



FORCED PREGNANCY

A COMMENTARY ON THE CRIME IN INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

Forced pregnancy is a serious violation of sexual and reproductive rights and autonomy. Like all sexual and gender-based human rights violations, it can cause severe physical and psychological harms and often has lasting personal, social and economic consequences.

In 1998, the Rome Statute of the International Criminal Court (ICC Statute) became the first international instrument to expressly list forced pregnancy as a crime against humanity and a war crime. Regrettably, the crime was defined narrowly to cover only a subset of violations of sexual and reproductive rights that deny persons reproductive autonomy during conflicts and other human rights crises. However, the extent of many of the limitations in the definition are opaque and will need to be addressed in the ICC's case law.

Amnesty International has prepared this commentary on the crime of forced pregnancy as defined in the ICC Statute as part of its on-going work to promote sexual and reproductive rights and effective remedies for victims/survivors.¹ The commentary analyses the crime through a human rights lens, drawing from the drafting history of the ICC Statute; academic debates about the definition of forced pregnancy in the Statute; international human rights law, jurisprudence and standards; and consultations with experts on gender, human rights and international criminal justice.² It provides detailed legal arguments to interpret and apply the definition of forced pregnancy in accordance with established rules of treaty interpretation and internationally recognized human rights (as required by Article 21(3) of the ICC Statute) in order give full effect to the law.

Part I sets out the legal sources relevant to the crime under international law of forced pregnancy. Part II explains the background to the crime. Part III examines the ICC Statute's definition in detail, including the *actus reus* and the mental elements. Part IV considers charging strategies that can be employed by prosecuting authorities to address gaps in the definition to ensure that there is no impunity for other serious violations of sexual and reproductive rights during conflicts and other human rights crises. Part V provides recommendations for providing full and effective reparation to victims of forced pregnancy.

I. LEGAL SOURCES

The ICC Statute was the first binding international instrument to recognize forced pregnancy as a crime under international law. Specifically, the Statute lists "forced pregnancy" as a crime against humanity when committed as part of a widespread or systematic attack against a civilian population, and as a war crime when committed in an international and non-international armed conflict.³ The term "forced pregnancy" is defined in Article 7(2)(f) of the Statute to mean:

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

¹ Amnesty International acknowledges that persons who have been subjected to sexual and reproductive violations often prefer to be identified as "survivors" instead of "victims". Recognizing that "victim" is the term predominantly used and defined in international criminal law, it is used in many places in this commentary for legal purposes. Moreover, while the ICC Statute defines forced pregnancy to mean the unlawful confinement of a 'woman' as explained in Part III.A below, "woman" for the purposes of the definition should be interpreted to include women, girls, transgender and intersex persons who are biologically capable of becoming pregnant. Therefore, throughout this paper, gender-neutral language is used, unless specifically referring to women, girls, transgender or intersex persons, or citing the ICC Statute or other sources.

² See Acknowledgements.

³ See ICC Statute, Articles 7(1)(g); 8(2)(b)(xxii) and 8(2)(e)(vi).

international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

Since 1998, more than 120 states have ratified the ICC Statute, thereby accepting its definition of crimes against humanity and war crimes. At least 36 states, including states parties and non-states parties to the ICC Statute, have enacted domestic legislation criminalizing forced pregnancy as a crime against humanity, or a war crime or both.⁴

The ICC Statute's definition is largely mirrored in the ICC Elements of Crimes that were adopted in 2002 by the Assembly of States Parties to the ICC Statute to assist the Court in interpreting and applying the crimes in the ICC Statute.⁵ The first element of the crime of forced pregnancy requires that:

The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.⁶

Subsequent to the ICC Statute, forced pregnancy has been listed in other international instruments, including:

- as a crime against humanity in the 2000 Statute of the Special Court for Sierra Leone, without a definition;⁷
- as a crime against humanity and war crime in United National Transitional Administration in East Timor's Regulation 2000/15 on the establishment of Panels with exclusive jurisdiction over serious criminal offences,⁸ applying the ICC Statute's definition;⁹
- as a crime against humanity and war crime in international and non-international armed conflicts in the African Union's Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,¹⁰ applying the ICC Statute's definition;¹¹

⁴ See for example: Argentina: Ley 26.200 (2007); Australia: International Criminal Court Act 2002; Azerbaijan: Criminal Code (as amended 2001); Belgium: Act of 5 August 2003 on serious violations of international humanitarian law; Bosnia and Herzegovina: Criminal Code 2003; Burkina Faso: Loi 052/2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabé; Canada: Crimes Against Humanity and War Crimes Act 2000; Comoros: Loi n°11-022/au du 13 décembre 2011, portant de Mise en Oeuvre du Statut de Rome; Croatia: Criminal Code 1998 (as amended 2004); Czech Republic: Criminal Code (08/01/2009); Fiji: Crimes Decree 2009 (decree 44 of 2009); Georgia: Criminal Code (as amended 1999); Germany: Act to introduce the Code of Crimes against International Law of 26 June 2002; Kenya: International Crimes Act 2008; Lesotho: Penal Code Act 2010; Mali: Penal Code 2001; Malta: Criminal Code 1854 (as amended 2002); Mauritius, International Criminal Court Act 2011; Netherlands: International Crimes Act 2003; New Zealand: International Crimes and International Criminal Court Act 2000; Norway: Penal Code (as amended 2008); Philippines: Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity 2009; Republic of Ireland: International Criminal Court Act 2006; Republic of Korea: Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007); Romania: Criminal Code; Rwanda: Law No33 Bis/2003 repressing the crime of genocide, crimes against humanity and war crimes; Samoa: International Criminal Court Act 2007; Slovenia: Criminal Code 2008; South Africa: Implementation of the Rome Statute of the International Criminal Court Act 2002; Spain: Criminal Code (as amended 2003); Switzerland: Criminal Code 1937 (as amended 2010); Timor-Leste: Penal Code 2009; Trinidad and Tobago: International Criminal Court Act 2006; Turkey: Criminal Code (2004); Uganda: International Criminal Court Act 2010; UK: International Criminal Court Act 2001; UK: International Criminal Court (Scotland) Act 2001; Uruguay: Ley 18.026 (2006).

⁵ ICC Statute, Article 9.

⁶ ICC Elements of Crime, Article 7(1)(g)-4, para.1; Article 8(2)(b)(xxii)-4, para.1; Article 8(2)(e)(vi)-4, para.1.

⁷ Article 2(g).

⁸ See Sections 5.1(g); 6.1(b)(xxii) and 6.1(e)(vi)

⁹ Section 5.2(e).

¹⁰ Annex, Statute of the African Court of Justice and Human and Peoples' Rights, Article 28C(1)(g); 28D(b)(xxiii); and 28D(e)(vi).

¹¹ Article 28C(2)(f).

- 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 definition;¹² and
- as a crime against humanity in the International Law Commission's 2019 draft articles of on crimes against humanity, applying the ICC Statute's definition.¹³

On 23 March 2016, Pre-Trial Chamber II of the ICC confirmed the Court's first charges of forced pregnancy as a war crime and a crime against humanity in the case against Dominic Ongwen, an alleged leader of the Lord's Resistance Army.¹⁴ This decision provided the first judicial interpretation of the crime. The trial commenced in December 2016 and is in progress at the time of writing.

II. BACKGROUND

The crime of forced pregnancy, as well as other sexual and gender-based crimes, came to the fore in the five years leading up to the ICC Statute, as details of widespread sexual and reproductive violence against women emerged from the conflict in the former Yugoslavia and the Rwanda Genocide. In particular, a 1993 Report of the Special Rapporteur of the UN Commission of Human Rights concluded that rape in the former Yugoslavia was widespread, commonplace in detention camps, and used as an instrument of ethnic cleansing.¹⁵ It documented one case where a Croat woman was shouted at by perpetrators "You will have a Serbian child" and told that, if she were pregnant, she would be "forced to stay there until six months of the pregnancy".¹⁶ NGOs and journalists documented similar cases.¹⁷ In a 1996 Decision, the ICTY recognized that some rape camps "were specifically devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often interned until it was too late for them to undergo an abortion".¹⁸

In response to these developments and civil society advocacy, forced pregnancy was expressly recognized as a serious violation of international human rights law and international humanitarian law in the Vienna Conference's Programme of Action,¹⁹ the Beijing Conference's Platform for Action²⁰ and in numerous resolutions by the UN Commission on Human Rights.²¹

Despite the attention given to such grave violations, forced pregnancy was not expressly listed as

¹² See Articles 13.1(g); 14.1(b)(xxii) and 14.1(d)(vi).

