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THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public

***Amici Curiae* Observations on the Rome Statute's definition of 'forced pregnancy' by
Dr Rosemary Grey, Global Justice Center,
Women's Initiatives for Gender Justice and Amnesty International**

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Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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A. Introduction

1. Having been granted leave to submit *amicus curiae* observations,¹ we respectfully offer these observations about the Rome Statute's definition of 'forced pregnancy'. This is the first occasion that the Appeals Chamber will provide its interpretation of this crime, which was expressly listed in an international instrument for the first time in the Rome Statute.

2. The Rome Statute enumerates forced pregnancy as a crime against humanity² and as a war crime in both international and non-international armed conflicts.³ The term 'forced pregnancy' is defined in Article (Art.) 7(2)(f) of the Rome Statute (RS), which states:

'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

3. Our *amicus curiae* brief addresses three issues pertinent to this definition: the irrelevance of national laws relating to pregnancy when interpreting the Rome Statute's definition of forced pregnancy; the elements of 'forced pregnancy' as a war crime and a crime against humanity; and the grounding of the crime of forced pregnancy in human rights that protect personal, sexual, and reproductive autonomy.

4. In doing so, we recall that the Court must interpret the Rome Statute and Elements of Crimes, including as they relate to forced pregnancy 'consistent with internationally recognised human rights' and 'without any adverse distinction founded on grounds such as gender' pursuant to Art. 21(3) RS.⁴ Additionally, the Court must interpret the Rome Statute in light of its object and purpose,⁵ namely, to 'put an end to impunity for the perpetrators of most serious crimes of concern to the international community as a whole',⁶ including the full range of sexual and gender-based crimes enumerated in the Statute. In light of their expertise, *amici also* seek to provide guidance on internationally recognised human rights relating to personal, sexual, and reproductive autonomy, and explain their relevance to the interpretation

¹ *Ongwen*, [Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence](#) (ICC-02/04-01/15-1914), 24 November 2021, [18].

² Rome Statute, Art. 7(1)(g).

³ *Ibid.*, Art. 8(2)(b)(xxii) and 8(2)(e)(vi).

⁴ 'Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights.' *Lubanga*, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19\(2\)\(a\) of the Statute](#) (ICC-01/04-01/06-772), 14 December 2006, [37].

⁵ Vienna Convention on the Law of Treaties, Art. 31(1), (1969).

⁶ Preamble to the Rome Statute.

of the Rome Statute's crime of forced pregnancy.

B. Irrelevance of national abortion law to the ICC's interpretation of 'forced pregnancy'

5. In its appeal brief, the Defence contends that the Trial Chamber failed to make a 'reasoned enquiry' about whether its interpretation of the crime affects the national law of Uganda on abortion.⁷ Throughout the world, national laws on pregnancy and abortion vary widely.⁸ Such variations in national laws are irrelevant to the ICC's interpretation of the crime of forced pregnancy as defined in Art. 7(2)(f) RS. Victims in states with restrictive national laws relating to pregnancy and abortion do not enjoy lesser protections under the Rome Statute than victims in states with more permissive laws relating to pregnancy and abortion.

6. The second sentence in Art. 7(2)(f) RS: 'This definition shall not in any way be interpreted as affecting national laws relating to pregnancy', is merely stating the obvious: the ICC has no authority to directly amend, nullify or void national legislation.⁹ Indeed, the Rome Statute's drafting history further confirms such an interpretation, which was a compromise meant to address concerns raised during negotiations of the potential impact of the criminalization in the Rome Statute of forced pregnancy on national abortion laws.

7. Around the time of the Rome Statute negotiations, and in response to developments relating to the conflict in the former Yugoslavia and the Rwandan genocide, as well as civil society advocacy, forced pregnancy was expressly recognised as a serious violation of international human rights law and international humanitarian law in the 1993 Vienna Conference's Declaration and Programme of Action,¹⁰ the 1995 Beijing Conference's Platform for Action,¹¹ and in resolutions by the UN Commission on Human Rights.¹²

8. The proposal to enumerate 'forced pregnancy' in the Rome Statute was first made by the Women's Caucus for Gender Justice in 1997¹³ to acknowledge the incomparable harm

⁷ *Ongwen*, Public Redacted Version of "Defence Appeal Brief Against the Convictions Judgment of 4 February 2021", filed on 21 July 2021, [ICC-02/04-01/15-1866-Red](https://www.iccnij.org/icc-02/04-01/15-1866-Red), 19 October 2021 ('*Ongwen* Appeal Brief'), [962].

⁸ World Health Organization, 'Global Abortion Policies Database': <https://abortion-policies.srhr.org/>; Center for Reproductive Rights, 'The World's Abortion Laws': <https://maps.reproductiverights.org/worldabortionlaws>.

⁹ See also Amnesty International, *Forced pregnancy: a commentary on the crime in international criminal law* (2020) <https://www.amnesty.org/en/documents/ior53/2711/2020/en/>.

¹⁰ [Vienna Declaration and Programme of Action, A/CONF.157/23](https://www.unhcr.org/refugees/documents/43969696), UN Doc. A/CONF.157/24, adopted by the World Conference on Human Rights in 25 June 1993, [38].

