Geneva Convention I, Art. 3, 698) "has been found to amount to torture, mutilation or cruel treatment." International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, ¶ 702 (Aug. 12, 1949), <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=>.

230 See, e.g., Human Rights Committee, *K.L. v Peru*, Comm. No. 1153/2003, CCPR/C/85/D/1153/2003 (2005); CEDAW Committee, *L.C. v Peru*, Comm. No. 22/2009, CEDAW/C/50/D/22/2009 (2011); Human Rights Committee, *Mellet v Ireland*, Comm. No. 2324/2013, CCPR/C/116/D/2324/2013, ¶¶ 7.6, 7.7, 7.8 (2016); Human Rights Committee, *Whelan v Ireland*, Comm. No. 2425/2014, CCPR/C/119/D/2425/2014, ¶¶ 7.7, 7.8, 7.9, 7.12 (2017). See also CAT Committee, Concluding Observations: Peru, CAT/C/PER/CO/5-6, ¶ 19 (2012); CAT Committee, Concluding Observations: Czech Republic, CAT/C/ CZE/CO/4-5, ¶ 12 (2012); CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, ¶ 18 (Jul. 26, 2017).

231 Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, ¶ 46 (Feb. 1, 2013); Submission to the International Commission of Human Rights Experts on Ethiopia: Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 17 (July 2022); In addition, in *Kunarac et al.*, intent to impregnate Muslim women with Serb babies was considered within the framework of both rape and torture. *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 653–56 (Feb. 22, 2001).

232 CAT Art. 1. Art. 1 establishes four elements of torture - an act inflicting severe pain or suffering, whether physical or mental; the element of intent; the specific purpose; and the involvement of a State official, at least by acquiescence. See Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/13/39, ¶ 43 (Feb. 9, 2010).

233 ICCPR Arts. 17 and 23(1); Human Rights Committee, *Mellet v Ireland*, CCPR/C/116/D/2324/2013, ¶ 8 (Jun. 9, 2016); Human Rights Committee, *Whelan v Ireland*, CCPR/C/119/D/2425/2014, ¶ 8 (Jul. 11, 2017); Human Rights Committee, *K.L. v Peru*, CCPR/C/85/D/1153/2003, ¶ 6.4 (Nov. 22, 2005); Human Rights Committee, *V.D.A. v Argentina*, CCPR/C/101/D/1608/2007, ¶ 9.3 (Apr. 28, 2011); CEDAW Committee, *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW/C/49/D/17/2008 (2011).

spacing of children,²³⁴ and a number of other human rights.²³⁵ Access to safe abortion is specifically guaranteed under the right to health.²³⁶ States' international legal obligations related to the right to health include ensuring safe abortions are available, accessible, and of good quality.²³⁷ The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has confirmed that access to "family planning, contraception including emergency contraception, safe abortion services and post-abortion care is a component of the right to health."²³⁸ The right to health further requires States to repeal and refrain from enacting laws and policies that create barriers to abortion access,²³⁹ including gestational limits, which are associated with higher rates of maternal mortality and morbidity and poor health outcomes, and thus contrary to States' international human rights obligations to prevent unsafe abortions and reduce maternal mortality and morbidity.

The CEDAW Committee has found that denial of abortion violates the victim's right to be free from GBV,²⁴⁰ as well as their sexual and reproductive health and rights, and confirmed that States must provide abortion services

234 CEDAW Art. 16(i)(e), "States Parties shall take all appropriate measures to ... 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." See also CAT Committee, Concluding Observations: Peru, CAT/C/PER/CO/5-6 (2012); Working Group on the issue of discrimination against women in law and in practice, Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends (Oct. 2017); Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254, ¶¶ 7, 44 (2011).

235 Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment, A/HRC/31/57, ¶ 43 (2016) ("Highly restrictive abortion laws that prohibit abortions even in cases 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."). Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice, Thematic analysis: eliminating discrimination against women in the area of health and safety, with a focus on the instrumentalization of women's bodies, A/HRC/32/44, ¶¶ 79, 80 (2016) ("Criminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health in order to preserve their function as reproductive agents and depriving them of autonomy in decision-making about their own bodies... Ultimately, criminalization does grave harm to women's health and human rights by stigmatizing a safe and needed medical procedure. In countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, safe termination of pregnancy is a privilege of the rich, while women with limited resources have little choice but to resort to unsafe providers and practices. This results in severe discrimination against economically disadvantaged women..."). Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice, Women's and girls' sexual and reproductive health rights in crisis, A/HRC/47/38, ¶ 22 (2021) ("Denial of access to various forms of reproductive health care, such as maternal health care, including emergency obstetric care, and the criminalization of abortion is a profound failure to meet the obligation to guarantee equality in the area of sexual and reproductive health.").

236 See ICESCR Art. 12; CEDAW Arts. 11(i)(f), 12, 14(2)(b)12; CRPD Art. 25; CRC Art. 24. See also CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶¶ 10–11, 13–14, 45, 49, (May 2, 2016); CRC Committee, General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health, CRC/C/GC/15, ¶¶ 56, (Apr. 17, 2013); Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Violence and its impact on the right to health, A/HRC/50/28, ¶ 20 (Apr. 14, 2022) (describing how "States violate the right to health when they fail to take effective steps to prevent third parties from undermining the enjoyment of the right to sexual and reproductive health.").

237 Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Interim Report to the General Assembly, A/66/254 (2011).

238 UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic, A/76/172, ¶ 33 (2021).

239 CESCR Committee, General Comment No. 22 on the right to sexual and reproductive health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22 (2016).

240 CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, ¶¶ 15, 18 (Jul. 26, 2017).

and post-abortion care in conflict and post-conflict settings.²⁴¹

The CESCR Committee has further confirmed that abortion services and post-abortion care should be integrated into comprehensive sexual and reproductive health services at all levels of health systems (including within prison health systems and detention settings) and that such services should be available, accessible, appropriate, and of good quality in line with the standards set forth under international human rights law.²⁴² To ensure abortion is not just available but meaningfully accessible, the CESCR Committee has specifically noted that States must ensure that these facilities are within the “safe physical and geographical reach for all.”²⁴³

In States where there are restrictions placed on abortion or where rules on medical confidentiality are unclear, the line is blurred between a legal abortion under qualifying emergency circumstances and a criminalized abortion that may trigger medical professionals’ duty to report. Criminal abortion restrictions may lead people to “avoid going to a hospital for fear of being criminalized” and this “jeopardizes their right to health, personal integrity and life.”²⁴⁴ The risk of disclosure of medical data may also discourage people from seeking needed abortion care, thereby endangering their health.²⁴⁵ Likewise, medical providers may hesitate to provide needed care under conditions of criminalization, leading to adverse outcomes for patients.

Documentation in several conflict situations has revealed instances of abortion denials but has largely not highlighted these instances as a distinct harm.

For example, the International Commission of Human Rights Experts on Ethiopia (CHREE) reported instances of unwanted pregnancies as a result of rape and sexual violence along with delayed access to healthcare facilities,

²⁴¹ CEDAW Committee, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, ¶ 52(c) (Nov. 2013); Akila Radhakrishnan, Elena Sarver, & Grant Shubin, Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers, 25 REPROD. HEALTH MATTERS 40, 41 (2017), <https://www.tandfonline.com/doi/epdf/10.1080/09688080.2017.1400361?needAccess=true>; Rebecca Cook & Veronica Undurraga, Article 12, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 320 (Chinkin, Freeman, & Rudolf, eds., 2012). See Human Rights Committee, General Comment No. 36 on Art. 6: the Right to Life, CCPR/C/GC/36, ¶ 8 (2018). See also, e.g., CEDAW Committee, Concluding Observations: Haiti, CEDAW/C/HTI/CO/8-9, ¶ 34(c) (2016); CEDAW Committee, Concluding Observations: Honduras, CEDAW/C/HND/CO/7-8, ¶ 37 (2016). See also CRC Committee, Concluding Observations: Mexico, CRC/C/MEX/CO/4-5 (2015) ¶ 50(c). See, e.g., CESCR Committee, General Comment No. 22 on Art. 12: The right to sexual and reproductive health, E/C.12/GC/22, ¶ 28 (2016). See also Joint Statement by CEDAW and CRPD, ‘Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities’ (Aug 29, 2018), www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx.

²⁴² See CESCR Committee, General Comment No. 14 on Art. 12: the right to the highest attainable standard of health, E/C.12/2000/4 (Aug. 11, 2000).

²⁴³ Submission to the International Commission of Human Rights Experts on Ethiopia, Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 7 (July 2022) (on file with author); see CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶¶ 15–16 (May 2, 2016).

²⁴⁴ Inter-American Court of Human Rights, Case of *Manuela et al. V. El Salvador* (Preliminary objections, merits, reparations and costs), ¶ 224 (Nov. 2, 2021), https://www.corteidh.or.cr/docs/casos/articulos/seriec_441_ing.pdf.