¹³ See International Law Commission, *Crimes against humanity: Text and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading*, A/CN.4/L.935, 15 May 2019, Articles 2(1)(g) and (2)(f).

¹⁴ *Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, ICC-02/04-01/15-422-Red, 23 March 2016, paras. 96-101.

¹⁵ *The situation of human rights in the territory of the former Yugoslavia*, UN Doc. A/48/92-S25341, 26 February 1993, Annex II.

¹⁶ *Ibid.*, para. 41.

¹⁷ See for example, Human Rights Watch, *Global Report on Women's Human Rights* (1996), at 10.

¹⁸ *Prosecutor v. Karadzic and Mladic* (IT-95-5-R61 & IT-95-18-R61), Review of Indictment Pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence, 11 July 1996, para. 64.

¹⁹ See: *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24, adopted by the World Conference on Human Rights in 25 June 1993, para. 38: "Violations of human rights in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."

²⁰ *Beijing Declaration and Platform for Action*, UN Doc. A/CONF/177/120, 15 September 1995, paras 114, 132 and 135.

²¹ 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).

a crime under the jurisdiction of the ICTY or ICTR. The ICTR did not prosecute acts of forced pregnancy, although the *Akayesu* Judgment recognized that forced impregnation could in some circumstances amount to the crime of genocide by measures intended to prevent births within a group:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.²²

The ICTY applied factual findings of forced impregnation and women being detained until it was too late to have an abortion to infer a policy of "ethnic cleansing"²³ and evidence relating to forced pregnancy was advanced in several cases.²⁴ However such acts of forced pregnancy were not prosecuted using available crimes under the ICTY Statute.²⁵

During the drafting of the ICC Statute a number of states, with the support of the NGO Women's Caucus for Gender Justice, advocated for the explicit criminalization of forced pregnancy as a crime against humanity and a war crime.²⁶ However, the proposals were met with opposition by the Holy See and some other states,²⁷ supported by "pro-life" lobbyist groups. They cited concerns, including that the crime of forced pregnancy could "displace domestic anti-abortion laws, threaten hospitals that refused to provide abortions, and allow for abortions on demand."²⁸

Following intense negotiations,²⁹ the drafters of the Statute adopted the following definition:

"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.

The definition contains three cumulative requirements: (1) the victim must be unlawfully confined

²² *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment, Trial Chamber, 2 September 1998, para. 507.

²³ *Prosecutor v. Karadzic and Mladic* (IT-95-5-R61 & IT-95-18-R61), Review of Indictment Pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence, *supra* note 18, para. 64.

²⁴ See: Saeeda Verrall, 'The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in ICTY Judgments' in S. Brammertz & M. Jarvis (eds), *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016) at 328.

²⁵ *Ibid.*

²⁶ Barbara Bedont and Katherine Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999), 6 *Brown Journal of World Affairs*, at footnote 53 list the following countries as supporters of including forced pregnancy in the ICC Statute: Australia, Austria, Azerbaijan, Bosnia-Herzegovina, Burundi, Canada, Croatia, Estonia, India, Mexico, Netherlands, Nigeria, Rwanda, Slovenia, Sudan, Turkey and USA.

²⁷ Bedont and Hall-Martinez, *supra* note 26, at footnote 42 list the following countries that made statements opposing or expressing concern regarding the inclusion of forced pregnancy: Bahrain, Colombia, Costa Rica, Ecuador, Egypt, Holy See, Iran, Iraq, Ireland, Kuwait, Libya, Malta, Nicaragua, Oman, Paraguay, Philippines, Poland, Russia, San Marino, Saudi Arabia, United Arab Emirates and Venezuela.

²⁸ Barbara Bedont, 'Gender-Specific Provisions in the Statute of the ICC' in Flavia Lattanzi and William Schabas (eds) *Essays on the Rome Statute of the ICC: Volume I* (II Sirent, 1999), 199.

²⁹ For a detailed account of the negotiations see: Cate Steains, 'Gender Issues' in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999), 357-390; see also Kristen Boon, 'Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and consent' (2001), 32 *Columbia Human Rights Law Review*, at 658-659; Bedont and Hall-Martinez, *supra* note 26, at 73-74; Carmela Beuhler, 'War crimes, crimes against humanity and genocide: The crime of forced pregnancy in the nascent system of supranational criminal law' (2002) 5 *NEMESIS*, at 161-162.

by the perpetrator; (2) the victim must have been forcibly made pregnant (albeit not necessarily by the perpetrator); and (3) the perpetrator acted with one of two specific intents (to affect the ethnic composition of a population, or to carry out other grave violations of international law).³⁰ When read together, these requirements restrict the scope of the crime of forced pregnancy to a subset of violations of sexual and reproductive rights committed during armed conflicts or during other human rights crises involving widespread and systematic attacks against civilian populations.

Nonetheless, as explained in Part III below, the ICC should interpret and apply these elements consistent with established rules of treaty interpretation and internationally recognized human rights in order to give full effect to the Statute's definition, thereby ensuring that victims are not unduly restricted from accessing justice before the Court.

Moreover, as explained in Part IV, while the definition of the crime of "forced pregnancy" does not expressly address many other serious violations of sexual and reproductive rights denying personal autonomy over individuals' lives, bodies and pregnancies, such conduct may be prosecuted as other crimes under international law.

III. THE ICC STATUTE'S DEFINITION

A. THE *ACTUS REUS*: "UNLAWFUL CONFINEMENT OF A WOMAN FORCIBLY MADE PREGNANT"

The definition of forced pregnancy in the ICC Statute, as confirmed by the ICC Elements of Crimes³¹ and ICC Pre-Trial Chamber II in the *Ongwen* case,³² focuses specifically on the act of "unlawfully confining a woman who has been forcibly made pregnant". The *actus reus* of the crime is therefore the unlawful confinement of the victim.

The *actus reus* of the ICC Statute definition is not forced impregnation. As explained below, the requirement that the victim has been "forcibly made pregnant" is a circumstance and knowledge element. There is no requirement that the perpetrator was involved in impregnating the victim.

Nor does the definition require that the victim actually gives birth to a child. Although some commentators have opined that the crime involves "forced carrying the foetus through to birth",³³ this narrow interpretation is not supported by a plain reading of the text and was rejected by Pre-Trial Chamber II in the *Ongwen* confirmation of charges decision which held that "it is not necessary to prove that the perpetrator has a special intent with respect to the outcome of the pregnancy".³⁴ Indeed, in some circumstances the victim may die, or have a miscarriage, or terminate the pregnancy before a child is born.

The harm recognized by the crime is therefore not forcing the victim to give birth but violating the victim's sexual and reproductive autonomy by unlawfully confining them, including by preventing

³⁰ Christine Chinkin, 'Gender-related Violence and International Criminal Law and Justice' in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), at 77 notes: "Nowhere else is an additional intent or motive required for an offence to constitute a crime against humanity."

³¹ The first element of forced pregnancy in Arts 7(1)(g)-4, 8(2)(b)(xxii)-4 and 8(2)(e)(vi)-4 states: "The perpetrator confined one or more women forcibly made pregnant. . .".

³² *Prosecutor v. Ongwen*, *supra* note 14, para. 99.

³³ Chinkin, *supra* note 30, at 77.