¹¹ Beijing Declaration and Platform for Action, UN Doc. A/CONF/177/120, 15 September 1995, paras 114, 132 and 135.

¹² See UN Commission on Human Rights Resolutions: 1995/85, The Elimination of Violence against Women, 8 March 1995, para. 5; 1996/49, The Elimination of Violence against Women, 19 April 1996, para. 5; 1997/44, The Elimination of Violence against Women, 11 April 1997, para 4; 1997/78, Rights of the Child, 18 April 1997, para. 13(a); 1998/52, The Elimination of Violence against Women, 17 April 1998, para. 4; 1998/76, Rights of the Child, 22 April 1998, para. 13(a).

¹³ Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom on The Establishment of an International Criminal Court', 1 December 1997 ('Women's Caucus December 1997

caused to the victim: ‘Where impregnation or enforced pregnancy results, the invasion of the body and self is total. Women are being treated as chattel for the purpose of reproduction; this is another form of gender enslavement.’¹⁴

9. As the Trial Chamber correctly noted, the proposal to recognise forced pregnancy in the Rome Statute was influenced by events in Bosnia, where Serb forces had reportedly raped and detained non-Serb women so that they would bear so-called ‘Serb babies’.¹⁵ Other precedents to inform the criminalisation of forced pregnancy included the Nazis’ forced medical experiments on pregnant people and their foetuses,¹⁶ as well as the long history of forced breeding¹⁷ in the context of enslavement.¹⁸

10. The proposal to recognise ‘forced pregnancy’ (a term used interchangeably with ‘enforced pregnancy’ at that time) received strong support in the Rome Statute negotiations. At the December 1997 meeting of the ICC Preparatory Committee, the Working Group on Definitions and Elements of Crimes proposed that the Rome Statute recognise sexual crimes including ‘rape, sexual slavery, enforced prostitution, *enforced pregnancy* [and] enforced sterilization’ as war crime in international and non-international armed conflicts.¹⁹ The Preparatory Committee ‘overwhelmingly’ supported the inclusion of these crimes.²⁰ As the negotiations progressed, the proposal to recognise the crime of (en)forced pregnancy was

submission’), at 32 (Recommendation 7), <https://4genderjustice.org/wp-content/uploads/2021/12/wcgj-prepcom-paper.pdf>.

¹⁴ Ibid, 39.

¹⁵ Ongwen, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021 (‘Ongwen Trial Judgment’), [2718]. See, for example: C. Steains, ‘Gender Issues’, in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 357–390 at 366; P. Kirsch and J.T. Holmes, ‘The Birth of the International Criminal Court: The 1998 Rome Conference’ 36 *Canadian Yearbook of International Law* (1999) 3–39 at 15.

¹⁶ Barbara Bedont and Katherine Hall Martinez, ‘Ending Impunity for Gender Crimes under the International Criminal Court’ (1999) *Brown Journal of World Affairs* 6(1): 65–85 at 74.

¹⁷ See Patricia Viseur Sellers, ‘Wartime Female Slavery: Enslavement?’ (2011) 44 *Cornell International Law Journal* 115 for an analysis of forced breeding, forced wet-nursing and related violations in the context of American slavery. See also Pamela Bridgewater, ‘Ain’t I a Slave: Slavery Reproductive Abuse, and Reparations’ (2005) 14(1) *UCLA Women’s Law Journal* 89.

¹⁸ The Women’s Caucus for Gender Justice argued in 1997 that: ‘enslavement and slavery-like practices encompass sexual and gender violence and oppression [...] These include being impressed into maternity service through forced impregnation and pregnancy.’ Women’s Caucus December 1997 submission (note 13), at 45. And during the Rome Conference, it argued that in addition to the Bosnian experience. ‘Forced pregnancy also took place during the period of African-American slavery. Women held as slaves were forced to bear children and were subjected to torture, beatings and other forms of coercion and deprivation if they did not. Some but not all of these pregnancies were the result of rape.’ Women’s Caucus for Gender Justice, ‘[Women’s Caucus advocacy in ICC negotiations: The crime of forced pregnancy](#)’ (26 June 1998).

¹⁹ UN Preparatory Committee on the Establishment of an International Criminal Court, ‘[Decisions taken by the Preparatory Committee at its session held from 1 to 12 December 1997](#)’, A/AC.249/1997/L.9/Rev.1, 18 December 1997, at 9 and 11 (emphasis added).

