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I. INTRODUCTION

All forms of sexual violence, including forced pregnancies, have been used as tools of oppression and control over women and girls from time immemorial.[1] Historically, however, the rules and practices of international criminal law have often overlooked violations of reproductive rights.[2] Therefore, it was a remarkable milestone when, on February 4, 2021, the International Criminal Court (ICC) handed down its judgment in the case of Dominic Ongwen, a former fighter with the Sinia Brigade of the Lord's Resistance Army in northern Uganda.[3] In a judgment of more than 1,000 pages, the court found the former child soldier guilty of sixty-one of the seventy counts against him, including all sexual and gender-based crimes.[4] For the first time since its inception in 2002, the ICC found the accused guilty of the crime of forced pregnancy as both a crime against humanity and a war crime.[5] The Court found that some of Dominic Ongwen's 'wives' had become pregnant as a result of repeated rapes and that they were confined since they were not allowed to leave the camp or they would be killed.[6]

This decision set an important precedent since, in the two decades that followed the creation of the ICC, independent specialized organizations have regularly reported cases of forced pregnancies committed in total impunity in various regions of the world. In Nigeria, the United Nations (U.N.) Human Rights Council has found that women and girls that were sexually abused repeatedly by Boko Haram rebels while captive were also

1. *See* Fourth World Conference on Women, *World Conference on Women: Action for Equality, Development and Peace*, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 15, 1995) [hereinafter *Beijing Convention*]; U.N. Secretary-General, *Conflict-Related Sexual Violence*, U.N. Doc. S/2019/280 (Mar. 29, 2019); U.N. Office of the High Comm'r for Hum. Rts, *Women's Rights Are Human Rights*, U.N. Doc. [ST/]HR/PUB/14/2, at 93 (2014).

2. Dieneke De Vos, *Colombia's Constitutional Court Issues Landmark Decision Recognizing Victims of Reproductive Violence in Conflict*, EUR. UNIV. INST. (Jan. 11, 2020), https://me.eui.eu/dieneke-de-vos/blog/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/ (last visited Apr. 4, 2022); Rosemary Grey, *The ICC's First 'Forced Pregnancy' Case in Historical Perspective*, 15 J. INT'L CRIM. JUST. 905, 906 (2017); VIRGINIE LADISCH, INT'L CTR. FOR TRANSITIONAL JUST., FROM REJECTION TO REDRESS: OVERCOMING LEGACIES OF CONFLICT-RELATED SEXUAL VIOLENCE IN NORTHERN UGANDA (2015) (focusing on the situation in Uganda and the lack of accountability for crimes which have led to motherhood); Ciara Laverty & Dieneke De Vos, *'Ntaganda' in Colombia: Intra-Party Reproductive Violence at the Colombian Constitutional Court*, OPINIOJURIS, (Feb. 25, 2020), http://opiniojuris.org/2020/02/25/ntaganda-in-colombia-intra-party-reproductive-violence-at-the-colombian-constitutional-court/ (last visited Apr. 4, 2022).

3. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Judgment (Feb. 4, 2021).

4. *Id.*

5. Press Release, Int'l Crim. Ct., Dominic Ongwen Declared Guilty of War Crimes and Crimes Against Humanity Committed in Uganda, U.N. Press Release ICC-CPI-20210204-PR1564 (Feb. 4, 2021) [available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1564] (last visited Apr. 4, 2022).

6. Prosecutor v. Ongwen, *supra* note 3, at ¶¶ 3057–3058.

victims of forced pregnancies.[7] In some instances, rebels thought that the children of the women that they had raped would be born radicalized and form the next generation of fighters.[8] In Myanmar, Rohingya Muslims have been victims of a violent campaign led by the Burmese Military, Border Guards, and police forces, including cases of unwanted and forced pregnancies.[9] These are not isolated incidents. Similar abuses have also occurred in South Sudan,[10] Mali,[11] and Northern Uganda, to name a few.[12]

Given the failure of this provision of the Rome Statute to deter perpetrators in practice, and the academic criticism of its definition for the crime of forced pregnancy,[13] this judgment is an opportunity to undertake a closer analysis of Article 7(2)(f), which provides that:

> "Forced pregnancy" means the unlawful detention of a woman who is forcibly made pregnant with the intent to alter the ethnic composition of a population or to commit other serious violations

7. *See* U.N. High Comm'r for Hum. Rts., Hum. Rts. Council 29th Session: Update on Boko Haram (July 1, 2015), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16177&LangID=E (last visited Apr. 4, 2022).

8. *U.N. Urges Nigeria to Ease Abortion Access for Women Raped by Boko Haram*, AL JAZEERA WITH AGENCE FRANCE-PRESSE (July 1, 2015), http://america.aljazeera.com/articles/2015/7/1/un-urges-nigeria-to-ease-abortion-access.html (last visited Apr. 4, 2022).

9. GRANT SHUBIN ET AL., GLOBAL JUSTICE CTR., DISCRIMINATION TO DESTRUCTION: A LEGAL ANALYSIS OF GENDER CRIMES AGAINST THE ROHINGYA 58 (2018). *See also* U.N. Hum. Rts. Council, Rep. on the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, ¶¶ 546–547, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018) (discussing lack of access to medical services and abortions due to movement restrictions in the Northern Rakhine state).

10. The internal conflict in South Sudan involves different rebel groups fighting against government forces. U.N. Hum. Rts. Council, Rep. of the Comm'n on Hum. Rts. in South Sudan, U.N. Doc. A/HRC/43/56 (Jan. 31, 2020). Most of the attacks, including sexual and gender-based violence, conducted against the civilians were committed by the government forces to spread terror and to impose authority upon the population. *Id.* Victims of forced pregnancies reported experiencing "long-term physical repercussions and severe psychological trauma." *Id.*

11. During this conflict, the population was under the control of Islamist armed groups. It was found by the court that laic Muslim women were forcibly married to extremist rebels for several purposes, including to mix the local population from Timbuktu with jihadists and to create a new generation. Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Pre-Trial Chamber I, Correction to the Decision Regarding the Confirmation of Charges, ¶ 570 (2019) [hereinafter Al Hassan Case, ICC].

12. LADISCH, *supra* note 2.

13. *See* Milan Markovic, *Vessels of Reproduction: Forced Pregnancy and the ICC*, 16 MICH. STATE J. INT'L L. 439 (2007); Alyson M. Drake, *Aimed at Protecting Ethnic Groups or Women? A Look at Forced Pregnancy Under the Rome Statute*, 18 WM. & MARY J. WOMEN & L. 595 (2012); Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625 (2001).

> of international law. This definition cannot in any way be interpreted as affecting national laws on pregnancy.[14]

A thorough analysis of this definition using a feminist lens is all the more relevant following the International Law Commission's (ILC) submission of the Draft Articles on Prevention and Punishment of Crimes Against Humanity (Draft Articles), for consideration to the Sixth Committee of the U.N.—responsible for legal matters—as part of the provisional agenda to its 76th Session in Autumn 2020.[15] Thus, the U.N.G.A. is currently examining the Draft Articles, including the above definition of the crime of forced pregnancy as a crime against humanity,[16] in order to decide whether to elaborate a new convention on crimes against humanity.[17]

Considering this rare opportunity to advance the cause of women, girls, and any individual who can biologically become pregnant, this article explains why the international community should reject the inadequate definition of the crime of forced pregnancy proposed by the ILC. It questions the appropriateness of copying the definition of the crime of forced pregnancy into such a new convention, because it perpetuates gender stereotypes and does not accurately reflect the experience of victims and survivors. Among other things, the definition of the ILC is gender-biased, does not promote accountability for the perpetration of crimes related to reproductive rights, and is outdated in light of the progress made in the past twenty years regarding the rights of women and girls.

The author proposes instead the adoption of an alternative definition of the crime of forced pregnancy that aligns with modern norms and values. The prevalence of these crimes and their gravity in terms of physical and mental harms—including the most serious cases, in which forced pregnancies are part of widespread and systematic attacks[18]—means this

14. Rome Statute of the International Criminal Court, art. 7(2)(f), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

15. Int'l Law Comm'n, Draft Articles on Prevention and Punishment of Crimes Against Human., U.N. Doc. A/74/10 (2019) [hereinafter Draft Articles]; G.A. Res. 74/187 (Dec. 18, 2019).

16. Sean D. Murphy (Special Rapporteur), *Fourth Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/725 (Feb. 18, 2019) [hereinafter *ILC, Fourth Report*]; G.A., Rep. of the Sixth Comm. on Crimes Against Human., U.N. Doc. A/76/474 (Nov. 18, 2021).

17. G.A. Res. 76/114 (Dec. 9, 2021).

18. *See e.g.*, U.N. Hum. Rts. Council, *supra* note 9 (examining the widespread and systematic use of forced pregnancies in Myanmar); OFF. OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2012 89 (2012) (examining the widespread and systematic use of forced pregnancies by Boko Haram in Nigeria); Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Prosecution's Pre-Trial Brief, ¶¶ 38–39 (Mar. 7, 2019) (examining forced pregnancies in Northern Uganda between July 2002 until approximately December 2005, where evidence indicated the attacks were directed against civilians, widespread, and systematic).

crime can no longer include a flawed definition.[19] This contribution builds on the academic criticism of the crime of forced pregnancy under the Rome Statute and brings it up to date with modern theories of feminism. It also adds to the surprisingly scarce literature on this topic concerning the recent definition of the ILC.

This article will proceed in two parts. The first part critically reviews the development of the crime of forced pregnancy in international criminal law. It begins by analyzing the historical context surrounding the drafting process of the crime during the U.N. Diplomatic Conference of 1998. It turns next to the interpretation of the crime in academic literature and the few judicial cases to have explored the issue. This article then explains how the idea of drafting a convention on crimes against humanity came about. Examining current developments in international criminal law, it explains how the Sixth Committee should seize this unique opportunity to enact an instrument that shows gender sensitivity rather than systematically repeating the wording used in the Rome Statute.

The second part of this article normatively assesses, through a gender perspective, the definition of the crime of forced pregnancy in the Rome Statute and Draft Articles. Three critiques of the current definition, taken together, explain why it should be modified at a future convention. The first critique concerns the requirement of proving that the perpetrator had an additional intention. This intention perpetuates gender biases in international law and encourages institutionalized discrimination against women. The second critique relates to the addition of the national caveat, which gives the wrong impression that women's rights are not universally recognized in international criminal law. The third critique explains that the definition is outdated, conflicts with any other fields of international law, and does not contribute to gender equality. In conclusion, this article provides recommendations as to how the crime should be defined under a future convention on crimes against humanity.

II. THE CRIME OF FORCED PREGNANCY UNDER THE ROME STATUTE: DRAFTING AND DEVELOPMENTS

A. EVOLUTION OF THE PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES IN INTERNATIONAL LAW

International criminal law has long been criticized for lacking gender sensitivity and for perpetuating gender biases.[20] The constitutive

19. Grey, *supra* note 2, at 907.

20. *See* ROSEMARY GREY, *The Road to Rome*, *in* PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL COURT: PRACTICE, PROGRESS AND POTENTIAL 67, 122 (Larissa van den Herik & Jean d'Aspremont eds., 2019); Christine Chinkin, *Feminist Interventions into International Law*, 19 ADELAIDE L. REV. 13, 16 (1997); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5

instruments of both the Nuremberg Tribunal and the Tokyo Tribunal are prime examples of this failure. Neither prosecuted sexual violence crimes,[21] despite documented evidence of their occurrence during World War II.[22]

The situation has been just as deplorable under international humanitarian law. The law of armed conflict employed for a long time a patriarchal language to describe sexual and gender-based crimes, using a male perspective to assess sexual violence.[23] Rape, for instance, was first prohibited in the 1907 Hague Regulations under the protection of "family honor and rights."[24] In the 1949 Geneva Conventions, the prohibition of rape became euphemized as a prohibition against violation of the victim's "honor."[25] These formulations were problematic for two reasons. First, they both considered the woman solely as a mother, existing only through her family unit, and therefore both overlooked the serious impact that such an offense had on the victim herself as an individual.[26] Second, although the concept of "honor" might have had an important connotation at the time of the drafting, it failed to accurately depict the mental and physical pain that victims of sexual violence endure.[27] Sexual crimes, including rape, were

HASTINGS WOMEN'S L.J. 243 (1994). *See generally* JUDITH GAIL GARDHAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW (2001).

21. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279, 288 (1945) [hereinafter Charter of the International Military Tribunal]; Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 27 (1946).

22. *See* Radhika Coomaraswamy (Special Rapporteur), *Rep. on the Republic of Korea and Japan on Military Sexual Slavery in Wartime*, U.N. Doc E/CN.4/1996/53/Add.1 (Jan. 4, 1996) (documenting the so-called "comfort women" who were violated by the Japanese army). *See generally* James W. Messerschmidt, *The Forgotten Victims of World War II: Masculinities and Rape in Berlin, 1945*, 12 VIOLENCE AGAINST WOMEN 706 (2006); U.N. Secretary-General, Letter dated May 24, 1994 from the Secretary-General to the President of the Security Council, ¶ 248, U.N. Doc. S/1994/674 (May 27, 1994); USTINIA DOLGOPOL & SNEHAL PARANJAPE, INT'L COMM. JURISTS, COMFORT WOMEN, AN UNFINISHED ORDEAL: REPORT OF A MISSION (1994); BONAIFER NOWROJEE, HUM. RTS. WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1993).

23. Copelon, *supra* note 20, at 249. *See also* THE U.N. SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, 15 YEARS OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN (1994–2009)—A CRITICAL REVIEW 58 (Audrey Thompson ed., 2009).

24. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annexes: Regulations Concerning the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

25. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 14, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

26. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 387 (1999).

