

# The Draft Crimes Against Humanity Convention

## Proposals on the Right to Reproductive Autonomy

### INTRODUCTION

‘Reproductive autonomy’ is an individual’s ability to exercise agency over their fertility, including their choice about whether and in what circumstances to reproduce. It is inseparable from human dignity and bodily autonomy, and its violation has profound physical, psychological, social, and economic consequences for affected individuals, families, and communities. Rights related to reproductive autonomy are protected in international and regional human rights instruments.<sup>1</sup> As confirmed by the International Criminal Court (ICC) Trial and Appeals Chambers, reproductive autonomy is also a distinct value protected under international criminal law.<sup>2</sup>

Gender competency in the Convention on Prevention and Punishment of Crimes Against Humanity (‘Convention’) necessitates enhanced consideration of reproductive autonomy. To ensure that the Convention reflects current interpretations of international law and supports existing rights to reproductive autonomy, states should:

1. **Change Draft Art. 2(1)(g) to: ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual or reproductive violence of a comparable gravity.’**
2. **Change the definition of ‘forced pregnancy’ in Draft Art. 2(2)(f) to: ‘the unlawful confinement of a person forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.’**
3. **Delete from Draft Art. 2(2)(f) the sentence on ‘national laws relating to pregnancy.’**

### PROPOSALS

#### PROPOSAL 1: THE LIST OF SEXUAL AND REPRODUCTIVE CRIMES IN DRAFT ARTICLE 2(1)(g)

Current text	Proposed text
‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of a comparable gravity.’	‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual or reproductive violence of a comparable gravity.’

The 1998 Rome Statute of the ICC, the 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity, and other international instruments expressly enumerate forced pregnancy and enforced sterilization as crimes against humanity.<sup>3</sup> In the 2022 *Ongwen* Appeal Judgment, the ICC Appeals Chamber confirmed that these two crimes protect the values of ‘reproductive autonomy’ and ‘reproductive integrity.’<sup>4</sup>

Other violations of reproductive autonomy also constitute crimes under international law. Examples recognized in the ICC Office of the Prosecutor’s (OTP’s) 2023 *Policy on Gender-Based Crimes* include ‘forced use of contraception, forced abortion, forced breastfeeding, denial of essential reproductive healthcare or physical violence aimed

\* This short form, which summarizes and provides several updates to the brief on how the [Draft Articles on Prevention and Punishment of Crimes Against Humanity Should Advance Justice for Reproductive Autonomy](#), is endorsed by Dr. Rosemary Grey, Sydney Law School, The University of Sydney; Center for Reproductive Rights Latin America and Caribbean Program Program; Global Justice Center; Akila Radhakrishnan, Independent; Physicians for Human Rights; and Women’s Link Worldwide.

at reproductive organs.<sup>5</sup> The OTP’s policy and practice indicates that such forms of reproductive violence fall within existing crimes against humanity including sexual violence, enslavement, persecution, and ‘other inhumane acts.’<sup>6</sup> State practice and international jurisprudence likewise indicates that acts violating reproductive autonomy constitute crimes against humanity, war crimes and genocide.<sup>7</sup> Examples can be seen in Argentina,<sup>8</sup> Colombia,<sup>9</sup> the Democratic Republic of the Congo,<sup>10</sup> and Guatemala,<sup>11</sup> among others.

This guidance confirms that acts of reproductive violence are sufficiently grave to constitute crimes under international law. But despite their prevalence, gravity, and criminality under international law, violations of reproductive autonomy have rarely been visible to practitioners of international criminal law. It is only recently that the ICC and national courts have recognized such violations as crimes against humanity. To affirm that interpretation of existing law and prevent a regression to past practices of overlooking violations of reproductive autonomy,<sup>12</sup> the Convention should refer expressly to ‘reproductive violence’ in the provision on sexual and reproductive crimes.

This concise yet versatile phrase gives investigators, prosecutors, judges, and other justice practitioners an explicit impetus to consider violations of reproductive autonomy. Its precision relative to the current text strengthens the principle of legality and recognizes the distinct harm of reproductive violence to victims and survivors. Several states have already expressed support for this proposal, including Brazil, Canada, Colombia, and Mexico.<sup>13</sup>

**PROPOSAL 2: THE DEFINITION OF ‘FORCED PREGNANCY’ IN DRAFT ARTICLE 2(2)(f)**

Current text	Proposed text
‘the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.’	‘the unlawful confinement of a person forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.’