²⁰ C. Hall, ‘The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court’ (1998) 92(2) *American Journal of International Law* 331–339 at 333.

supported by many states – many that later became States Parties to the Rome Statute.²¹

11. Some states were more equivocal. At the Preparatory Committee’s meeting in March–April 1998, the Holy See proposed that the term ‘enforced pregnancy’ be replaced with ‘forcible impregnation’.²² However, delegations supporting the term ‘enforced pregnancy’ opposed this proposal, on the basis that:

‘forcible impregnation’ was not an acceptable substitute because it did not capture all of the elements of enforced pregnancy – forcible impregnation referred only to forcibly *making* a woman pregnant, whereas enforced pregnancy was a broader concept involving *keeping* the women pregnant (for purposes contrary to international law).²³

12. As the negotiations progressed, some states expressed concern over how the crime of ‘forced pregnancy’ would relate to national abortion regulations. The Libyan Arab Jamahiriya argued that the reference to forced pregnancy ‘warranted further consideration’ because ‘[e]nforced pregnancy was the result of rape and it was the act itself that should constitute a crime’ because ‘[u]nder Libyan legislation, abortion, too, was a crime’.²⁴ Similar concerns were raised by the United Arab Emirates,²⁵ Saudi Arabia²⁶ and the Islamic Republic of Iran.²⁷ Other states continued to voice strong support for the inclusion of the crime. Jordan argued that ‘abortion was not the issue; to force a woman to bear the child of a rapist was torture in extreme form, and should be included as a crime against humanity’.²⁸ Support was also voiced by Liechtenstein²⁹ and Slovenia.³⁰

13. To help bridge the differences on the issue, an informal meeting of interested states was convened three weeks into the Rome Conference.³¹ According to Cate Steains, an Australian diplomat who served as the meeting’s co-ordinator:

The informal meeting agreed to a set of ‘understandings’, which included consensus agreement that the crime of forced pregnancy under international humanitarian law should

²¹ These states included Australia, Austria, Azerbaijan, Bosnia-Herzegovina, Burundi, Canada, Croatia, Estonia, Finland, India, Jordan, Liechtenstein, Mexico, New Zealand, Nigeria, Rwanda, Slovenia, Solomon Islands, Sudan, Turkey, and the USA. Steains (note 15) at 367; Bedont and Hall Martinez, (note 16), at footnote 43. See also delegates’ statement cited in para. 12 of this brief.

²² [Proposal by the Holy See](#), UN Doc A/AC.249/1998/DP.13’ (1 April 1998).

²³ Steains (note 15) at 366-367.

²⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998, *Official Records (Volume II: Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*, (‘Rome Conference Official Records, Vol II), 160 at [63].

²⁵ *Ibid*, 160 at [66].

²⁶ *Ibid*, 163 at [21].

²⁷ *Ibid*, 166 at [72].

²⁸ Rome Conference Official Records, Vol II (note 24), 332 at [73].

²⁹ *Ibid*, 340 at [53].

³⁰ *Ibid*, 346 at [30].

³¹ Steains (note 15) at 367.

not be construed to interfere with national laws concerning abortion, as well as preliminary agreement on the requisite elements of a definition of forced pregnancy'. These elements were (i) pregnancy resulting from an act of force (e.g., rape, insemination); (ii) unlawful confinement and detention of the pregnant woman; and (iii) and additional (unspecified) 'intent' element.³²

14. The second sentence of Art. 7(2)(f) RS, which specifies that the Rome Statute's definition of forced pregnancy 'shall not in any way be interpreted as affecting national laws relating to pregnancy', was added as concession to those states that had voiced concerns about this crime's relationship to restrictions on abortion under domestic law. As Steains explains:

The rather curious second sentence of the definition was inserted as an additional measure to reassure the Catholic and Arab countries [which had expressed concerns about this crime] that the inclusion of forced pregnancy would not interfere in the legal right of States to regulate nationally with respect to pregnancy (anti-abortion laws).³³

15. As the drafting history makes abundantly clear, the purpose of Art. 7(2)(f) RS's second sentence was not to restrict the ICC's interpretation of the term 'forced pregnancy'; rather, its sole purpose was to reassure concerned states that the enumeration of 'forced pregnancy' as a crime against humanity and a war crime in the Rome Statute does not invalidate restrictions on abortion under national law. As the Prosecutor has correctly observed, the Rome Statute's definition of 'forced pregnancy' 'already reflects and accommodates the various concerns expressed during negotiations'.³⁴ Consistent with this reasoning, the terms used in the second sentence of Art. 7(2)(f) RS, '[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy', when given their ordinary meaning, do not require the ICC to consider a state's national laws relating to pregnancy when interpreting the elements of the crime of forced pregnancy. Crucially, however, the last sentence of Art. 7(2)(f) RS does not affect in any way the Court's ability to admit into evidence, consider and make findings on the role that national laws relating to pregnancy may have played in the commission of the crime. Nor can it be interpreted to provide any protection to those who perpetrate forced pregnancy pursuant to national laws. Indeed, it is a fundamental principle of international criminal law that, although an act that constitutes a crime under international law may be legal in national law, it does not relieve the

³² Ibid, 367-368.

³³ Steains (note 15) at 368.

³⁴ See Ongwen, [Public redacted version of "Prosecution Response to 'Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021'"](#) (ICC-02/04-01/15-1882-Red), 8 November 2021, ('OTP response to Mr. Ongwen's appeal'), [579] (emphasis added).

person who committed the act from responsibility under international law.³⁵

16. The Defence's claim in the present case that '[d]isregarding this provision in establishing jurisprudence is a tacit invitation to legal uncertainty regarding these sensitive and divisive issues'³⁶ is incorrect. The impact would actually be the opposite. Should the Defence's arguments be taken up, the definition of the crime would become uncertain and potentially different in situation country from situation country. Such an approach to the interpretation of an international crime is contrary to Art. 21 RS, and the basic tenets of international law.