³⁴ *Prosecutor v. Ongwen*, *supra* note 14, para. 100.

them from accessing a safe abortion.³⁵ Confirming this interpretation in the *Ongwen* case, Pre-Trial Chamber II held:

It is apparent that the essence of the crime of forced pregnancy is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy.³⁶

Removing the victim's autonomy over the pregnancy through unlawful confinement is a serious violation of their sexual and reproductive rights, including the right to protect and control their own health³⁷ and body.³⁸ Moreover, unlawfully confining persons without adequate medical care, including sexual and reproductive health services, may also violate their rights to life,³⁹ health,⁴⁰ equality and discrimination,⁴¹ privacy⁴² and to be free from torture and other cruel, inhuman or degrading treatment.⁴³

"UNLAWFUL CONFINEMENT"

The act of "unlawful confinement" includes, but is broader than, subjecting a person to "unlawful imprisonment" – a term notably rejected in drafting the definition in the ICC Statute.⁴⁴ Indeed, if the essence of the crime "is in unlawfully placing the victim in a position in which she cannot

³⁵ Abortion is safe when it is performed by a trained provider under sanitary conditions in the case of surgical abortion, or when a person has access to high quality medication, information and support to undergo a medical abortion. See: World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (second edition, 2012).

³⁶ *Prosecutor v. Ongwen*, *supra* note 14, para. 100. See also: Boon, *supra* note 29, at 660 further argues: "The legal harm in forced pregnancy is that women are kept pregnant by means of confinement, violating their rights to bodily integrity and privacy."

³⁷ *Mellet v. Ireland*, Human Rights Committee (HRC) communication no. 2324/2013, 9 June 2016, para. 7.11; *Whelan v. Ireland*, HRC communication no. 2425/2014, 12 June 2017, para. 7.12.

³⁸ United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 22 on the Right to sexual and reproductive health* (2016), at para. 5:

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 Covenant.

See also: paras 25 and 56; CESCR, *General Comment 14 on the right to health under Article 12 of the ICESR* (2000), para. 8; *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/66/254, 3 August 2011, para. 12: "[t]he use of overt physical coercion by the State or non-State actors, such as in cases of forced sterilization, forced abortion, forced contraception and forced pregnancy has long been recognized as an unjustifiable form of State-sanctioned coercion and a violation of the right to health."

³⁹ CESCR, *General Comment No. 22 (The right to sexual and reproductive health (Article 12))*, UN Doc. E/C.12/GC/22, (2016), para. 10: "lack of emergency obstetric care services or denial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment"; HRC, *General Comment 36 on Article 6 of the ICCPR on the Right to Life*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 8: "Although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant."

⁴⁰ CESCR, *General Comment 22*, para. 40; UN Committee on the Rights of the Child (CRC), *General Comment 15 (right of the child to the enjoyment of the highest attainable standard of health)*, UN Doc. CRC/C/GC/15, 2013, para. 70; *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, *supra* note 38, paras 21 and 36.

⁴¹ *Mellet v. Ireland*, *supra* note 37, para. 7.11.

⁴² See HRC, *General Comment 28 (Equality of rights between men and Women (Article 3))*, UN Doc. CCPR/C/21/Rev.1/Add.10, 2000, para. 20; see also, *Karen Noelia Llantoy Huamán v. Peru*, HRC, UN Doc. CCPR/C/85/d/1153/2003, 2005, para. 6.4; *L.M.R. v. Argentina*, HRC, UN Doc. CCPR/C/101/D/1608/2007, 2011, para. 9.3.

⁴³ CESCR, *General Comment 22*, *supra* note 39, para. 10; *Whelan v. Ireland*, *supra* note 37, para. 7.7.

⁴⁴ See Boon, *supra* note 29 at 662, footnote 164.

choose whether to continue the pregnancy”, then all other forms of unlawful confinement that restrict the victim’s ability to exercise their sexual and reproductive rights in relation to the pregnancy must apply.⁴⁵

The ICC Statute definition does not require that the pregnant person be unlawfully confined for any specific duration. There is no requirement that the confinement must last for the whole, or even the majority of the pregnancy. To satisfy the *actus reus* element, it is therefore sufficient that the person who has been made forcibly pregnant is unlawfully confined for *any* period of the pregnancy.⁴⁶ Indeed, there are likely to be scenarios where the victim is not unlawfully confined at the time that they are forcibly made pregnant or they escape or are released from confinement while still pregnant. In each of these scenarios the *actus reus* element in the definition is satisfied.

Unlawful confinement in violation of international human rights law

Unlawful confinement includes all violations of the right to liberty in international human rights law. As the Human Rights Committee observes “liberty of persons concerns freedom from confinement of the body”.⁴⁷ Therefore, arbitrary all arrests and detentions or unlawful deprivations of the right to liberty amount to “unlawful confinement”.⁴⁸

“Arbitrary arrest and detention” must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of unreasonableness, or lack of necessity and proportionality.⁴⁹ It includes: arresting or detaining someone for the legitimate exercise of their human rights⁵⁰ (which must include instances when pregnant persons are detained or arrested for seeking to exercise their sexual and reproductive rights or other rights that are essential to give effect to these rights – for example, freedom of movement to access sexual and reproductive health services); arresting or detaining someone on discriminatory grounds⁵¹ (which must include detention of a person because they are, or are believed to be, pregnant); any form of detention, other than judicially imposed sentences, that are

⁴⁵ Boon, *supra* note 29, at 662 suggests: “[r]ather than inquiring into where a woman was kept, ICC Judges should assess whether a woman was detained in any place where she was not at liberty to leave.”

⁴⁶ See Boon, *supra* note 29, 662-3: “It is important to note that the definition of forced pregnancy does not require that the woman be confined at the time she was forcibly made pregnant or when she gave birth. The critical time of confinement is between the time the woman is thought to be pregnant and the termination of the pregnancy, whether by giving birth, by miscarriage, by abortion or by the limit permitted by local laws for obtaining an abortion”; see also: Beuhler, *supra* note 29, at 162 “The confinement is not required to last until the woman gives birth, however, a temporal element is decisive. The relevant time frame will last from the moment of forcible impregnation until termination (including miscarriage) of the pregnancy or the impossibility of abortion for legal or medical reasons.”

⁴⁷ HRC, *General Comment 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 2.

⁴⁸ There is no basis to limit unlawful confinement to “severe” deprivations of liberty. See Beuhler, *supra* note 29, at 162.

⁴⁹ Working Group on Arbitrary Detention (WGAD), *Deliberation No.9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, UN Doc. A/HRC/22/44, 24 December 2012, para. 80; HRC, *Gorji-Dinka v. Cameroon*, communication No. 1134/2002, views adopted on 17 March 2005, para. 5.1; HRC, *General Comment 35*, para. 12; HRC, *Mukong v. Cameroon*, Communication No. 458/1991, views adopted on 21 July 1994, para. 9.8; Inter-American Court of Human Rights, *Gangaram Panday v. Suriname*, Judgement, Ser. C, No. 16, 21 January 1994, para. 47; HRC, *Van Alphen v. Netherlands*, Communication No. 305/1988, views adopted on 23 July 1990, para. 5.8.

⁵⁰ HRC, *General Comment 35*, *supra* note 47, para. 17; WGAD, *Deliberation No.9*, *supra* note 49, para. 38(a).

⁵¹ HRC, *General Comment 35*, *supra* note 47, para. 17, the HRC also emphasises in para. 3: “Article 9 guarantees those rights to everyone. “Everyone” includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.” WGAD, *Deliberation No.9*, *supra* note 49, para. 38(e) “[t]he Working Group regards cases of deprivation of liberty as arbitrary under customary international law in cases where: ... the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights.”

not subject to periodic re-evaluation of the justification for continuing the detention;⁵² treating a detainee in a manner which does not relate to the purpose for which they are ostensibly being held;⁵³ continued confinement of detainees in defiance of a judicial order for their release;⁵⁴ unauthorized confinement beyond the length of a criminal sentence⁵⁵ or unauthorized extension of other forms of detention;⁵⁶ imprisonment after a manifestly unfair trial;⁵⁷ some forms of administrative detention;⁵⁸ enforced disappearance;⁵⁹ incommunicado and secret detention.⁶⁰

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 ICCPR and other applicable treaties).⁶¹ It also includes deprivation of liberty for purposes that violate domestic and international criminal law, including rape, sexual slavery, forced pregnancy, enforced prostitution and other forms of sexual violence.