²⁴⁵ Inter-American Court of Human Rights, Case of *Manuela et al. V. El Salvador* (Preliminary objections, merits, reparations and costs), ¶¶ 222–24 (Nov. 2, 2021), https://www.corteidh.or.cr/docs/casos/articulos/seriec_441_ing.pdf.

including abortion services.²⁴⁶ Civil society documentation confirmed that, in at least some cases, these delays led to denials of abortion care, and some survivors therefore attempted to induce abortions using unsafe methods, leading to complications.²⁴⁷ However, the CHREE did not characterize these cases as discrete forms of reproductive violence, despite the IHL violations implicated by the denial of needed medical care in conflict and the apparent violation of human rights to health, family, timing and spacing of children, and freedom from torture or other CIDT, among others.²⁴⁸

In States where there are restrictions placed on abortion or where rules on medical confidentiality are unclear, the line is blurred between a legal abortion under qualifying emergency circumstances and a criminalized abortion that may trigger medical professionals' duty to report.

Likewise, there have been reports of difficulties accessing abortion care for Rohingya refugees who fled from Myanmar to Bangladesh following so-called “clearance operations” by Myanmar’s military. Victims of widespread rape campaigns in Myanmar pled with camp managers in Bangladesh for abortions they could not obtain owing to Bangladesh’s abortion restrictions. They suffered tremendous psychological harm in the process, and sometimes resorted to unsafe abortion practices as a result.²⁴⁹ Despite recording the increased rates of pregnancy and requests for termination among refugees in camps in Bangladesh, the Independent International Fact-Finding Mission on Myanmar (IIFFM) did not analyze these incidents as discrete violations of

246 Human Rights Council, Report of the International Commission of Human Rights Experts on Ethiopia, A/HRC/54/55, 11 (Sept. 14, 2023); Human Rights Council, Report of the International Commission of Human Rights Experts on Ethiopia, A/HRC/51/46, 10 (Oct. 14, 2022); Ethiopia: I Don’t Know If They Realized I Was a Person: Rape and Other Sexual Violence in the Conflict in Tigray, AMNESTY INTERNATIONAL 15–16, 25–26 (Aug. 11, 2021), <https://www.amnesty.org/en/documents/afr25/4569/2021/en/>; Submission to the International Commission of Human Rights Experts on Ethiopia, Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 13 (July 2022) (on file with author).

247 Amnesty International reports that Amhara militia members raped and held captive a 16-year-old girl for five months, resulting in her pregnancy. When she escaped and then reached a hospital, she was denied an abortion due to gestational limits under the law. In another instance, a 19-year-old survivor of rape and forced pregnancy reported that she could not access abortion services because the medical facility in the area was not operating. She reported: “I used traditional medicine. Later I came to the Red Cross. Traditional medicine caused lots of problems. I was about to die.” Other women described “being unable or too afraid to access health services for a number of months after the attack, at which point they said it was too late to obtain an abortion.” Amnesty documented numerous other cases where women were unable to get safe abortions for unwanted pregnancies that were a result of rape. Ethiopia: I Don’t Know If They Realized I Was a Person: Rape and Other Sexual Violence in the Conflict in Tigray, AMNESTY INTERNATIONAL 15–16, 25–26 (Aug. 11, 2021), <https://www.amnesty.org/en/documents/afr25/4569/2021/en/>.

248 See, e.g., CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 5 (May 2, 2016); Human Rights Committee, *K.L. v Peru*, Comm. No. 1153/2003, CCPR/C/85/D/1153/2003 (2005); CEDAW Committee, General Recommendation No. 35: gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, ¶ 18 (Jul. 26, 2017); CEDAW Committee, General Recommendation No. 24: Article 12 of the Convention (Women and Health), ¶¶ 11, 14, 17 (1999); CEDAW Committee, Report of the Committee on the Elimination of Discrimination against Women on its twentieth session, A/54/38/Rev.1, Part one (1999); Human Rights Committee, *Mellet v Ireland*, Comm. No. 2324/2013, CCPR/C/116/D/2324/2013, ¶¶ 7.6, 7.7, 7.8 (2016); Human Rights Committee, *Whelan v Ireland*, Comm. No. 2425/2014, CCPR/C/119/D/2425/2014, ¶¶ 7.7, 7.8, 7.9, 7.12 (2017).

249 Sexual Violence, Trauma, and Neglect: Observations of Health Care Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh, PHYSICIANS FOR HUMAN RIGHTS 10 (Oct. 2020), https://phr.org/wp-content/uploads/2020/10/PHR_Rohingya_Sexual-Violence-Trauma-and-Neglect_Oct-2020_Report.pdf.

reproductive autonomy under IHL or IHRL.²⁵⁰

Refugees and migrants across many contexts may suffer reproductive harm as a consequence of challenges navigating abortion and other SRHR services in the unfamiliar legal and social context of new countries. For example, Ukrainian refugees in Poland, Hungary, and Slovakia face significantly greater restrictions on abortion than in their home country. The limits on access impact all pregnant and potentially pregnant people in these countries, curtailing their reproductive autonomy. In addition, the restrictions impose unfamiliar and often impossible-to-navigate challenges on refugees seeking care in their country of refuge. In Poland, abortion is only allowed in cases of sexual assault or when the pregnant person's life or health is at risk. This means that survivors have to first report the incident to the police and obtain a prosecutorial certificate before being able to get an abortion – a near impossibility for refugees seeking care for CRSV that took place in Ukraine.²⁵¹ In Hungary and Slovakia, surgical abortion is allowed up to 12 weeks, but only after confirming a situation of crisis and mandatory counseling. Such bans and restrictions have resulted in many Ukrainians seeking abortion care in other countries²⁵² or outside the legal regime, such as through telemedicine.²⁵³ The legal restrictions combine with other barriers, such as stigma around abortion, leading medical professionals to either dissuade pregnant people from getting abortions or to refuse to provide abortions.²⁵⁴

All of these barriers can lead to violations of reproductive autonomy under IHRL and rights to access medical care under IHL. However, these violations have evaded documentation by UN mechanisms, perhaps in part because they take place in third countries outside the territory under investigation. None of the reports of the Independent International Commission of Inquiry on Ukraine mention access to abortion, either in Ukrainian territory or in the territory of countries of refuge.

Other forms of interference with reproductive autonomy have likewise gone undocumented so far, despite occurring within a single territory under investigation. Within Ukraine, for example, abortion is generally permitted, but according to some reports, patient privacy is being compromised in the name of national security, potentially interfering with reproductive autonomy.²⁵⁵ Patients have been required to sign a form that grants

250 Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2 ¶¶ 933–37, 1409–10 (Sept. 17, 2018); see also Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, A/HRC/42/CRP.4 ¶¶ 211–14, 270 (Aug. 22, 2019). However, the latter report does include a specific recommendation on abortion access: “Ensure the availability of sexual and reproductive health services, as well as preventative and emergency healthcare, under the principles of inclusion and accessibility, to ethnic minority women and girls, including obstetric, prenatal and postnatal care, contraceptive information and services, emergency contraception, safe abortion and psychological health services, for victims and survivors of rape and other forms of sexual and gender-based violence, in a safe environment free of stigma and reprisals.”

251 Care in Crisis: Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania and Slovakia, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 14 (May 16, 2023), https://reproductiverights.org/wp-content/uploads/2023/06/CRR_UkraineReport_V2o_Screen.pdf.

252 Care in Crisis: Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania and Slovakia, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 14 (May 16, 2023), https://reproductiverights.org/wp-content/uploads/2023/06/CRR_UkraineReport_V2o_Screen.pdf.

253 Care in Crisis: Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania and Slovakia, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 18 (May 16, 2023), https://reproductiverights.org/wp-content/uploads/2023/06/CRR_UkraineReport_V2o_Screen.pdf.

254 Care in Crisis: Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania and Slovakia, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 45 (May 16, 2023), https://reproductiverights.org/wp-content/uploads/2023/06/CRR_UkraineReport_V2o_Screen.pdf.

255 Ukraine: The Handoff, RADIOLAB (Feb. 3, 2023), <https://radiolab.org/podcast/ukraine-handoff/transcript>.

permission to disclose personal data related to national security, economic prosperity, and human rights before obtaining an abortion.²⁵⁶ This lack of confidentiality may act as a deterrent for those who need abortions to access care, and in some cases, may lead people to undergo unsafe abortions to avoid disclosing personal data.

Lack of Access to Healthcare with Reproductive Consequences

Direct and indirect interference with access to sexual and reproductive healthcare in crisis or conflict situations also causes reproductive harm, and can amount to reproductive violence in particular cases.

The ICC's Office of the Prosecutor's Policy on Gender-Based Crimes recognized that many reproductive crimes, such as denial of access to reproductive healthcare, are not delineated under the Rome Statute but may still be charged under different provisions.²⁵⁷ As discussed in the previous section, IHL protects the rights to sexual and reproductive health by providing an affirmative duty to provide medical care to the "wounded and sick."²⁵⁸ This means that pregnant people must be provided with comprehensive sexual and reproductive healthcare services.²⁵⁹

IHRL likewise mandates "unhindered access" to health facilities, goods, services, and information.²⁶⁰ The CEDAW Committee details the following goods and services that must remain available in the context of a conflict:

Psychosocial support; family planning services, including emergency contraception; maternal health services, including antenatal care, skilled delivery services, prevention of vertical transmission and emergency obstetric care; safe abortion services; post-abortion care; prevention and treatment of HIV/AIDS and other sexually

Applicable provisions

IHL:

- Article 16, Geneva Convention (IV)
- Common Article 3, Geneva Conventions

IHRL:

- Article 12, ICESCR
- Article 12(1), CEDAW
- Articles 23(1) and (3), 24, CRC

²⁵⁶ Ukraine: The Handoff, RADIOLAB, (Feb. 3, 2023), <https://radiolab.org/podcast/ukraine-handoff/transcript>.