27. Gloria Gaggioli, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*, 96 INT'L REV. RED CROSS 503, 512 (2014).

not even explicitly included in the provision on the grave breaches of the Geneva Conventions in 1949.[28]

The International Criminal Tribunal for Rwanda (ICTR) and the International Tribunal for the former Yugoslavia (ICTY) in the late 1990s delivered the first gender-sensitive decisions.[29] They acknowledged the impact of sexual violence on human dignity and, in so doing, acknowledged it amounted to a breach of core norms of international law.[30] The constitutive documents of both international tribunals only prohibited the crime of rape.[31] However, investigators' and prosecutors' willingness to focus on the prosecution of sexual and gender-based crimes,[32] combined with gender sensitivity on the bench,[33] led to the development of a meaningful jurisprudence on sexual and gender-based violence. Notably, the tribunals did not endorse a narrow reading of their statutes. For instance,

28. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III), *supra* note 25, at art. 130; Geneva Convention (IV), *supra* note 25, at art. 147.

29. For instance, in the Akayesu case, the ICTR recognized that rape and other acts of sexual violence could constitute genocide. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Chamber I Judgment, ¶ 597 (Sept. 2, 1998) [hereinafter Akayesu case, ICTR]. The ICTY, in turn, was the first tribunal to recognize in the Čelebići camp case that rape could be a form of torture, and thus could constitute a grave breach of the Geneva Conventions and the corresponding common article 3. Prosecutor v. Mucić, Case No. IT-96-21-T, Trial Chamber Judgment, ¶¶ 494–497 (Nov. 16, 1998) [hereinafter Čelebići camp case, ICTY]. In addition, the Furundžija case was the first case which entirely and solely dealt with sexual violence. Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeals Chamber Judgment (July 21, 2000).

30. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 183 (Dec. 10, 1998).

31. *See* S.C. Res. 955, art. 3(g) (Nov. 8, 1994); S.C. Res. 827, art. 5(g) (May 25, 1993). These provisions respectively established the International Tribunals for Rwanda and the former Yugoslavia, which prohibited rape as a crime against humanity. The ICTR also implicitly prohibits other forms of sexual and gender-based crimes under the broader—and inaccurate—term of "outraged upon personal dignity." *See* S.C. Res. 955, art. 4(e) (Nov. 8, 1994).

32. For instance, the Chief Prosecutor of the ICTY, Richard Goldstone, decided to appoint Patricia Sellers as the Legal Advisor on Gender in order to address how sexual and gender-based violence would be prosecuted. Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J INT'L L. 305, 309–11 (2002). Sellers, along with other lawyers and investigators, pushed for the investigation and prosecution of sexual and gender-based crimes which reportedly occurred during the conflict in former Yugoslavia. *Id.*

33. For example, the ICTR Trial Chamber's reasoning in the Akayesu case noted the "public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice." Akayesu case, ICTR, *supra* note 29, at ¶ 417.

they have ruled that, in certain circumstances, rape can constitute genocide[34] or amount to torture.[35]

Following pressure from feminist groups,[36] the codification of sexual crimes under the Rome Statute began to more accurately reflect the experience of women.[37] The Rome Statute, among others, raised crimes of sexual violence up to "serious violations of the laws and customs" of international humanitarian law.[38] It also expanded the types of sexual violence that are prosecutable, including the crimes of sexual slavery, enforced prostitution, and forced pregnancy.[39] The Rome Statute thus represented an important milestone in the fight against impunity for such crimes and brought gender-sensitive provisions within the framework of international criminal law.[40]

Despite this hard-won battle, the definition of the crime of forced pregnancy as a crime against humanity in the Rome Statute remains problematic. Before engaging in a critique of this definition, this article will examine the elements of the crime of forced pregnancy.

B. ELEMENTS OF THE CRIME OF FORCED PREGNANCY UNDER THE ROME STATUTE

The crime of forced pregnancy as a crime against humanity is found under Article 7(1)(g) of the Rome Statute, which provides that:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[41]

Article 7(2)(f) of the Rome Statute further expands on the definition of forced pregnancy as follows: "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

34. Akayesu case, ICTR, *supra* note 29, at ¶¶ 732–734.
35. Čelebići camp case, ICTY, *supra* note 29.
36. *Women Caucus Advocacy in ICC Negotiations: The Crime of Forced Pregnancy*, WOMEN'S CAUCUS FOR GENDER JUST., http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/rome/forcedpreg.html (last visited Apr. 4, 2022).
37. Louise Chappell, *Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court*, 22 POL'Y & SOC'Y 3, 15 (2003).
38. Rome Statute, *supra* note 14, at arts. 8(2)(b)(xxi), 8(2)(e)(vi).
39. Chappell, *supra* note 37.
40. Grey, *supra* note 20.
41. Rome Statute, *supra* note 14, at art. 7(1)(g).

law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."[42]

Only one decision of the ICC has interpreted this crime. In Prosecutor v. Ongwen, the Trial Chamber (Ongwen Trial Decision) interpreted what the drafters of the Rome Statute intended in a few, but insightful, paragraphs.[43] In this case, Dominic Ongwen, a former Army Commander of the Lord Resistance Army in Uganda, was charged with several counts of war crimes and crimes against humanity, including charges of forced pregnancy.[44]

As Mr. Ongwen is the first person to be held responsible for the crime of forced pregnancy, the Ongwen Trial Judgment represents a landmark holding for the prosecution of crimes concerning reproductive rights.[45] This judgment, read in conjunction with independent human rights experts' scholarship, can shed light on the legal contours of this crime. In the following subparts, three main elements of the crime of forced pregnancy are addressed: the material elements (*actus reus*), the mental elements (*mens rea*), and the national law caveat.

1. The material element of the crime of forced pregnancy

The material element of the crime is the act by the perpetrator of confining one or more women who were forcibly made pregnant—that is, the material existence of any coercive circumstance that can undermine a person's ability to give genuine and voluntary consent.[46] It does not matter if the alleged perpetrator is involved in the pregnancy,[47] nor does it matter whether the pregnancy is the result of a rape or artificial insemination against the woman's will—forcible under the Court's construction means the existence of any coercive circumstances that can undermine a person's ability to give genuine and voluntary consent.[48] Kristen Boon goes even further in her interpretation of "force" to include acts that prevent a woman

42. Rome Statute, *supra* note 14.

43. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Trial Judgment, ¶ 2717–2729 (Feb. 4, 2021) [hereinafter Ongwen Trial Judgment].

44. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Pre-Trial Decision on Confirmation of Charges Against Ongwen, ¶ 112 (Mar. 23, 2016) [hereinafter Ongwen, Pre-Trial Decision].

45. OPEN SOCIETY JUSTICE INITIATIVE, BRIEFING PAPER: THE TRIAL OF DOMINIC ONGWEN AT THE INTERNATIONAL CRIMINAL COURT 4 (2016); Ephrem Rugiririza, *ICC Prosecutor Puts Sexual Crimes at Heart of Ongwen Trial*, JUSTICEINFO.NET (Sept. 9, 2016), https://www.justiceinfo.net/en/tribunals/icc/29012-icc-prosecutor-puts-sexual-crimes-at-heart-of-ongwen-trial.html (last visited Apr. 4, 2022); WOMEN'S INITIATIVE FOR GENDER JUSTICE, GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 123 (2018).

46. Rome Statute, *supra* note 14, at art. 7(2)(f).

47. Ongwen Trial Judgment, *supra* note 43, at ¶ 2723; MICHAEL COTTIER, ET AL., *Article 8*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 275, 450 (Otto Triffterer ed., 2008).

48. MICHAEL COTTIER, ET AL., *supra* note 47; Ongwen Trial Judgment, *supra* note 43, at ¶ 2725.

from controlling her reproductive cycles: "[i]f 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 a forced pregnancy."[49]

In any event, the facts that must be present to constitute the crime include: that the pregnant person did not consent, nor make the free and deliberate choice, to carry a child;[50] and that the perpetrator, while aware that the woman was forcefully made pregnant,[51] placed her "in a position in which she cannot choose whether to continue the pregnancy."[52] Furthermore, the confinement of the woman should not be compared to "imprisonment."[53] Rather, it should include any case wherein a woman is "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."[54]

Finally, there is also a temporal element of the confinement: it should last from the moment the perpetrator knows the woman is forcibly made pregnant until the end of the pregnancy (either through miscarriage, birth, or abortion).[55] Cases in which the perpetrator confines a woman until, in accordance with national laws, she no longer has access to a medical abortion, could be interpreted as a "confinement."[56]

2. The two mental elements of the crime of forced pregnancy

The Rome Statute envisages two mental elements for the crime of forced pregnancy. The first one, which is present in all other crimes against humanity, requires that the "perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack

49. Boon, *supra* note 13, at 661.

50. The obligation of having a victim who was *forcibly* made pregnant was primarily to ensure that the crime of forced pregnancy could not be raised against national laws controlling abortion under all circumstances. *See generally* Cate Steains, *Gender Issues*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 357, 366 (Roy S. Lee ed., 1999).

51. CTR. FOR INT'L L. RSCH. AND POL'Y, INTERNATIONAL CRIMINAL LAW GUIDELINES: LEGAL REQUIREMENTS OF SEXUAL AND GENDER-BASED VIOLENCE CRIMES 49 (Aleksandra Sidorenko & Andreja Jerončič eds., 2017).

52. Ongwen, Pre-Trial Decision, *supra* note 44, at ¶ 99.

53. Boon, *supra* note 13, at 662; Ongwen, Pre-Trial Decision, *supra* note 44, at ¶ 2724.

54. C. Buehler, *War Crimes, Crimes Against Humanity and Genocide*, 5 NEMESIS 158, 162 (2002). Note: this is, however, a broad interpretation proposed by Carmela Buehler.

55. *Id.* Note: other scholars have interpreted confinement without the requirement of any specific time frame. *See* MARIA SJÖHOLM, *Commentary on Article 7*, *in* COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 31, 53 (Mark Klamberg ed., 2017).

56. Boon, *supra* note 13, at 662–63.

directed against a civilian population."[57] This article does not discuss this intent further, as it is already widely analyzed and understood.[58]

The second mental element requires that the perpetrator have confined one or more women with either "the intent of affecting the ethnic composition of any population"[59] (first intent alternative) or with the intent of "carrying out other grave violations of international law"[60] (the second intent alternative) – together referred to as "the additional intention." This article will examine the two separately, as they are both specific to the crime of forced pregnancy and found under Article 7(2)(f) of the Rome Statute.

i. The first intent alternative: "affecting the ethnic composition of any population"

The first alternative is the intent of affecting the ethnic composition of any population. It was drafted in the wake of the violations committed in Rwanda and in the former Yugoslavia following the testimonies of the survivors.[61] Reports revealed that during the conflict in the former Yugoslavia, women were detained until it was too late for them to receive an abortion.[62] Given that the region was in the midst of an ethnic conflict, it is not surprising that the context and testimonies showed that Serbian soldiers were driven by the intent of conceiving children who would share their ethnicity; in other words, children who would have an ethnicity different from those of their mothers.[63]

To prove this intent, the prosecutor must establish that the objective of the perpetrator, when confining the victim(s), was closely related to the outcome of the pregnancy, and that the victim(s) were confined because the perpetrator wanted this pregnancy to affect the ethnicity of a particular group.[64] This intent has been interpreted extremely narrowly, restricting the

57. INT'L CRIM. CT., ELEMENTS OF CRIMES 9 (2011) [available at: https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf] (last visited Apr. 4, 2022).

58. *See e.g., Art. 7 Common Elements*, CASE MATRIX NETWORK, https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/art-7/common-elements/2/ (last visited Apr. 4, 2022) (compiling the most relevant decisions interpreting this mental element).

59. INT'L CRIM. CT., *supra* note 57.

60. *Id.*

61. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/13 (Vol. II) (1998) [hereinafter U.N. Diplomatic Conference (1998)].

62. Drake, *supra* note 13, at 596; Grey, *supra* note 2, at 919.

63. *See* Rep. of the Comm'n of Experts, in letter dated May 27, 1994, from the Secretary-General to the President of the Security Council, ¶ 248, U.N. Doc. S/1994/674 ("During the conflict in the former Yugoslavia, victims reported that soldiers unequivocally expressed their intent to give birth to Serbian babies: 'She was raped almost daily by three or four soldiers. She was told that she would give birth to a chetnik boy who would kill Muslims when he grew up.'").

64. Ongwen Trial Judgment, *supra* note 43, at ¶ 100.

crime to cases in which the perpetrator and the victim did not belong to the same ethnic group.[65]

ii. The second intent alternative: "carrying out other grave violations of international law"

The second intent alternative requires that the perpetrator intend to carry out other grave violations of international law in addition to confining the victim(s), who, to the perpetrator's knowledge, had been forcibly made pregnant.[66] It is still unclear, however, what the drafters intended by this requirement.[67] While the Rome Statute does not provide a definition for this term and little insight is furnished in the preparatory work leading up to the conference, it does seem that the intent alternative was specifically added to cover such cases as those crimes committed by Nazis under Nazi rule of Germany.[68] During World War II, women were forcibly made pregnant and confined by the Nazis with the intent of medical experimentation on both the pregnant women and the resulting fetuses.[69]

Unlike the "grave breaches of the Geneva Conventions," which have been expressly framed under Article 8(2) of the Rome Statute, what amounts to a grave violation under Article 7(2)(f) is largely left to the discretion of judges.[70] It does not, however, cover situations where the perpetrator is acting out of pure sadism or with the sole intent of seriously violating the victim's mental or physical integrity. [71]

In contrast to the first intent alternative, the Ongwen Trial Judgment states that the intention of carrying out another grave violation does not have to be linked to the pregnancy or its outcome per se.[72] In other words, the prosecutor does not have to prove that the perpetrator forced the woman to become pregnant in order to carry out another grave violation, such as carrying out medical experimentation specifically on pregnant women,[73] to

65. Boon, *supra* note 13, at 663.

66. INT'L CRIM. CT., *supra* note 57.

67. Markovic, *supra* note 13, at 443.

68. VALERIE OOSTERVELD, *Gender-Based Crimes Against Humanity*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 78, 91 (Leila Nadya Sadat ed., 2011).