C. Elements of the crime of forced pregnancy

17. When forced pregnancy is charged under Art. 7(1)(g) RS, the contextual elements for crimes against humanity must be met. When it is charged under Art. 8(2)(b)(xxii) or 8(2)(e)(vi) RS, the contextual elements for war crimes must be met. In either case, the specific elements of the crime are the same. According to Art. 7(2)(f) RS:

- a. the material element is the unlawful confinement of the victim in a particular circumstance (when the victim has been 'forcibly made pregnant');³⁷
- b. the mental element is that the perpetrator meant to engage in the specified conduct (unlawful confinement) and had knowledge of the specified circumstance (that the victim had been 'forcibly made pregnant');³⁸ and
- c. the perpetrator must have unlawfully confined the victim with one of two alternative special intents: 'affecting the ethnic composition of any population' or 'carrying out other grave violations of international law'.

18. The Pre-Trial and Trial Chambers correctly identified these elements in the present case.³⁹ No other elements need be satisfied. In particular, the Trial Chamber was correct to observe that the final sentence of Art. 7(2)(f) RS '*does not add a new element to the offence – and is thus not reproduced in the Elements of Crimes – but allays the concern that criminalising forced pregnancy may be seen as legalising abortion*'.⁴⁰ To complement the Pre-Trial and Trial Chambers' analysis, we offer the following observations.

³⁵ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle II.

³⁶ *Ongwen* Appeal Brief, 962.

³⁷ Rome Statute, Art. 7(2)(f).

³⁸ *Ibid*, Art. 30(2)(a) and 30(3).

³⁹ *Ongwen*, [Decision on the confirmation of charges](#), ICC-02/04-01/15-422-Red, 23 March 2016, ('*Ongwen* Confirmation Decision'), [97]-[101]; *Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021 ('*Ongwen* Trial Judgment'), [2723]-[2729].

⁴⁰ *Ongwen* Trial Judgment, [2721].

(a) *Material element (unlawful confinement of a victim⁴¹ who has been forcibly made pregnant)*

19. The Rome Statute contains two crimes that are instructive to understanding the contours of unlawful confinement — the war crime of unlawful confinement under Art. 8(2)(a)(vii) RS and the crime against humanity of imprisonment or other severe deprivation of physical liberty under Art. 7(1)(e) RS. The Elements of Crimes defines unlawful confinement as the confinement or continued confinement of ‘one or more persons to a certain location’,⁴² and it has been noted that the essence of this crime is the inability of the victim to leave.⁴³ Similarly, severe deprivation of physical liberty requires in addition to the deprivation that ‘the gravity of the conduct was such that it was in violation of fundamental rules of international law’.⁴⁴ It is important to note here that for the purposes of forced pregnancy, there is no parallel requirement that the deprivation of liberty be ‘severe’.

20. Building on this, unlawful confinement includes all violations of the right to liberty in international human rights law. A deprivation of liberty is ‘unlawful’ when it violates either domestic law or international law (or both). This includes deprivation of liberty on grounds that are not established by domestic law; are prohibited by international law; that violate judicial decisions; and that are not consistent with national procedures or procedures in international human rights law (including the procedural safeguards in Article 9 of the International Covenant on Civil and Political Rights and other applicable treaties).⁴⁵ It also includes deprivation of liberty for purposes that violate domestic and international criminal law, including rape, enslavement, sexual slavery, forced pregnancy, enforced prostitution and other forms of sexual violence.

21. The Rome Statute’s definition of ‘forced pregnancy’ does not require that the victim be unlawfully confined for any specific duration or that the victim give birth. Additionally, there is no requirement that the confinement must last for the whole, or even the majority of,

⁴¹ Although Art. 7(2)(f) refers to the victim as a ‘woman’, there is no evidence in the Statute’s drafting history, or in any subsequent drafting process, of any intention to exclude other pregnant persons from the scope of the crime, including girls of any age, or non-binary, transgender and intersex individuals who are capable of becoming pregnant. Moreover, Article 21(3) of the Rome Statute requires that the definition must be applied and interpreted in accordance with internationally recognised human rights and without any adverse distinction founded on grounds including age, gender or other status. Accordingly, the term ‘woman’ in Art. 7(2)(f) must be understood to mean *any person* who is biologically capable of pregnancy.

⁴² ICC Elements of Crimes, Art. 8(2)(a)(vii)-2.

⁴³ K. Boon, ‘Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and consent’ (2001) *Columbia Human Rights Law Review* 32: 625-675, at 662.

⁴⁴ ICC Elements of Crimes, Art. 7(1)(e).

