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THE APPEALS CHAMBER

Before:

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public

***Amici Curiae* Observations on Sexual- and Gender-Based Crimes, Particularly Forced
Pregnancy, and on Standards of Proof Required for Sexual and Reproductive Violence
Pursuant to Rule 103 of the Rules of Procedure and Evidence**

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I. Introduction

1. On 25 October 2021, the Appeals Chamber issued an Order inviting expressions of interest as *amici curiae* in judicial proceedings in relation to specific legal questions arising from the appeal against Trial Chamber IX's judgement of 4 February 2021 in the case of *The Prosecutor v. Dominic Ongwen*.¹ On 15 November 2021, the *amici* filed a joint request for leave to submit a brief pursuant to Rule 103 of the Rules of Procedure and Evidence, which was granted on 24 November 2021.

2. This submission focuses on two points: (a) the legal interpretation of the crime of forced pregnancy as a specific and distinct form of reproductive violence that should be recognised by the Court; and (b) the legal standards for the assessment of the evidence of sexual violence crimes.

II. Forced pregnancy is an autonomous and distinct form of reproductive violence criminalised under the Rome Statute

3. The crime of forced pregnancy requires proof of three core and cumulative elements: (a) the unlawful confinement of a woman (the *actus reus*); (b) forcibly made pregnant (a circumstantial element); and (c) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law (special *mens rea*).² The crime of forced pregnancy protects and criminalises conduct that affects and harms reproductive autonomy, a legally protected interest distinguishable from other forms of harm.³ The second special intent element should be interpreted broadly, in a manner consistent with other sources of international law, as explained below.

i. *Reproductive autonomy merits specific and independent protection under international criminal law*

4. Forced pregnancy encompasses conduct affecting specific legally protected interests that transcend those infringed by other international crimes,⁴ and it is a crime that affects an individual's reproductive autonomy. This offence is a form of reproductive violence, which affects a person's reproductive capacity and targets victims because of their reproductive

¹ ICC, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15), [Trial Chamber Judgment](#), Trial Chamber IX, 4 February 2021 (hereinafter, 'Trial Chamber Judgment').

² The underlying conduct for this crime is defined in Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute and the respective Elements of Crimes.

³ ICC, *The Prosecutor v. Dominic Ongwen*, [Trial Chamber Judgment](#), paras. 2717, 2722.

⁴ ALTUNJAN, T., 'Chapter 5: Forced Pregnancy as a Crime Against Humanity and a War Crime', *Reproductive Violence and International Criminal Law*, International Criminal Justice Series, vol. 29, (Asser Press, 2021), p. 260.

capacity.⁵ Reproductive autonomy refers to the capacity and possibility to freely make informed decisions relating to one's reproductive choices, including all aspects concerning impregnation, pregnancy, birth and maternity.⁶ Overall, it comprises the freedom to choose whether, how, and under what circumstances to reproduce,⁷ as well as the capability of doing so in a safe and healthy environment.⁸

5. Therefore, as a form of reproductive violence, the criminalisation of forced pregnancy recognises the inherent value of reproductive autonomy of women and girls.⁹

i. The debates and travaux préparatoires leading to the adoption of the Rome Statute show an intention to criminalise a specific form of gender-based violence focused on reproductive coercion

6. The separate and distinct recognition of forced pregnancy as criminal conduct under the crimes against humanity and war crimes provisions was the subject of intense debates during the drafting of the Rome Statute.¹⁰ Those discussions, coupled with the inclusion of this crime in the final text, highlight the specificities of this reproductive crime as a separate offence, which is disconnected from references to personal dignity and ethnic cleansing¹¹ and is focused on the experiences of violence affecting women.¹²

7. The crime of forced pregnancy was adopted to include atrocities such as rape in the context of detention directed to affect the composition of an ethnic, religious or cultural

⁵ ASKIN, K. D., *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Leiden, Martinus Nijhoff Publishers, 1997), p. 397; ALTUNJAN, T., *Op. cit.* 4, pp. 97-99; D'COSTA, B., HOSSAIN, S., (14 July 2010), '[Redress for Sexual Violence Before the International Crimes Tribunal in Bangladesh: Lessons from History, and Hopes for the Future](#)', *Criminal Law Forum*, 21, 331-359, p. 343; GREY, R., (2017), '[The ICC's First 'Forced Pregnancy' Case in Historical Perspective](#)', *Journal of International Criminal Justice*, vol. 15, issue 5, 905-930, p. 906.

⁶ GREY, R., (2020), '[Reproductive Crimes in International Criminal Law](#)', *The University of Sydney Law School, Legal Studies Research Paper Series*, n°. 20/19, p. 4.

⁷ ALTUNJAN, T., *Op. cit.* 4, p. 98.

⁸ Reproductive justice needs to take into account 'the holistic needs of women and the societal structures that limit individual's choice around fertility, pregnancy and motherhood.' See, LANG, C., (2018), '[An Introduction and Road Map to Engaging with Reproductive Justice](#)', *Resources for Gender and Women's Studies: A Feminist Review*, vol. 39, n°. 3-4, pp. 29-30.

⁹ DE VOS, D., 'Prosecuting sexual and gender-based violence at the International Criminal Court,' in Shepherd, L., *Handbook on gender and violence*, (Edward Elgar Publishing, 2019), p. 399.