As the Human Rights Committee notes, the prohibitions of arbitrary arrest and detention and unlawful deprivation of liberty “overlap, in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Arrest or detention that lacks any legal basis is also arbitrary”.⁶²

Deprivations of liberty can be carried out by state actors, including private individuals or entities empowered or authorized by a state to exercise powers of arrest or detention⁶³ or by non-state actors acting independently of the state, whether they are perpetrated by criminal or armed groups or lawful organizations, such as employers, schools and hospitals.⁶⁴

The Human Rights Committee notes that the means of depriving persons of their liberty can include “police custody, arraigo [extended pre-trial detention for up to 80 days], remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.”⁶⁵

⁵² HRC, *General Comment 35*, *supra* note 47, para. 12.

⁵³ HRC, *General Comment 35*, *supra* note 47, para. 14.

⁵⁴ HRC, *General Comment 35*, *supra* note 47, para. 11.

⁵⁵ HRC, *General Comment 35*, *supra* note 47, para. 11.

⁵⁶ HRC, *General Comment 35*, *supra* note 47, para. 11.

⁵⁷ HRC, *General Comment 35*, *supra* note 47, para. 17; WGAD, *Deliberation No.9*, *supra* note 49, para. 38(c).

⁵⁸ WGAD, *Deliberation No.9*, *supra* note 49, para. 69. Under international law, administrative detention (including internment of civilians during armed conflict) can be lawful, but only if key safeguards are in place. Nonetheless, Amnesty International opposes administrative detention in all circumstances.

⁵⁹ HRC, *General Comment 35*, *supra* note 47, para. 17.

⁶⁰ WGAD, *Deliberation No.9*, *supra* note 49, para. 60.

⁶¹ HRC, *General Comment 35*, *supra* note 47, para. 43-44.

⁶² HRC, *General Comment 35*, *supra* note 47, para. 11.

⁶³ HRC, *General Comment 35*, *supra* note 47, para. 18.

⁶⁴ HRC, *General Comment 35*, *supra* note 47, para. 7; In particular, this position is based on the duty of states in international human rights law to protect the right to liberty against deprivation by third parties, see for example: HRC, *General Comment 35*, para. 7; HRC, *Concluding observations: Yemen* (CCPR/C/YEM/CO/5, 2012), para.24.

⁶⁵ HRC, *General Comment 35*, *supra* note 47, paras 43-44.

In at least one decision the Human Rights Committee has indicated that deprivations of liberty may also occur when a person is “confined to a specific, circumscribed location or was restricted in his movements on the State party's territory”.⁶⁶ Thus, measures taken to confine a pregnant person to a certain location (e.g. a town) or to preclude them from travelling within a country or to another jurisdiction in order to obtain a safe abortion, could also amount to arbitrary or unlawful deprivations of liberty.

Unlawful confinement could also be established if it could be shown that instead of directly taking measures to detain a pregnant person, those accused otherwise create or take advantage of a coercive environment (with the necessary intent) to deprive them of their liberty and prevent them from exercising their sexual and reproductive rights.⁶⁷

Moreover, given that the essence of the crime is “unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy”⁶⁸, other restrictions placed on a pregnant person, such as restrictions on freedom of association or movement may, depending on the facts of the case, amount to “unlawful confinement” for the purpose of the crime of forced pregnancy, even though they may not necessarily amount to deprivations of the right to liberty.

Unlawful confinement in violation of international humanitarian law

International humanitarian law also prohibits arbitrary detention and unlawful deprivation of liberty of protected persons during international and non-international armed conflicts, which would amount to unlawful confinement for the purposes of prosecuting the crime of forced pregnancy.⁶⁹

Rules on the reasons for which a party to an international armed conflict may deprive persons of their liberty are set out in the fourth Geneva Conventions.⁷⁰ In particular, Article 42 of the Fourth Geneva Convention states that civilians may only be interned or placed in assigned residence “if the security of the Detaining Power makes it absolutely necessary”. The ICTY in the *Delalić* case interpreted Article 42 as permitting internment only “if it [the Detaining Power] has serious and legitimate reasons to think that they [civilians] may seriously prejudice its security by means such as sabotage or espionage”.⁷¹

Moreover, the 1949 Geneva Conventions set out procedural requirements that must be complied with for detentions to be lawful. In particular, the Fourth Geneva Convention sets out that civilians who have been interned or placed in assigned residence must be able to challenge their detention

⁶⁶ HRC, *González del Río v. Peru*, Communication No. 263/1987, views adopted on 2 November 1992, para. 5.1.

⁶⁷ See for example: Beuhler, *supra* note 29, at 162 (citing the ICTY's findings in *Prosecutor v. Kunarac* (IT-96-23-T & IT-96-23/1-T), Judgement, Trial Chamber, 22 February 2001, at para. 740) argues convincingly that “A woman should thus be regarded as deprived of her physical liberty including when she, although theoretically able to leave the place of confinement, de facto cannot go anywhere e.g. because of being surrounded by enemy territory”. The Trial Chamber in *Kunarac* found that women had been held in captivity even though they may have been given a key to the house at some point because they had nowhere to go and had no place to hide even if they had attempted to leave the house and the defendants were fully aware of this fact.

⁶⁸ *Prosecutor v. Ongwen*, *supra* note 14, para. 100.

⁶⁹ See: ICRC, *Customary International Humanitarian Law*, Rule 99: Deprivation of liberty.

⁷⁰ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field regulates the detention or retention of medical and religious personnel in Articles 28,30 and 32; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea regulates the detention or retention of medical and religious personnel of hospital ships in Articles 36 and 37; although Articles 21 and 118 of Geneva Convention (III) relative to the Treatment of Prisoners of War permit the internment of prisoners of war from the duration of the conflict, Articles 90, 95, 103 and 109 set out conditions relating to disciplinary punishments, judicial investigations and repatriation of seriously wounded or sick prisoners of war; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 42.

⁷¹ *Prosecutor v. Delalić* (IT-96-21-A), Judgement, Trial Chamber, 16 November 1998, para. 576.

before a court or administrative board,⁷² to appeal that decision⁷³ and to have their detention periodically reviewed.⁷⁴

As the ICRC notes, detention that is not in conformity with the various rules provided by the Geneva Conventions is specifically referred to as “unlawful confinement”,⁷⁵ which is listed as a Grave Breach of the Fourth Geneva Convention.⁷⁶ The ICC Statute,⁷⁷ the ICTY Statute⁷⁸ and UNTAET Regulation 2000/15⁷⁹ list “unlawful confinement” as a grave breach of all four Geneva Conventions and a war crime in international armed conflict. Notably, the ICC Elements of Crimes appear to broaden the scope of “unlawful confinement” by prohibiting confinement “to a certain location” as opposed to places of “internment” and “assigned residence”.⁸⁰

In relation to deprivation of liberty in non-international armed conflict, the ICRC states that arbitrary detention is prohibited by customary international humanitarian law, as well as on the basis of international human rights law.⁸¹ In terms of procedural requirements, the ICRC notes:

[A]ll persons deprived of their liberty for reasons related to a non-international armed conflict must be given the opportunity to challenge the legality of the detention unless the government of the State affected by the non-international armed conflict claimed for itself belligerent rights, in which case captured enemy “combatants” should benefit from the same treatment as granted to prisoners of war in international armed conflicts and detained civilians should benefit from the same treatment as granted to civilian persons protected by the Fourth Geneva Convention in international armed conflicts.⁸²

Unlawful confinement in international criminal law

Unlawful confinement in relation to forced pregnancy may also be established from findings that the pregnant person was a victim of other crimes under international law that involved unlawful confinement. Depending on the facts of the case, this may include, inter alia: the crimes against humanity of enslavement, imprisonment and severe deprivation of physical liberty in violation of fundamental rules of international law, sexual slavery, enforced prostitution and enforced disappearance of persons; or war crimes of unlawful confinement, sexual slavery, enforced prostitution, and conscripting or enlisting children under the age of fifteen.

“OF A WOMAN”

Although the text of the definition of forced pregnancy refers to the unlawful confinement of “a woman”, there is no evidence in the drafting history of the crime in the ICC Statute or in any subsequent drafting process of any intention in using “woman” to exclude other pregnant persons from the scope of the crime, including girls of any age or transgender or intersex persons who are biologically capable of becoming pregnant. Indeed, if the essence of the crime is the denial of

⁷² Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 43.