²⁵⁷ Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 37 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

²⁵⁸ International Committee of the Red Cross, International Humanitarian Law Databases, Rule 110 Treatment and Care of the Wounded, Sick and Shipwrecked, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule110>; International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field ¶766–67, Art. 3 (Aug. 12, 1949), <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016>.

²⁵⁹ Submission to the International Commission of Human Rights Experts on Ethiopia, Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 8 (July 2022) (on file with the author); International Committee of the Red Cross ICRC, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field; see also Akila Radhakrishnan, Elena Sarver, & Grant Shubin, Protecting safe abortion in humanitarian settings: overcoming legal and policy barriers, 25 REPRODUCTIVE HEALTH MATTERS 40 (2017), <https://www.tandfonline.com/doi/epdf/10.1080/09688080.2017.1400361?needAccess=true>; Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV) Art. 16 (Aug. 12, 1949); see also ICRC Customary IHL Database, Practice Relating to Rule 134: Women - Section B, Particular care for pregnant women and nursing mothers, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule134_sectionb.

²⁶⁰ CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 5 (May 2, 2016).

*transmitted infections, including post-exposure prophylaxis; and care to treat injuries such as fistula arising from sexual violence, complications of delivery or other reproductive health complications, among others.*²⁶¹

Further, the CESCR Committee, in its General Comment 22 (right to sexual and reproductive health), confirms that States must “guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities, in particular for women and disadvantaged and marginalized groups.”²⁶² This obligation applies in the context of conflict, post-conflict, and transition,²⁶³ and also obligates States to prevent violations by third parties. States must also prevent and prohibit private actors from placing practical or procedural barriers to accessing health services.²⁶⁴

Access to healthcare may be hindered in many ways. In some cases, the destruction of adequate and accessible infrastructure may block access. For instance, the Commission of Human Rights Experts on Ethiopia noted difficulties in accessing healthcare in Tigray as a result of conflict, with pregnant women being “forced to walk nearly 40 kilometers to access the nearest health facility.”²⁶⁵ Though this was recorded under “starvation and food insecurity,”²⁶⁶ walking long distances to access necessary healthcare can also have severe adverse reproductive health consequences for pregnant women. Similarly, in Colombia, forced displacement caused by the armed conflict led to individuals being unable to access contraception and abortion services when they were most needed.²⁶⁷ In Sudan, the armed conflict blocked access in certain parts of the country to medicines, including contraceptives and equipment required for obstetric care and post-rape treatment.²⁶⁸ Overall, in cases where accessing general health facilities is difficult, the impact on reproductive rights must be considered specifically.

Restrictive abortion laws also lead to the denial of other forms of necessary sexual and reproductive healthcare. For instance, in a case before the Inter-American Court of Human Rights, a Salvadoran woman who had sought treatment for an obstetric emergency was referred by her doctors to prosecutors on suspicion of having attempted an abortion, which is fully criminalized in El Salvador.²⁶⁹ The victim was handcuffed to a hospital bed,

²⁶¹ Submission to the International Commission of Human Rights Experts on Ethiopia, Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 7 (July 2022) (on file with the author); CEDAW Committee, General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, ¶ 52(c) (Oct. 18, 2013). The CESCR also provides that States: “must guarantee physical and mental health care for survivors of sexual and domestic violence in all situations, including access to post-exposure prevention, emergency contraception and safe abortion services.” CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 45 (May 2, 2016).

²⁶² CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 49(c) (May 2, 2016).

²⁶³ CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 59 (May 2, 2016).

²⁶⁴ CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 43 (May 2, 2016).

²⁶⁵ Human Rights Council, Report of the International Commission of Human Rights Experts on Ethiopia, A/HRC/54/55, 10 (Sept. 14, 2023).

²⁶⁶ Human Rights Council, Report of the International Commission of Human Rights Experts on Ethiopia, A/HRC/54/55, 10 (Sept. 14, 2023).

²⁶⁷ An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 12–13 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>.

²⁶⁸ Women and Girls Hit Hard by Attacks on Health in Sudan, UN Agencies Warn, WORLD HEALTH ORGANIZATION (Jun. 20, 2023), <https://www.who.int/news/item/20-06-2023-women-and-girls-hit-hard-by-attacks-on-health-in-sudan--un-agencies-warn>.

²⁶⁹ Inter-American Court of Human Rights, Case of *Manuela et al. v. El Salvador*, ¶¶ 52–57 (Nov. 2, 2021).

interrogated, prosecuted, and eventually sentenced to prison for 30 years. She died two years later as a result of being denied further necessary medical care for an unrelated condition while in prison. The Inter-American Court held that the denial of medical care violated the victim's human rights to health and to life.²⁷⁰

Policies and practices might lead to other barriers to accessing healthcare. For instance, in Afghanistan, the Taliban have imposed a prohibition on women leaving their homes without a male relative or being treated by male doctors.²⁷¹ In one case, a pregnant woman lost her two newborn children because of her husband's refusal to let her see a doctor.²⁷² Overall, these policies have led to pregnant women being unable to access essential healthcare services and a reported increase in maternal mortality in Afghanistan,²⁷³ a predictable consequence of the inability to access necessary healthcare in a timely manner.

The CESCR Committee, in its General Comment 22 (right to sexual and reproductive health), confirms that States must “guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities.”

Further, pregnant and postpartum Ukrainian refugees who have fled to neighboring countries have found it difficult to access antenatal care, postnatal care, and abortion services. This includes the unavailability of contraceptives without a prescription in Hungary and Poland and difficulty accessing sexual or reproductive healthcare services for minors without parents' or guardians' consent.²⁷⁴

Barriers such as the high cost of emergency contraception and abortion care also continue to limit sexual and reproductive healthcare access for refugees. On paper, some sexual and reproductive health services are available for refugees free of charge in Poland and Hungary. However, unclear policies have led to public health facilities either turning away refugees or charging them upfront for these services.²⁷⁵ Lack of adequate information adds to existing difficulties, such as language barriers, for refugees seeking access to sexual and reproductive healthcare services.²⁷⁶

270 Inter-American Court of Human Rights, Case of *Manuela et al. V. El Salvador*, ¶¶ 183, 228, 245–46 (Nov. 2, 2021).

271 ‘Every Midwife Is Afraid’: Worrying Signs Over Maternal Deaths In Afghanistan, RFE/RL (May 20, 2023), <https://www.rferl.org/a/afghanistan-maternal-mortality-rate-midwives/32419238.html>.

272 ‘Every Midwife Is Afraid’: Worrying Signs Over Maternal Deaths In Afghanistan, RFE/RL (May 20, 2023), <https://www.rferl.org/a/afghanistan-maternal-mortality-rate-midwives/32419238.html>.

273 ‘Every Midwife Is Afraid’: Worrying Signs Over Maternal Deaths In Afghanistan, RFE/RL (May 20, 2023), <https://www.rferl.org/a/afghanistan-maternal-mortality-rate-midwives/32419238.html>.

274 See *Care in Crisis: Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania and Slovakia*, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 15, 45 (May 16, 2023), https://reproductiverights.org/wp-content/uploads/2023/06/CRR_UkraineReport_V2o_Screen.pdf.

275 *Care in Crisis: Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania and Slovakia*, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 28 (May 16, 2023), https://reproductiverights.org/wp-content/uploads/2023/06/CRR_UkraineReport_V2o_Screen.pdf.

276 *Care in Crisis: Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania and Slovakia*, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 7 (May 16, 2023), https://reproductiverights.org/wp-content/uploads/2023/06/CRR_UkraineReport_V2o_Screen.pdf.

Destruction of Infrastructure and Healthcare

Under IHL, parties involved in conflict are required to minimize civilian harm, “which includes harm to diverse women, men, boys and girls.”²⁷⁷ IHL also grants protection to civilian objects,²⁷⁸ which includes hospitals and medical facilities, unless they make an effective contribution to military action and attacking them “offers a definite military advantage.”²⁷⁹

Geneva Convention I specifically prohibits targeting medical personnel, medical facilities, and medical transport established to provide medical care to wounded and sick members of armed forces.²⁸⁰ Under Article 18 of Geneva Convention IV, civilian hospitals (including maternity hospitals) and medical facilities “may in no circumstances be the object of attack” and must “at all times be respected and protected by the Parties to the conflict.”²⁸¹ Further, as discussed above, “expectant mothers” and “maternity cases”²⁸² fall within the protection of IHL. Therefore, the destruction of infrastructure, hospitals, and healthcare facilities providing necessary maternal, sexual, and reproductive health services would violate the duty to provide medical care for the “wounded and sick”²⁸³ under IHL.

Destruction of healthcare facilities also violates States’ IHRL obligations to provide “unhindered access” to a range of health facilities, goods, services, and information.²⁸⁴ It violates the non-derogable obligation under the right to sexual and reproductive health “[t]o guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities, in particular for women and disadvantaged

Applicable provisions

IHL:

- Articles 12, 19-37, Geneva Convention (I)
- Articles 16, 18, 21, 22, 23, 50, 89, 91, 127, 132, Geneva Convention (IV)
- Article 52, Protocol Additional (I) to the Geneva Conventions

IHRL:

- Article 12, CESCRC
- Article 12(I), CEDAW
- Article 24, 38(1), CRC

²⁷⁷ Gendered Impacts of Armed Conflict and Implications for The Application of International Humanitarian Law, INTERNATIONAL COMMITTEE OF THE RED CROSS 4 (Jun. 29, 2022), <https://www.icrc.org/en/publication/4634-gendered-impact-armed-conflict-and-ihl>.