¹⁰ ALTUNJAN, T., 'Chapter 5: Forced Pregnancy as a Crime Against Humanity and a War Crime,' *Reproductive Violence and International Criminal Law*, International Criminal Justice Series, vol. 29, (Asser Press, 2021), pp. 196-209; BOON, K., (2001), '[Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent](#)', *Columbia Human Rights Law Review*, 32(3), 625-676, pp. 656-659; STEINS, C., 'Chapter Twelfth: Gender Issues', in LEE, R. S. K., *The International Criminal Court: The making of the Rome Statute--issues, negotiations, results*, (The Hague: Kluwer Law International, 1999), pp. 365-369.

¹¹ GREY, R., (2017), *Op. cit.* 5, pp. 907-910.

¹² SANCHEZ PARRA, T., FERNANDEZ-PAREDES, T., (2020), '[From Reproductive Labor to Reproductive Violence: Colombia's Special Jurisdiction for Peace and Its Window of Opportunity](#)', *PoLAR: Political and Legal Anthropology Review*.

group,¹³ as well as other situations of forced pregnancy and maternity committed in the context of medical experimentation, human trafficking, military recruitment of children or labour exploitation.¹⁴ Since its inclusion in the Statute, subsequent instruments of international criminal law have expressly incorporated forced pregnancy as a crime against humanity and as a war crime.¹⁵ At least 43 States have enacted domestic legislation criminalising forced pregnancy as an international crime.¹⁶ The crime of forced pregnancy has thus emerged as an independent crime, which should be addressed separately from other forms of gender-based violence.¹⁷

¹³ BEDONT, B., HALL-MARTINEZ, K., (1999), '[Ending Impunity for Gender Crimes Under the International Criminal Court](#),' *The Brown Journal of World Affairs*, vol. 6, issue 1, 65-85, pp. 73-74.

¹⁴ GREY, R., (2020), *Op. cit.* 6, p. 4.

¹⁵ See e.g., UN SECURITY COUNCIL, *Security Council resolution 1315 (2000) on establishment of a Special Court for Sierra Leone*, 14 August 2000, S/RES/1315 (2000), Article 2(g); UN TRANSITIONAL ADMINISTRATION IN EAST TIMOR, *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, 6 June 2000, UN Doc. UNTAET/REG/2000/15, sections 5(1)(g) and 5(2)(e); REPUBLIC OF KOSOVO, *Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, 3 August 2015, Articles 14(1)(b)(xxii) and 14(1)(d)(vi); AFRICAN UNION, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014, Article 28C, Article 28D(b)(xxiii) and 28D(e)(vi).

¹⁶ See e.g. ARGENTINA *Law n.º 26.200*, 2007; AUSTRALIA *Criminal Code Act*, 1995, Chapter 8, Articles 268.62, 268.85; and ICC *Act*, 2002, Schedule 1; AZERBAIJAN *Criminal Code*, 1999, amended 25 December 2007, Article 116.0.17; BELGIUM *Penal Code*, amended in 2003, Chapter III, Article 136 *ter* and *quarter*; *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols*, amended in 1999, Article 1(2)(7); and *Law relating to the Repression of Grave Breaches of International Humanitarian Law*, amended in 2003, Article 1bis and 1ter; BOSNIA AND HERZEGOVINA *Criminal Code*, 2003, Article 172(1)(g) and (2)(f); BURKINA FASO *Law 52-2009/AN*, 2009; BURUNDI *Law on Genocide, crimes against humanity and war crimes*, 2003, Article 3(g), 4(b)(u) and (D)(f); *Penal Code*, 2009, Article 197 and 198; CANADA *Crimes Against Humanity and War Crimes Act*, 2000, Schedule Subsection 2(1); COMOROS *Law nº11-022/AU*, 2011; CONGO *Genocide, War Crimes and Crimes against Humanity Act*, 1998, Articles 1 and 6; CÔTE D'IVOIRE *Penal Code*, amended in 2015, Article 138 and 139; DEMOCRATIC REPUBLIC OF THE CONGO *Military Penal Code*, 2002, Article 169; *Law Relative to Sexual Violence*, 2006, Article 174 k; CROATIA *Criminal Code*, amended in 2004, Article 158; CZECH REPUBLIC *Criminal Code*, 2009, Article 401; FIJI *Crimes Decree*, Decree n.º 44, 2009, Division 3, section 91; GEORGIA *Criminal Code*, 1999, Article 413(d); GERMANY *Act to introduce the Code of Crimes against International Law*, 2002, section 7(1)(6); GUINEA *Children's Code*, 2008, Article 353; IRAQ *Law of the Supreme Iraqi Criminal Tribunal*, 2005, Article 13; KENYA *International Crimes Act*, Law n.º 16, 2008, First Schedule; LESOTHO *Penal Code Act*, 2010, Article 94 and 95; MAURITIUS *International Criminal Court Act*, 2011, Schedule section 2; MALI *Penal Code*, 2001, Article 29(g), 30(d), 31(i)(22); THE NETHERLANDS *International Crimes Act*, 2003, Article 3(1)(d), 4(1)(g), 5(3)(a) and (b), 6(1)(c) and 6(2)(a) and (b); NEW ZEALAND *International Crimes and International Criminal Court Act*, 2000, Schedule; NORWAY *Penal Code*, 1902, as amended in 2008, section 103(d); PHILIPPINES *Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity*, 2009, section 3, 4 and 6; REPUBLIC OF IRELAND *International Criminal Court Act*, 2006, Schedule 1; REPUBLIC OF KOREA *ICC Act*, 2007, Articles 8(2)(3), 9(2)(6) and 10(2)(3); ROMANIA *Criminal Code*, 2009, Article 439 and 440; RWANDA *Law n.º 33 Bis/2003 repressing the crime of genocide, crimes against humanity and war crimes*, 2003, Article 5; SAMOA *International Criminal Court Act n.º 26*, 2007, Schedule 1; SENEGAL *Penal Code*, 1965, as amended in 2007, Article 431-1(4), 431-2(1) and 431-3(b)(19) and (d)(6); SLOVENIA *Criminal Code*, 2008, Article 101 and 102; SOUTH AFRICA *ICC Act*, 2002; SPAIN *Penal Code*, amended in 2010, Article 607bis and 611; SWITZERLAND *Criminal Code*, amended in 2010, Article 264a(g) and 264e(b); TIMOR-LESTE *Penal Code*, Decree-Law No. 19/2009, Article 123.1(c) and 124(g); TRINIDAD AND TOBAGO *International Criminal Court Act*, 2006, Chapter 4:26; TURKEY *Criminal Code*, 2004, Article 76(d), 77(f)-(h); UGANDA *International Criminal Court Act*, 2010, section 8 and 9; UNITED KINGDOM *International Criminal Court Act*, 2001, Schedule 8; URUGUAY *Law n.º 18.026*, 2006, Article 16(B) and (D), 26.2 and 26.3.30.