⁷³ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War Article 78.

⁷⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Articles 43 and 78.

⁷⁵ ICRC, *Customary International Humanitarian Law*, Rule 99: Deprivation of liberty.

⁷⁶ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 147.

⁷⁷ ICC Statute, Article 8(2)(a)(vii).

⁷⁸ ICTY Statute, Article 2(g).

⁷⁹ UNTAET Regulation 2000/15, s. 6.1(a)(vii).

⁸⁰ ICC Elements of Crime, Article 8(2)(a)(vii)-2, para.1.

⁸¹ ICRC, *Customary International Humanitarian Law*, Rule 99: Deprivation of liberty.

⁸² *Ibid.*

autonomy over a pregnancy by means of unlawful confinement, as the ICC Pre Trial Chamber states, then the crime must be applied to all pregnant persons subjected to such treatment. To do otherwise would be discriminatory. Indeed, Article 21(3) of the ICC Statute requires that the definition must be applied and interpreted in accordance with internationally recognized human rights and without any adverse distinction founded on grounds including age, gender or other status.⁸³

“FORCIBLY MADE PREGNANT”

Although some commentators have stated that the crime of forced pregnancy involves two separate violent actions (forcibly impregnating the victim and forcibly keeping them pregnant through unlawful confinement),⁸⁴ a plain reading of the definition of the crime confirms that unlawful confinement is the prohibited act and that “forcibly made pregnant” is a circumstance element that relates to the status of the victim and the knowledge of the perpetrator; but there is no requirement that the perpetrator impregnated the victim). The ICC Pre-Trial Chamber in confirming the charges of forced pregnancy in the *Ongwen* case confirmed this interpretation, stating:

the crime of forced pregnancy does not depend on the perpetrator’s involvement in the woman’s conception; it is only required that the perpetrator knows that the woman is pregnant and that she has been made pregnant forcibly.⁸⁵

It is not required to determine that the accused or any other person is criminally responsible for that act of forced impregnation. Indeed, in some circumstances, it may not be possible to identify who is responsible for forcibly making the person pregnant.

The ICC Elements of Crimes offer guidance on interpreting “*forcibly* made pregnant”. Specifically, it states that the term “forcibly” includes:

- use of 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;
- taking advantage of coercive circumstances, including armed conflict situations⁸⁶ and detention.⁸⁷

The Elements of Crimes also identify another type of force in respect of sexual violence crimes, namely, that the perpetrator took advantage of the victim's incapacity to give genuine consent,⁸⁸

⁸³ See for example: *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, May 2018, UN Doc. A/HRC/38/43; Human Rights Council Resolution, *Protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc. A/HRC/RES/32/230, 30 June 2016; Office of the High Commissioner for Human Rights, *Report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity*, May 2015, UN Doc. A/HRC/29/23; Human Rights Council Resolution, *Human rights, sexual orientation and gender identity*, UN Doc. A/HRC/RES/27/32, 2 October 2014; Office of the High Commissioner for Human Rights, *Report to the Human Rights Council on violence and discrimination based on sexual orientation and gender identity*, December 2011, A/HRC/19/41.

⁸⁴ Chinkin, *supra* note 30, 77.

⁸⁵ *Prosecutor v. Ongwen*, *supra* note 14, para. 99.

⁸⁶ See: *Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, Subcommission on prevention of discrimination and protection of minorities*, UN Doc E/CN.4/Sub.2/1998/13, 22 June 1998, para. 25.

⁸⁷ ICC Elements of Crimes, Article 6 (e) Genocide by forcibly transferring children, footnote 5; Article 7(1)(d), Crime against humanity of deportation or forcible transfer of population, footnote 12.

⁸⁸ See ICC Elements of Crimes, Articles 7(1)(g)-1; 7(1)(g)-3; 7(1)(g)-5; 7(1)(g)-6; 8(2)(b)(xxii)-1; 8(2)(b)(xxii)-3; 8(2)(b)(xxii)-5; 8(2)(b)(xxii)-6; 8(2)(e)(vi)-1; 8(2)(e)(vi)-3; 8(2)(e)(vi)-5; 8(2)(e)(vi)-6.

including where the victim has been affected by natural, induced or age-related incapacity⁸⁹ or subjected to deception.⁹⁰

Some commentators have further opined that “forcibly made pregnant” requires that the victim has been raped.⁹¹ Rape resulting in pregnancy would undoubtedly amount to forced impregnation, however, there is no requirement (as some have questioned)⁹² that courts must: make a finding of the crime of rape; require the prosecution to prove beyond a reasonable doubt that rape was committed either by the accused or another person; or find that the accused had knowledge of each and every element of rape.

Conflating the requirement that the victim was “forcibly made pregnant” with the crime of rape unnecessarily complicates the application of this element and risks decisions that erroneously narrow the scope of the crime. For example, as other commentators have noted, “no showing of intercourse or sexual assault is required” by the definition of forced pregnancy,⁹³ recognizing that persons could be forcibly made pregnant through artificial insemination. While forced artificial insemination would fall within the definition of rape in international criminal law,⁹⁴ such a finding is not necessary for a court to determine that the victim had been forcibly made pregnant. Similarly, the denial of contraceptives to persons in some circumstances or the deception of persons who consent to sex regarding the use of contraception can amount to forced impregnation.⁹⁵ Again, while sexual intercourse in such circumstances may amount to rape,⁹⁶ such a determination is not necessary to satisfy the requirement in the ICC Statute’s definition that the victim had been forcibly made pregnant.

B. THE MENTAL ELEMENTS

In accordance with general principles of criminal law set out in Article 30(1) of the ICC Statute, a person can only be held criminally responsible if it can be proved that they committed the material elements of the crime with knowledge and intent.

KNOWLEDGE

According to Article 30(3) of the ICC Statute, the knowledge requirement is satisfied if it is shown that the accused person was aware that a circumstance existed, or that a consequence would occur in the ordinary course of events.

⁸⁹ ICC Elements of Crimes, Article 7(1)(g)-1 Crime against humanity of rape, footnote 16.

⁹⁰ ICC Elements of Crimes, Article 7(1)(g)-1 Crime against humanity of enforced sterilization, footnote 20; and Article 8(2)(b)(xxii)-5 War crime of enforced sterilization, footnote 55 state “It is understood that “genuine consent” does not include consent obtained through deception.” See also Boon, *supra* note 29, 660-1.

⁹¹ See for example, Chinkin, *supra* note 30, 77.

⁹² Milan Markovic, ‘Vessels of Reproduction: Forced Pregnancy and the ICC’ 16 *Michigan State Journal of International Law* (2007-8), 439-458, at 444.

⁹³ Boon, *supra* note 29, at 661; Beuhler, *supra* note 29, at 163.

⁹⁴ ICC Elements of Crimes, Article 7(1)(g)-1, Crime against humanity of rape defines the *actus reus* of the crime as “the perpetrator invaded the body of a person by conduct resulting in penetration, however slight,... of the... genital opening of the victim with any object or any other part of the body”.

⁹⁵ Boon, *supra* note 29, at 661: “If a woman is not permitted to control her reproductive cycles by way of being “forcibly” prevented from using contraceptives, for example, the acts could constitute evidence of forced pregnancy.”

⁹⁶ See for example, UK High Court decision in *R(F) v. DPP* [2013] EWHC 945 (Admin); and Canadian Supreme Court decision in *R v Hutchinson* [2014] 1 SCR 346.

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 the circumstance.⁹⁷

Where sufficient evidence is not available to directly establish such knowledge, international criminal practice, as well as the ICC Elements of Crimes, confirms that it may be possible to infer it from relevant facts and circumstances.⁹⁸ The ICC Trial Chamber in the *Bemba* case confirmed that knowledge could be inferred providing it is “the only reasonable conclusion available based on the evidence” and relates “directly to the accused’s knowledge”.⁹⁹

Therefore, it may be possible to infer knowledge of the pregnancy from a range of factors, including:

- the person’s physical appearance and other common symptoms of pregnancy;
- systems in place to confine pregnant persons together;
- requests or denials of access to sexual and reproductive health services; or
- the accused’s knowledge that persons in confinement had been subjected to rape, including through artificial insemination.