²⁷⁸ Protocol Additional (I) of the Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts (adopted Nov. 30 1993, entered into force Mar. 1 1994), Art. 52 - General protection of civilian objects, https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc_002_0321.pdf#page=42.

²⁷⁹ Protocol Additional (I) of the Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts, (adopted Nov. 30 1993, entered into force Mar. 1 1994), Art. 52(2) - General protection of civilian objects, https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc_002_0321.pdf#page=42.

²⁸⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Arts. 19–37 (Aug. 12, 1949), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.30_GC-I-EN.pdf#page=11.

²⁸¹ Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Art. 18 (Aug. 12, 1949), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf#page=13.

²⁸² Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Art. 16, “[E]xpectant mothers, shall be the object of particular protection and respect.” See also Arts. 23, 50, 89, and 132 (referring to provision of food, clothing, medical assistance and repatriation); Arts. 18, 21, 22, 91, and 127 (referring to medical assistance to and transport for pregnant women as well as their removal from besieged areas), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf#page=13.

²⁸³ International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field (Aug. 12, 1949), ¶ 1432, Art. 12, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-12/commentary/2016?activeTab=>.

²⁸⁴ CESCRC Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 5 (May 2, 2016).

and marginalized groups.”²⁸⁵

In Ukraine, there have been reports of prenatal centers and maternity hospitals being destroyed.²⁸⁶ In one case, the UN Human Rights Monitoring Mission in Ukraine (HRMMU) has verified that a Russian airstrike damaged a maternity hospital in Mariupol, killing three people and injuring seventeen. A pregnant civilian died as a result of injuries sustained in the air strike and her baby, delivered after the attack, also did not survive.²⁸⁷ There have been many other reports of attacks on maternity hospitals and healthcare facilities in Ukraine.²⁸⁸ In relation to the conflict, the HRMMU has also noted that many Ukrainian women in maternity hospitals had to give birth in basements.²⁸⁹ The HRMMU has not yet specifically characterized attacks on maternity hospitals or reproductive healthcare as reproductive violence, however.²⁹⁰

In South Sudan, the WHO noted that pregnant women were “hit the hardest” due to attacks on healthcare facilities and workers.²⁹¹ Lack of or difficulty in accessing healthcare facilities may amount to a violation of the victims’ right to health, as it either makes it impossible or prohibitively difficult for victims to access necessary reproductive healthcare.

285 CESCR Committee, General Comment No. 22 on Art. 12: the right to sexual and reproductive health, E/C.12/GC/22, ¶ 49(c) (May 2, 2016); see also CEDAW Art. 12(1).

286 OHCHR, Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation, 24 February – 15 May 2022, ¶ 51 (Jun. 29, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf>.

287 OHCHR, Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation 24 February – 15 May 2022, ¶ 42 (Jun. 29, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf>; OHCHR, Update on the Human Rights Situation in Ukraine, 24 February – 26 March, ¶ 18 (2022), https://www.ohchr.org/sites/default/files/2022-03/HRMMU_Update_2022-03-26_EN.pdf; see also Lavrov confirms Russia deliberately bombed maternity hospital in Mariupol, EUROPEAN PRAVDA (Mar. 10, 2022), <https://web.archive.org/web/20220310145334/https://www.pravda.com.ua/eng/news/2022/03/10/7330042/>.

288 Laurie Churchman, Russia bombs Ukrainian maternity hospital in Zhytomyr as mothers and children ‘flee to basement’, THE INDEPENDENT (Mar. 2, 2022), <https://www.independent.co.uk/news/world/europe/russia-ukraine-zhytomyr-hospital-bomb-b2026632.html>; Russian bombs destroy residential house and hospital in Zhytomyr – mayor, UKRINFORM (Mar. 2, 2022), <https://www.ukrinform.net/rubric-ato/3417489-russian-bombs-destroy-residential-house-and-hospital-in-zhytomyr-mayor.html>; Bel Trew, Ukrainian baby born in hospital bunker after Russian missile shatters maternity ward, THE INDEPENDENT (Mar. 7, 2022), <https://www.independent.co.uk/news/world/europe/russia-ukraine-war-maternity-hospital-birth-b2027092.html>; see “Anyone can die at any time”: Indiscriminate Attacks by Russian Forces in Kharkiv, Ukraine, AMNESTY INTERNATIONAL 3–4 (Jun. 13, 2022), <https://www.amnesty.org/en/latest/research/2022/06/anyone-can-die-at-any-time-kharkiv/>; Violence against or obstruction of health care in Ukraine: 22 March - 05 April 2022, AMNESTY INTERNATIONAL 2 (Apr. 2022), <https://insecurityinsight.org/wp-content/uploads/2022/04/22-March-05-April-2022-Violence-Against-or-Obstruction-of-Health-Care-in-Ukraine.pdf>; see also Marcus Yam & Laura King, In a Ukraine maternity ward: The roar of bombs, a newborn’s cry, LOS ANGELES TIMES (Apr. 8, 2022), <https://www.latimes.com/world-nation/story/2022-04-08/bombs-ukraine-maternity-ward-newborns-moms>; Ukraine: Unlawful Russian Attacks in Kharkiv, HUMAN RIGHTS WATCH (Aug. 16, 2022), <https://www.hrw.org/news/2022/08/16/ukraine-unlawful-russian-attacks-kharkiv>.

289 OHCHR, Update on the Human Rights Situation in Ukraine, 24 February – 26 March, ¶ 19 (2022), https://www.ohchr.org/sites/default/files/2022-03/HRMMU_Update_2022-03-26_EN.pdf.

290 See for example the Commission’s reports and analysis in Human Rights Council, Conference room paper of the Independent International Commission of Inquiry on Ukraine, A/HRC/52/CRP.4, ¶¶ 641–43 (Aug. 2023), https://www.ohchr.org/sites/default/files/2023-08/A_HRC_52_CRP.4_En%20%28003%29.pdf; Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/55/66, ¶¶ 18, 24 (Mar. 2024), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/a-hrc-55-66-aev.pdf>.

291 Women and girls hit hard by attacks on health in Sudan, UN agencies warn, WORLD HEALTH ORGANIZATION (Jun. 20, 2023), <https://www.who.int/news/item/20-06-2023-women-and-girls-hit-hard-by-attacks-on-health-in-sudan--un-agencies-warn>.

In Ethiopia, demand for sexual and reproductive health services increased owing to SGBV committed during the armed conflict. Simultaneously, obstruction of humanitarian aid and targeted attacks on healthcare facilities negatively impacted these facilities' ability to provide sexual and reproductive healthcare.²⁹² Moreover, the destruction of the health system in Tigray raises concerns about long-term impacts on SGBV survivors, potentially including undiagnosed and untreated physical and reproductive consequences, HIV infections, unwanted pregnancies, and unsafe abortions.²⁹³

Similarly, the destruction of healthcare facilities in Gaza, along with restrictions on the delivery of humanitarian aid imposed by Israel, has caused extraordinary strain on the reproductive healthcare system. For instance, in Rafah, the sole remaining hospital has been attempting to provide for almost 100 deliveries a day with only six available delivery beds.²⁹⁴ Restrictions on medical supplies have also led to shortages in anesthesia medication, resulting in deliveries, including C-sections, conducted without pain relief.²⁹⁵ Experts have also highlighted an attack on an in-vitro fertilization (IVF) clinic in Gaza that destroyed thousands of preserved embryos, sperm, and egg samples as an example of reproductive violence.²⁹⁶ They noted that the strike could further be analyzed as an act of genocide depending on intent, as the deliberate destruction of the reproductive capacity of a community by targeting stored reproductive material could amount to a measure to prevent births.²⁹⁷

In short, the destruction of healthcare infrastructure in any conflict must be analyzed carefully, and the targeting of maternity hospitals and facilities that provide reproductive healthcare must be identified separately. Such specific targeting may be followed by an increase in maternal or infant deaths which can assist in identifying the intent behind such attacks. Such an analysis can assist in highlighting reproductive harms and violations of the reproductive rights of victims in need of such healthcare.

Other Cases

Apart from the situations discussed above, numerous other cases may amount to reproductive violence or violations of reproductive rights. As an emerging issue subject to evolving technological and legal developments, reproductive violence will continue to manifest in new forms. It is therefore essential to identify and document both known and emerging forms to ensure accountability and secure the full range of reparations commensurate to the severity of harm suffered. The non-exhaustive list of reproductive violence in this analysis will need to be

292 Submission to the International Commission of Human Rights Experts on Ethiopia. Observations on selected allegations of sexual and reproductive rights violations, GLOBAL JUSTICE CENTER 3 (July 2022) (on file with the author).

293 Human Rights Council, Report of the International Commission of Human Rights Experts on Ethiopia (Advance unedited version), A/HRC/54/55, ¶ 55 (Sept. 14, 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/chreethiopia/A_HRC_54_55_AUV.pdf.

294 Gaza's silent killings: The destruction of the healthcare system in Rafah, MEDECINS SANS FRONTIERES 22 (Apr. 29, 2024), <https://www.msf.org/gazas-silent-killings-destruction-healthcare-system-rafah>.