69. *Id.*; Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 73 (1999).

70. Markovic, *supra* note 13, at 443. *See also* Ongwen Pre-Trial Decision, *supra* note 44, at ¶ 101 (broadly interpreting the term by stating that grave violations of international law could include using the victims as his forced wives and to rape, sexually enslave, enslave, and torture them).

71. COTTIER, ET AL., *supra* note 47.

72. Ongwen Trial Judgment, *supra* note 43, at ¶ 2728.

73. "The Holy See aggressively pushed for restricting the boundaries of the forced pregnancy provision. This included attempts to limit it to the situation in Bosnia-Herzegovina and to acts with the intent of ethnic cleansing. Such proposals were too restrictive, however, and would have unduly excluded critical situations such as the experiences of many Jewish women during World War II. These women were forcibly made and kept pregnant so that their fetuses could be used for medical experiments. This submission was rejected through the insertion of the phrase 'or carrying out other grave

use the child as a future child soldier, or that the "pregnancy of the woman [had to be] in any way causally linked to her confinement."[74]

Following the court's interpretation, it would be enough for the prosecutor to prove, for instance, that the perpetrator confined the victim, knowing that she was forcibly made pregnant, with the additional intent of exploiting her as his or her own sex slave or to use her as a forced wife.[75] Such confinement and exploitation are both grave violations under international criminal law.[76] While this broader interpretation by the Ongwen Trial Judgment of the second intent alternative to carry out other grave violations is welcome, it is problematic that not every confinement of a forcibly impregnated woman constitutes the crime of forced pregnancy.

3. The caveat to national law

The last sentence of the definition of the crime of forced pregnancy specifies that "[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy."[77] While this caveat is an exceptional addition to the definition of this international crime,[78] the drafting history of the crime of forced pregnancy—and the fact that it was one of the most difficult to reach an agreement on[79]—adds to our understanding of why it was added by the drafters. This exception was a political compromise[80] to reassure states with national laws criminalizing abortion (including those which criminalize survivors of rape) that they could not be prosecuted for the crime of forced pregnancy.[81]

Yet it is still unclear how this caveat should be interpreted, or the legal effect it will have on the prosecution of this crime. Milan Markovic believes that it

violations of international law' into the final definition." Jessie Soh Sie Eng, *Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide*, 4 N.Z. J. OF PUB. AND INT'L 311, 325 (2006).

74. Ongwen Trial Judgment, *supra* note 43, at ¶ 99.

75. *Id.* at ¶101.

76. The crime of sexual slavery is prohibited under art. 7(1)(g) of the Rome Statute and the crime of forced marriage can be charged under art. 7(1)(k) of the Rome Statute (classifying under "other inhumane acts"). *See* Ongwen Trial Judgment, *supra* note 43, at ¶ 95.

77. Rome Statute, *supra* note 14, at art. 7(2)(f).

78. There are, in fact, no other international crimes in the Rome Statute referring to the national laws of states. *See* Rome Statute, *supra* note 14.

79. *See* Bedont & Hall-Martinez, *supra* note 69, at 73 (stating that the definition of the crime of forced pregnancy was "the most contentious" issue discussed during the Diplomatic Conference (1998)).

80. Drake, *supra* note 13, at 608; Boon, *supra* note 13, at 637.

81. JOSEPH POWDERLY & NIAMH HAYES, *Article 7*, *in* THE ROME STATUTE OF THE INTERNATIONAL COURT: A COMMENTARY 215 (O. Triffterer eds., 2016); Soh Sie Eng, *supra* note 73, at 327.

> suggests that the ICC Statute requires that enormous deference be given to national abortion laws. Thus, if a crime of forced pregnancy occurs on the territory of a state where abortion is not permitted and the confinement is not contrary to the laws of that state, it will be impossible for the ICC to prosecute the forced pregnancy.[82]

Kristen Boon adds that this caveat "shields inconsistent national laws from the effect of the provision."[83] Certainly, it would be of interest to have further explanation from the ICC on the concrete effects that this exception can have on the prosecution of the crime of forced pregnancy as a crime against humanity.

C. THE ROAD FROM THE ROME STATUTE TO A FUTURE CONVENTION ON CRIMES AGAINST HUMANITY

The definition of the crime of forced pregnancy in the Rome Statute has been criticized as problematic, notably from a gender perspective, by several scholars. For instance, Milan Markovic expressed concerns about the caveat to national law.[84] Alyson Drake also criticized the requirement to affect the ethnicity of a group.[85] While amending the Rome Statute would be challenging and could compromise the concept of consistency in ICC jurisprudence,[86] a future convention on the prevention and punishment of crimes against humanity should not replicate this misstep in defining forced pregnancy. The following subparts explain the legislative process involved in the ILC's submission of the Draft Articles for consideration to the Sixth Committee of the U.N. from a feminist lens.

1. The genesis of creating a future convention on crimes against humanity

A group of academics launched the Crimes Against Humanity Initiative (Initiative) in 2008 to fill a gap in international criminal law: the absence of a comprehensive and specialized convention on crimes against humanity.[87] They argued that the legislative framework was not broad enough to protect all victims of mass atrocities and to sanction the perpetrators of these serious crimes.[88] Some scholars focused on the

82. Markovic, *supra* note 13, at 448.
83. Boon, *supra* note 13, at 640.
84. Markovic, *supra* note 13, at 445–48.
85. Drake, *supra* note 13, at 616–17.
86. MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 28–29 (1996).
87. LEILA. N. SADAT, *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 449, 457 (Leila N. Sadat ed., 2011).
88. Sean D. Murphy (Special Rapporteur), *First Rep. on Crimes Against Humanity*, 6, U.N. Doc. A/CN.4/680 (Feb. 17, 2015) [hereinafter *ILC, First Report*].

absence of a universally accepted definition of crimes against humanity.[89] Others criticized the specific mandates of the international criminal tribunals, including their territorial or temporal limitations in prosecuting crimes against humanity.[90]

An equally important criticism put forth by the Initiative was the reliance on the ICC as the sole body to prosecute crimes against humanity.[91] While the ICC contributed to the prosecution of these crimes and the development of jurisprudence under Article 7 of the Rome Statute,[92] the ICC was, and remains, strictly complementary to national legal systems. Importantly, only half of the world's population can seek redress under its current jurisdiction.[93] Ultimately, the Initiative aimed to create an "effective tool of prevention and interstate cooperation and to provide for universal jurisdiction and state responsibility."[94]

For over ten years, the Initiative's steering committee attempted to convince members of the international community of the relevance of having a special convention on crimes against humanity.[95] It sought the technical opinion of more than 200 experts and shared draft versions with relevant stakeholders, including U.N. Member states and members of civil society and international organizations.[96] In 2014, the Draft Articles developed by the Initiative were subsequently introduced as a topic to the program of the ILC.[97]

2. The decision to keep the definition verbatim for the sake of consistency

Both the Initiative's steering committee and the ILC questioned during their respective drafting processes whether the definition of forced pregnancy in Article 7 of the Rome Statute was to be replicated in the future

89. SADAT, *supra* note 87, at 462.

90. GREGORY H. STANTON, *Why the World Needs an International Convention on Crimes Against Humanity, in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 346, at 354 (Leila N. Sadat ed., 2011).

91. STANTON, *supra* note 90, at 354.

92. *See* THE WHITNEY R. HARRIS WORLD L. INST., DECLARATION ON THE NEED FOR A COMPREHENSIVE CONVENTION ON CRIMES AGAINST HUMANITY (2010) [hereinafter WASHINGTON DECLARATION].

93. *See The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/ (last visited Apr. 4, 2022) (listing the 123 state parties to the Rome Statute, however, important political and economic powers such as Russia, China, India, and the United States are not party signatories).

94. SADAT, *supra* note 87, at 458.

95. TESSA BOLTON, *The Proposed Convention on the Prevention and Punishment of Crimes Against Humanity: Developments and Deficiencies*, *in* ON THE PROPOSED CRIMES AGAINST HUMANITY CONVENTION 369, 370 (Morten Bergsmo & Song Tianying eds., 2014).

96. *See* SADAT, *supra* note 87 (engaging in a comprehensive discussion of the work conducted for the first proposed convention on the prevention and punishment of crimes against humanity).

97. G.A. Res. 69/118, at 3 (Dec. 10, 2014).

convention.[98] As Leila Nadya Sadat recalls, it was agreed from the very first meeting "that the Convention should complement the Rome Statute for the International Criminal Court."[99]

For many experts, it appeared that changing the definition already (laboriously) negotiated during the Diplomatic Conference (1998) would be difficult in practice.[100] Notably, such a change would go against the purpose of the future convention, which was "to craft a balanced text that would prompt states to do better in adopting national laws and national jurisdiction concerning crimes against humanity … while at the same time respecting certain limits on what states would likely accept in a new convention."[101] Approximately 100 states had already implemented the definition of the Rome Statute in their domestic legislation and would have to review work that had already been completed.[102] Both the Initiative and the ILC decided to keep the definition verbatim and to accept its weaknesses.[103]

According to Lisa Davis, a professor who was part of the worldwide campaign asking for a modification of the definition of "gender" in the Draft Articles, the reluctance to make changes stemmed from the belief that important modification to the language would only undermine the likelihood of the General Assembly to adopt a convention on crimes against humanity.[104] However, as she rightly adds, "[r]easoning like this has consistently led to the de-prioritization of gender concerns in conflict, from sexual and reproductive health care to LGBTQI-tailored responses."[105]

The decision to replicate verbatim the definition of the Rome Statute is regrettable, especially considering the criticisms expressed in the past twenty years over its lack of gender sensitivity.[106] The nation of Estonia and some non-governmental organizations (NGO), including the Global Justice Center, have also criticized replication of the definition of the crimes against humanity in the current Draft Articles.[107]

98. *ILC, First Report*, *supra* note 88, at 6.
99. SADAT, *supra* note 87, at 458.
100. *Id.* at 460.
101. Sean D. Murphy, *Striking The Right Balance for a Draft Convention on Crimes Against Humanity*, JUST SECURITY (Sept. 17, 2021), https://www.justsecurity.org/78257/striking-the-right-balance-for-a-draft-convention-on-crimes-against-humanity/ (last visited Apr. 4, 2022).
102. SADAT, *supra* note 87, at 463.
103. WASHINGTON DECLARATION, *supra* note 92, at ¶ 2.
104. Lisa Davis, *New Draft of 'Crimes Against Humanity' Treaty Affirms Protection for Women and LGBTIQ Persons. The Fight Wasn't Easy—and It Isn't Over Yet*, COMMON DREAMS (June 24, 2018), https://www.commondreams.org/views/2019/06/24/new-draft-crimes-against-humanity-treaty-affirms-protection-women-and-lgbtiq (last visited Apr. 4, 2022).
105. *Id.*
106. *See* Markovic, *supra* note 14; Drake, *supra* note 13; Boon, *supra* note 13.
107. *Submission to the International Law Commission: The Need to Integrate a Gender-Perspective into the Draft Convention on Crimes against Humanity*, GLOB. JUST. CTR. (Nov.

3. The modification of the definition of "gender" as an example of success

While the decision to leave the definition of forced pregnancy unchanged did not generate much discussion globally, the ILC did face criticism with respect to its definition of "gender."[108] This definition also mirrored that of the Rome Statute.[109] It was formally proposed as Draft Article 3 of the Draft Articles and provisionally adopted during the 77th Session of the ILC.[110]

The Draft Articles were submitted to the U.N. Secretary General to be shared with states, international organizations, and members of civil society for comments and observations.[111] They referred to "gender" as "the two sexes, male and female, within the context of society."[112] states deemed it "obsolete,"[113] "under-inclusive and inaccurate,"[114] "opaque, outdated and not in line with the recent more inclusive and gender-sensitive definitions of 'gender',"[115] and "not reflect[ing] the current international human rights law." [116] NGOs, academics, and activists also petitioned against the definition.[117]

30, 2018), https://www.globaljusticecenter.net/blog/19-publications/1011-submission-to-the-international-law-commission-the-need-to-integrate-a-gender-perspective-into-the-draft-convention-on-crimes-against-humanity (last visited Apr. 4, 2022); Danielle Hites, *New Crimes Against Humanity Must Not Perpetuate Outdated Definition of Gender*, OPINIOJURIS (Jan. 24, 2019), http://opiniojuris.org/2019/01/24/new-crimes-against-humanity-treaty-must-not-perpetuate-outdated-definition-of-gender/ (last visited Apr. 4, 2022); Written Contribution of Estonia on the Draft Articles on Crimes Against Humanity, Memorandum adopted on first reading, Int'l Law Comm'n on Its Sixty-Ninth Session, at 2 (2017) [available at: https://legal.un.org/ilc/sessions/71/pdfs/english/cah_estonia.pdf] (last visited Apr. 4, 2022).

108. MACHTELD BOOT, *Article 7, Paragraph 3: Definition of Gender*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 159, 273 (Otto Triffterer ed., 2008).

109. Rome Statute, *supra* note 14, at art. 7(3).

110. *ILC, Fourth Report*, *supra* note 16, at 2.

111. The ILC received an impressive number of responses from the international community, including responses from about 700 NGOs and individuals, 38 states and 7 international organizations. *Id.* at 5.