The term ‘woman’ should be replaced with ‘person’ for consistency with all other provisions in the Convention, which are neutral as to age and gender. This ensures that the definition applies in jurisdictions where ‘woman’ might be interpreted in ways that are unduly restrictive, for example, as excluding children, or excluding trans, intersex, or non-binary persons capable of pregnancy. A broad coalition of human rights organizations and children’s rights experts have recommended replacing ‘woman’ with inclusive language,<sup>14</sup> as have several states including South Africa (proposing to add ‘girls’),<sup>15</sup> and Canada and the United Kingdom (proposing gender neutral language).<sup>16</sup>

Some states have noted that the ‘unlawful confinement’ requirement might also unduly restrict the application of this crime.<sup>17</sup> However, this concern would be mitigated by including a general reference to ‘reproductive violence’ (since forced impregnation without unlawful confinement is a form of reproductive violence). The concern is also mitigated by ICC jurisprudence indicating that unlawful confinement includes being prevented from fleeing one’s captors; it does not require being physically detained in one place.<sup>18</sup>

**PROPOSAL 3: THE REFERENCE TO ‘NATIONAL LAWS RELATING TO PREGNANCY’ IN DRAFT ARTICLE 2(2)(f)**

Current text	Proposed text
‘This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.’	N/a (delete text)

After defining ‘forced pregnancy,’ Article 2(2)(f) includes a sentence referring to ‘national laws relating to pregnancy.’

This sentence is a relic from the Rome Statute’s definition of forced pregnancy. In the context of the Rome Statute, it merely states the obvious: the ICC has no authority to directly amend, nullify or void national legislation. The ICC Appeals Chamber has confirmed it does not add an element to the crime of forced pregnancy nor require consideration of domestic restrictions on abortion.<sup>19</sup> The Rome Statute’s drafting history confirms this interpretation. It shows that this sentence was not intended to restrict the ICC’s interpretation of the term ‘forced pregnancy;’ its sole purpose was to reassure concerned states that including ‘forced pregnancy’ as a crime against humanity and a war crime in the Rome Statute does not automatically invalidate abortion restrictions under national law.<sup>20</sup>

In the ICC’s *Ongwen* case, significant court resources were expended on litigating this sentence, only to confirm that it is legally superfluous. For the efficiency of future proceedings under the Convention, this confusing and redundant sentence should be deleted. The sentence is also an anomaly: there is no similar provision anywhere in the Rome Statute or Draft Articles. States supporting this proposal to date include Canada and the United Kingdom.<sup>21</sup>