295 Yousef Ruzzi, A C-Section in Gaza, CARE (Jun. 11, 2024), <https://www.care.org/news-and-stories/news/a-c-section-in-gaza/>.

296 Saleh Salem, Imad Creidi, & Andrew Mills, Gaza's IVF embryos destroyed by Israeli strike, REUTERS (Apr. 17, 2024), <https://www.reuters.com/world/middle-east/5000-lives-one-shell-gazas-ivf-embryos-destroyed-by-israeli-strike-2024-04-17/>; Dawn Clancy, Israeli Forces Hit the Main Fertility Clinic in Gaza. Legal Experts Ask, Is It Genocide?, PASS BLUE (May 8, 2024), <https://www.passblue.com/2024/05/08/israeli-forces-hit-the-main-fertility-clinic-in-gaza-legal-experts-ask-is-it-genocide/>.

297 Akila Radhakrishnan comments on the *Ongwen* case, saying the ICC "affirmed that what the crime sought to protect was personal, sexual and reproductive autonomy, setting the stage for deepening our understanding of other potential reproductive crimes," which includes the destruction of embryos, sperm, and unfertilized eggs. Dawn Clancy, Israeli Forces Hit the Main Fertility Clinic in Gaza. Legal Experts Ask, Is It Genocide?, PASS BLUE (May 8, 2024), <https://www.passblue.com/2024/05/08/israeli-forces-hit-the-main-fertility-clinic-in-gaza-legal-experts-ask-is-it-genocide/>.

revised and updated periodically, responding to emerging examples, issues, and analytical frameworks; however, a few illustrative examples of additional forms of reproductive violence are described below.

Chemical Exposure

In Colombia, glyphosate spraying used to eradicate illicit crops has contributed to high rates of miscarriages.²⁹⁸ There is evidence that glyphosate has additional negative consequences for reproductive health and fetal development as well.²⁹⁹ The use of such herbicides or other chemicals without precautions to account for its impacts on health violates the right to health and, in some cases, constitutes reproductive violence. There may also be a correlation between chemical weapons and miscarriages. For instance, miscarriages were recorded after the Israeli military's use of teargas on Palestinian civilians in 1988.³⁰⁰

Detention Settings

In Belarus, the OHCHR investigation of human rights violations documented multiple instances of forced miscarriage in police custody. In one case, the mechanism found:

[A] woman arbitrarily detained in Kherson Prison in Minsk...was denied obstetric care despite repeated requests and visible signs of her advanced pregnancy. Committee of State Security interrogators referred to her pregnancy, threatened her with death and sent her to an isolation cell without ventilation. The victim reported that she fainted and was administered medication before being returned to the same cell. That same night, six months pregnant and without any medical care, she gave birth to a stillborn boy in her cell. She was denied any official acknowledgement of the pregnancy or stillbirth and threatened with punishment if she did not stay silent.³⁰¹

OHCHR noted that this forced miscarriage "...may amount to ill-treatment or in some cases torture,"³⁰² but did not specifically label the incident reproductive violence. In other instances documented by OHCHR in Belarus, pregnant women were beaten while detained, including with blows to the abdomen, resulting in the termination of their pregnancies.³⁰³ This treatment constitutes torture or other CIDT, as well as reproductive violence.

298 See An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 29 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>; see generally Reproductive health and glyphosate, CENTER FOR REPRODUCTIVE RIGHTS (2020), <https://reproductiverights.org/wp-content/uploads/2021/09/Reproductive-Health-Glyphosate-Colombia-Conflict.pdf>.

299 See An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 29 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>; see generally Reproductive health and glyphosate, CENTER FOR REPRODUCTIVE RIGHTS (2020), <https://reproductiverights.org/wp-content/uploads/2021/09/Reproductive-Health-Glyphosate-Colombia-Conflict.pdf>.

300 Matthew R. Francis, Police Who Tear-Gas Abortion-Rights Protesters Could Induce Abortion, SCIENTIFIC AMERICAN (Jul. 20, 2022), <https://www.scientificamerican.com/article/police-who-tear-gas-abortion-rights-protesters-could-induce-abortion/>.

301 Human Rights Council, Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, A/HRC/55/61, ¶ 29 (Mar. 25, 2024), <https://undocs.org/en/A/HRC/55/61>.

302 Human Rights Council, Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, A/HRC/55/61, ¶ 29 (Mar. 25, 2024), <https://undocs.org/en/A/HRC/55/61>.

303 Human Rights Council, Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, A/HRC/52/68, ¶ 39 (Feb. 3, 2023), <https://documents.un.org/doc/undoc/gen/g23/008/97/pdf/g2300897.pdf>.

Symbolic Targeting of Pregnant Persons

In cases like these, careful investigation may reveal particular motives for targeting pregnant people. For example, this violence can carry potent symbolic meaning. Across cultures, pregnant women and mothers hold particular significance and are often identified as symbols of community continuity. Attacks on these perceived embodiments of a community's persistence and resilience can communicate the attackers' determination to wipe out the group.³⁰⁴ Pregnant women are also often considered to be among the most vulnerable members of the community, entitled to special solicitation in recognition of their medical needs. This solicitation manifests in IHL, which specifically obliges warring parties to ensure care for "maternity cases, new-born babies and other persons...such as the infirm or expectant mothers."³⁰⁵

In light of this status – both highly vulnerable and highly protected – attacks on pregnant women can communicate powerfully to multiple audiences. To the victims and their community, these attacks indicate that no one will be spared, and that the victims cannot rely on either the laws of war or social norms to protect them.³⁰⁶ Perhaps equally important, such attacks can indicate to other members of the perpetrators' group that they are operating beyond the bounds of the law. The overt, flamboyant rejection of customs, morals, and law can serve to bind perpetrators together by signifying a permanent rupture with the world of rules, to which they cannot return given the stigma associated with the forms of violence they have committed.³⁰⁷

Violence against Children as Reproductive Violence

Reproductive violence can also take the form of violence inflicted against children to heighten the suffering of their parent(s). In addition to constituting a violation against the child directly, this violence can be understood as reproductive because it targets an individual through their reproductive capacity, being carried out through the violent destruction of this capacity or the children who result from it. For example, during the Holocaust, many mothers were forcibly separated from their very young children and infants in ghettos, "deportation" proceedings, and in labor and extermination camps. The resultant suffering could be seen as ancillary to other goals of the genocide, such as ensuring the steady supply of slave labor, but was also intended to penalize reproduction, producing "maternity infected by atrocity, where the established conventions of motherhood

304 Beyond Killing: Gender, Genocide, and Obligations under International Law, GLOBAL JUSTICE CENTER 34 (Dec. 6, 2018) (Referencing "ingrained stereotypes of women as carriers of life, vessels for paternal identity, and also the beings more responsible for their community's regeneration.") See also Fionnuala Ni Aolain, Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law, 12 YALE JOURNAL OF LAW & FEMINISM 61 (2000) ("as 'carriers of the nation,' mother and child destruction marks out the realization of broader military objectives, by destroying the future of a people and hence the people themselves.").

305 International Committee of the Red Cross, Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field (Aug. 12, 1949), ¶ 742, Art. 3. [https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=.](https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=)

306 An Examination of Reproductive Violence against Women and Girls during the Armed Conflict in Colombia, CENTER FOR REPRODUCTIVE RIGHTS 27 (July 2020), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf#page=27> ("violence against pregnant women is used specifically to terrorize a population.... In a society where the figure of women as mothers holds special meaning, directing violence against the bodies of pregnant women sent the message that there were no limits and the enemy would be annihilated.").

307 Scott Gates, Membership Matters: Coerced recruits and rebel allegiance, 54(5) JOURNAL OF PEACE RESEARCH 18–19 (2017), <https://www.duo.uio.no/bitstream/handle/10852/64966/4/Gates-Group-allegiance-JPR-penultimate.pdf#page=18>.

are deliberately ravaged and assaulted.”³⁰⁸ Similarly, in Syria, some enslaved women were punished through violence against their children: “ISIS fighters often target younger Yazidi children as a means of punishing their mothers. In one case, an ISIS fighter killed several children after their mother failed in her escape attempt.”³⁰⁹

In other contexts, reproductive violence involving the forcible removal of children has served as a punishment for perceived political dissent or violation of social norms, or as a tool of political control. For example, in Argentina, when perceived political opponents were ‘disappeared’ by the military junta, their infant children were often “given away to ‘politically acceptable’ parents as part of what human rights groups call a systematic plan to steal and sell the stolen babies of [the junta’s] victims.”³¹⁰ Dissidents who were pregnant at the time of their abduction or who became pregnant during their captivity, often as a result of rape, were sometimes kept alive only long enough to give birth, whereupon the newborns were taken away for adoption and their mothers murdered.³¹¹ Similarly, in Spain between the 1930s and the 1980s, thousands of newborns were allegedly stolen from their mothers at birth due to the parents’ perceived political opposition to the government and the prevailing belief that the infants would inherit “communist tendencies” if they remained with their birth families.³¹² Many of the infants were distributed to families loyal to the regime of dictator Francisco Franco.