112. Sean D. Murphy (Special Rapporteur), *Third Rep. on Crimes Against Humanity*, 153, U.N. Doc. A/CN.4/704 (Mar. 6, 2017) [hereinafter *ILC, Third Report*]. *See ILC, Fourth Report*, *supra* note 16.

113. *See ILC, Fourth Report*, *supra* note 16, at 33.

114. *See* Int'l Law Comm'n, Comments and Observations Received from Governments, International Organizations and Others, U.N. Doc. A/CN.4/726, at 33 (2019) [hereinafter Int'l Law Comm'n Comments].

115. *Id.* at 32.

116. *Id.* at 40.

117. *See e.g.*, *Gendering the Crimes Against Humanity Treaty–Timeline of Civil Society Intervention*, MADRE, https://www.madre.org/gendering-crimes-against-humanity-treaty (last visited Apr. 4, 2022) (explaining the work of MADRE, OutRight Action International, the Human Rights and Gender Justice Clinic of CUNY School of Law, and the Center for Socio-Legal Research at the Universidad de Los Andes).

The Special Rapporteur for Crimes Against Humanity, Sean Murphy, explained that the majority of states, the Office of the High Commissioner for Human Rights, and a large number of NGOs and individuals urged the ILC either to replace the definition or to remove it completely.[118] Regrettably, the ILC chose the latter option, thereby missing an opportunity to actively incorporate gender sensitivity in international criminal law. [119] Removing the definition completely failed to reflect significant developments of the past two decades, especially in the field of international human rights law and the prosecution of sexual and gender-based violence.[120]

This example of the definition of "gender" illustrates that in some cases, outdated definitions lacking gender perspective have found their way into versions of the Draft Articles, despite the time and effort of various stakeholders in the drafting process. It also shows that such definitions can change in response to the mobilization of states and civil society.

Similarly, the definition of forced pregnancy should also be modified in the future convention on crimes against humanity. During its 74th Session, the Sixth Committee of the U.N. General Assembly took note of the latest version of the Draft Articles recommended by the ILC and included a discussion under "crimes against humanity" for its 75th Session held in the fall of 2020.[121] The Sixth Committee must now decide if and how to elaborate a future convention on crimes against humanity. The following section proposes that the Sixth Committee should do so, and that it should also change the definition of forced pregnancy as proposed by the ILC.

III. THE CRIME OF FORCED PREGNANCY IN THE FUTURE CONVENTION ON CRIMES AGAINST HUMANITY: GENDER-PERSPECTIVE CRITICISM

Three arguments support modifying the definition of the crime of forced pregnancy in a future convention on crimes against humanity. First, the additional intention to alter the ethnicity of a group or to carry out other

118. *ILC, Fourth Report*, *supra* note 16, at 34–35.

119. *See* U.N. GAOR, Int'l Law Comm'n, 71st Sess., 3468th mtg., at 5, U.N. Doc. A/CN.4/SR.3468, at 5 (2019) (reflecting the new official version of the Draft Articles, adopted May 2019, without the definition of "gender").

120. *See* discussion *infra* Section 3.3 (analyzing the ILC's missed opportunity to engage and synchronize with developments in international human rights law regarding gender-mainstreaming and sexual and gender-based violence).

121. Int'l Law Comm'n, Rep. on the Work of its Seventy-First Session, U.N. Doc. A/C.6/74/L.21 (2019). The 75th session of the Sixth Committee of the U.N. General Assembly was held in 2020. *See* G.A. Sixth Comm. on Crimes Against Human., Rep. on Overall Work Program Recommendation by the Bureau, U.N. Doc. A/76/474 (Nov. 18, 2021) [available at: https://www.un.org/en/ga/sixth/75/provisional_programme_of_work.pdf] (last visited Apr. 4, 2022).

grave violations must be removed, given that a main objective of the future convention should be to enhance accountability for crimes against humanity. Second, the caveat to national laws must also be removed, as it serves no purpose in an international criminal law instrument. Third, the additional intention and the caveat must be removed, as they do not align with developments of international human rights law and the growing recognition that international instruments should be drafted in accordance with gender-sensitive practices. Each argument is examined in turn in the following subpart.

A. THE ADDITIONAL INTENTION OF THE PERPETRATOR

In order to successfully prosecute any crime against humanity in the Rome Statute, the Office of the Prosecutor must prove that the perpetrator had the knowledge that the conduct was part of, or the intention that it be part of, a "widespread or systematic attack directed against a civilian population."[122] The crime of forced pregnancy, in contrast to all other crimes of sexual violence, also requires an additional intention either to affect the ethnic composition of a group *or* to carry out other grave violations of international law.[123]

This additional intent requirement fosters gender biases and institutionalizes sexist behavior against women and girls in the field of international criminal law,[124] and should therefore be removed from the future convention. This subpart explains why the first intent alternative (i.e., to modify the ethnic composition of a group) affects the status of women as victims in their own rights. It then shows how the second intent alternative (i.e., the intent to commit other grave violations of international law) perpetuates the incorrect presumption that reproductive violence is a crime of 'lesser' gravity that cannot be prosecuted independently.

1. The intention of affecting the ethnic composition of any population

The first alternative for the Office of the Prosecutor to successfully prosecute forced pregnancy as a crime against humanity under the Rome Statute is to prove that the perpetrator wanted to affect the ethnic composition of a group.[125] This additional requirement, however, has a pervasive effect. First, it maintains a lack of accountability for sexual and gender-based crimes. Second, it perpetuates the idea that the rights of women must be considered not through the harm done to their sexual autonomy and body integrity, but rather to the 'honor' of the community to

122. *See* Rome Statute, *supra* note 14, at art. 7(1)(g)-4, ¶ 3.
123. See *id.* at arts. 7 (1) (g)-1–6).
124. Louise Chappell, *Conflicting Institutions and the Search for Gender Justice at the International Criminal Court*, 67 POL. RSCH. Q. 183, 185 (2014); INTER-AM. COMM'N ON HUM. RTS., ACCESS TO JUSTICE FOR WOMEN VICTIMS OF SEXUAL VIOLENCE IN MESOAMERICA 14 (2011).
125. Rome Statute, *supra* note 14, at art. 7(2)(f).

which they belong. Finally, this first intent alternative also blurs the identity of the legal subject protected under this crime.

i. The limitation to the fight against impunity

The first intent alternative limits the prosecution of reproductive violence at the international level to a very specific situation: when the perpetrator does not have the same ethnicity as his or her victim. The crime of forced pregnancy thus cannot be committed against members of the same ethnic group.[126] Narrowing the crime in such a way is at odds with a future convention that is explicitly aimed at enhancing the prosecution of crimes against humanity.[127] This limitation defeats the very purpose of such a convention. It also fails to focus on the very essence of the crime of forced pregnancy, namely the violation of the reproductive rights of women,[128] regardless of their ethnicity or the ethnicity of their perpetrators.

These limitations of the first intent alternative were highlighted following a request of the International Co-Prosecutors to open an investigation for the crime of forced pregnancy allegedly committed in Cambodia between 1975 and 1979.[129] The International Co-Prosecutors wanted to open an investigation under Article 5 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) concerning "other inhuman acts."[130] The prosecutors relied heavily on the definition of the Rome Statute since it represented the "common understanding under international law" of the crime of forced pregnancy.[131] In addition, since Article 9 of the Agreement between the U.N. and the Royal Government of Cambodia provided that the ECCC's jurisdiction included crimes against humanity as defined in the Rome Statute,[132] then it followed the ECCC could interpret the definition of forced pregnancy under Article 7(2)(f) of the Rome Statute.

In a 2016 decision, the Office of the Co-Investigating Judges of the ECCC held that a finding of intent to modify the ethnic composition of a group was fact-specific and aimed at responding to a particular set of

126. *Id.*

127. Draft Articles, *supra* note 15 ("Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."); *ILC, First Report*, *supra* note 88, at 11.

128. *See* Ongwen Trial Judgment, *supra* note 43, at ¶ 99 ("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.").

129. Co-Prosecutor v. Ao, Case No. 004/07-09-2009-ECCC-OCIJ, Consolidated Decision on the Request for Investigative Action Concerning the Crime of Forced Pregnancy and Forced Impregnation, ¶ 13 (Extraordinary Chambers in the Cts. of Cambodia June 13, 2016) [hereinafter Case 004, ECCC].

130. *Id.* at ¶ 20.

131. *See id.* (lending further support from the fact that the definition of the crime of forced pregnancy in the Rome Statute was also mirrored in the Statute of the Special Court for Sierra Leone).

132. *Id.* at ¶ 67.

circumstances, namely the grave violations committed against women and girls in Rwanda and Bosnia and Herzegovina.[133] The ECCC expressly noted that the "additional intent to change the ethnic composition of the population [was] unlikely to be met by the factual *circumstances relevant to forced pregnancy* during the [Democratic Kampuchea] regime [in Cambodia]"[134]—explicitly acknowledging the occurrence of forced pregnancies between 1975 and 1979.

However, the ECCC dismissed the possibility of opening an investigation, because the circumstances in Cambodia did not meet the restrictive intent to modify the ethnic composition of a group as provided under the Rome Statute's definition.[135] The ECCC was shown clear evidence that, during the Democratic Kampuchea regime, couples from the same ethnicity were forced to have sexual relations and women were forced to bring their pregnancies to term in accordance with the strategy of the regime to increase the Cambodian population.[136]

This example demonstrates how this definition of the crime of forced pregnancy fails victims. Despite evidence that Cambodian women were subject to forced pregnancies, the Court did not have jurisdiction because there was no finding of an intent to change the ethnic composition of the Cambodian population. As it stands, the first intent alternative frames the crime of forced pregnancy through a lens that fails to be gender sensitive.[137]

ii. The protection of human rights of women

The first intent alternative impedes the progress already achieved in recognizing the rights of women as individual human rights. At the time of the Diplomatic Conference (1998), violence against women was already described as being "among the most serious and pervasive human rights abuses that the international community confronts."[138] The discussions in the preparatory work leading up to the conference highlight the eagerness of the drafters to recognize the human rights of women and to address the situation.[139]

One of the goals was thus to create an international criminal institution that could effectively combat and prosecute sexual and gender-based

133. *Id.* at ¶ 69.
134. *Id.* (emphasis added).
135. *Id.*
136. Case 004, ECCC, *supra* note 129, at 119.
137. Chappell, *supra* note 37, at 6.
138. HUM. RTS. WATCH, *Women's Human Rights*, *in* HUMAN RIGHTS WATCH WORLD REPORT (1998) [available at: https://www.hrw.org/legacy/worldreport/Back-04.htm#P643_128126] (last visited Apr. 4, 2022).
139. *See* U.N. Diplomatic Conference (1998), *supra* note 61, at 120, 112 (statements of the Observer for the Asian Centre for Women's Human Rights and the Observer for the U.N. Children's Fund, respectively).

crimes.[140] However, the requirement of proof of an additional intent of the perpetrator to modify the ethnicity of a group significantly diminished the potential of success for prosecuting forced pregnancy as a crime against humanity on its own.[141] It ultimately affected the potential to develop a new gender-sensitive jurisprudence in which the human rights of women, especially their reproductive rights, would be at the focus.

This first intent alternative also dismisses the experience of women as the primary victims of this crime and fails to protect *their* rights. After all, they are the ones who have been confined and forced to bear a child, with irremediable psychological and physical effects resulting from this exploitation.[142] The legal focus should thus be placed on the protection of their reproductive rights, instead of on the impact the crime of forced pregnancy might have on the demographic composition of an ethnic group. In focusing on the effect on the ethnic composition of a group, the experience of women who are victims of forced pregnancy is cast aside, encouraging the traditional view of international jurisprudence that women are legal subjects belonging to someone else, rather than individual persons.[143]

This additional mental element fails to address the root causes of the issue of forced pregnancy and the fact that institutionalized gender imbalance has historically led to the violation of the rights of women.[144] It fosters what has been heavily criticized, both in the fields of international criminal law and of international humanitarian law, as structural domination, confining women who are victims of grave violations to their roles as mothers, wives, and members of a community.[145] The Rome Statute did not perpetuate the patriarchal language that was first used to define the harm done to women.[146] However, in adopting it, it failed to recognize

140. U.N. Diplomatic Conference (1998), *supra* note 61, at 65, 100, 107 (statements of Norway, New Zealand, and Bangladesh, respectively). *See also* Khadija Ali, *Sexual and Gender Based Crimes in International Criminal Law: Moving Forwards or Backwards?*, 9 INT'L J. OF L. AND POL. SCI. 3619, 3621 (2015).

141. Drake, *supra* note 13, at 616.

142. U.N. Hum. Rts. Council, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 43, U.N. Doc. A/HRC/31/57 (2016).

143. F.N. Aolain, *Sex-Based Violence and the Holocaust–A Reevaluation of Harms and Rights in International Law*, 12 YALE J.L. & FEMINISM 43, 78–79 (2000); Boon, *supra* note 13, at 632.

144. Chinkin, *supra* note 20, at 16; THE U.N. SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, *supra* note 23, at 48.