⁴⁵ HRC, General Comment 35, para. 43-44.

the pregnancy.⁴⁶ It is therefore sufficient that the person who has been made forcibly pregnant is unlawfully confined for any period of the pregnancy.⁴⁷

22. The Elements of Crimes offers interpretive guidance on the phrase ‘forcibly made pregnant’. It states that the term ‘forcibly’ includes: physical force; threat of force; coercion (such as that caused by fear of violence, duress, detention, physiological oppression and abuse of power, against such person or another person); and taking advantage of coercive circumstances (which, we contend, could include armed conflict and detention).⁴⁸ It also identifies another type of force for sexual violence crimes, namely, that the perpetrator took advantage of the victim's incapacity to give genuine consent, including where the victim has been affected by natural, induced or age-related incapacity, or by deception.⁴⁹ The concept of being ‘forcibly made pregnant’ must incorporate all these types of force.

23. There is additionally no requirement that the perpetrator of the crime of forced pregnancy be the same person who caused the victim to become pregnant. If the victim was forcibly impregnated by a third party, that will suffice for the purposes of Art. 7(2)(f) RS.⁵⁰

(b) Mental element (intent and knowledge)

24. The Rome Statute’s standard ‘intent’ and ‘knowledge’ requirements are found in Art. 30 RS. The ‘intent’ requirement is satisfied if the perpetrator ‘means to engage in the [criminal] conduct’ (regarding forced pregnancy, this is the conduct of unlawfully confining a person who has been forcibly made pregnant).⁵¹ It need not be shown that the perpetrator unlawfully confined the victim *with the intent of keeping that victim pregnant*. This is evident from the terms used in the Rome Statute, which make no mention of such an intent. It is also clear from the drafting history of the Elements of Crimes, which shows that states expressly rejected a proposal to insert words to that effect, because that would unduly restrict the crime and exclude situations where, for example, the intent is to torture the victim.⁵²

⁴⁶ T. Altunjan, *Reproductive Violence and International Criminal Law*, 233 (Asser Press, 2021).

⁴⁷ This requirement was correctly interpreted by the OTP who argued that ‘the essence of the crime is the forced experience of pregnancy and not the result of the forced pregnancy in the form of giving birth. There is no requirement for the woman to be confined for the full term of the pregnancy. What is simply required is that she be confined for a period of time while she is pregnant’. *Ongwen* Confirmation of Charges transcript, pg. 49 (22 Jan. 2016), ICC-02/04-01/15-T-21-Red2-ENG WT 22-01-2016 1/86 SZ PT.

⁴⁸ ICC Elements of Crimes, footnote 5.

⁴⁹ *Ibid.*, Art. 7(1)(g)-1 (element 2).

⁵⁰ Altunjan (note 46), pg. 230.

⁵¹ Rome Statute, Art. 30(2)(a).

⁵² Knut Dormann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 330, footnote 5; E. La Haye, ‘Article 8(2)(b)(xxii)’, in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 184, at 192. *See also* Bedont and Hall Martinez, (note 16), 74: ‘The Holy See tried to restrict the definition to acts committed for the purpose of ethnic cleansing. These proposals were

25. The standard ‘knowledge’ requirement is satisfied if it is shown that the perpetrator was aware that a circumstance existed, or that a consequence would occur in the ordinary course of events.⁵³ As the definition of forced pregnancy requires that the victim has been forcibly made pregnant, it must therefore be shown that the accused was aware of that circumstance.⁵⁴ This requires actual knowledge. It may be possible to infer knowledge of the victim’s pregnancy from relevant facts and circumstances, including: the victim’s physical appearance and other common signs and symptoms of pregnancy; systems in place to confine pregnant persons together; requests or denials of access to sexual and reproductive health services, including contraception; or the perpetrator’s knowledge that persons in confinement had been subjected to rape or artificial insemination. It may be possible to infer knowledge that the pregnancy was initiated ‘forcibly’ where it can be shown that the perpetrator knew that the person has been impregnated whilst being confined (without consensual conjugal visits) for longer than the duration of the pregnancy; that the pregnant person had been denied access to contraception; that persons in detention had been denied access to reproductive health services; that rape or artificial insemination had been committed against persons in confinement, including through coercion and taking advantage of a coercive environment; about factors that precluded the pregnant person from giving genuine consent to the pregnancy; or of policies or practices of confining persons who have been forcibly made pregnant.

(c) Special intent

26. Art. 7(2)(f) RS indicates that the perpetrator must have confined the victim with one of two special intents: ‘affecting the ethnic composition of any population’ or ‘carrying out other grave violations of international law’. The inclusion of this special intent requirement was crucial to obtaining support from states with concerns about the crime’s relationship with restrictions on abortion under domestic law.⁵⁵

27. As noted above, the first special intent option was a response to the Bosnian war, where forced pregnancy had been used in the context of ethnic cleansing.⁵⁶ The terms used in

resisted because it would have excluded many other forms of the crime. For example, during the Second World War, Jewish women were forcibly made pregnant so that they and their fetuses could be used for medical experiments. Only on the second to last day of the conference did the parties finally agree to a definition which includes "carrying out other grave violations of international law" as an alternative purpose for the crime's commission.’

⁵³ Rome Statute, Art. 30(3).

⁵⁴ Altunjan (note 46), pg. 237-238.

⁵⁵ Steains (note 15), 367-368.

⁵⁶ See paragraphs 7 and 9 of this brief.