It may also be possible to infer knowledge that a person has been forcibly made pregnant, for example, where it can be shown that the accused knew:

- that the person has been impregnated whilst being confined (without consensual conjugal visits)¹⁰⁰ for longer than the duration of the pregnancy;
- that the pregnant persons had been denied access to effective contraception;
- that persons in detention had been denied access to reproductive health services;¹⁰¹
- that rape including through 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.

INTENT

Article 30(2) of the ICC Statute sets out the general intent requirement that a person “means to engage in conduct” or intends to cause a consequence or is aware that the consequence will occur in the ordinary course of events.

For forced pregnancy, this general intent requirement is satisfied if it is shown that the accused meant to engage in the conduct constituting the *actus reus*, i.e. unlawfully confining a person who has been forcibly made pregnant. During the drafting of the Elements of Crimes there was some debate between states as to whether the crime of forced pregnancy applied only where the perpetrator’s intention was to confine a woman *in order to keep her pregnant*. However, this requirement was rejected on the grounds that this would unduly restrict the scope of the crime.¹⁰²

⁹⁷ *Prosecutor v. Ongwen*, *supra* note 14, para. 99.

⁹⁸ ICC Elements of Crimes, General Introduction, para. 3.

⁹⁹ *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, Trial Chamber III, ICC-01/05-01/08-3343, 21 March 2016, para. 192.

¹⁰⁰ Recognizing that rape may still be committed during conjugal visits, even when such visits take place courts should consider the facts of the case to determine whether the person was forcibly made pregnant and whether the accused had knowledge of it.

¹⁰¹ Boon, *supra* note 29, at 661.

¹⁰² ICRC, Knut Dormann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the ICC* (CUP 2003), at 330.

In addition, the definition of forced pregnancy sets out two alternative special intents, namely that the perpetrator unlawfully confined a person forcibly made pregnant “with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law”. As the ICC Pre-Trial Chamber held in confirming charges against Dominic Ongwen, it is “the act of confinement that must be carried out with the required special intent”.¹⁰³ In doing so the Chamber rejected arguments by the defence that the special intent applies to the act of forcibly making a woman pregnant.¹⁰⁴

“AFFECTING THE ETHNIC COMPOSITION OF ANY POPULATION”

The first of the two alternative special intents focuses on situations of forced pregnancy similar to those perpetrated in the former Yugoslavia where persons are forcibly impregnated in order to affect the perceived ethnic composition of a population. The ICC Pre-Trial Chamber in the *Ongwen* confirmation of charges decision noted that this special intent typically involves some intention with respect to the outcome of the pregnancy,¹⁰⁵ including that children are born as a result that will affect ethnic composition.

As a special intent requirement, however, it is important to emphasize that this element focuses on the intention of the perpetrator in acting to unlawfully confine a person who has been forcibly been made pregnant.¹⁰⁶ Whether the perpetrator’s actions *actually* affected the ethnic composition of the population is irrelevant – what matters is the intent, not the effect. Indeed, recognizing that ethnicity, like race and gender, is a socially constructed identity¹⁰⁷ - not a biological fact – the focus must be on the perpetrator’s personal perceptions of how the ethnic composition of the group will be affected by their actions, rather than how the targeted population responds to such action. The latter may however be relevant for assessing harm and determining reparation to victims in the event of a conviction (see Part V below).

A plain reading of the phrase “affecting the ethnic composition of any population” confirms that intent to affect the ethnic composition of a population by any degree will suffice. The provision does not require, and there is nothing in the drafting history to suggest, that the perpetrator must intend to substantially affect the ethnic composition, or anything of that nature. Thus, it will suffice that the perpetrator intended to affect the ethnic composition in any way, which could potentially include a single act of unlawfully confining one person who has been forcibly made pregnant.¹⁰⁸

Moreover, “affecting” is defined in the Oxford English Dictionary as “having an effect on, either

¹⁰³ *Prosecutor v. Ongwen*, *supra* note 14, para. 99.

¹⁰⁴ *Prosecutor v. Ongwen*, *supra* note 14, para. 98.

¹⁰⁵ *Prosecutor v. Ongwen*, *supra* note 14, para. 100.

¹⁰⁶ Markovic, *supra* note 92, at 444 observes correctly that it is not a requirement of the definition to show that the person was forcibly made pregnant with either special intent, noting: “A textual reading suggests that only the confinement is subject to the heightened requirement because a comma separates “forcibly made pregnant” from “with the intent of.” Thus the Prosecutor will not have to explore the reasons underlying a rape, for example.”

¹⁰⁷ See for example, expert testimony by Alison Des Forges at the ICTR, *Prosecutor v. Akayesu*, Judgment, *supra* note 22, para. 172:

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.

¹⁰⁸ In relation to charges of crimes against humanity, the prosecution would separately need to establish that the accused intended the conduct to be part of widespread or systematic attack directed against a civilian population; in relation to the war crime it would need to be proved that the conduct took place in the context of and was associated with an armed conflict.

materially or otherwise”.¹⁰⁹ The perpetrator’s aim of “affecting the ethnic composition of any population” must therefore be considered broadly. It would certainly 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 man), as well 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 is also sufficiently broad to cover the unlawful confinement of a person with the intent of “maintaining” or “strengthening” the ethnic composition of the perpetrator’s own ethnic group (for example, attempting to ensure the “ethnic purity” of the group by forcing women from their own group to give birth to children who are perceived as sharing their own ethnicity). Although some commentators argue this special intent “places a limit on the identity of the perpetrators and the victims: they must be members, or thought to be members, of different ethnic groups”,¹¹⁰ there exists no such requirement in the text of the definition, and it is unnecessary to impose such a limit in order for the provision to make sense.

In applying this element, courts may consider notions of ethnicity and how it is assigned that are discriminatory, including the idea that a child inherits its ethnicity from the father. It is therefore important that courts acknowledge such attitudes without endorsing them. In particular, courts should fully recognize the harms experienced by the victim that result from such values in their community; set out clearly the role that such discrimination played in the commission of the crimes; and highlight its impact on the social status and relationships of the victims.

“CARRYING OUT OTHER GRAVE VIOLATIONS OF INTERNATIONAL LAW”

Alternatively, the ICC Statute definition recognizes that the crime of forced pregnancy may be committed if the unlawful confinement is committed with the special intent of “carrying out other grave violations of international law”. The charges of “forced pregnancy” in the ICC’s *Ongwen* case relate to this second special intent.

This special intent relates to the reason for the victims’ confinement, but it need not relate to the pregnancy or its outcome in any way. The ICC Pre-Trial Chamber confirmed:

[I]t is not necessary to prove that the perpetrator has a special intent with respect to the outcome of the pregnancy, or that the pregnancy of the woman is in any way causally linked to her confinement. While the first alternative of the special intent requirement (intent of “affecting the ethnic composition of any population”) would typically include such component, the second alternative (intent of “carrying out other grave violations of international law”) does not call for any such restrictive interpretation.¹¹¹

Indeed, the drafters of the ICC Elements of Crimes expressly rejected a proposal to insert “to keep the woman or women pregnant *in order to* affect the ethnic composition of any population or to carry out other grave violations of international law” because the words “in order to” would unduly restrict the crime and exclude situations where, for example, the intent is to torture the victim.¹¹² A

¹⁰⁹ *Oxford English Dictionary* on-line version.

¹¹⁰ Boon, *supra* note 29, 663; See also Beuhler, *supra* note 29, at 163; Markovic, *supra* note 92, at 443.

¹¹¹ Prosecutor v. Ongwen, *supra* note 14, para.100.

¹¹² Knut Dormann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, *supra* note 102, 330, footnote 5.

demonstrated intent to commit any grave violation of international law, whether related to the pregnancy or not, will suffice.