145. Ali, *supra* note 140, at 3619.

146. In comparison, for instance, to the language used in the Geneva Convention which prohibits outrage upon personal dignity. *See* DIANNE OTTO, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, *in* INT'L L. & ITS OTHERS 318, 322 (A. Orford ed., 2006). Another example is the provision on family honor and rights in The Hague Regulations of 1907 which implicitly prohibit violence against women. *Id.*

women as full legal agents of their own.[147] A future convention on crimes against humanity should not repeat the same mistake.

iii. The legal subject individually protected under the crime

The first intent alternative to modify the ethnicity of the group diminishes the protection of women. It raises the question: Is the crime against humanity of forced pregnancy aimed at protecting the victim of forcible maternity? Or is it rather directed at protecting the group to which she belongs?[148]

At its inception, the crime of forced pregnancy was unequivocally intended to protect women's rights. The Vienna Declaration described forced pregnancy as "violations of the human rights of *women* in situations of armed conflict,"[149] while the Beijing Declaration clearly addressed the issue as being one of *gender* and not of ethnicity.[150]

This relationship between forcible maternity and ethnicity only appeared during the drafting of the Rome Statute, when the crime was linked to the violations committed in Rwanda and the former Yugoslavia.[151] In doing so, the drafters of the Rome Statute brought together the protection of the reproductive rights of women with the protection of the ethnicity of the group to which they belonged. This change overlooked the central role of women as the primary victims of the crime.[152]

This additional mental element to modify the ethnic composition of a group does not comport with the definition of crimes against humanity; it more closely resembles the definition of genocide. Crimes against humanity encompass a broader range of crimes, which do not require the specific intent to discriminate against a specific ethnic group.[153] Only the crime of persecution requires such a discriminatory intent.[154]

The intent to affect the ethnicity of the group is even harder to understand when no other sexual or gender-based crime defined as a crime against humanity requires such an intent. It is true that crimes against

147. Charlesworth, *supra* note 26, at 387.

148. Drake, *supra* note 13, at 597.

149. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 38, U.N. Doc. A/CONF.157/23 (June 25, 1993) (emphasis added) [hereinafter *Vienna Declaration*].

150. *Beijing Declaration*, *supra* note 1, at ¶ 142(c) (emphasis added).

151. In fact, the first draft of the Rome Statute did not mention any specific definition of forced pregnancy. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Commission on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2 (Apr. 14, 1998). *See also*, U.N. Diplomatic Conference (1998), *supra* note 61, at 162.

152. Drake, *supra* note 13, at 616.

153. William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703,1716–17 (2006); *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, 2015, I.C.J. Rep., U.N. Sales No. 1077.

154. Rome Statute, *supra* note 14, at art. 7(1).

humanity may often represent early warning signs of genocidal intent.[155] Targeting the ethnic composition of a group, however, is not generally the main purpose of perpetrators of crimes against humanity. As William Schabas states, "[c]rimes against humanity can be used to describe a much broader range of atrocities, involving violence against the person and persecution, *that fall short of physical destruction of a group.*"[156] For this reason, the definition of the crime of forced pregnancy should focus exclusively on the forcible impregnation and confinement of a woman—regardless of her ethnic group—and to prove that the perpetrator knew that this act was part of a widespread or systematic attack.

If any intent should be considered part of the crime of forced pregnancy, it should be that the perpetrator intended "an assault on the reproductive self-determination of women"[157] and "to mark rape and the rapist upon the woman's body and upon the woman's life."[158] This is unfortunately not the case under the current definition. The requirement to prove an intention to destroy a community is uncalled for and diminishes the grave violations of women's physical and mental integrity that this crime really represents. Therefore, it should be removed from the definition of a future convention.

2. The intention to carry out other grave violations of international law

The first intent alternative to affect the "ethnic composition of any population" was added by the drafters of the Rome Statute as a response to crimes committed during the conflicts in Rwanda and the former Yugoslavia.[159] Some states explained that the crime of forced pregnancy could also occur in circumstances other than an ethnic cleansing and should thus not be restricted to this context exclusively.[160] Feminist critics and the Women's Caucus for Gender Justice also lobbied during the Diplomatic Conference (1998) to put an end to impunity for reproductive violence[161] and for the definition not to be limited to situations closely related to ethnic cleansing.[162]

155. STANTON, *supra* note 90, at 349.
156. Schabas, *supra* note 153, at 1716–17 (emphasis added); Boon, *supra* note 13, at 663.
157. Copelon, *supra* note 20, at 263.
158. *Id.*
159. U.N. Diplomatic Conference (1998), *supra* note 61, at 161.
160. Grey, *supra* note 2, at 920; Bedont & Hall-Martinez, *supra* note 69, at 74.
161. *Women Caucus Advocacy in ICC Negotiations: The Crime of 'Forced Pregnancy,'* WOMEN'S CAUCUS FOR GENDER JUST. (June 26, 1998), http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/rome/forcedpreg.html (last visited Apr. 4, 2022).
162. *See* Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, 2 WOMEN AND INT'L HUM. RTS. L. 3, 15–16 (1999); Grey, *supra* note 2, at 921–922; Bedont & Hall-Martinez, *supra* note 69, at 72–73.

Accordingly, the solution to expand the definition was the addition of the mental element of "carrying out other grave violations of international law" to the crime of forced pregnancy.[163] This represented a compromise between the states that wanted to ensure that reproductive violence would be included in the Rome Statute and those that feared an overly broad definition.[164]

While the *purpose* of broadening the intention is welcome, its *effect* is not. Requiring this intention first reduces the crime of forced pregnancy to a "lesser" crime, which must include the intention to perpetrate other grave violations of international law. It signals the crime is not considered egregious enough to be worth prosecuting on its own. This second intent alternative further perpetuates the idea that, under international criminal law, sexual and gender-based crimes are not a priority on the prosecutor's agenda.

i. The disregard of the experience of victims

Far from being objective, the second intent alternative reflects gendered biases and perpetuates a male-dominant viewpoint of international law, which has traditionally disregarded the experience of women in policymaking.[165] For one, the definition of the crime does not accurately take into account the harm suffered by the victims of this crime. It still gives the negative impression that forcing a woman to be pregnant, even when conducted in a widespread and systematic manner, is not a violation serious enough to be prosecuted on its own. It indicates that international law remains unable to effectively protect the rights of women,[166] since even such a core violation of the reproductive rights of women is not *in itself* considered a "grave violation."[167]

Moreover, the definition disregards the direct consequences that a forced pregnancy has on the autonomy of a woman and on her dignity. Confining a forcibly impregnated woman violates the bodily dignity and mental integrity of that person, which are two fundamental rights.[168] In

163. Drake, *supra* note 13, at 598.
164. Grey, *supra* note 2, at 921–22; Boon, *supra* note 13, at 666.
165. Chappell, *supra* note 124, at 185.
166. The Women's Caucus for Gender Justice tried to mainstream gender during the drafting process of the Rome Statute to overcome the incapacity of international humanitarian law to effectively protect women. Pam Spees, *Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28(4) SIGNS 1233, 1239 (2003). The group wanted to make sure that the gravity of sexual and gender-based violence would be fully recognized and prosecuted under international criminal law. *Id.*
167. Boon, *supra* note 13, at 627.
168. *See* International Covenant on Civil and Political Rights *adopted* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1987), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976). *See also* U.N. Hum. Rts. Comm., General Comment 20 on Article 7, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (1994). Int'l Law Comm'n Comments, *supra* note 114, at 33.

addition, the definition overlooks the physical and mental harm a forced pregnancy has on the victim practically. An unwanted pregnancy can have extremely damaging long-term effects on the physical and mental health of a woman.[169] A confinement can lead to "morbidity and ill-health, as well as negative mental health outcomes."[170]

The physical and mental harms caused by the act of forcing a woman to bear a child are far more severe than those caused by other crimes against humanity. For instance, the effects of forced pregnancy share similarities with the effects caused by torture,[171] which is also prohibited under Article 7(1)(f) of the Rome Statute.[172] The Special Rapporteur on torture and ill-treatment, Juan Méndez, reported that the Committee Against Torture had been concerned about restrictive access to reproductive rights, including the right to abortion, because the denial of reproductive health causes "tremendous and lasting physical and emotional suffering inflicted on the basis of gender."[173]

For these reasons, the crime of forced pregnancy should be in and of itself a grave violation of international law and should not require the additional intent of "carrying out other grave violations of international law."[174] This second intent alternative should be removed from a future convention on crimes against humanity.

ii. Fostering the belief that sexual violence is not worth being prosecuted

"I've got ten dead bodies; how do I have time for rape? That's not as important." [175] This comment is an example of the type of comments that were made by some members of the investigating team in the early years of the ICTY.[176] This example from the 1990s demonstrates how sexual crimes were considered to be lesser crimes by members of the investigation and prosecution team. At that time, sexual violence was not deemed a priority, but rather viewed as an inevitability of war.[177] Fortunately, the case law of certain ad hoc tribunals later changed this stereotype and adopted a

169. Grey, *supra* note 2, at 928.
170. U.N. Secretary-General, *Rights of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 21, U.N. Doc. A/66/254 (Aug. 3, 2011).
171. Juan E. Méndez (Special Rapporteur), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, ¶ 50, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).
172. Rome Statute, *supra* note 14, at art. 7(1)(f).
173. *Id.* These concerns were also shared by the U.N. Human Rights Council. U.N. Hum. Rts. Council, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, ¶ 8 U.N. Doc. CCPR/C/GC/36, (2018).
174. Rome Statute, *supra* note 14, at art. 7(2)(g).
175. Kuo, *supra* note 32, at 310–11.
176. *Id.*
177. Boon, *supra* note 13, at 628.

gender-sensitive approach for the first time in the history of international criminal law.[178]

This article recognizes the support the Rome Statute has provided in the fight against impunity for sexual crimes over the past two decades and the support it still provides today.[179] Yet it is difficult to comprehend why the crime of forced pregnancy, as part of all the crimes against humanity listed in Article 7 of the Statute, is the only one requiring a higher level of intent.[180] To mirror its definition of forced pregnancy in a future convention would entrench the perception that violations of the reproductive rights of women are not "grave" enough to be prosecuted in an international criminal legal forum without an additional intention to carry out another violation.[181] A gender-sensitive approach shows that this crime represents a grave "assault on the reproductive self-determination of women,"[182] and this grave violation of human rights should be reflected in the definition of the crime.

As confirmed by the Ongwen Trial Judgment when examining the crime of forced pregnancy, however, the second intent alternative is a prerequisite to the crime of forced pregnancy.[183] While this case represents an important precedent and may encourage new prosecutions of the crime in the future,[184] the ruling of the Chamber reveals weaknesses of the definition. Given the current definition in the Rome Statute, the judges of the Ongwen Trial Judgment could not conclude that placing women who become pregnant as a result of rape under close surveillance[185] and therefore could not give them the free choice to decide whether to continue their pregnancy could itself constitute a grave violation of international law.[186] In order to do so the prosecutor had to have successfully proven that Mr. Ongwen also intended to submit these women to *other* violations of human rights—including the crimes of forced marriage, torture, rape, or sexual slavery.[187]

In short, a direct violation of the reproductive rights of women would not represent a grave violation of international criminal law based on the definition in the Rome Statute and its subsequent interpretation by the Ongwen Trial Judgment. If the alleged perpetrators did not intend to use women as their forced wives, did not intend to rape them, did not intend to

178. *See also* Copelon, *supra* note 20, at 247.
179. See, for instance, the landmark decisions of the ICC regarding sexual and gender-based violence. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, (July 8, 2019); *Al Hassan* case, ICC, *supra* note 11.
180. Drake, *supra* note 13, at 619.
181. Grey, *supra* note 3, at 915.
182. Copelon, *supra* note 20, at 263.
183. Ongwen Trial Judgment, *supra* note 43, at ¶ 101.
184. Grey, *supra* note 2, at 930.
185. Ongwen Trial Judgment, *supra* note 43, at ¶ 3058.
186. Ongwen, Pre-Trial Judgment, *supra* note 44, at ¶ 99.
187. Ongwen Trial Judgment, *supra* note 43, at ¶ 3061.

enslave them (with or without a sexual component), or did not intend to torture them, the victims would be unlikely to succeed in bringing forth forced pregnancy charges.[188]

This interpretation fosters the idea that reproductive violence cannot be prosecuted on its own. Instead of encouraging the prosecution of the crime of forced pregnancy, the requirement to prove that the perpetrator had the intent of committing another grave violation encourages victims to bring cases of forced pregnancies as the aggravating consequences of another grave violation.

This path was taken in the *Brima* case at the Special Court for Sierra Leone.[189] In this case, women, so-called "bush wives," were forced to marry rebels and to conduct domestic chores for them while being repeatedly sexually abused.[190] Pregnant victims were then prevented from getting abortions.[191] Despite clear evidence of forced pregnancies, the prosecution decided not to raise charges for this crime (as prohibited in Article 2(g) of the Special Court for Sierra Leone Statute).[192] Rather, the fact that women were forcibly made pregnant was deemed to be an inherent consequence of forced marriage or sexual slavery.[193]

As a consequence of this case and others, prosecutions and sanctions for the crime of forced pregnancy as a crime against humanity have been largely missing from the jurisprudence of international tribunals.[194] This can be partially explained by the legal gap in the constitutive statutes of these international tribunals, which do not expressly prohibit this crime.[195] Another reason for this exclusion is that crimes related to reproductive

188. *Id.* at ¶ 2726.

189. Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment (June 20, 2007).

190. Prosecutor v. Brima, Case No. SCSL-04-16-T, Concurring Opinion of Judge Sebutinde (June 20, 2007).

191. Prosecutor v. Brima, *supra* note 190, at ¶¶ 1080–1081.

192. *Id.*

193. *Id.* at ¶ 1114. *See also* Prosecutor v. Brima, *supra* note 189, at ¶ 579; Prosecutor v. Brima, Case No. SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), ¶ 587 (June 20, 2007) (considering the constant sexual abuses of the bush wives, including the forced pregnancies, as an inherent component of forced marriages).

194. *See* discussion *supra* note 2.