¹⁷ ICRC, [Practice Relating to Rule 93. Rape and Other Forms of Sexual Violence](#).

- ii. *The interpretation and application of the crime of forced pregnancy should be informed by the recognition and protection of reproductive autonomy in international law*

8. Reproductive autonomy has been recognised in a broad range of international instruments. These include the 1993 Vienna Declaration and Programme of Action,¹⁸ the 1994 Cairo Programme of Action,¹⁹ the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women,²⁰ the 1995 Beijing Declaration and Platform for Action,²¹ and the Maputo Protocol.²² Human rights mechanisms—such as the CCPR,²³ the CEDAW²⁴ and the CESC²⁵—have recognised the inherent value of women’s reproductive autonomy and reproductive health, as well as the existence of reproductive violence as a specific form of control and coercion over women’s bodies, explicitly mentioning forced pregnancy as a violation of women’s human rights, that can amount *per se* to torture or cruel, inhuman, or degrading treatment. Other international instruments have also acknowledged the particularities of forced pregnancy as a reproductive offence, separate from other forms of sexual violence, that directly affects the agency of women and their rights to autonomy.²⁶

¹⁸ UN GENERAL ASSEMBLY, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, paras. 39, 41.

¹⁹ UN POPULATION FUND, *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994*, 1995, A/CONF.171/13/Rev.1.

²⁰ ORGANIZATION OF AMERICAN STATES (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (‘Convention of Belem do Para’), 9 June 1994, Articles 1-9.

²¹ UN, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), paras. 96, 135.

²² AFRICAN UNION, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003, Article 14.

²³ UN HUMAN RIGHTS COMMITTEE (2018) General Comment no. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc. CCPR/C/GC/36, para. 8.

²⁴ UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN ‘CEDAW’ (1993) General Recommendation no. 19 (A/47/38), paras 22, 24; CEDAW (1994) General Recommendation no. 21 (A/49/38), para 22; CEDAW (1999) General Recommendation no. 24 (A/54/38/Rev.1), para. 31; CEDAW (2013) General Recommendation no. 30, CEDAW/C/GC/30, para 34; CEDAW (2017) General Recommendation no. 35, CEDAW/C/GC/35, para 18.

²⁵ UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2016) General Comment no. 22 (2016), UN Doc. E/C.12/GC/22, paras 28, 34, 40, 45.

²⁶ RUSSELL, D.E.H., VAN DE VEN, N, *Crimes Against Women: Proceedings of the International Tribunal* (Russell Publications, 1990). See also, WOMEN’S INITIATIVES FOR GENDER JUSTICE, (2019), [The Hague Principles on Sexual Violence](#), pp. 33-34.

9. Finally, different national jurisdictions—including Argentina,²⁷ Colombia,²⁸ and Guatemala²⁹—have prosecuted cases related to the reproductive autonomy of people, granting them an individual and specific protection under the law. Hence, interpreting forced pregnancy as a violation of reproductive autonomy is consistent with the recognition and protection that it has in other sources of international law.

iii. *Forced pregnancy causes specific harms beyond those affecting an individual's sexual autonomy and sexual integrity*

10. As with other reproductive related offences, the crime of forced pregnancy affects distinct victims and causes specific effects and harms.³⁰ Forced pregnancy is a gender-specific crime that, by its nature, only affects women and persons with reproductive capacities, such as transgender men or non-binary/gender non-conforming persons. Conversely, other forms of sexual and gender-based violence may also affect victims that lack the capacity to carry a child. Moreover, persons who become forcibly pregnant and who are unlawfully confined to impair their reproductive agency endure a distinct form of suffering stemming from the pregnancy itself, the childbirth, the subsequent forced maternity, and potential stigma upon return to the victim's community post-conflict. These effects transcend the values protected by both the crime of enslavement and imprisonment –which capture the element of unlawful confinement– and the crimes of rape and torture –which capture the forced conception. A

²⁷ The crime of forced abortion has been characterised and prosecuted as a crime against humanity. See, Criminal Federal Oral Court of Santa Fe, Argentina, *Case of Maria Eva Aebi and others*, [Judgement n.º 101/18](#), 16 October 2018, pp. 152-153. The act of forcing illegally detained women to give birth in inhumane conditions has been characterised as a form of torture and a crime against humanity. See, Federal Criminal Oral Court N.º 3, *Campo de Mayo case*, n.º 9243/2007, [Judgement](#), 30 October 2018, pp. 179-180, 217, 623-628.