Commentaries on the drafting negotiations note that while some states preferred to only recognize forced pregnancy committed for the purposes of “ethnic cleansing”, others considered that approach “too restrictive”.¹¹³ For example, it was recalled that during World War II, Jewish women were forcibly made pregnant so that they and their foetuses could be used for medical experiments.¹¹⁴ The second special intent, which contains no link to the ethnicity of the perpetrator or the victim,¹¹⁵ was therefore added as an “eleventh hour compromise”.¹¹⁶ Although commentators generally agree that this second special intent would apply to “medical experimentation” contrary to international law¹¹⁷ the phrase is obviously broader than this one example.

“Other grave violations of international law” must include all crimes within the jurisdiction of the ICC, which are defined in the ICC Statute as “the most serious crimes of international concern.”¹¹⁸ Some commentaries support this approach.¹¹⁹ Significantly, it has also been applied by the Pre-Trial Chamber in the *Ongwen* case which confirmed the charges of “forced pregnancy” on the grounds that the accused confined women 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.¹²⁰ Notably, while “forced marriage” is not expressly defined as a crime in the Statute, the Pre-Trial Chamber recognized it as an “other inhumane act” under Article 7(1)(k).¹²¹ Indeed, all crimes under international law, whether they are expressly listed in the ICC Statute or not, amount to “other grave violations of international law” and the definition will inevitably further evolve as international criminal law continues to develop.¹²²

“Other grave violations of international law” also includes an intention to carry out grave violations of international human rights law or international humanitarian law, whether or not they are expressly criminalized in the ICC Statute or other international criminal law instruments. The notion of “gross violations of human rights” and “serious violations of international humanitarian law”, which has been used in a number of contexts to focus on violations that are particularly grave,¹²³ provides useful guidance on what should be considered “grave violations of international law”.

¹¹³ Steains, *supra* note 29, 638. See also Michael Cottier & Sabine Mzee, “Article 8(2)(b)(xxii): Rape and other forms of sexual violence”, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Munich: C.H. Beck, Hart Publishing and Nomos, 2016), at 499.

¹¹⁴ Bedont and Hall-Martinez, *supra* note 26, at 74.

¹¹⁵ See for example, Markovic, *supra* note 92, at 443.

¹¹⁶ Steains, *supra* note 29, 638.

¹¹⁷ See for example, D. Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’, 93(1) *American Journal of International Law* (1999) 43-57, at 53, footnote 63; Cottier & Mzee, *supra* note 113, 499; Markovic, *supra* note 92, at 443.

¹¹⁸ ICC Statute, Preamble, Articles 1 and 5.

¹¹⁹ See for example, Boon, *supra* note 29, 665 “the judges should draw analogies between the other crimes within the jurisdiction of the ICC.”

¹²⁰ *Prosecutor v. Ongwen*, *supra* note 14, para.101.

¹²¹ *Prosecutor v. Ongwen*, *supra* note 14, paras 87-95, the Pre-Trial Chamber found that: “Dominic Ongwen confined women who had been forcibly made pregnant, with the intent to carry out grave violations of international law, including to use them as his forced wives and to rape, sexually enslave, enslave and torture them”.

¹²² Article 10 of the ICC Statute states that nothing in Part 2 of the Statute “shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

¹²³ For example, “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

In his 1993 study, the UN Special Rapporteur Theo van Boven to the Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities concluded that the notion of "gross violations of human rights" should not be defined in a "fixed and exhaustive sense", but should be understood to include, at a minimum:

[G]enocide; 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.¹²⁴

The Office of the High Commissioner for Human Rights also emphasized in presenting an illustrative list that:

[O]ther kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.¹²⁵

With limited further guidance, courts will have to make a determination on a case-by-case basis whether an accused person intended to carry out human rights violations or violations of international humanitarian law that amount to "other grave violations of international law". In doing so, courts should recognize that an intention to violate sexual and reproductive rights in international human rights law could meet this threshold, which may include, inter alia, intent to violate:

- the right to decide, freely and responsibly, the number and spacing of one's children, which includes the right to reproductive autonomy;¹²⁶
- the right to the highest attainable standard of health, including the right to sexual and reproductive health;¹²⁷
- the right to life;¹²⁸
- the prohibition of discrimination on the basis of sex;¹²⁹
- the right to comprehensive sexuality education and information;¹³⁰
- the right to be free from cruel, inhumane or degrading treatment;¹³¹ and
- the right to be free from interference with one's privacy and family life.¹³²

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."

¹²⁴ *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.

¹²⁵ OHCHR, *The Corporate Responsibility to Protect Human Rights: An Interpretative Guide* (2012), 6.

¹²⁶ See especially Convention on the Elimination of All forms for Discrimination Against Women, Article 16(1)(e), provides that "State Parties shall ... ensure, on a basis of equality of men and women ... (e) 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".

¹²⁷ ICESCR, Article 12, provides "the right of everyone to the enjoyment of the highest attainable standard of ... health"; Convention on the Rights of the Child, Art 24; CESCR, *General Comment 22*, *supra* note 39.

¹²⁸ ICCPR, Article 6(1); HRC, *General Comment 36 on the Right to life*, para. 8.

¹²⁹ ICCPR, Article 3.

¹³⁰ 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, para. 60; CEDAW, *General Recommendation 21 on equality in marriage and family relations*, UN Doc. A/49/38, 1994, para 22; CESCR, *General Comment 22*, *supra* note 39, para. 63.

¹³¹ ICCPR, Article 7.

¹³² ICCPR, Article 17.

INFERRING INTENT

As the ICTR has noted: “explicit manifestations of criminal intent are . . . often rare in the context of criminal trials”.¹³³ Consistent with the ICC Elements of Crimes¹³⁴ and other international criminal law practice,¹³⁵ the general intent and the special intents of the crime of forced pregnancy may be inferred from relevant facts and circumstances. In particular, when considering whether the intent requirements have been proven, courts should consider, inter alia, statements by the accused, records of detention and confinement, the conduct of the accused, including their treatment of those in detention and patterns of purposeful action. Social attitudes relating to ethnicity may also be relevant in determining whether the accused intended to affect the ethnic composition of a population where it can be shown that an accused person shared those attitudes.

C. “THIS DEFINITION SHALL NOT IN ANY WAY BE INTERPRETED AS AFFECTING NATIONAL LAWS RELATING TO PREGNANCY”

According to several commentaries, this sentence was included at the end of the definition of forced pregnancy in the ICC Statute¹³⁶ as part of the political compromise to “reassure the Catholic and Muslim countries that the inclusion of forced pregnancy would not interfere in the legal right of States to regulate nationally with respect to pregnancy.”¹³⁷ However, by precluding the definition from being “interpreted as affecting national laws relating to pregnancy”, this sentence is merely stating the obvious: the ICC has no authority to amend, nullify or void national legislation.

Other commentaries have read more into the sentence, to suggest that: it shields national abortion laws from ICC scrutiny;¹³⁸ creates a “state action” exception;¹³⁹ ensures that the ICC will not recognize a general right to abortion;¹⁴⁰ and protects hospitals that refuse to provide abortions to women who become pregnant through rape.¹⁴¹ However, the text of the sentence does not support such interpretations, which are furthermore inconsistent with the special rule in Article 21(3) of the ICC Statute that the Court must apply the law consistent with internationally recognized human rights and without adverse distinction on gender and other grounds.

No doubt some states were concerned that the ICC’s ability to prosecute the crime of forced pregnancy could lead to the prosecution of those who enforce national laws relating to pregnancy, given that many such laws violate international human rights law.¹⁴² However, the last sentence of

¹³³ *Prosecutor v. Gacumbitsi* (Case No. ICTR-2001-64-A), Judgment, Trial Chamber, 7 July 2006, para. 40.

¹³⁴ ICC Elements of Crimes, General Introduction, para. 3.

¹³⁵ See for example: *Prosecutor v. Akayesu*, Judgment, *supra* note 22, para.523.

¹³⁶ In most cases, this sentence has not been replicated in the legislation of other international and internationalized criminal courts or in national laws defining the crime.