195. In fact, the 1945 Charter of the International Military Tribunal (Nuremberg Charter), the 1946 Charter of the International Military Tribunal for the Far East (Tokyo Charter), the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (and its updated version of 2009), and the 1994 Statute of the International Tribunal for Rwanda do not prohibit the crime of forced pregnancy. *See e.g.*, Prosecutor v. Gagovic, Case No. IT-96-23, Indictment, ¶¶ 9.3, 9.13 (June 18, 1996); Prosecutor v. Karadzic, Case Nos. IT-95-5-R61 & IT-95-18-R61, Review of Indictments, ¶ 94 (June 27, 1996). Hence, victims of forced pregnancies had to be content with a mere acknowledgement from the Prosecutor that such crimes had been committed against them, without the possibility of raising charges. *Id.*

violence have been rarely prosecuted on their own.[196] To avoid this situation, the new convention should not require a separate intent to commit other grave violations, and should instead encourage the prosecution of the crime independently.

The shortcomings of the current definition of the crime are thus apparent. Criminal courts and tribunals have been reluctant to either investigate or prosecute forced pregnancy as a separate offense from another grave violation. This situation has created a culture of impunity, leaving an important gap in which perpetrators of reproductive violence have not been sanctioned for their crimes, despite evidence of the increasing occurrence of these crimes.[197] The concern of feminist groups that the current definition would create a crime "for which accountability could be easily avoided by utilizing loopholes,"[198] and for which "the qualifications on gender-based crimes would create confusion and complications within the court when victims sought redress,"[199] has unfortunately materialized.

For the above reasons, the additional intent "of affecting the ethnic composition of any population or carrying out other grave violations of international law"[200] should be removed from the definition of a future convention on crimes against humanity. Women activists advocated in the late 1990s for a definition of the crime of rape that would better reflect the harm caused to women and insisted that "rape is an atrocity whatever the purpose."[201] The same holds true here: forced pregnancy is an atrocity, whatever additional intent the perpetrator may have had.

B. THE CAVEAT TO NATIONAL LAW

The definition of forced pregnancy as a crime against humanity was also criticized for the caveat added at the very end of Article 7(2)(f) of the Rome Statute (and again mirrored in the Draft Articles proposed by the ILC), which states that "[t]his definition [of forced pregnancy] shall not in any way be interpreted as affecting national laws relating to pregnancy."[202]

196. As rightfully stated by Dieneke De Vos, "[h]istorically, however, there have only been few instances where such violence has been independently recognized and considered. This left reproductive violence relatively invisible in international law. Nonetheless, current developments reflect a growing recognition that reproductive violence constitutes a distinct form of violence that should be independently recognized as violating specific, individual rights and may also constitute (international) crimes in certain circumstances." De Vos, *supra* note 2.

197. *See e.g.*, HUM. RTS. WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT 40 (2003); SHUBIN, *supra* note 9, at 9–10; LADISCH, *supra* note 2; U.N. High Comm'r for Hum. Rts., *supra* note 9; U.N. Hum. Rts. Council, *supra* note 7.

198. SHUBIN, *supra* note 9, at 8–9.

199. *Id.* at 9.

200. Rome Statute, *supra* note 14, at art. 7(2)(f).

201. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 223 (2000).

202. Rome Statute, *supra* note 14, at art. 7(2)(f).

First, this part criticizes the unjustifiable fears of certain states, which have created a definition of a crime that perpetuates patriarchal patterns and disrespects the reproductive rights of women. Second, it argues that this reference to domestic legislation does not reflect the spirit of the Statute (and international criminal law more generally) and subjects the reproductive rights of women to cultural relativism.

1. The unrelated (and unjustified) discussion about abortion

The definition of the crime of forced pregnancy in the Rome Statute was drafted to secure a compromise between the states participating in the Diplomatic Conference (1998), and thus, in its final version, it ultimately failed to protect women against human rights violations.[203] Certain like-minded states and the Holy See (i.e. the Vatican) were openly against reproductive choices for women, and saw in the codification of the crime of forced pregnancy as a crime against humanity a possible threat to national laws prohibiting abortion or other forms of contraception.[204]

However, as was pointed out by the Women's Caucus for Gender Justice and reiterated twenty years later by the Global Justice Center, there is no reason under international criminal law to link the crime of forced pregnancy—which is a severe violation of body integrity and autonomy of women—to domestic laws regulating abortion.[205] States with national legislation on the termination of pregnancy are not per se violating international criminal law,[206] and any reference to that national legislation should have been discarded or deemed irrelevant.

Rather, only an approach to the fundamental rights of women lacking in gender sensitivity could lead to an exception shielding the legislation of states inconsistent with the prohibition of committing the heinous act of confining a woman forcibly made pregnant to carry a child against her will.[207] This concession in favor of national legislation for a crime that *only* affects women shows how patriarchal mentalities have dominated the

203. *See* Boon, *supra* note 13, at 666.

204. U.N. Diplomatic Conference (1998), *supra* note 61, at 148, 160, 163, 166 (statements of Saudi Arabia, Libyan Arab Jamahiriya, Islamic Republic of Iran, respectively).

205. *Women Caucus Advocacy in ICC Negotiations: The Crime of 'Forced Pregnancy,' supra* note 143; GLOBAL JUST. CTR., SUBMISSION TO THE INTERNATIONAL LAW COMMISSION: THE NEED TO INTEGRATE A GENDER-PERSPECTIVE INTO THE DRAFT CONVENTION ON CRIMES AGAINST HUMANITY 6 (2018) [available at: https://www.globaljusticecenter.net/blog/19-publications/1011-submission-to-the-international-law-commission-the-need-to-integrate-a-gender-perspective-into-the-draft-convention-on-crimes-against-humanity] (last visited Apr. 4, 2021).

206. The Rome Statute's Preamble only provides for the importance of prosecuting the "most serious crimes of concern to the international community as a whole." Rome Statute, *supra* note 14. The ones that have "threaten the peace, security and well-being of the world." *Id.* Accordingly, a national law preventing abortion in some circumstances would not necessarily fall within the realm of international criminal law.

207. Markovic, *supra* note 13, at 447–48. Boon, *supra* note 13, at 639–40.

development of international criminal law generally[208] and influenced the drafting of the Rome Statute specifically.

Significantly, a parallel can be made between how the crime of rape was first conceptualized (i.e., as a crime against the "honor" of the family, not a crime of physical violence against the victim[209]) and how the crime of forced pregnancy was framed in 1998 by considering national laws on abortion.[210] In both cases, the individual rights of women were overlooked to give precedence to concerns that were not directly articulated in relation to the physical[211] and mental harms[212] of the victims themselves. As was remarked upon by the representative of Jordan during the U.N. Diplomatic Conference (1998), "abortion was not the issue [in the discussion]; 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."[213]

The crime of forced pregnancy does not extend only to situations in which the pregnancy is the result of a rape. The ICC was created to prosecute the most egregious crimes, and to accept that an exception could be made for the crime of forced pregnancy to consider domestic laws encourages impunity. It also ignores the impact that sexual and gender-based crimes have on victims.

2. The rejection of cultural relativism under international criminal law

The explicit exception regarding the national legislation of states opens the door to cultural relativism[214] and raises concerns about how gender-sensitive approaches can be integrated into international criminal law regarding sexual and reproductive violence against women. First, the inclusion of this caveat contrasts other crimes prohibited by the Rome Statute, which do not make any reference to national laws.[215] Second, it

208. *See* Askin, *supra* note 162, at 295. In her analysis, Askin reviews the lack of references that were made to women in international criminal law documents prior to the creation of the Rome Statute. She concludes that "primarily men neglected to enumerate, condemn, and prosecute these [sexual and gender-based] crimes." *Id.*

209. Copelon, *supra* note 20, at 249.

210. The caveat refers to "national laws relating to pregnancy." Rome Statute, *supra* note 14, at art. 7(2)(f).

211. *See e.g.*, Rome Statute, *supra* note 14, at art. 7(2)(e). The crime of torture which is defined as the "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused."

212. *Id.*

213. U.N. Diplomatic Conference (1998), *supra* note 61, at 332.

214. Cultural relativism is defined as "[t]he position that there is no universal standard to measure cultures by and that all cultures are equally valid and must be understood in their own terms." *Cultural Relativism*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095652905 (last visited Apr. 4, 2022).

215. As rightfully stated by Milan Markovic, "[t]his apparent deference given to national law in forced pregnancy prosecutions is in stark contrast to how other crimes are prosecuted by the ICC. As a general matter, the ICC will only apply domestic law as a last resort and after having examined the ICC Statute and international materials. A worrying possibility is

compels the ICC to evaluate whether the defendant acted in violation of his or her own domestic laws, creating a "'state action' exception in forced pregnancy cases."[216] Finally, and most importantly, like-minded states proposed a definition of crimes against humanity that would take into account cultural, religious, and legal differences.[217] However, their proposition was rejected during the discussions[218] because states wanted to prevent the integration of cultural relativism into the provisions of the Statute.[219]

In the words of the Pre-Trial Chamber of the ICC, "[t]he international community has declared itself in favor of a right to crimes against humanity that would be the same for all humanity."[220] Unfortunately, the voices of a few states and the Holy See—which did not accept autonomous reproductive rights for women primarily for cultural and religious reasons—were heard at the expense of the fundamental rights of women.[221] These reasons might have some cultural or religious values; however, these are exactly the same values intrinsically linked to cultural relativism that were rejected in the Statute in the first place.[222] These values should not have influenced the legislative process, which had the explicit purpose of prohibiting the "most serious crimes of concern to the international community as a whole."[223]

While international criminal law should sometimes consider multiculturalism and find compromises between states with different beliefs,[224] specific references to national laws are completely unnecessary. In response to the fear expressed by several states that an activist court could be too progressive or could attempt to impose "Western standards" on their national laws,[225] the drafters of the Rome Statute made it unequivocal that the ICC would play a complementarity role to national

that the ICC might have to apply national abortion laws even when they are fundamentally discriminatory or sexist." Markovic, *supra* note 13, at 448.

216. *Id.* at 447.

217. Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, and United Arab Emirates, Proposal Concerning the Elements of Crimes Against Humanity, U.N. Doc PCNICC/1999/WGEC/DP.39 (Dec. 3, 1999).

218. DARRYL ROBINSON, *The Elements of Crimes Against Humanity, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57, 67–68 (Roy S. Lee & Hakan Friman eds., 2001).

219. *Id.* at 68.

220. « La communauté internationale s'est prononcée en faveur d'un même droit des crimes contre l'humanité pour toute l'humanité » (author's translation). Al Hassan case, ICC, *supra* note 11, at ¶ 181.

221. Boon, *supra* note 13, at 666. *See also* Markovic, *supra* note 13, at 448.

222. Robinson, *supra* note 218, at 68.

223. U.N. Secretary-General, Preamble, in Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

224. Steains, *supra* note 50, at 365–69.

225. U.N. Diplomatic Conference (1998), *supra* note 61, at 116, 117 (statements of Iraq and Yemen, respectively). *See also* Robinson, *supra* note 218, at 69.

jurisdiction.[226] Thus, there is no reason that explains why the caveat to national law was included in the definition. This caveat concedes that national laws on reproductive rights can (and will) trump the obligations that states have under international criminal law regarding this crime.[227]

Given this exception, the crime of forced pregnancy, which primarily affects women who were absent from the negotiations table in the 1990s, seemingly does not offer the same level of protection as the other crimes found under Article 7 of the Rome Statute, which concern both men and women.[228] This caveat should thus be removed from a future convention on crimes against humanity, because the direct violation of fundamental rights of women should not be permitted under any circumstances.

C. THE LACK OF HARMONIZATION WITH INTERNATIONAL HUMAN RIGHTS LAW

The strong criticisms expressed by states, international organizations, and NGOs on the definition of "gender" in the proposed articles of the ILC apply equally to the definition of forced pregnancy.[229] Most of these comments pointed out that the definition of "gender" did not take "into consideration the developments of the last twenty years in the areas of international human rights law and international criminal law, particularly regarding sexual and gender-based crimes."[230]

The same holds true for the definition of the crime of forced pregnancy, which should be modified to better reflect the state of international law today. More precisely, this subpart first argues that international criminal law should be harmonized with the advancement and wide recognition of the rights of women, including their reproductive rights, as supported by international human rights law. Second, this subpart highlights the critical importance of gender mainstreaming. Lastly, this subpart explains the reasons why gender mainstreaming and the advancement of women's rights should be considered in the definition of the crime of forced pregnancy in a future convention on crimes against humanity.

1. The recognition of reproductive rights in international human rights law

The crime of forced pregnancy proved to be one of the most controversial crimes to define during the Diplomatic Conference (1998), because certain states feared it would affect their national laws.[231] These concerns transformed the definition of this crime into a political and

226. The Preamble of the Rome Statute emphasizes that the ICC will act be complementary to national criminal jurisdiction. Rome Statute, *supra* note 14.
227. Markovic, *supra* note 13, at 447.
228. Soh Sie Eng, *supra* note 73, at 327.
229. *See ILC, Fourth Report*, *supra* note 16, at 32–37.
230. Int'l Law Comm'n Comments, *supra* note 114, at 31 (statement of Belgium).
231. Ongwen Trial Judgment, *supra* note 43, at ¶ 2718.

cultural compromise. Instead, there should have been a real attempt from the international community to address violations of international human rights law, especially regarding the impact forced pregnancies have on women.[232] States should be reminded of their duty, "regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[233] The Sixth Committee of the General Assembly should not forget this obligation when shaping and drafting a future convention on crimes against humanity.

It could be argued that the definition in the Rome Statute is the result of an absence of recognition under international human rights law of reproductive rights as fundamental rights at the time of the Diplomatic Conference (1998). This argument, however, cannot be raised today. Reproductive rights are now understood to be human rights.[234] As such, they deserve the same level of protection as all others.