²⁸ The High Court of Medellin and the Constitutional Court of Colombia have found that forced abortion against female combatants by members of their own armed group constitutes a war crime and represents a serious violation of human rights. This crime has been found to gravely impair the victims' right to make decisions about their bodies and live freely and autonomously regarding their sexuality and reproduction, including their right to opt for motherhood and to decide when to become pregnant. See, High Court of Medellin, Justice and Peace Chamber, [Olimpo de Jesús Sánchez Caro and others](#), 16 December 2015, pp. 277-282, 294-307, 344-346, 585-593; Constitutional Court of Colombia, [Case Helena](#), 11 December 2019, File n.º T-7.396.064, pp. 15-20, 60-67, 72.

²⁹ Several cases have examined systematic attacks against the sexual freedom and reproductive capacity of indigenous women as underlying acts of genocide, because these acts targeted the existence of the group as such. See, High-Risk Tribunal for Crime, Drug Trafficking and Environmental Crimes (Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente por Procesos de Mayor Riesgo), Judgment, [José Mauricio Rodríguez Sánchez](#), 26 September 2018, pp. 99-100, 176-180; High-Risk Tribunal for Crime, Drug Trafficking and Environmental Crimes, Judgment, [José Mauricio Rodríguez Sánchez y Efraín Ríos Montt](#), 10 May 2013, pp. 34, 87-88, 141-142, 212-213, 285, 451. In the *Sepur Zarco* case, forcing women to take contraceptives to prevent them from getting pregnant from rape was considered an exercise of control over women's bodies and their ability to procreate, as well as evidence of the intent to perpetrate sexual violence against them. See High-Risk Tribunal for Crime, Drug Trafficking and Environmental Crimes, Judgment, [Esteelmer Francisco Reyes Girón, Heriberto Valdez Asig](#), 26 February 2016, pp. 47, 200, 205, 208, 232, 234, 252, 480, 483.

³⁰ WOMEN'S LINK WORLDWIDE, (2020), [Una violencia sin nombre: violencia reproductiva en el conflicto armado colombiano](#), pp. 15-20.

forced pregnancy represents a harm distinct from confinement or rape and other forms of sexual assault because pregnancy itself involves reproductive freedom and autonomy.³¹

11. The crime of forced pregnancy has far-reaching consequences.³² Its effects are long-lasting, impacting different stages of the pregnancy, captivity, birth, motherhood and the return of the victims to their community in a post-conflict scenario. Most of the literature on forced motherhood resulting from sexual violence committed by armed groups has shown the complex relationships of ambiguity and hardship that women endure after giving birth. Motherhood affects all aspects of women's lives both during captivity and during the reintegration process.³³ Regarding their sense of self and the specific struggles presented while gestating, survivors of forced pregnancy can experience a sense of selflessness and alienation towards their bodies.³⁴ This can be coupled with extraordinary emotional distress since they are forced to gestate their captor's child in a hostile environment.³⁵ Feelings of fear, anger, and resentment may also arise during pregnancy due to the negative implications of having a child in these circumstances and the uncertainty about their future.³⁶ The consequences of forced pregnancy are permanent and follow survivors and their children in the aftermath of the conflict, after their return to civilian life, where both mothers and children are often marginalised within their community. During the reintegration process, it affects, in particular, education, employment and livelihood, health, and identity. Victims may face pervasive stigma at the hands of their family and community, which usually leads to rejection and social exclusion and ostracism. This reinforces and increases their realities and feelings of shame, guilt, and self-hatred.

12. Victims' chances of forming new families, remarrying, and integrating into the economic and social dynamics of their communities are also hampered. Due to social rejection, formerly abducted women with children in captivity often have difficulties remarrying, finding

³¹ BOON, K., (2001), *Op. cit.* 10, p. 655. See also BASSIOUNI, M.C., MAUIKAS, P., MANIKAS, P., *The Law of the International Criminal Tribunal for the Former Yugoslavia*, (Transnational Pub Inc, 1995), p. 565 (noting that forced pregnancy is a 'crime separate from rape and sexual assault because the harm it causes is qualitatively and quantitatively different from that caused by sexual violence alone').

³² JESSIE, S.S.E., (2006), '[Forced Pregnancy: Codification in the Rome Statute and Its Prospect as Implicit Genocide](#),' *New Zealand Journal of Public and International Law*, vol. 4, n.º 2, 311-338, p. 329.

³³ See, e.g., DENO, M., GREEN, A., LAKOR, A. A., ARACH, J., (2018), '[Mothering in the Aftermath of Forced Marriage and Wartime Rape: The Complexities of Motherhood in Postwar Northern Uganda](#),' *Journal of the Motherhood Initiative for Research and Community Involvement*, vol. 9, n.º 1, p. 162.

³⁴ *Ibid.*

³⁵ GOLDSTEIN, A.T., *Recognising Forced Impregnation as a War Crime under International Law*, Center for Reproductive Law and Policy (New York, 1993), p. 27.

³⁶ See, DENO, M., GREEN, A., LAKOR, A. A., ARACH, J., (2018), '[Mothering in the Aftermath of Forced Marriage and Wartime Rape: The Complexities of Motherhood in Postwar Northern Uganda](#),' *Journal of the Motherhood Initiative for Research and Community Involvement*, vol. 9, n.º 1, p. 164.

employment, and participating in social and public events.³⁷ Some decide to abandon their children or send them with distant relatives in order to overcome the violence they experienced.³⁸ Families of victims can threaten, attack or kill the mother and/or the child because they are regarded as a sign of dishonour.³⁹ Many others may not be able to rely on support networks for parenting because of the stigma and shame associated with raising a person born of genocidal violence.⁴⁰ This leads to complicated conditions of impoverishment without access to land, education or stable and secure jobs. This case offers an opportunity for the Court to address the unique harms and effects of forced pregnancy, including the protection gap that children born as a result of sexual violence and their mothers face in the aftermath of conflict.