¹³⁷ Steains, *supra* note 29, at 368; see also: Beuhler, *supra* note 29, at 162 “Alongside the Vatican, some predominantly Catholic and Muslim States were in harsh opposition, driven by the fear that a provision on forced pregnancy could interfere with national abortion legislation in that it might oblige states to provide forcibly impregnated women access to abortion....As a result of a compromise the second sentence of Article 7.2(f) was included...”; Christopher K. Hall, Joseph Powderly and Niamh Hayes, ‘Article 7’ in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, *supra* note 116, at 275 note that the inclusion of forced pregnancy “made some delegations fear that national law prohibiting abortion would have to be deemed being in violation of international law”.

¹³⁸ Boon, *supra* note 29, at 666.

¹³⁹ Markovic, *supra* note 92, at 447.

¹⁴⁰ Markovic, *supra* note 92, at 445.

¹⁴¹ Boon, *supra* note 29, at 659.

¹⁴² See for example: *Mellet v. Ireland*, *supra* note 37; *Whelan v Ireland*, *supra* note 37.

Article 7(2)(f) does not address these concerns or 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 person who committed the act from responsibility under international law.¹⁴³ The ICC's ability to exercise jurisdiction over the crime of forced pregnancy or to hold individuals to account for the crime is not restricted by national laws, even if they authorize or facilitate the commission of the crime. National laws do 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.

IV. CHARGING STRATEGIES TO ADDRESS OTHER SERIOUS VIOLATIONS OF SEXUAL AND REPRODUCTIVE RIGHTS

Even if the definition of the crime of "forced pregnancy" is interpreted as advocated in Part III, the crime addresses only a subset of serious violations of sexual and reproductive rights that may be committed during conflicts and human rights crises to deny personal autonomy over individuals' lives, bodies and pregnancies.

For example, the definition of forced pregnancy does not cover conduct where:

- a person is confined and raped with the intent of forcing them to become pregnant, but they do not become pregnant;¹⁴⁴ or
- persons are forcibly made pregnant, but they are not unlawfully confined; or
- a person who has become pregnant consensually is then unlawfully confined with the effect that they are denied autonomy over the pregnancy.

In order to fulfil the commitments of its ground-breaking 2014 Policy Paper to pay particular attention to sexual and gender-based crimes, the ICC Office of the Prosecutor and other authorities investigating such crimes should, where possible, look at applying other crimes under international law to address these and other serious violations of sexual and reproductive rights that fall outside the scope of the definition, including where appropriate:

- the crimes against humanity or war crimes of rape and/or sexual slavery;
- the crime against humanity or war crime of torture;
- the crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- the war crime of unlawful confinement;
- the crime against humanity of persecution – the intentional and severe deprivation of fundamental rights of a group or collectivity - on grounds of gender; or
- the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

¹⁴³ *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, Principle II.

¹⁴⁴ Boon, *supra* note 29, at 659-660.

V. CONSIDERATIONS FOR REPARATION

Victims of forced pregnancy have a right to full and effective reparation to address the harm they have suffered,¹⁴⁵ which should include transformative measures to guarantee non-repetition of the crimes by addressing pre-existing structures of inequality and discrimination that contributed to the crime.

Forced pregnancy typically causes serious and complex harm to the persons whose rights are violated and to children born as a result. Courts and other reparation mechanisms should consult with victims and relevant experts to determine the full extent of the harm caused, including specific gendered harms, in order to identify the most appropriate measures of reparation that should be adopted towards addressing them.

Particular consideration should be given to whether there is evidence of any of the following harms:

- Physical harms: Victims of forced pregnancy often endure physical harm due to lack of effective pre-natal healthcare, the inability to seek an abortion when their physical and mental health is at serious risk, inadequate childbirth facilities, or post-natal care which can potentially have long-term ramifications and may prevent them from having children in the future. They may be beaten, subjected to rape and sexual violence or subject to other ill-treatment leading to physical harm or may suffer self-harm. If they are released or escape, they may only have access to illegal and unsafe abortions.
- Mental harms: As a result of the denial of personal autonomy, the experience of an unwanted pregnancy, violations during confinement, and the denial or inability to obtain a safe abortion, victims of this crime often endure serious mental and emotional harm, including the risk of suicide, pre and post-natal depression and fear of becoming pregnant again.¹⁴⁶ The mental harm may be further compounded by the fact that the person's pregnancy and the subsequent child, if there is one born of the pregnancy, are constant reminders of their suffering.¹⁴⁷ In cases where victims are forcibly separated from children following childbirth, victims may experience additional mental harm.
- Socio-economic harms: Victims suffer socio-economic consequences, including stigma and ostracization as a result of forced pregnancy. They may be unable to gain employment and complete education. Forced pregnancy may also result in forms of social exclusion and isolation – for example, some victims may be seen as “unmarriageable” within society¹⁴⁸ or they may be accused of “collaborating” with the enemy. While this harm is also often present in the case of rape, in the case of forced pregnancy it can be increased because of the visible physical consequences of the crime – i.e. the pregnancy.¹⁴⁹ Victims may also face further social and economic harm if there is a child born as a result of the pregnancy, including the responsibilities of raising the child, which can have serious negative consequences for the victim's education, employment and social reintegration.¹⁵⁰

¹⁴⁵ See for example, *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*, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, UN Doc. A/res/60/147.

¹⁴⁶ See generally Alexandra Takai 'Rape and Forced Pregnancy as Genocide before the Bangladesh Tribunal' (2011) 25 *Temple International and Comparative Law Journal* 393, 403.

¹⁴⁷ Beuhler, *supra* note 29, 166.

¹⁴⁸ Chinkin, *supra* note 30, 76.

¹⁴⁹ Beuhler, *supra* note 29, 166.

¹⁵⁰ Maria Lobato, *Forced Pregnancy during the Khmer Rouge Regime: Acknowledging Forced Pregnancy as a Distinct Crime in the ECCC Proceedings* (2016) Cambodian Human Rights Action Coalition 19.

Although those confined are the direct victims of forced pregnancy, children born as a result of forced pregnancy may also experience harm as a result of the crime.¹⁵¹ They may experience physical harm as a result of mistreatment and lack of effective healthcare provided to the pregnant person during confinement. They may suffer mental harm, stigma and socio-economic harm as a result of being a child of a forced pregnancy. Their access to education, employment and resources, as well as the social and cultural practices of their community may be denied or restricted throughout their lifetime. They may be subjected to enforced disappearance, wrongful removal, as well as violations of the right to identity, name, family and juridical personality, among others. Such harm should be considered in determining reparation measures, taking into account specific barriers that they may experience in accessing reparation. These include: “practical, ethical and cultural barriers to being seen and identified as victims; fear of perpetrator retaliation; stigma and mothers’ “protective silences” around their birth origins.”¹⁵²

¹⁵¹ See Joanne Neenan, *The Role of the ICC in Protecting the Rights of Children Born of Rape in War*, *EJILTalk*, 12 February 2018, available at: <https://www.ejiltalk.org/the-role-of-the-icc-in-protecting-the-rights-of-children-born-of-rape-in-war/>; Beuhler, *supra* note 29, at 166.

¹⁵² Neenan, *supra* note 151.

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FORCED PREGNANCY

A COMMENTARY ON THE CRIME IN INTERNATIONAL CRIMINAL LAW

In 1998, the Rome Statute of the International Criminal Court (ICC Statute) became the first international instrument to expressly list forced pregnancy as a crime against humanity and a war crime. Regrettably, the crime was defined narrowly to cover only a subset of violations of sexual and reproductive rights that deny persons reproductive autonomy during conflicts and other human rights crises. However, the extent of many of the limitations in the definition are opaque and will need to be addressed in the ICC's case law.

More than 20 years later the first case involving charges of forced pregnancy is being prosecuted by the ICC.

Amnesty International has prepared this commentary on the crime of forced pregnancy as defined in the ICC Statute as part of its on-going work to promote sexual and reproductive rights and effective remedies for victims/survivors.

The commentary analyses the crime through a human rights lens, drawing from the drafting history of the ICC Statute; academic debates about the definition of forced pregnancy in the Statute; international human rights law, jurisprudence and standards; and consultations with experts on gender, human rights and international criminal justice.

It provides detailed legal arguments to interpret and apply the definition of forced pregnancy in accordance with established rules of treaty interpretation and internationally recognized human rights in order give full effect to the law.