As early as 1968 the Proclamation of Tehran recognized the right of parents "to determine freely and responsibly the number and the spacing of their children."[235] This right was then reiterated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which 189 states are parties.[236] Out of those, only nine raised reservations regarding Article 16(1)(e), which makes a clear reference to the reproductive rights of women and men.[237] Still, the strong objections that were subsequently made by other state-parties to these reservations,[238] combined with the wide ratification of the CEDAW,[239] indicate a strong acceptance of reproductive rights by the international community as early as 1979.

However, it was only recently that sexual and gender-based violence that occurred during armed conflict was directly connected with the violation of women's human rights, including their reproductive rights.[240]

232. Soh Sie Eng, *supra* note 73, at 328, 330.

233. *Vienna Declaration*, *supra* note 149.

234. THE U.N. POPULATION FUND, DANISH INST. FOR HUM. RTS., AND U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS: A HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 13 (2014).

235. International Conference on Human Rights, *Final Act of the International Conference on Human Rights*, U.N. Doc. A/CONF.32/41, at 4 (May 12, 1968).

236. Convention on the Elimination of All Forms of Discrimination Against Women art. 16(1)(e), Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW].

237. The nine countries are Algeria, Bahrain, Egypt, Iraq, Israel, Malta, Monaco, Niger, and the United Arab Emirates. *See* CEDAW, *supra* note 236.

238. *See id.* at 16 (objections made by Denmark against the reservation made by Niger on Article 16(1)(e)); *id.* at 21 (objection made by Finland against the reservation made by Bahrain on Article 16); *id.* at 23 (objection made by France against the reservation made by the United Arab Emirates on Article 16). State Parties principally argued that the reservations made by certain states went against the object and purpose of the Convention.

239. There are currently 189 State Parties to the CEDAW. CEDAW, *supra* note 236.

240. Ted Alcorn, *Responding to Sexual Violence in Armed Conflict*, 383 THE LANCET 2034, 2034 (2014).

In fact, it was only in 1998 that the U.N. Human Rights Commission first condemned the violation of the human rights of women in situations of armed conflict, recognized them to be violations of international human rights and humanitarian law and called for a particularly effective response to violations of this kind, including forced pregnancy.[241]

In 2022, the international community also celebrated the twenty-second anniversary of the first Security Council resolution recognizing the impact of armed conflict on women and girls. This became the first Women, Peace, and Security resolution.[242] The Women, Peace, and Security resolution sought to implement an action plan to ensure the participation of women in peace negotiations and focused on incorporating a gender perspective in field operations.[243] In accordance with the Women, Peace, and Security agenda, the Security Council has stressed the importance of protecting access to reproductive health (including abortion) in armed conflicts.[244]

In 2019, however, the United States challenged the recognition of reproductive rights as human rights in the annual meeting of the Security Council on sexual and gender-based violence.[245] The United States threatened to veto the resolution if language implicitly referring to abortion as a reproductive right was used.[246] This backlash was widely contested by other members of the Security Council, including Belgium, the Dominican Republic, the United Kingdom, France and South Africa, all of whom stressed that sexual and reproductive health rights were part of the fundamental right to women's health, and should therefore be upheld.[247]

Different U.N. bodies have also consistently recognized reproductive health rights in relation to the protection and promotion of human rights.

241. Commission on Human Rights Res. 1998/5, U.N. Doc. E/CN.4/RES/1998/5, ¶ 4 (Mar. 17, 1998).

242. U.N. SCOR, 55th Sess., 4213th mtg. U.N. Doc. S/RES/1325 (Oct. 31, 2000). *See also* SARAH TAYLOR & GRETCHEN BALDWIN, INT'L PEACE INST., FOCUS ON 2020: OPPORTUNITIES FOR THE TWENTIETH ANNIVERSARY OF RESOLUTION 1325 1 (2019).

243. U.N. SCOR, 55th Sess., 4213th mtg. U.N. Doc. S/RES/1325, at 1, 5, (Oct. 31, 2000).

244. U.N. SCOR, 68th Sess., 6984th mtg. at 19, U.N. Doc. S/RES/2106 (June 24, 2013). *See* Jennifer Thomson & Claire Pierson, *Can Abortion Rights Be Integrated into the Women, Peace and Security Agenda?* 20 IFJP 350, 356–57 (2018) (explaining the Women, Peace and Security resolutions of the U.N. Security Council have been criticized for their lack of explicit references to the importance of respecting the human rights of women, including their reproductive rights, during armed conflicts).

245. U.N. GAOR, 74th Sess., 44th plen. mtg., at 12, U.N. Doc. A/74/PV.44 (Dec. 11, 2019) (statement of France).

246. U.N. SEC. COUNCIL, IN HINDSIGHT: NEGOTIATIONS ON RESOLUTION 2467 ON SEXUAL VIOLENCE IN CONFLICT (2019), [available at: https://www.securitycouncilreport.org/whatsinblue/2019/05/in-hindsight-negotiations-on-resolution-2467-on-sexual-violence-in-conflict.php] (last visited Apr. 4, 2022).

247. U.N. SCOR, 74th Sess., 8514th mtg., at 15, 20, 26, 28, 30, U.N. Doc. S/PV.8514 (Apr. 23, 2019) (statements of Belgium and South Africa).

First, the General Assembly explicitly referred to reproductive rights[248] in many of its resolutions,[249] including its most recent 2020 Global Health and Foreign Policy resolution.[250] It also reaffirmed its accord with the Beijing Platform of Actions.[251] Twenty-five years since its adoption, this platform is still relevant because it recognizes that the "human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health."[252] Even though they are non-binding, the General Assembly resolutions are a relevant tool to assess the position of states on public international law matters and can be used to observe the evolution of norms.[253] In this case, the numerous resolutions and their strong language show that states do consider reproductive rights an integral part of human rights law.[254]

Second, in its updated General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights,[255] the U.N. Human Rights Committee (UNHRC) linked the right to life to the access to safe abortion for women and girls–and thus to reproductive rights.[256] While recognizing that states can regulate abortion laws, the UNHRC stresses the fact that states should remove obstacles to reproductive health.[257] If it still imposes limitations, these limitations should be constructed with respect to women's right to life, without discrimination or arbitral interference in their privacy.[258]

Third, the evolution of the reproductive rights of women, including their right to access abortion, is worth mentioning. In the past seventy-five years, international human rights law has significantly contributed to the

248. U.N. GAOR 74th Sess., 126th plen. mtg., at 2, U.N. Doc. A/RES/74/20 (Dec. 11, 2019).

249. *See* U.N. GAOR 65th Sess., 61st plen. mtg., at 2, U.N. Doc. A/RES/65/95 (Dec. 9, 2010); U.N. GAOR 67th Sess., 53rd plen. mtg., at 11, U.N. Doc. A/RES/67/81* (Dec. 12, 2012); U.N. GAOR 70th Sess., 80th plen. mtg., at 5, U.N. Doc. A/RES/70/183 (Dec. 17, 2015); U.N. GAOR 72nd Sess., 72nd plen. mtg. at 2, 7, U.N. Doc. A/RES/72/139 (Dec. 12, 2017).

250. U.N. GAOR 74th Sess., 126th plen. mtg., at 3, U.N. Doc. A/RES/74/20 (Dec. 11, 2019).

251. U.N. GAOR 74th Sess., 50th plen. mtg. at 1, U.N. Doc. A/RES/74/128 (Dec. 18, 2019).

252. *Beijing Convention*, *supra* note 1, at ¶ 96.

253. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

254. It is to be noted, however, that some states, including the United States, have explicitly declared that these resolutions did not create a new international right for abortion. *See* U.N. GAOR 74th Sess., 126th plen. mtg., at 2, U.N. Doc. A/RES/74/20 (Dec. 11, 2019).

255. *See* International Covenant on Civil and Political Rights, *supra* note 168.

256. U.N. Hum. Rts. Council, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, ¶ 8 U.N. Doc. CCPR/C/GC/36, (2018).

257. *Id.*

258. *Id.*

enhancement of the rights of women.[259] Specifically, it has impacted how states have integrated a greater recognition for reproductive rights in their criminal and human rights frameworks.[260]

A few examples illustrate this change. In Africa, state-parties to the Maputo Protocol are required to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus."[261] The European Court of Human Rights found that forbidding a woman to have access to reproductive health services, including abortion, when the pregnancy was the result of rape amounted to "inhuman or degrading treatment."[262] In the Americas, the Committee of Experts on Violence observed that forcing a survivor of rape to carry a pregnancy against her will could constitute a form of torture.[263]

In addition, only twenty-six countries today still prohibit abortion in cases of rape.[264] As human rights law has evolved, a convention on crime against humanity should exemplify this evolution and the progress made. Since the concerns that were raised before the addition of this caveat do not hold the same relevance today, it would be unreasonable to maintain such a caveat in a definition of the crime of forced pregnancy.

Given the progression of the inclusion of reproductive rights in international human rights law, the current definition is problematic. It fails to represent the progress that has occurred over the last two decades in relation to the individual autonomy and physical integrity of women. Like the definition of gender that was heavily criticized and deemed outdated by states, the definition of forced pregnancy and the way it supersedes national laws over the protection of women is obsolete.

259. U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., WOMEN'S RIGHTS ARE HUMAN RIGHTS 3–5, U.N. Sales No. E.14.XIV.5 (2014).

260. For instance, the UNHRC urges states not to regulate reproductive rights of women in a way that would be against the rights to life of women and girls as well as other rights protected under the ICCPR. *See* U.N. Hum. Rts. Council, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, ¶ 8 U.N. Doc. CCPR/C/GC/36, (2018).

261. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 14(2)(c), *adopted* July 11, 2003, reprinted in Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and People's Rights in Africa*, 1 AFR. HUM. RTS. L.J. 40, 53 (2001).

262. P. and S. v. Poland, Case. No. 57375/08, Appeal, ¶ 56 (Oct. 30, 2012),

263. Org. of Am. States, Second Follow-up Report on the Recommendations of the Committee of Experts of the MSECVI, 111, Doc. OEA/Ser.L/II (Oct. 2014).

264. *The World's Abortion Laws*, CTR. FOR REPROD. RTS., https://reproductiverights.org/worldabortionlaws#law-policy-guide (last visited Apr. 4, 2022).

2. The promotion of gender mainstreaming in all fields of public international law

As the fundamental rights of women are increasingly recognized and protected in international law, the concept of gender mainstreaming has also gained importance in the field.[265] Emphasis has been placed on the use of gender perspective as a tool to better fight discriminatory practices and gender-biased institutions. The Security Council even recognized in its Resolution 2493 (2019) that the year 2020 presented a great opportunity to advance the rights of women and girls,[266] and urged the Secretariat and agencies of the U.N. to mainstream a gender perspective in their activities.[267] This section addresses why a definition of the crime of forced pregnancy should mainstream gender, and how it would affect both the additional intention and the national caveat.

Gender mainstreaming has been used in different circumstances: (1) during peace processes, especially during the negotiations and conclusion of peace agreements;[268] (2) in the work of the U.N., including in the resolutions passed by the Security Council,[269] the General Assembly,[270] and the Economic and Social Council (ECOSOC);[271] (3) in international law

265. Gender mainstreaming is defined as "[t]he process of assessing the implications for women and men of any planned action, including legislation, policies, or programs, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic, and societal spheres so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal is to achieve gender equality." *Gender Mainstreaming*, U.N. WOMEN, https://www.unwomen.org/en/how-we-work/un-system-coordination/gender-mainstreaming (last visited Apr. 4, 2022).

266. U.N. SCOR, 74th Sess., 8649th mtg., at 2, U.N. Doc. S/RES/2493 (Oct. 29, 2019). Most notably, the world is celebrating the 27th anniversary of the Fourth World Conference on Women in Beijing and its Platform of Actions. *See Beijing Convention*, *supra* note 1, at 51. The Beijing Platform of Actions promoted the development of policies that would mainstream gender in order to eliminate violence against women and girls, including sexual and gender-based violence. *Id.*

267. U.N. SCOR, 74th Sess., 8649th mtg., at 2, U.N. Doc. S/RES/2493 (Oct. 29, 2019).

268. J. Alvarado Cóbar et al., *Assessing Gender Perspectives in Peace Processes with Application to the Cases of Colombia and Mindanao*, 6 SIPRI INSIGHT ON PEACE & SEC. 8, 8–9, (2018).

269. *See generally* U.N. SCOR, 55th Sess., 4213th mtg. U.N. Doc. S/RES/1325 (Oct. 31, 2000); U.N. SCOR, 63rd Sess., 5916th mtg. U.N. Doc. S/RES/1820 (June 19, 2008); U.N. SCOR, 64th Sess., 6195th mtg. U.N. Doc. S/RES/1888 (Sept. 30, 2009); U.N. SCOR, 64th Sess., 6196th mtg. U.N. Doc. S/RES/1889 (Oct. 5, 2009); U.N. SCOR, 65th Sess., 6453rd mtg. U.N. Doc. S/RES/1960 (Dec. 16, 2010); U.N. SCOR, 68th Sess., 6984th mtg. U.N. Doc. S/RES/2106 (June 24, 2013); U.N. SCOR, 68th Sess., 7044th mtg. U.N. Doc. S/RES/2122 (Oct. 18, 2013); U.N. SCOR, 70th Sess., 7533rd mtg. U.N. Doc. S/RES/2242 (Oct. 13, 2015); U.N. SCOR, 74th Sess., 8514th mtg. U.N. Doc. S/RES/2467 (Apr. 23, 2019); U.N. SCOR, 74th Sess., 8649th mtg. U.N. Doc. S/RES/2493 (Oct. 29, 2019).