iv. Forced pregnancy appropriately recognises abuses to reproductive autonomy, a legal interest at the core of this crime

13. By acknowledging reproductive and gendered harms derived from the crime of forced pregnancy as distinct from sexual damages, and by focusing on violence specifically targeting individuals because of their reproductive capacity and outside a context of ethnic cleansing, the decision of the Appeals Chamber will give visibility to particular gender-based harms that have long remained ignored in international criminal law. Distinguishing reproductive autonomy as an independent interest worthy of protection from violence and an essential right of individuals with reproductive capacity is fundamental for several reasons. First, it serves to recognise the crime of forced pregnancy as a crime that is not subordinated to other forms of violence –such as rape or unlawful detention– and that harms and impairs concrete and independent rights. Second, it gives due recognition to the seriousness of this offence and to the differentiated values at stake when abuses against reproductive autonomy are committed. Moreover, the specific acknowledgement of individuals’ reproductive autonomy also contributes to addressing the current under-investigation and under-prosecution of these crimes, as well as fostering future investigations of similar forms of violence. Legal frameworks must adapt and evolve to better capture, understand, and render visible marginalised and disregarded gendered experiences of violence, such as forced pregnancy, forced motherhood and the situation of children born of war-time sexual violence.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ GAGGIOLI, G., (2013), ‘[Is there a ‘right to abortion’ for women and girls who become pregnant as a result of rape? A humanitarian and legal issue,](#)’ *International Committee of the Red Cross*, p. 2.

⁴⁰ MUKAGENDO, M.C.M., ‘Caring for children born of rape in Rwanda’ in CARPENTER, R.C. (Ed.), *Born of war: Protecting children of sexual violence survivors in conflict zones*. (Bloomfield, CT: Kumarian, 2007), pp.40-52.

ii. *‘Other grave violations of international law’ should be interpreted broadly without limiting the phrase to international crimes under the jurisdiction of the Court*

14. In its judgement, the Trial Chamber found that the *mens rea* element of the crime of forced pregnancy had been established because the defendant had confined the victims, who had been forcibly made pregnant with the intent of sustaining the continued commission of other crimes –namely, forced marriage, torture, rape and sexual slavery.⁴¹ By referencing the intention to commit other crimes within the jurisdiction of the Court, the Chamber appears to have construed and interpreted the concept of ‘other grave violations of international law’ quite narrowly. This restrictive approach limits the meaning of grave violations of international law to international crimes, excluding the application of this crime to other scenarios where forced pregnancy takes place without the joint or subsequent commission of other international crimes.

15. The reference to ‘international law’ is used in the Statute to describe the elements of other crimes such as deportation or forcible transfer of population,⁴² imprisonment,⁴³ persecution,⁴⁴ and certain war crimes.⁴⁵ In none of these crimes do grave violations of international law exclusively refer to the commission of other international crimes, except in the case of the crime of persecution. With respect to the definition of the crime of persecution, the Statute specifically provides that it can only be prosecuted if the deprivation of fundamental rights contrary to international law has been produced ‘in connection with any crime within the jurisdiction of the Court’.⁴⁶ This specific requirement is absent in the definition of the crime of forced pregnancy.

16. The Court has the discretion to establish which violations of international law qualify for the specific intent of forced pregnancy and the gravity threshold required for said breaches. The second form of intent under the definition of this crime does not refer to ‘grave’ –contrary to, for example, the crime of persecution, which qualifies the deprivation as severe– nor does it refer to any specific provisions of international law.⁴⁷ The only requirement is that the perpetrator intended to go beyond the violations purely derived from the unlawful confinement

⁴¹ ICC, *The Prosecutor v. Dominic Ongwen*, [Trial Chamber Judgment](#), paras. 3060-3061.

⁴² See, Article 7(2)(d) of the Rome Statute.

⁴³ See, Article 7(1)(e) of the Rome Statute.

⁴⁴ See, Article 7(2)(g) of the Rome Statute.

⁴⁵ See, Article 8(2)(b)(iii); Article 8(2)(b)(vii), Article 8(2)(b)(xi), Article 8(2)(e)(ix), Article 8(2)(b)(xiii), Article 8(2)(e)(xii), Article 8(2)(b)(xix), Article 8(2)(e)(xv), Article 8(2)(b)(xxiii), Article 8(2)(b)(xxiv), Article 8(2)(e)(ii) and Article 8(2)(e)(iii) of the Rome Statute.

⁴⁶ See, Article 7(1)(h) and (2)(g) of the Rome Statute.

⁴⁷ BUEHLER, C., (2002), ‘[War crimes, crimes against humanity and genocide](#),’ *NEMESIS*, n.º 5, 158-167, p. 163.

of the victims.⁴⁸ In other words, the particularity of this intent is that it must carry an ulterior or surplus motive with a view to producing other violations of international law different from the unlawful confinement itself.

17. According to the general rules of interpretation contained in Article 31 of the Vienna Convention on the Law of the Treaties, there is no specific reason to confine the meaning of ‘grave violations of international law’ to those breaches punished by other international crimes contained in the Statute. Both literal and contextual interpretations lead to a broader understanding of the term ‘grave violations of international law’, which includes severe breaches of international human rights law and/or international humanitarian law.