Art. 7(2)(f) RS make it clear that whether the perpetrator's actions *actually* affected a population's ethnic composition is irrelevant – what matters is the *intent*. Recognizing that ethnicity, like race and gender, is a socially constructed identity,⁵⁷ the focus must be on the perpetrator's perceptions of how the ethnic composition of the group will be affected, rather than how the targeted population responds.

28. An intent to 'affect the ethnic composition of any population' would cover intent to change the ethnic composition of a group by forcing members of the group to give birth to children perceived as members of other ethnic groups (for example, in patrilineal societies where the perpetrator considers that a child inherits its identity from the biological father), as well as intent to weaken or alter the ethnicity of a group or its members (for example, where the perpetrator considers that children perceived to be of mixed ethnicity or born as a result of rape by persons of another ethnic group will damage the ethnic identity of the group). It would also include an intent to 'maintain' or 'strengthen' the ethnic composition of the perpetrator's own ethnic group (for example, attempting to ensure the 'ethnic purity' of the group by forcing victims from the perpetrator's own group to give birth to children who are perceived as sharing the perpetrator's own ethnicity).

29. The second special intent option – to carry out 'other grave violations of international law' – was included because some states saw the focus on ethnic cleansing as 'too restrictive'.⁵⁸ The phrase 'other grave violations of international law' must logically include all crimes within the jurisdiction of the ICC, which are defined in the Rome Statute as 'the most serious crimes of international concern'. Some commentaries support this approach.⁵⁹ Indeed, the Pre-Trial Chamber in this case correctly confirmed the charges of 'forced pregnancy' on the grounds that the accused confined victims who had been made forcibly pregnant with intent to carry out numerous acts which constitute crimes within the jurisdiction of the ICC, including rape, sexual slavery, forced marriage, enslavement and torture. The Trial Chamber followed this approach.

30. The ICC must also interpret 'other grave violations of international law' in line with

⁵⁷ See, for example, the expert testimony by Alison Des Forges at the ICTR's *Akayesu* case: 'The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group [...] the definition of the group to which one feels allied may change over time. But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time.' *Akayesu*, [Judgment](#), ICTR-96-4-T, 28 September 1998, [172].

⁵⁸ Steins (note 15), 368.

⁵⁹ See for example, Boon, 'Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and consent' (2001) *Columbia Human Rights Law Review* 32: 625-675, at 665 'the judges should draw analogies between the other crimes within the jurisdiction of the ICC.'

Art. 21 RS, which provides that the Court shall apply ‘where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’,⁶⁰ and that ‘the application and interpretation of law pursuant to [Art. 21 RS] must be consistent with internationally recognised human rights’.⁶¹ In line with Art. 21 RS, and particularly Art. 21(3) RS, the phrase ‘other grave violations of international law’ must also include grave violations of international and regional human rights treaties, such as the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (‘Maputo Protocol’), whether or not such violations are expressly criminalized in the Rome Statute. These international and regional instruments, and their interpretation by courts and treaty bodies, are also relevant to the interpretation of the Rome Statute by virtue of Art. 21(3) RS. It should also be noted that the meaning of ‘other grave violations of international law’ will inevitably further evolve as international law continues to develop.⁶²

31. The notions of ‘gross violations of human rights’ and ‘serious violations of international humanitarian law’, which have been used in a number of contexts to focus on violations that are particularly grave,⁶³ provide useful guidance on what should be considered ‘grave violations of international law’. For example, the UN Special Rapporteur to the Commission on Human Rights’ Sub-Commission on Prevention of Discrimination and Protection of Minorities concluded that ‘gross violations of human rights’ should not be defined in a ‘fixed and exhaustive sense’, but should be understood to include, at a minimum: ‘genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender’.⁶⁴ The Office of the High Commissioner for Human Rights also emphasized that: ‘other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and

⁶⁰ Rome Statute, Art. 21(1)(b).

⁶¹ Ibid, Art. 21(3).

⁶² Ibid, Art. 10.

⁶³ For example, the phrase ‘gross violations of human rights’ was initially used as a threshold for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider Resolution 1503 complaints. Despite recognition that all victims of human rights violations have a right to a remedy and reparation, in 2005, the United National adopted Principles and Guidelines on the Right to a Remedy and Reparation that were limited in scope to ‘victims of gross violations of international human rights law and serious violations on international humanitarian law.’

⁶⁴ *Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by Mr. Theo van Boven, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1993/8 (2 July 1993), 13.

systematic, for example violations taking place on a large scale or targeted at particular population groups'.⁶⁵

32. Crucially, the Appeals Chamber should recognise that an intention to violate sexual and reproductive rights in international human rights law can amount to an intent to carry out 'other grave violations of international law' for the purposes of Art. 7(2)(f) RS. Those internationally recognised rights, which are relevant to the interpretation of the Rome Statute by virtue of Arts. 21(1)(b) and 21(3) RS, include: the right to life and freedom from torture and other ill-treatment;⁶⁶ the right to decide, freely and responsibly, the number and spacing of one's children;⁶⁷ the prohibition of discrimination on the basis of sex/gender;⁶⁸ the right to the highest attainable standard of health, of which 'the right to sexual and reproductive health is an integral part';⁶⁹ the right to comprehensive sexuality education and information⁷⁰; the right to be free from cruel, inhumane or degrading treatment⁷¹; and the right to be free from interference with one's privacy and family life;⁷² and the right to control one's fertility.⁷³