- 1 [2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa](#), art.14(1); [1979 Convention on the Elimination of Discrimination Against Women](#), art. 16(1)(e); [1966 International Covenant on Civil and Political Rights](#); [1995 Beijing Declaration and Platform for Action](#), para. 96; [1968 Teheran Proclamation](#), art. 16.
- 2 ICC, *Prosecutor v. Ongwen*, [Judgment on Appeal against Trial Judgment](#), 15 Dec. 2022, paras. 18, 1055, 1063.
- 3 [1998 Rome Statute of the International Criminal Court](#), art. 7(1)(g); [2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity](#), art. 2(1)(g); [2002 Statute of the Special Court for Sierra Leone](#), art. 2(g); [2000 Regulation establishing the Special Panels for Serious Crimes in East Timor](#), art. 5(1)(g).
- 4 ICC, *Prosecutor v. Ongwen*, [Judgment on Appeal against Trial Judgment](#), 15 Dec. 2022, paras. 18, 1053, 1055, 1063.
- 5 ICC OTP, [2023 Policy on Gender-Based Crimes](#), para. 37.
- 6 *Ibid.*, para. 64 (causing forced abortion as ‘other inhumane acts’); ICC OTP, [2012 Situation in Colombia Interim Report](#); para. 143 (causing forced abortion as ‘other forms of sexual violence’); ICC OTP, [2022 Policy on the Crime of Gender Persecution](#), paras. 24 and 80 (reproductive violence as persecution); ICC OTP [2024 Policy on Slavery Crimes](#), para. 68 (reproductive violence as enslavement). For further legal analysis on the use of existing crimes against humanity to prosecute reproductive violence, see: [Documenting reproductive violence: Unveiling opportunities, challenges, and legal pathways for UN investigative mechanisms](#), UN Women and Global Justice Center (2024); R. Grey, ‘Reproductive Crimes in International Criminal Law’, in I. Rosenthal, V. Oosterveld and S. SáCouto, *Gender and International Criminal Law* (Oxford University Press 2022) pp. 231-264.
- 7 ICTR, *Prosecutor v Akayesu*, [Trial Judgment](#), 2 Sept. 1998, paras. 507-508 (forced sterilization, forced birth control and forced impregnation as acts of genocide by imposing measures intended to prevent births within the group).
- 8 *Tribunal Oral en lo Criminal Federal de Santa Fe*, María Eva Aebi, Juan Calixto Perizzotti, Ricardo Silvio Ramón Ferreyra, Oscar Alberto Farina, Sentencia 101/18, (Oct. 16 2018). Pp. 2-3, 7- 9, 63-67, 142-156 (forced abortion as a crime against humanity under article 7.1.g as “any other form of sexual violence of comparable gravity”); *Tribunal Oral en lo Criminal Federal*, [Bignone, Reynaldo Benito Antonio y otros, Causa Número 9243/2007 \(1818/15\)](#) pp. 620-627 (Oct. 30 2018) (removal of newborns from mothers detained in clandestine centers and the forced suppression of their lactation as crimes against humanity of torture and inhumane treatment).
- 9 *Jurisdicción Especial para la Paz* (Special Jurisdiction for Peace): Caso 7, [Order No. 05 of 2024](#), 9 Oct. 2024, paras. 1494 and 1501-1504 (forced abortion, forced contraception and other forms of reproductive violence as the war crime of torture), paras. 1485-1486 (forced contraception as the war crime of outrages on personal dignity); Caso 5, [Order No. 266 de 2021](#), 11 Oct. 2021, para. 19 onward (reproductive violence in the form of forced contraception as the war crimes of torture, cruel treatment, outrages on personal dignity, and sexual violence); *Corte Constitucional* (Constitutional Court): [Sentencia SU-599/19](#), 11 Dec. 2019, at Section 3.3 (forced abortion and forced contraception as the war crime of sexual violence).
- 10 2023 judgment of the Military Tribunal of Uvira, convicting Munyololo Mbao of crimes against humanity including forced pregnancy. See: TRIAL International’s [2023 summary](#).
- 11 *Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente*, [Sentencia C-01076-2012-00021 Of. 2º](#). Esteelmer Francisco Reyes Girón, Heriberto Valdez Asig, 26 de febrero de 2016, pp. 47, 200, 205, 208, 232, 234, 252, 480, 483 (forced contraception against victims of sexual slavery by the armed forces in the context of the civil war as ‘crimes against the duties of humanity’).
- 12 [Documenting reproductive violence: Unveiling opportunities, challenges, and legal pathways for UN investigative mechanisms](#), UN Women and Global Justice Center (Sept. 2024).
- 13 Brazil, [Written Comments: December 2023](#), para. 16; Canada, [Written Comments: December 2023](#), p. 3. See also: UN General Assembly, Sixth Committee, Summary record of the 40th meeting, 2 Apr. 2024, [A/C.6/78/SR.40](#), paras. 35 (Mexico), 103 (Colombia).
- 14 Amnesty International et al, [Justice for Children in the Future Convention on the Prevention and Punishment of Crimes Against Humanity](#), 2025 (proposing the language of ‘woman, girl, or other person’).
- 15 South Africa, [Sixth Committee Statement](#), p. 2 Apr. 2024.
- 16 Canada, [Written Comments: December 2023](#), p. 3; United Kingdom, [Written Comments: December 2023](#), para. 16.
- 17 United Kingdom, [Written Comments: December 2023](#), para. 16.
- 18 ICC, *Prosecutor v. Ongwen*, [Judgment on Appeal against Trial Judgment](#), 15 December 2022, paras. 1074-1091.
- 19 ICC, *Prosecutor v. Ongwen*, [Judgment on Appeal against Trial Judgment](#), 15 December 2022, paras. 1065-1066.
- 20 *Ibid.*, para. 1065, citing: ICC, *Prosecutor v. Ongwen*, [Amici Curiae Observations on the Rome Statute’s definition of ‘forced pregnancy’ by Dr Rosemary Grey](#), Global Justice Center, Women’s Initiatives for Gender Justice and Amnesty International, 23 Dec. 2021, para. 14.
- 21 Canada, [Written Comments: December 2023](#), p. 3; United Kingdom, [Written Comments: December 2023](#), para. 16.