18. Moreover, given the connection to international human rights law in the application and interpretation of the Statute as set out in its Article 21(3), this special intent should be interpreted as including grave violations of international human rights law. In the present case, the control exercised over the victims, during and after the pregnancy, severely deprived them of multiple human rights. These include their right to reproductive autonomy; their reproductive and sexual rights; their right to decide, freely and responsibly, the number and spacing of their children; their right to the highest attainable standard of health; the prohibition of discrimination on the basis of their sex; their right to be free from cruel, inhumane or degrading treatment; their freedom of movement; and their right to privacy and family life, among others.

19. Thus, the intention to impair an individual’s reproductive rights under international law satisfies the special intent requirement. In addition, this special intent can be present in cases where an accused participates in acts of forced pregnancy with a view to: discriminate against members of particular groups; humiliate and degrade the victims; abuse civilians from their own ethnicity, culture or religion; impose forced labour, forced conscription, restriction of movement and other forms of serious human rights violations on both the mother and/or the children born; make strategic use of forced pregnancies by raising the children to become future fighters; impair the economic, social and cultural rights of the victims; sell the mother and/or the child as slaves; or subject them to medical experiments, among other situations.⁴⁹

⁴⁸ JESSIE, S.S.E., (2006), *Op. cit.* 32, p. 321; GREY, R. (2017), *Op. cit.* 5, pp. 925-926.

⁴⁹ GREY, R., (2020), *Op. cit.* 6, p. 25; BOON, K., *Op. cit.* 10, p. 665. See also GREY, R., (2017), *Op. cit.* 5, pp. 925-926.

III. The Appeal Chamber should interpret standards of proof for sexual and reproductive violence broadly to encompass different forms of evidence

i. *Circumstantial and indirect evidence is sufficient to establish the commission of sexual and reproductive violence crimes*

20. Contrary to the Defence's claim,⁵⁰ a Trial Chamber can establish the elements of international crimes—including crimes of sexual and reproductive violence—and the general coercive circumstances surrounding these crimes on the basis of indirect evidence. International criminal tribunals have relied on circumstantial and witness evidence to prove different aspects of international crimes.

21. For instance, the International Criminal Tribunal for Rwanda ('ICTR') accepted that a conviction may be based on circumstantial evidence⁵¹ and that a Trial Chamber has the discretion to decide, in light of the circumstances of each case, whether corroboration is necessary.⁵² Significantly, the ICTR used indirect evidence to prove sexual violence crimes. In the *Muhimana* case, the Trial Chamber convicted the defendant of rape on the basis of non-victim testimony by a witness who had not directly witnessed the rape but whose description of the circumstances made clear that a rape had occurred.⁵³ Moreover, the ICTR also relied on background circumstances to infer certain elements of sexual violence crimes—such as the lack of consent—on the basis of the existence of a coercive context,⁵⁴ relying on this evidence to also establish the *mens rea* of the perpetrators of sexual violence.⁵⁵

22. Similarly, the International Criminal Tribunal for the former Yugoslavia ('ICTY') used non-victim evidence to prove sexual violence charges.⁵⁶ In the absence of direct evidence, the Appeals Chamber in the *Dorđević* case confirmed that a crime of sexual violence could be

⁵⁰ ICC, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15), [Defence Appeal Brief, Public Redacted Version of "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021"](#), 19 October 2021, paras. 945-947 (hereinafter, 'Defence Appeal Brief').

⁵¹ NGANE, S. N., 'Chapter 3. International Criminal Tribunal for Rwanda', in NGANE, S. N., *The Position of Witnesses before the International Criminal Court*, (Brill, 2015), pp. 172-173.

⁵² ICTR, *The Prosecutor v. Mikaeli Muhimana*, [Appeal Judgment](#), ICTR-95-1B-A, Appeals Chamber, 21 May 2007, para. 52.

⁵³ The Trial Chamber specifically stated that '[a]lthough Witness AP was not an eyewitness to the rape of Goretti and Languida, the Chamber infers that the Accused raped them on the basis of the following factors: the witness saw the Accused take the girls into his house; she heard the victims scream, mentioning the Accused's name and stating that they 'did not expect him to do that' to them; finally the witness saw the Accused lead the victims out of his house, stark naked, and she noticed that they were walking 'with their legs apart.'" See, ICTR, *The Prosecutor v. Mikaeli Muhimana*, [Judgement and Sentence](#), ICTR-95-1B-T, Trial Chamber III, 28 April 2005, paras. 22-36.

⁵⁴ ICTR, *The Prosecutor v. Sylvestre Gacumbitsi*, [Appeal Judgment](#), ICTR-2001-64-A, Appeals Chamber, 7 July 2006, paras. 153-156; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, [Judgment](#), ICTR-96-4-T, Trial Chamber I, 2 September 1998, para. 688.

⁵⁵ ICTR, *The Prosecutor v. Théoneste Bagosora et al.*, [Judgment](#), ICTR-98-41-T, Trial Chamber I, 18 December 2008, paras. 2201-2202.

⁵⁶ GOPALAN, P., KRAVETZ, D., MENON, A., 'Chapter 5. Proving Crimes of Sexual Violence' in BRAMMERTZ, B.S., JARVIS, M., *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (OUP, 2016), pp. 150-152.

established through circumstantial evidence, holding that the testimony of a witness –who had observed a young girl being removed from a convoy of displaced persons and taken to the woods, heard screaming, and seen the victim return wrapped in a blanket– was sufficient to find that the crime had been committed.⁵⁷ The ICTY also relied on indirect evidence to provide context to the statements of victims of sexual abuses,⁵⁸ infer non-consent of the victims from a coercive background,⁵⁹ and establish command responsibility for the commission of widespread sexual crimes by subordinates.⁶⁰