For decades in Ireland, unmarried women who became pregnant were heavily pressured or forced to surrender their children for adoption due to vehement social and religious rejection of women who gave birth outside marriage.³¹³ In the United States, Canada, and Australia, the widespread forced removal of children from Indigenous communities has been described as a form of cultural or biological genocide, or both.³¹⁴ These instances illustrate the importance of integrating an understanding of reproductive justice – the realization of all human rights that ensure and maintain bodily autonomy, including the choice and ability to have children,

308 Fionnuala Ni Aolain, *Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law*, 12 *YALE JOURNAL OF LAW AND FEMINISM* 43, 57, 60 (2000), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/6857/06_12YaleJL_Feminism43_2000_.pdf?sequence=2&isAllowed=y (“when a woman as mother is forcibly separated from her dependent child, whose fate she cannot control and can only imagine as grim, I would suggest that another quantifiable harm has been caused.”).

309 “They came to destroy”: ISIS Crimes Against the Yazidis, *INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC*, A/HRC/32/CRP.2, ¶ 83 (Jun. 16, 2016), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf.

310 “Where’s my stolen grandchild?” Argentina seeks truth, justice, OHCHR (Aug. 30, 2023), <https://www.ohchr.org/en/stories/2023/08/wheres-my-stolen-grandchild-argentina-seeks-truth-justice>. According to some experts, the stealing and ‘adoption’ of infants and children in Argentina was motivated by a desire to punish and control perceived enemies and their extended families: “The appropriation of children, as well as rape, has always been aimed at humiliating and subduing the enemy. Taking away the enemy’s child was a bargaining chip.” Lorenzo Tondo, Elena Basso, & Sam Jones, *Adopted by their parents’ enemies: tracing the stolen children of Argentina’s ‘dirty war’*, *THE GUARDIAN* (Jan. 16, 2023), <https://www.theguardian.com/global-development/2023/jan/16/tracing-stolen-children-of-argentina-dirty-war>.

311 “Where’s my stolen grandchild?” Argentina seeks truth, justice, OHCHR (Aug. 30, 2023), <https://www.ohchr.org/en/stories/2023/08/wheres-my-stolen-grandchild-argentina-seeks-truth-justice>.

312 Lucía Benavides, *How Spanish Women Were Allegedly Targeted In ‘Stolen Babies’ Cases For Decades*, *NATIONAL PUBLIC RADIO (NPR)* (Aug. 17, 2018), <https://www.npr.org/2018/08/17/639226190/how-spanish-women-were-allegedly-targeted-in-stolen-babies-cases-for-decades>.

313 Irish government to apologise over mother-and-baby homes, *BBC NEWS* (Jan. 12, 2021), <https://www.bbc.com/news/world-europe-55622548>; see also Caelainn Hogan, ‘A nun called me a destroyer of lives’: how adoption rights activist Susan Lohan fought the Irish establishment, *THE GUARDIAN* (Mar. 9, 2022), <https://www.theguardian.com/society/2022/mar/09/a-nun-called-me-a-destroyer-of-lives-how-adoption-rights-activist-susan-lohan-fought-the-irish-establishment>.

314 Yulia Ioffe, *Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?*, 25 *JOURNAL OF GENOCIDE RESEARCH* 3–4, 321–23 (2023), <https://www.tandfonline.com/doi/full/10.1080/14623528.2023.2228085#d1e182>.

not have children, *and to parent the children one has in safe and sustainable communities*³¹⁵ – in order to identify and analyze cases of reproductive violence.

Interference with Breastfeeding

The denial of reproductive autonomy over lactation or breastfeeding also constitutes a violation of reproductive rights that can amount to reproductive violence. For example, the Commission of Human Rights Experts on Ethiopia recorded evidence of an Irob woman being enslaved along with her one-year-old daughter. The woman was subjected to multiple perpetrator rape, and her daughter died because the woman was prohibited from breastfeeding.³¹⁶ During the Holocaust, “Doctor Mengele... tied up [the victim’s] breasts after the delivery of her child so that she was unable to feed her newborn.”³¹⁷ On the other hand, there may be cases where victims are forced to breastfeed. These may be linked to instances of forced pregnancy in which victims are forced to give birth and then to breastfeed; in other cases, forced breastfeeding is linked to enslavement, through the co-optation of an enslaved person’s milk to feed others’ infants.³¹⁸

Reproductive Consequences of Starvation

A further example of reproductive violence is linked to the war crime of starvation of a civilian population.³¹⁹ Starvation has specific, disproportionate, and severe consequences on all aspects of reproduction, including pregnancy and lactation. The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel documented these disproportionate impacts, noting “the terrible effect of the lack of food and water on vulnerable groups, including children and pregnant and lactating women” while finding that “Israeli authorities...have committed the war crime of intentionally using starvation of civilians as a method of warfare...”³²⁰ The report’s detailed analysis of starvation provides a strong example of how to document differentiated, gendered impacts of particular international crimes, including crimes which on their

³¹⁵ See CEDAW Art. 16(1)(e), “States Parties shall take all appropriate measures to ... 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.” See also About Us Page on Reproductive Justice, SISTERSONG, <https://www.sistersong.net/about-x2>.

³¹⁶ Human Rights Council, Comprehensive investigative findings and legal determinations of the International Commission of Human Rights Experts on Ethiopia, A/HRC/54/CRP.3, ¶ 142 (Oct. 13, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/chrethiopia/a-hrc-54-crp-3.pdf#page=27>.

³¹⁷ Fionnuala Ni Aolain, Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law, 12 YALE JOURNAL OF LAW AND FEMINISM 43, 55–56 (2000), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/6857/06_12Yal_eJL_Feminism43_2000_.pdf?sequence=2&isAllowed=y (The victim of this crime administered covertly-acquired morphine to her newborn in order to kill the infant rather than watch it starve to death).

³¹⁸ Emily West and R.J Knight, Mothers’ Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South, 83 JOURNAL OF SOUTHERN HISTORY 37 (Feb. 2017).

³¹⁹ ICRC Customary IHL Database, Rule 53: Starvation as a Method of Warfare, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule53>.

³²⁰ Human Rights Council, Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, AND ISRAEL, A/HRC/56/CRP.4, ¶¶ 451, 464 (Jun. 10, 2024), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session56/a-hrc-56-crp-4.pdf#page=113>.

face may not appear to be gendered.³²¹ The report could have been further strengthened by making specific reference to reproductive violence, in order to recognize the reproductive aspects of starvation and highlight the violations of specific IHRL and IHL protections for reproductive autonomy.

Reproductive Violence as Gender Persecution

While the above sections outline how acts aimed at restricting reproductive autonomy constitute particular crimes and violations, other international law provisions can apply to reproductive harms that may not fit perfectly within any of the categories discussed above. For example, violations such as denial of abortion committed with the intent to violate reproductive rights could amount to ‘other grave violations of international law’ for the purposes of Art. 7(2)(f) of the Rome Statute. In cases of severe deprivation of international human rights, the “umbrella crime[]”³²² of persecution as a crime against humanity may also be used to account for acts of reproductive violence not recognized elsewhere.³²³

In all cases, it is essential that the provisions available under international law are used comprehensively to account for all reproductive harms or violations of reproductive rights in a particular situation. Only then can there be comprehensive justice for reproductive violence and adequate reparations for its victims.

CONCLUSION AND RECOMMENDATIONS

While documentation of reproductive violence by UN mechanisms has been hampered by challenges both unique to the topic and common to other forms of violence, the foregoing analysis shows that this documentation is far from impossible. An array of techniques and choices can contribute to more robust documentation of these harms. Such documentation remains essential to fulfilling the mandates of UN investigative mechanisms to promote accountability, build the historical record, prevent future violations, and provide avenues of redress and justice for victims of the harms.³²⁴

The research and analysis in this report identify specific steps that can be taken by individual gender advisors, other officers, coordinators, and senior managers of investigative mechanisms, as well as the authorities that establish these mechanisms, to strengthen the documentation of reproductive violence.

³²¹ See also Human Rights Council, Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, AND ISRAEL, A/HRC/56/CRP.4, ¶¶ 316–29 (Jun. 10, 2024), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session56/a-hrc-56-crp-4.pdf#page=79>.

³²² Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 86 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=45>.

³²³ Rome Statute of the ICC, Art. 7(i)(h); Art. 7(2)(g).

³²⁴ Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, OHCHR 7 (2015), https://www.ohchr.org/sites/default/files/Documents/Publications/Col_Guidance_and_Practice.pdf#page=15.

Terms of Establishment

As the pattern of under-documentation of reproductive violence shows, it is essential but insufficient to solely include references to SGBV in the mandates of investigative mechanisms. Robust, clearly articulated support for the investigation and documentation of all gender-based violations and for the documentation of gendered elements of all violations is needed.

Mandate language should encourage all investigators to collect and analyze information that accounts for the myriad ways reproductive capacity and autonomy can motivate or be impacted by violence and violations. In addition, mandates should include examination of the root causes of SGBV, not simply its effects, to capture the full scope of the violation. Understanding the underlying causes and patterns of violations is necessary for the prevention of future violations and as a guarantee of non-recurrence – an essential element of reparation. Mandates should thus clearly articulate the need to identify manifestations of systemic gender-based discrimination and the subsequent imbalance of power as violations.