33. Pursuant to Art. 21(1)(b) and Art. 21(3) RS, the ICC must consider applicable treaties, principles and rules of international law relating to the rights of children, including the 1989 Convention on the Rights of the Child (CRC),⁷⁴ when interpreting the crime of forced pregnancy. Such rights are relevant because children — including child soldiers — have been, and could be made, forcibly pregnant. Such an interpretation, based on the human rights of the child, is guided by the CRC general principles of non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6); as well

⁶⁵ OHCHR, *The Corporate Responsibility to Protect Human Rights: An Interpretative Guide* (2012), 6.

⁶⁶ Human Rights Committee, *General Comment 36* (2018), [8]; [Amicus brief by Mr. Juan Mendez et al.](#) 2016.

⁶⁷ Proclamation of Teheran, adopted at the International Conference on Human Rights, Teheran, 1968, Art. 16; Convention on the Elimination of All forms for Discrimination Against Women, Art. 16(1)(e).

⁶⁸ International Covenant on Civil and Political Rights Art. 3.

⁶⁹ Committee on Economic, Social and Cultural Rights, *General Comment 22* (2016), [1].

⁷⁰ Convention on the Elimination of All forms for Discrimination Against Women, Art. 10; CRC Committee, *General Comment 20 on the implementation of the rights of the child during adolescence*, UN Doc. CRC/C/GC/20, 2016, [60]; CEDAW, *General Recommendation 21 on equality in marriage and family relations*, UN Doc. A/49/38, 1994, para 22; Committee on Economic, Social and Cultural Rights, *General Comment 22* (2016), [63].

⁷¹ International Covenant on Civil and Political Rights, Article 7.

⁷² *Ibid.*, Article 17.

⁷³ Protocol to the African Charter on Human and Peoples' Rights (Rights of Women in Africa), Art. 14(1)(a).

⁷⁴ See, also article 25 of the Universal Declaration of Human Rights 1948; principle 2 of the Declaration of the Rights of the Child 1959; article 10(3) of the 1966 International Covenant on Economic, Social and Cultural Rights; article 24 of International Covenant on Civil and Political Rights 1966; articles 14, 17, 23, 24, 38, 50, 51, 68, 76, 82, 89, 94 and 132 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War; articles 8, 70(1), 77 and 78 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; articles 4(2), 4(3) and 6(4) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts; and article 3(2) of the Convention on the Rights of the Child 1989.

as rights to health and education, among others. A children's human rights perspective recognises that children must be protected from sexual abuse and exploitation, including forced pregnancy, due to the devastating impact these have on a child's education, physical and mental health and wellbeing. Particular attention must be paid to the gender-specific harms on children subjected to forced pregnancy.

D. The grounding of the crime of forced pregnancy in human rights that protect personal, sexual, and reproductive autonomy

34. The Trial Chamber stated: '[t]he crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family'.⁷⁵ The Defence's appeal brief asserts that this finding 'brings forced pregnancy into the political and ideological debate on women's personal and reproductive autonomy and the right to family, which the State Parties hoped to avoid through passionate debate and cautious safeguards'.⁷⁶

35. Here, it is the Defence who introduces political concerns late⁷⁷ and without cause. Since its inception, the crime of forced pregnancy has been understood as an attack on 'reproductive integrity'.⁷⁸ Moreover, the notion that all people including women are entitled to personal, sexual, and reproductive autonomy enjoys substantial support from states. That many states pressed for the inclusion of 'forced pregnancy' in the Rome Statute even when the negotiations became difficult, and that the States Parties ultimately included this crime, is evidence. So too is the fact that most countries allow access to abortion in some circumstance, particularly in the context of rape; furthermore, states have recognised rights pertaining to reproductive autonomy in international and regional human rights instruments, as noted above. In addition, human rights bodies have interpreted that internationally recognised human rights include sexual and reproductive rights. UN treaty bodies and independent experts have increasingly criticized abortion laws that restrict and undermine pregnant people's reproductive autonomy and their right to make decisions about their pregnancy. For example, in 2012, the CEDAW Committee expressed concern to New Zealand that the current legal framework and requirements make women 'dependent on the benevolent interpretation of a rule which nullifies their autonomy' and recommended that the state

⁷⁵ *Ongwen* Trial Judgment, [2717].

⁷⁶ *Ongwen* Appeal Brief, [961].

⁷⁷ The Trial Chamber's observation that the crime of forced pregnancy protects the value of reproductive autonomy is consistent with observations made by the Pre-Trial Chamber in the *Ongwen* confirmation decision, as the Office of the Prosecutor correctly notes. *Ongwen*, OTP response to Mr Ongwen's Appeal Brief, [580].

⁷⁸ In December 1997, when the Women's Caucus for Gender Justice first proposed that forced pregnancy be recognised as a crime in the Rome Statute, both forced pregnancy and forced sterilization were described as 'attacks on reproductive integrity'. See Women's Caucus December 1997 submission (note 13), 33.