23. In a similar manner, the Special Court for Sierra Leone (‘SCSL’) inferred from the environment of violence and coercion –described by witnesses– that the victims had been subject to acts of sexual violence and that they could not have consented to them.⁶¹ Circumstantial evidence was sufficient, according to the Trial Chamber, to satisfy the *actus reus* and *mens rea* of the crime of sexual slavery.⁶² The SCSL also relied on the existence of factual patterns of abductions of women and a subsequent period of control over them to establish the commission of forced marriage.⁶³ Overall, the SCSL considered that the specific circumstances of an armed conflict, where rapes on a large scale are alleged to have occurred, coupled with the social stigma borne by victims of rape in certain societies, may require reliance on circumstantial evidence to demonstrate the *actus reus* of sexual crimes.⁶⁴

24. Moreover, some domestic jurisdictions applying international criminal law have also regarded indirect evidence as fundamental when prosecuting sexual violence and determining the elements of these offences. For instance, in Argentina, the courts have relied upon the testimonies of witnesses to prove the commission of acts of sexual violence against victims of enforced disappearance.⁶⁵

⁵⁷ Furthermore, the Appeals Chamber relied on circumstantial evidence to establish that two other sexual assaults had occurred. ICTY, *The Prosecutor v. Vlastimir Đorđević*, [Appeal Judgment](#), ICTY-05-87/1-A, Appeals Chamber, 27 January 2014, paras. 853-859, 863-869, 887.

⁵⁸ ICTY, *The Prosecutor v. Radoslav Brđanin*, [Judgment](#), ICTY-99-36-T, Trial Chamber II, 1 September 2004, para 514.

⁵⁹ ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, [Appeal Judgment](#), IT-96-23 and IT-96-23/1-A, Appeals Chamber, 12 June 2002, paras. 130-133, 218. (hereinafter, ‘Kunarac Appeal Judgment’)

⁶⁰ INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, *The Prosecutor v. Jadranko Prlić et al.*, [Judgment](#), IT-04-74-T, Trial Chamber III, 29 May 2013, paras. 72, 284, 437, 834, 1014.

⁶¹ SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, [Judgment](#), SCSL-04-16-T, Trial Chamber II, 20 June 2007, para. 1105. (hereinafter, ‘Brima Trial Judgment’)

⁶² SCSL, [Brima Trial Judgment](#), paras. 694-695, 1105, where the Trial Chamber found that: “The Trial Chamber infers from the environment of violence and coercion that the women did not consent to these sexual acts.”

⁶³ SCSR, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, [Trial Judgment](#), SCSL-04-15-T, Trial Chamber I, 2 March 2009, paras. 149, 499, 1293.

⁶⁴ SCSL, *The Prosecutor v. Charles Ghankay Taylor*, [Judgment](#), SCSL-03-01-T, Trial Chamber II, 18 May 2012, para. 416.

⁶⁵ Criminal Federal Oral Court N.º 2 of San Martín (Argentina), *Case of Riveros and others*, [Judgment](#), FSM 27004012/2003/TO22, 2 November 2020, pp. 90-93; Criminal Federal Oral Court N.º 5 of Buenos Aires (Argentina), *Case ESMA IV*, [Judgment](#), CFP 10828/2011/TO2/CFC7, 12 October 2021, pp. 410-460

25. Finally, international human rights bodies have also addressed the evidentiary value of circumstantial evidence. The Inter-American Court of Human Rights ('IACtHR') has noted that certain crimes, such as torture or enforced disappearance, can only be proved through indirect evidence, which itself can be shown through the existence of a policy, a state practice or a general environment of violence.⁶⁶ The IACtHR has found that, in cases of widespread and systematic violence, circumstantial evidence is fundamental to prove that an individual was a victim of international crimes because, otherwise, it might be impossible to establish the crimes.⁶⁷ Using contextual and pattern analysis, it has relied on circumstantial evidence to support the finding that sexual violence was committed against disappeared women, prior to their murder.⁶⁸ It has also relied on contextual evidence to ascertain that sexual violence occurred in the context of massacres and armed conflict, and to establish international responsibility for those abuses.⁶⁹ For instance, in the *El Mozote case* concerning the internal armed conflict in El Salvador, the IACtHR found that the commission of systematic sexual violence against victims who had been executed was established on the basis of the testimony of an indirect witness.⁷⁰ The European Court of Human Rights ('ECHR') has also addressed the role and relevance of circumstantial evidence in cases of sexual violence, recognising that the reliance on indirect evidence is common practice in cases of sexual violence committed against minors.⁷¹ It has also stressed that disregarding indirect evidence in cases of sexual violence when direct proof is not available amounts to a breach of the States' positive obligations under the prohibition of torture and the right to respect for private life.⁷²

26. The Appeals Chamber should avoid holding sexual crimes to higher standards of proof than other crimes,⁷³ and accept the validity of circumstantial and indirect evidence—including the testimony of non-victim witnesses—to prove crimes of sexual and reproductive violence.

⁶⁶ BOVINO, A., (2005). '[Evidential issues before the Inter-American Court of Human Rights](#)', *Sur Revista Internacional de Derechos Humanos*, issue 3, year 2, pp. 69-70.

⁶⁷ IACtHR, *Case of Godínez-Cruz v. Honduras*, [Judgment \(Merits\)](#), 20 January 1989, paras. 130-132, 135-137.

⁶⁸ IACtHR, *Case of González and others ('Campo Algodonero') v. Mexico*, [Judgement \(Preliminary objections, Merits, Reparations and Costs\)](#), 16 November 2009, paras. 113-164. See also: IACtHR, *Case of Gelman Vs. Uruguay*, [Judgement, Merits and Reparations](#), 24 February 2011, paras. 97.