270. Taylor & Baldwin, *supra* note 242, at 1 n.2.

271. *See generally*, Economic and Social Council Res. E/RES/2015/6 (July 13, 2018).

making processes;[272] (4) in the course of criminal investigation;[273] and (5) by international criminal courts in reparation orders.[274]

Yet, the decision to replicate the definition of forced pregnancy from the Rome Statute in the Draft Articles represents a failure of the ILC to effectively mainstream gender in its process.[275] An important aspect of gender mainstreaming is the inclusion of a gender-sensitive approach during the policy-making process.[276] This notably means recognizing the unique experience of women in armed conflicts.[277]

Against this backdrop, the adverse impact of forced pregnancies on the victims is unequivocal. There is the extreme physical pain suffered by most victims of sexual violence.[278] In addition, the legal representatives of victims explained, when discussing the harm suffered by the victims in the *Ongwen* case, that:

> The most affected group [of women who suffered mental distress] is the women who returned from the bush with children [i.e., the women who returned to their village after the abduction]. This may be in part related to the sexual violence they had experience[d]: Sexual violence survivors are particularly likely to suffer ongoing mental health difficulties . . . However, it is also likely due to the particular problems of shame and stigma experienced by women who returned to communities with children born in the [Lord Army

272. U.N. WOMEN, GENDER MAINSTREAMING: A GLOBAL STRATEGY FOR ACHIEVING GENDER EQUALITY & THE EMPOWERMENT OF WOMEN AND GIRLS 2 (2020); *Policy Areas of the Council of Europe*, COUNCIL OF EUR., https://www.coe.int/en/web/genderequality/policy-areas-of-the-council-of-europe (last visited Apr. 4, 2022).

273. *See generally* OFF. OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES, INTERNATIONAL CRIMINAL COURT 1 (2014) [available at: https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes—june-2014.pdf] (last visited Apr. 4, 2022).

274. *See* Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence of Judge Pangalangan, ¶ 34 (Sept. 27, 2017).

275. *See* Chappell, *supra* note 37, at 20. It is important to note, however, that, except for the definition of the crime of forced pregnancy, the definition of the crimes against humanity found in the Rome Statute (and now proposed in the Draft Articles by the ILC) is successfully mainstreaming gender. More precisely, the list of sexual crimes prohibited is not exhaustive. It therefore gives the possibility for future prosecutors to raise charges for other types of sexual and gender-based crimes that have not been foreseen yet. The definition also expressly recognizes that gender-based violence can also amount to crimes against humanity under certain circumstances (e.g., the crime of persecution).

276. *See* OFF. OF THE PROSECUTOR, *supra* note 273, at 3. It encourages the relevant stakeholders to better understand the "differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions […]" and enables policymakers, negotiators, practitioners, advocates, and academics to better grasp "the crimes, as well as the experiences of individuals and communities in particular society." *Id.*

277. Chappell, *supra* note 37, at 6.

278. Gaggioli, *supra* note 27, at 522.

> Resistance], as well as consequential social problems such as an inability to marry or access land.[279]

The crime of forced pregnancy has important adverse consequences on the victim, both physical and mental. Conflict-related forms of sexual violence, including forced pregnancies, are used as weapons of war to attack or destabilize a group.[280] However, the definition of the crime should not overlook the deep social, financial, and emotional consequences this crime has *on the victim herself.* A definition that fails to grasp this impact dismisses the experience of women and is insensitive to their reality.[281]

This, however, is the consequence of the Draft Articles, as they establish the requirement to prove in the first intent alternative that forced pregnancies are intended to affect the ethnic composition of a population.[282] This intent requirement perpetuates the perception in international criminal law that a violation against a woman is primarily a violation against the ethnic group to which she belongs.[283] A gender mainstreaming approach calls for eliminating this first intent alternative to focus solely on the experience of the victim.

Gender mainstreaming also calls for deletion of the second intent alternative to carry out other grave violations. Prior to the jurisprudence of the ICTR, the definition of rape "failed to recognize the violent and individual aspect of rape."[284] Similarly, the current definition of forced pregnancy fails to capture the very essence of this crime. As stated by the Ongwen, Pre-Trial Decision, this crime is about "placing the victim in a position in which she cannot choose whether to continue the [involuntary] pregnancy."[285] The definition of the crime should thus only focus on the violation of her reproductive rights without requiring another intent.

The experience of victims of forced pregnancy should not be undermined with the requirement of an often-irrelevant intention. Especially when this additional intention does not relate to her fundamental rights, nor does it accurately acknowledge her suffering. To ensure that the reality experienced by victims of sexual violence is not overlooked, a gender-sensitive perspective requires that the definition accurately reflect the harm that forced pregnancy inflicts on women.[286]

Furthermore, a gender mainstreaming approach requires deletion of the exceptions allowed for national laws. As emphasized by the Global Justice

279. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Victims' Closing Brief, ¶ 373 (Mar. 31, 2019).
280. U.N. SCOR, 63rd Sess., 5916th mtg. U.N. Doc. S/RES/1820 (June 19, 2008).
281. COTTIER, ET AL., *supra* note 47, at 434.
282. Draft Articles, *supra* note 15.
283. Chappell, *supra* note 37, at 7.
284. *Id.* at 11.
285. Ongwen Trial Judgment, *supra* note 43, at ¶ 99.
286. WOMEN'S INITIATIVES FOR GENDER JUST., THE HAGUE PRINCIPLES ON SEXUAL VIOLENCE 5 (2019).

Center in its submission to the ILC, "forced pregnancy is the only act which includes a caveat on national laws, which arbitrarily differentiates between forced pregnancy and other acts constituting crimes against humanity."[287]

This exception inevitably raises the question of whether the ILC evaluated the trauma experienced by the victims of such a crime before integrating the caveat in the Draft Articles. The mere fact that the prohibition of reproductive violence against women in international criminal law still depends on the national laws of each state fails to seriously recognize the harm done to women victims of forced pregnancy. Neglecting to incorporate gender perspective could lead to reproduction of the national caveat to the definition in a future convention.[288]

In summary, the Sixth Committee should ensure to reflect the progress made in international human rights law to ensure the effectiveness and continuity of a future convention on crimes against humanity. It should not overlook the increased recognition of the reproductive rights of women. In light of the norms and values of the present era, the Sixth Committee should also include a gender-sensitive approach in its drafting process.

IV. CONCLUSION

As Louise Chappell writes, "[o]pportunities can also arise from the creation of new institutions, such as the introduction of a bill of rights or women's policy agencies in the bureaucracy."[289] According to Chappell, "institutions are dynamic rather than static entities."[290]

These statements encapsulate an overall theme of this article: the Sixth Committee's consideration of a future convention highlights that change is possible. This article has shown that various organs of the U.N. and NGOs have already largely agreed on the importance of consciously drafting policies that mainstream gender to promote and protect the rights of women. In the drafting of a future convention, the Sixth Committee must now include women, as gender mainstreaming begins with a greater implication of women in decision-making processes.[291]

This article has presented three arguments supporting why the definition proposed by the ILC should be modified in a future convention on crimes against humanity. First, the additional intent requirement is gender biased. It fails to effectively protect the rights of women, does not focus on the gravity of the harms done to the victim personally, and

287. SHUBIN, *supra* note 9, at 5.
288. Chappell, *supra* note 37, at 11.
289. *Id.* at 4.
290. *Id.*
291. *See generally* Taylor & Baldwin, *supra* note 242; Paola Profeta, *Gender Equality in Decision-Making Positions: The Efficiency Gains*, 52 INTERECONOMICS 34 (2017); S.C. Res. 2493, ¶ 3 (Oct. 29, 2019); U.N GAOR, 26th Sess., 1st plen. mtg. U.N. Doc. A/56/PV.1 (May 25, 2017).

perpetuates the misconception that sexual and gender-based crimes are violations of lesser gravity in the eyes of international criminal law.

Second, the caveat accommodating national laws that was added at the end of the definition is the clear product of a political compromise that was made at the expense of the protection and recognition of women's reproductive rights. None of the violations defined in a future convention on crimes against humanity should allow for an exception for states' national jurisdiction. There is no place for cultural relativism in a future convention.

Third, the field of international criminal law should be harmonized with the other fields of public international law, especially international human rights law. To overcome potential future criticisms, such as the ones that were raised against the definition of "gender," both the additional intent requirement and the caveat for national laws must be removed from the definition of the crime of forced pregnancy.

Accordingly, the proposed definition in a future convention should be as follows: "*'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant*." While displaying gender sensitivity, the definition would be narrow enough to ensure that states that do not legalize abortion do not fear prosecution for crimes against humanity. This definition focuses on cases where the alleged perpetrator, aware that the victim was impregnated by force, unlawfully confines the woman as part of a widespread and systematic attack.

Today, it still seems unrealistic to propose a definition of the crime of forced pregnancy that would be broad enough to condemn measures that actively prohibit women from accessing abortion care in cases of forced pregnancy or other assault.[292] Nevertheless, the Sixth Committee should be inspired by The Hague Principles on Sexual Violence, which have proposed a definition of the crime of forced pregnancy focusing on the act of depriving someone of reproductive autonomy.[293] Since these principles are the result of thorough work by civil society and the collection of views and experience from practitioners, academics, and self-identified survivors of sexual violence, these principles should be seriously taken into account to assess how sexual and gender-based violence can be integrated in a future convention.[294]

This proposed definition does not accord deference to national laws. Under no circumstances should a direct violation of the reproductive autonomy of a woman be deemed legal, especially not in an international convention. Since most states today have legalized abortions for survivors

292. Grey, *supra* note 20, at 192 (noting this proposition had not even been put forward by feminist groups during the drafting process of the Rome Statute).
293. The Hague Principles, *supra* note 286, at 18.
294. *See id.* at 105.

of rape,[295] there is no longer a place for compromise on this issue. The increased recognition of the reproductive rights of women further supports this argument.[296] Alternatively, if the exception for national laws is not removed, a further explanation of what it means should be added. As Valerie Oosterveld proposes, this exception should be clarified to better understand how exactly national laws can limit the prosecution of the crime.[297]

This article took into account the arguments raised in favor of replicating the current definition of crimes against humanity in a future convention. It acknowledged the possibility that this could ensure coherence between international criminal law instruments and national jurisdictions. This article also recognized the work that has already been accomplished by several states to legally integrate the crime of forced pregnancy as defined in the Rome Statute into their respective jurisdictions. However, the definition of the crime of forced pregnancy in these jurisdictions is far from homogenous.[298] As international law has the potential to influence the lawmaking of national jurisdictions, it should also promote a gender-sensitive definition in a future convention.[299]

Finally, since sexual and gender-based violence (including reproductive violence) remains highly underreported and non-prosecuted, a definition of the crime of forced pregnancy that takes into account the violence experienced by the victims should be a priority.[300] Enhancing the prosecution of these crimes and publicly holding perpetrators accountable would likely reduce the stigma that victims of reproductive violence suffer

295. *Law and Policy Guide: Rape and Incest Exceptions*, CTR. FOR REPROD. RTS., https://reproductiverights.org/law-and-policy-guide-rape-and-incest, (last visited Apr. 4, 2022).

296. *See Law and Policy Guide: Criminality*, CTR. FOR REPROD. RTS., https://reproductiverights.org/law-and-policy-guide-criminality (last visited Apr. 4, 2022).

297. Oosterveld, *supra* note 68, at 100–01.

298. Various national criminal codes do not define the crime of forced pregnancy as a crime against humanity. *See* C.I.CR./SV. (Belg.), art. 136; C.C. art. 172(2)(f) (Bos. & Herz.); C.C. §3(4) (Fin.); CODE PÉNAL [C. PÉN.] art. 212-1 (Fr.); [Act on the Punishment, etc. of Crimes Under the Jurisdiction of the International Criminal Court] art. 2 para. 6 (S. Kor.); C.C. art. 29(g) (Mali); C.C. §102(g) (Nor.). Other jurisdictions have preferred not to replicate the caveat to national laws. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 2254 (Ger.); C.C. art. 371 (Serb.); C.C. art. 439(f) (Rom.); C.P. art. 607 (Spain); SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311 (1941), *as amended by* No.1 of the FA, Sept. 30, 2011, AS 2575 (2012), art. 264a(g) (Switz.); International Criminal Court Act 2001, c. 17, art. 7(2)(f) (U.K.).

299. This view was expressly shared by Sweden on behalf of the Nordic Countries. *See ILC, Fourth Report*, *supra* note 16, ¶ 26. *See also* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 49, U.N. Doc. S/2004/616 (Aug. 23, 2004) (stating the Rome Statute has served as a catalyst for enacting national laws against the gravest international crimes).

300. *See* INT'L FED'N FOR HUM. RTS., UNHEARD, UNACCOUNTED: TOWARDS ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED VIOLENCE AT THE ICC AND BEYOND 47 (2018). *See also* AMNESTY INT'L, RAPE AND SEXUAL VIOLENCE: HUMAN RIGHTS LAW AND STANDARDS IN THE INTERNATIONAL CRIMINAL COURT 6 (2011).

and would enhance their trust in the international criminal law system.[301] Overall, the proposed definition in this article is not limited to only promoting the rights of women and girls nor does it only advocate for a gender-sensitive approach. Above all, the proposed definition aligns with the goal of the proposed Draft Articles of the ILC for a future convention, which is not only to prevent the perpetration of international crimes, but also to fight against their impunity.[302]

301. González v. Mexico, Judgment of Judge Quiroga, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 400 (Nov. 6, 2009); LADISCH, *supra* note 2, at 21, 27; Charlesworth, *supra* note 26, at 391.

302. *See ILC*, *Fourth Report*, *supra* note 16, at 13 (proposing a preamble for the Draft Articles including the intent to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.").

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