Mechanisms also need sufficient investment – of both money and time – to document the full scope of violations. The assessment and allocation of required resources will likewise depend on the mandate, which, in turn, impacts the proposed and approved budgets for each mechanism.³²⁵ Mandates should thus be drafted to account for the full resources needed to document reproductive violence. This includes specialized support for victims, such as referral pathways for mental and physical healthcare and legal support. Moreover, the amount of time required for documentation of reproductive violence can, in some cases, exceed what is typically allocated for mandates. Providing longer initial mandates and consistently securing their renewal will enable documenters to conduct the careful interviews and analysis needed to reveal reproductive violence.

Working Methods

Mechanisms can also take a range of steps in conducting their work that will enhance documentation of sexual and reproductive rights violations, including reproductive violence. In particular, mechanisms could:

- Hold trainings on gender analysis and reproductive violence to foster ownership and understanding by entire investigative teams of gender issues.
- Ensure their methodologies are flexible enough to respond to possible fluctuation in harms and impacts suffered by victims of reproductive violence, particularly harms that may manifest over time.
- Include reproductive violence documentation and analysis in all investigative mechanism reporting or provide an explanation for the absence of documentation.
- Develop strategies and tools to combat preemptive self-censorship and to withstand pressure that may arise to curtail documentation of reproductive violence in reports.

³²⁵ Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, OHCHR 28 (2015), https://www.ohchr.org/sites/default/files/Documents/Publications/Col_Guidance_and_Practice.pdf#page=36.

Based on the research in this report, the following additional protocols can be incorporated into fact-finding by investigative mechanisms to increase documentation of reproductive violence:

- Analyze attacks on maternal facilities, reproductive health infrastructure, and women’s health facilities, in addition to internally displaced people (IDP) and refugee camps, detention sites, jails and prisons, hospitals, and clinics, to assess intent and impacts on reproductive health.
- Consider the impact of gender inequality and discrimination on contexts before, after, and during atrocity/conflict situations, with particular attention to how legal, civil, economic, political, cultural, and social consequences of crises affect people of varying genders differently.
- Ensure that the specific needs and rights of both victims who give birth as a result of CRSV and the children born of CRSV are each respected and protected throughout the investigation process. Recognize that the needs of these children and their survivor parents may sometimes diverge and organize investigations to facilitate the protection of the rights of both.
- Ask follow-up questions related to reproduction in any cases of SGBV, including SGBV committed against men and boys.
- Analyze how local laws, including restrictions on abortion access, may contribute to SRHR violations and take steps to mitigate these violations.
- Interview doctors, health care professionals, midwives, nurses, family members, and other relevant witnesses about sexual and reproductive health issues and SGBV, in addition to victims and survivors.
- Consider the impact of other human rights violations on reproductive rights, such as hindering access to information or services through male guardianship and denial of access to education for women.
- Apply consistent standards for assessing the existence of violations, regardless of whether the alleged crimes involve SGBV.
- Use direct and precise terminology when referring to SGBV, including abortion and reproductive violence.
- Engage with civil society in collecting, corroborating, and collating information on reproductive violence.
- Consult the legal guidance provided in this report for concrete information on forms and examples of reproductive violence that may be applicable to assessing harms in particular country situations.
- Continuously update legal guidance to reflect progressive developments in international standards.

Taken together, these measures would enhance qualitatively and quantitatively the documentation of reproductive violence, thereby helping to ensure the true scope of harms are captured in investigative mechanisms’ reporting. Over time, this will ensure mechanisms meet their mandates fully and generate more effective international responses, including allocation of services and accountability. Investigative mechanisms and the authorities that establish them have a significant opportunity to improve understanding of reproductive violence and document its manifestations. In the interests of victims, survivors, impacted communities, and justice and prevention efforts, they must seize this opportunity.

ANNEX: ADDITIONAL DETAILS ON DOCUMENTATION CHALLENGES

This annex presents additional details related to the challenge of documenting reproductive violence that were highlighted by our interviewees, but which could not fit within the scope of the main report. They are included here to preserve the richness of these conversations, and to spur further discussion.

Time and Resource Challenges

Documenting reproductive violence requires detailed and often time-consuming evidence-gathering techniques. While investigators in international investigations with an explicit criminal justice mandate may have the latitude to spend several days building trust with and interviewing a single witness or victim, a human rights fact-finding mechanism might be expected to conduct multiple interviews per day, often in non-private settings. As a result, broaching sensitive topics such as sexual and reproductive violence is more challenging.

Inadequate resourcing for UN mechanisms, particularly those that do not have a mandate to gather evidence for criminal prosecutions, can contribute to time pressure that prevents sufficiently thorough investigation or analysis. Interviewees noted that the time available for documentation of reproductive violence can also depend on the allocation of other investigational resources, including the services of interpreters, the kind of reporting being produced, and the expertise of staff. Where staff lack country-specific expertise when deployed, more time is required to orient the team. When interpreters are in short supply, the nuanced documentation of reproductive violence may be deprioritized compared to other issues that may be relatively straightforward to document and analyze. Counterintuitively, the production of longer reports was also identified as a potential hurdle for including reproductive violence in reports. Although a longer report (such as a conference room paper) provides more space for documentation, the intensive work required to produce these longer documents can, if not properly resourced, foreclose the nuanced analysis required to tease out reproductive violence from other, more widely understood violations.

Insufficient specialist staffing can be an additional difficulty. For example, some noted a lack of adequate medical or forensic expertise within teams, which prevented appropriate documentation of medical reproductive harms. In addition, some reproductive rights violations may only be revealed at a broader population level, requiring statistical demographic analysis to understand the full scope of harm.

Effects of Sensitivity and Stigma

Interviewees reported instances of self-censorship within mechanisms due to perceived or actual sensitivity of findings related to reproductive violence within victims' communities.

Stigmas around SGBV overall mean that such crimes require extensive trust building to make victims feel safe disclosing their experiences. Interviewees expressed that they experienced difficulty building such trust in the context of a UN fact-finding mission where information may be used for a wide variety of purposes over a long period of time. This means that investigators cannot always explain or even anticipate how information shared with them will be used, where it will end up, or who will have access to it. This can make victims even more reluctant to disclose sensitive information.

Cultural taboos around reproductive violence and reproduction more broadly can also impede documentation by limiting the understanding of victims or witnesses about the violations they experienced. For example, one interviewee described having to explain to a victim the significance of asking whether their rapist ejaculated during the rape. Where insufficient education or taboos limit public awareness of reproductive functions, recording detailed information about these topics may be nearly impossible.

Stigmas around reproductive violence can also combine with pressures faced by UN mechanisms to further complicate documentation. For example, interviewees noted that where the very existence of the mandate is challenged by the State being investigated, the mechanism may feel pressure to adopt a risk-averse or conservative approach in their legal analysis to preemptively defend against attacks on their final report and the mechanism's legitimacy. Access to physical territory can be a double-edged sword for mechanisms under these conditions. While a mechanism's access to territory in which alleged violations have occurred directly facilitates the collection of information, the need to preserve this access can also make a mechanism reticent to address issues identified as particularly sensitive. These factors can contribute to an overall pattern of under-representation of harms that are perceived as more sensitive, such as reproductive violence.

Kin and Identity Relationships

Interviewees explained the complexities of documenting reproductive violence that leads to kin or identity relationships while upholding the rights of the range of victims involved. For example, in cases of so-called "children born of war,"³²⁶ violent circumstances of conception can be magnified by subsequent violations of reproductive rights, such as a lack of autonomy to decide whether and under what circumstances to continue the pregnancy. A rape victim may have a new identity – that of 'mother' – forced upon her involuntarily, and a new kinship relationship forged with both her infant and the perpetrator.³²⁷ These relationships can be, as researchers of genocidal rape in Rwanda described them, "particularly fraught with agonizing emotion."³²⁸

³²⁶ See generally Kimberly Theidon, LEGACIES OF WAR: VIOLENCE, ECOLOGIES, AND KIN 42 (July 2022).

³²⁷ Kimberly Theidon, LEGACIES OF WAR: VIOLENCE, ECOLOGIES, AND KIN 42 (July 2022).

³²⁸ Maggie Zraly, Sarah E. Rubin, & Donatilla Mukamana, Motherhood and Resilience among Rwanda Genocide-Rape Survivors, 41 ETHOS 429 (2013), <https://www.jstor.org/stable/24029815>. See also UN Security Council, Women and girls who become pregnant as a result of sexual violence in conflict and children born of sexual violence in conflict, Report by the Secretary General, S/2022/77, ¶ 12 (Jan. 31, 2022), <https://digitallibrary.un.org/record/3957087?ln=en&v=pdf>.

Interviewees identified a tension in investigating these violations. On the one hand, there is a need to recognize children born of war as victims of the violent circumstances of their conception and of the trauma that their mothers experienced, which can have lifelong impacts on their identities, mental and physical health, and life opportunities. On the other hand, the recognition of these impacts on children can, in some cases, manifest as implicit or explicit blame on mothers for failing or refusing to ascribe to social scripts of motherhood. These standards may perpetuate discrimination by reifying patriarchal patterns that contribute to SGBV or by assuming motherhood as the default, natural state of women. One interviewee highlighted that the concepts of ‘forced maternity’ or ‘forced motherhood’³²⁹ can provide useful frameworks for exploring these forced kinship and identity relationships.

Adequately documenting the experiences of both direct victims, who may in some cases reject motherhood as a further violation, and their children, who are born into ruptured or non-existent kinship webs because of crimes committed before their birth, presents significant challenges. As a result, investigators may hesitate to broach these complex topics at all.