‘review the abortion law and practice with a view to simplifying it and to ensure women’s autonomy to choose’.⁷⁹ Similarly, the CESCR Committee has explicitly articulated increased access to abortion as part of states’ obligation to ‘respect the right of women to make autonomous decisions about their health’,⁸⁰ the CRC Committee has called on states to ensure that the views of pregnant children are always heard and respected in abortion decisions,⁸¹ and UN experts have noted that restrictive abortion policies ‘negate [women’s] autonomy in decision-making about their own bodies’.⁸² As a result, expert bodies monitoring compliance with the core human rights treaties have recommended both the liberalisation of abortion laws, as well as the full decriminalisation of abortion to ensure respect for a pregnant person’s personal, sexual, and reproductive autonomy.⁸³

36. As noted above, many states involved in the Rome Conference viewed the crime of ‘forced pregnancy’ as necessary to address a harm that was not addressed by existing crimes, nor by the Holy See’s proposed crime of ‘forced impregnation’. For these states, forced pregnancy involved more than forcible impregnation; it also involved restricting the victim’s ability to decide whether to proceed with a pregnancy initiated by force (the detention of raped women in Bosnia was a widely-cited example, but states were careful not to limit the definition to that one scenario).⁸⁴ The Trial Chamber’s phrase ‘personal and reproductive autonomy’⁸⁵ aptly expresses this idea, using terms more widely used in international law today. The focus on reproductive autonomy distinguishes ‘forced pregnancy’ from related crimes such as rape, enslavement or imprisonment.

37. 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

⁷⁹ CEDAW Committee, Concluding Observations: New Zealand, UN Doc. CEDAW/C/NZL/CO/7 (2012), paras 34, 35(a).

⁸⁰ CESCR Committee, General Comment 22 on the right to sexual and reproductive health, para. 28 (2016).

⁸¹ CRC Committee, Concluding Observations: Ireland, UN Doc. CRC/C/IRL/CO/3-4 (2016), para. 58(a); Morocco, UN Doc. CRC/C/MAR/CO/3-4 (2014), para. 57(b); Kuwait, UN Doc. CRC/C/KWT/CO/2 (2013), para. 60; Sierra Leone, UN Doc. CRC/C/SLE/CO/3-5 (2016), para. 32(c); United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/5 (2016), para. 65(c).

⁸² UN Office of the High Commissioner for Human Rights, ‘Unsafe abortion is still killing tens of thousands of women around the world’ – UN rights experts warn, 28 Sept 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E>.

⁸³ Office of the High Commissioner for Human Rights, *Information Series on Sexual and Reproductive Health and Rights: Abortion* (2020), https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf; see also *Brief of Amici Curiae Human Rights Watch, Global Justice Center, and Amnesty International in Support of Respondents, Dobbs v. Jackson Women’s Health Organization*, United States Supreme Court (2021) at 30, see also (note 78-81).





⁸⁴ Steains (note 15), 366.

⁸⁵ *Ongwen* Trial Judgment, [2717]. See also [2722].

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 criminalised or otherwise restricted. It obstructs access to essential services that the victim may otherwise have accessed (even if restricted under domestic law).⁸⁶

38. As the ICTY Trial Chamber has observed, ‘[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender’.⁸⁷ Reproductive autonomy is a key aspect of human dignity.⁸⁸ The ICC is justified in referring to this important concept. Declining to do so is not a ‘neutral’ approach; it is a regressive and politically significant choice.

39. Personal, sexual, and reproductive autonomy are values of central importance to international human rights law and international criminal law. The crime of ‘forced pregnancy’, which has been the focus of this brief, describes certain harms associated with the violation of these values — it describes the unlawful confinement of a victim who has been made forcibly pregnant, with one or both of the special intents specified in Art. 7(2)(f) RS. Yet in most cases, the harm to such victims will extend beyond unlawful confinement. It can include the physical and mental harms of forced pregnancy, labour, birth, parenthood or miscarriage, and may also include further physical, mental, social and economic consequences if the pregnancy results in a child being born. This range of harms may best be captured under a broader charge such as enslavement, which as noted above, has been entwined with the crime of forced pregnancy since its inception.

			
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⁸⁶ For example, since 2004 it has been the official policy of *Médecins Sans Frontières* to provide abortion on request in all situations where the organisation works. Catrin Schulte-Hillen, Nelly Staderini and Jean-François Saint-Sauveur, ‘Open Letter: Why Médecins Sans Frontières (MSF) provides safe abortion care and what that involves’ 10 *Conflict and Health* (2016). See also J. Bearak et. al., *Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990-2019*, *The Lancet* (2020), finding that there is “no evidence that abortion rates were lower in settings where abortion was restricted” and that “women with unintended pregnancies rely on abortion even in settings where abortion is restricted.”

⁸⁷ *Furundžija*, [Trial Judgment](#), 10 December 1998, [183].

⁸⁸ Human Rights Committee, *General Comment 36* (2018), [3] read together with [8]; Report of the Special Rapporteur on the right to health, [UN Doc. A/66/254](#), 3 August 2011, [15].