⁶⁹ IACtHR, *Case of the massacre of Dos Erres v. Guatemala*, [Judgement \(Preliminary objections, Merits, Reparations and Costs\)](#), 24 November 2009, paras. 58, 79-81, 138-141, 233; IACtHR, *Case of the massacres of Río Negro v. Guatemala*, [Judgement \(Preliminary exceptions, Merits, Reparations and Costs\)](#), 4 September 2012, paras. 77, 134, 226-228.

⁷⁰ IACtHR, *Case of the massacres of El Mozote and other near locations v. El Salvador*, [Judgement \(Merits, Reparations and Costs\)](#), 25 October 2012, paras. 52-57, 77, 93, 163-164.

⁷¹ ECHR, *X and Others v. Bulgaria [GC]*, n.º 22457/16, Joint Concurring Opinion of Judges Turković, Pinto de Albuquerque, Bošnjak and Sabato, § 35, 2 February 2021.

⁷² ECHR, *M.C. v. Bulgaria*, n.º 39272/98, §§ 178-187, ECHR 2003-XII, 4 December 2003.

⁷³ SÁCOUTO, S., CLEARY, K., (2009), '[The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court](#)', *American University Journal of Gender, Social Policy & the Law*, 17(2), pp. 337-360.

ii. *Inaccuracies and apparent inconsistencies in the testimony of victims of sexual and reproductive violence do not invalidate their evidence*

27. Contrary to the Defence's submission,⁷⁴ the Trial Chamber correctly relied on the testimony of the seven witnesses to ascertain the commission of forced pregnancy. Specifically, it correctly found that they had been abducted, distributed to Dominic Ongwen, placed under heavy guard, threatened with death if they escaped, subjected to beating and forced to perform domestic duties; while being sexually abused on a repeated basis, which led to three forced pregnancies.⁷⁵

28. As the cases mentioned above indicate, victim testimony is not always available in cases of sexual and reproductive violence. Yet, when it is available, victim evidence can be central to establishing crimes of sexual and reproductive violence, particularly in the absence of witnesses or of physical evidence.⁷⁶ Minor inconsistencies do not undermine the reliability of the accounts of victims. For instance, inaccuracies relating to the date on which an incident took place, the precise sequence of events, and other peripheral details, have been deemed insufficient by international criminal courts to discredit the entirety of the testimony of victims of sexual violence.⁷⁷

29. International criminal tribunals have indicated that several factors should be taken into account when assessing inconsistencies in the accounts of victims of sexual and reproductive violence. First, these crimes often take place in a context where victims are deprived of their rights, for example, when they are detained for prolonged periods of time, which frequently impairs them from recalling their experiences and prevents them from knowing the exact date or time of the criminal events.⁷⁸ Second, direct witnesses and victims have to reconstruct these abuses multiple times and, usually, with considerable time lapses between the moment when the event occurred and each moment when they give their statements.⁷⁹ Moreover, these traumatic experiences might not be remembered with precision due to the violent manner in which they are perpetrated, their repetitive nature, or the stage of the victim in their healing

⁷⁴ ICC, [Defence Appeal Brief](#), paras. 948-958.

⁷⁵ ICC, *The Prosecutor v. Dominic Ongwen*, [Trial Chamber Judgment](#), paras. 205-211, 2009-2093.

⁷⁶ GOPALAN, P., KRAVETZ, D., MENON, A., *Op. cit.* 56, p. 136.

⁷⁷ ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, [Judgment](#), IT-96-23 and IT-96-23/1-A, Trial Chamber, 22 February 2001, paras. 564, 712, 733 (hereinafter, 'Kunarac Trial Judgment'); ICTY, [Kunarac Appeal Judgment](#), paras. 208-210, 215-217, 243; ICTY, *The Prosecutor v. Anton Furundžija*, [Judgment](#), IT-95-17/1-T, Trial Chamber, 10 December 1998, para. 113; ICTY, *The Prosecutor v. Milan Milutinović et al.*, [Judgment](#), IT-05-87-T, 26 February 2009, para. 629.

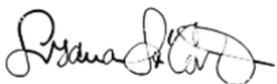
⁷⁸ ICTY, [Kunarac Trial Judgment](#), paras. 564, 733.

⁷⁹ ICTY, [Kunarac Trial Judgment](#), para. 564; ICTY, [Kunarac Appeal Judgment](#), paras. 208-210.

process.⁸⁰ Additionally, some victims are subjected to these crimes while being underaged or immature, which also can affect the level of detail in their statements.⁸¹

30. On the other hand, minor inconsistencies can actually enhance the reliability of the victims. The Appeals Chamber in the *Kunarac case* emphasised that the absence of such natural discrepancies could form the basis for suspicion as to the credibility of testimony.⁸² Furthermore, material inconsistencies affecting an aspect of the testimony of a victim should not be interpreted as undermining the reliability of their testimony as a whole.⁸³

31. In conclusion, the Appeals Chamber should take these factors into account when assessing the credibility of victims' testimony and not invalidate their testimony on the basis of minor inconsistencies.



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María Cecilia Ibáñez

Dated this 22nd day of December 2021

At The Hague, The Netherlands.

⁸⁰ ICTY, [Kunarac Appeal Judgment](#), para. 267.

⁸¹ ICTY, [Kunarac Trial Judgment](#), para. 565.

⁸² ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, [Appeal Judgment](#), IT-96-23 and IT-96-23/1-A, Appeals Chamber, 12 June 2002, paras. 254, 309.

⁸³ ICTY, *The Prosecutor v. Milomir Stakić*, [Judgment](#), IT-97-24-T, Trial Chamber II, 31 July 2003, paras. 796, 805-806.