In some circumstances, the ‘do no harm’ principle³³⁰ may even guide investigators to avoid certain questions in order to prevent further harm. These circumstances include investigation contexts where support services are unavailable, the time and expertise needed to ask particular questions are in short supply, or when severe social consequences could flow from the disclosure of a child’s origins. However, ‘do no harm’ does not mean avoiding difficult questions, but rather mustering the requisite sensitivity and resources to engage with survivors fully and appropriately. Interviewees emphasized that intricate webs of identity and relationships must be navigated with sensitivity, maintaining space for complexities that may not be easily captured by international legal standards and analytical frameworks.

Similarly, the complexity of categorizing harms that constitute reproductive violence may inhibit their full documentation. One interviewee explained that all societies implicitly tolerate some level of reproductive violence (or at least denial of reproductive autonomy). It is only in certain narrowly-defined, specific situations where these limits are deemed to offend international law. For example, certain biological and/or physical acts – forced pregnancy, enforced sterilization, forced abortion – are seen as unacceptable and criminalized. Other forms of reproductive coercion, such as legal restrictions on abortion that foreclose choices about whether to continue a pregnancy, are accepted in many contexts. Some interviewees also raised questions about whether the expectations of ‘motherhood’ – the domestic tasks and servitude that accompany maternity in many societies – constitute a separate violation when the status of motherhood is imposed involuntarily. Many interviewees suggested that these issues are considered too complex to be tackled within their documentation efforts.

³²⁹ Both terms ‘forced maternity’ and ‘forced motherhood’ have been used in contexts where women, girls, and LGBTI persons are forced to become mothers. For instance, see discussion on forced maternity in *Reproductive Violence in the Armed Conflict in Colombia*, CENTER FOR REPRODUCTIVE RIGHTS 8 (Sept. 2021), <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-SHORT-Reproductive-Violence-Conflict-Colombia.pdf#page=10>. A detailed discussion exploring the full meaning of each term is beyond the scope of this paper.

³³⁰ OHCHR, *Basic Principles of Human Rights Monitoring*, in *MANUAL ON HUMAN RIGHTS MONITORING* 4 (2011), <https://www.ohchr.org/sites/default/files/Documents/Publications/Chapter02-MHRM.pdf#page=4>. (“In all circumstances and at all times, [investigators] have an obligation not to jeopardize the life, physical and psychological safety, freedom and well-being of victims, witnesses and all those who enter into contact with them...[They] have a responsibility to balance the need to gather information and the potential risk of harm to those who may be in a position to provide such information.”).

Further Perceived Limits in the Law

Another difficulty is the interpretation of international law, and ICL in particular, through the lens of retrospective condemnation of previous atrocities.³³¹ Interviewees noted that it can take time for investigators, prosecutors, judges, and others to divorce a crime from its historical context and to begin to understand that other situations, which may look somewhat different from the original animating context, may fall within the ambit of the law. For example, enforced sterilization – which has not been prosecuted internationally since Nuremberg³³²– was identified as an international crime in large part because of the role it played in the Holocaust.³³³ Because of this high-profile and highly specific origin, one expert explained that it may be challenging for investigators to identify other forms of enforced sterilization that occur in different contexts.

Interviewees raised a related concern regarding the terminology used in some legal instruments. For example, Geneva Convention IV Article 27’s admonition that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”³³⁴ was identified as vague and encoded with patriarchal values rather than upholding bodily integrity and autonomy. Detailed and accurate analysis of SGBV, including reproductive violence, can be impeded by this veiled and charged language.

Another challenge is the high threshold of evidence and corroboration – for both prohibited acts and the intent underlying them – required in order to classify a harm (*e.g.*, to classify a particular kind of coerced medical treatment as enforced sterilization). One interviewee shared that, in some cases, a mechanism might not be able to corroborate each element of the violation and so may be forced to choose between leaving the information out of the report, reporting only on the elements that can be corroborated, or classifying the harm broadly, *i.e.*, omitting the uncorroborated contextual elements that would place the harm into a more specific category.

Terminology: Understandings of “Violence” vs. Violations

The terminology used to describe a harm can influence how it is experienced, and what steps are taken to recognize, repair, and prevent it. As discussed above, each interviewee was asked to share their views on how best to characterize conduct that attacks reproductive autonomy or limits the exercise of reproductive choices: as reproductive harm, violations, violence, or other combinations of terms. The question provoked a variety of thoughtful and sometimes contradictory responses as interviewees wrestled with the meaning of violence in

331 For example, the genocide convention was adopted in part to “signif[y] the international community’s commitment to ‘never again’ after the atrocities committed during the Second World War.” Ratification of the Genocide Convention, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT ¶ 1 (2022), <https://www.un.org/en/genocideprevention/genocide-convention.shtml#:~:text=The%20Genocide%20Convention%20was%20the,during%20the%20Second%20World%20War>. The ICTY and ICTR responded to specific events, and the atrocities in the former Yugoslavia and Rwanda strengthened calls for the establishment of a permanent international criminal court, culminating with the creation of the ICC. ICC History - The Road to Rome: The 1990s UN Tribunals, COALITION FOR THE INTERNATIONAL CRIMINAL COURT ¶ 6, <https://www.coalitionfortheicc.org/icc-history>.

332 Several Nazi doctors and officials were found guilty of war crimes and crimes against humanity for the sterilization experiments conducted at Ravensbruck, Auschwitz, and elsewhere. NMT Case 1, *U.S.A. v. Karl Brandt et al.*: The Doctors’ Trial, HLS NUREMBERG TRIALS PROJECT (2020), https://nuremberg.law.harvard.edu/nmt_1_intro.

333 See above for more on enforced sterilization. See also Tanja Altunjan, REPRODUCTIVE VIOLENCE AND INTERNATIONAL CRIMINAL LAW 100 (2021).

334 Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Art. 27, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf#page=17.

different contexts and legal frameworks. The summary of their reflections is found in the body of the text above, with additional details here.

Interviewees identified some difficulties with using the term ‘violence’ to describe a wide range of conduct. While there are advantages to the use of the term to underscore the painful impact and deliberate choices (policy or otherwise) that this harm involves, some interviewees explained that for legal officers in particular, ‘violence’ tends to be defined narrowly. Using the term ‘reproductive violence’ might, in this view, lead investigators to limit their attention to only the most direct physical aggression, such as enforced sterilization or forced pregnancy. One interviewee cited the example of a woman being forced by laws on child custody to marry her deceased husband’s brother or face the loss of custody of her children. This circumstance could be identified relatively uncontroversially as sexual and reproductive harm based on the interference with the woman’s reproductive and sexual autonomy that it would entail. But it might be difficult to convince a legal officer to recognize this situation as an instance of violence. Similarly, the systematic destruction of maternity wards by an armed force or the denial of care such that one is forced to give birth in unsanitary conditions is likely to be seen uncontroversially as reproductive harm. But to classify these as reproductive violence may be more difficult, depending on the investigators and leadership of the mechanism. Yet the severity of the impact of these situations and their systematic nature bring them within the bounds of a holistic understanding of violence.

Varying interpretations of ‘reproductive violence’ between IHRL and ICL frameworks pose another complication. Interviewees explained that under IHRL, reproductive violence can be defined as conduct that infringes upon reproductive autonomy, which is defined in reference to numerous specific human rights. But from a criminal law perspective, reproductive violence might be understood to have a narrower meaning, limited to specific enumerated crimes: enforced sterilization, forced pregnancy, and preventing births as genocide.³³⁵ This raises difficulties when investigators have a background and expertise in primarily one body of law. When working from a human rights perspective, evidence collected on these harms may not meet a criminal standard. By contrast, if the investigators have criminal law backgrounds, they may not capture the full context and range of violence that would be important to document from a human rights perspective.

³³⁵ However, note that the ICC OTP’s Policy on Gender-Based Crimes includes a broader definition of gender-based crimes, encompassing both physical and non-physical harm. This may facilitate a more consistent understanding of gender-based violence across IHRL and ICL contexts. Karim A.A. Khan KC, Office of the Prosecutor: Policy on Gender-Based Crimes, INTERNATIONAL CRIMINAL COURT ¶ 30 (Dec. 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf#page=21>.

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Reproductive violence is a distinct form of sexual and gender-based violence targeting reproductive autonomy, a right protected under international law. The impacts of reproductive violence can be as profound, damaging, and long-lasting as those accompanying other forms of violence, and can compound the pain of other forms of sexual and gender-based violence.

Yet recognition of reproductive violence as a distinct harm has historically been overlooked, including in international investigations of atrocities, conflict, humanitarian crises, or other instability.

International investigations often play a key role in guiding international responses to crises, and the omission of reproductive violence can thus have significant ripple effects. Victims may go un- or under-recognized; vital reproductive services may be absent from humanitarian responses; prevention efforts may fail to address the risks and inflammatory impacts of this violence; and justice, accountability, and reparations efforts may omit reproductive harms from consideration.

This paper analyzes the documentation of reproductive violence to date by UN-mandated fact-finding and other investigative mechanisms. To enhance documentation going forward, the paper also provides guidance on the international law governing reproductive harms. The guidance explains how international criminal, humanitarian, and human rights laws prohibit reproductive violence – including forced pregnancy, enforced sterilization, forced abortion, forced contraceptive use, restricting access to reproductive care, destroying essential reproductive healthcare infrastructure, and other forms of reproductive violence.