

# Reproducing Impunity: *Gendering the Draft Convention on Crimes against Humanity*

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**The Draft Convention on Crimes against Humanity offers an opportunity to improve accountability for grave violations of international law; however in its current form, it continues to limit justice for sexual and gender-based violence.**

The International Law Commission (“ILC”) undertook the task of compiling a Draft Convention on Crimes against Humanity in 2014. In the ILC’s first draft, it replicated the definition of crimes against humanity verbatim from the Rome Statute of the International Criminal Court (“Rome Statute”)<sup>1</sup> for the sake of expediency,<sup>2</sup> sparking unprecedented engagement from gender groups and experts to reform the provisions. As a result, during the final cycle of the ILC drafting process, 20 of the 33 states that submitted comments and a cohort of 23 UN experts called for the removal of an outdated definition of gender that failed to recognize a basis for persecution and limited justice and accountability for such crimes.

Removing the gender definition was a crucial step towards recognizing that it is not enough to merely replicate existing language without reckoning with legal developments and the gendered dimensions of mass atrocity crimes. However, the call did not go far enough to address the draft treaty’s inadequacies on sexual and gender-based violence, including restrictive definitions of torture,<sup>3</sup> enslavement,<sup>4</sup> and other sexual and gender-based acts “of comparable gravity” that constitute crimes against humanity.<sup>5</sup> This factsheet will focus on one such crime under the treaty—forced pregnancy.

## Lack of a Legal Basis for Differentiation

Forced pregnancy is the only prohibited act under the draft treaty that makes an exception for conflicting national legislation. The draft treaty’s criminalization of forced pregnancy, taken directly from the Rome Statute, states: “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”<sup>6</sup> This deference is in “stark contrast” to the criminalization of other mass atrocity crimes, where reliance on domestic law is a last resort.<sup>7</sup>

The inclusion of the qualification in the Rome Statute was solely the result of political compromise and has no functional or legal basis.<sup>8</sup> Conservative states, led by the Holy See, feared that including forced pregnancy as a crime under the Rome Statute would impact laws and policies denying abortion access.<sup>9</sup> This compromise gives undue authority to ideological and patriarchal concerns about control over women’s bodies rather than addressing the grave violation that it seeks to remedy.

The exception also creates a legal inconsistency by simultaneously criminalizing forced pregnancy while creating a caveat for states to ban its equitable remedies, namely abortion access.<sup>10</sup>

## Legal Developments on Forced Pregnancy and Abortion Services

Contrary to the ILC’s assertion that the Rome Statute represents the consensus on crimes against humanity, modern formulations have evolved since its adoption. Several states and international judicial bodies have enacted legislation criminalizing forced pregnancy without reproducing the caveat for national laws.<sup>11</sup>

In the decades since the passage of the Rome Statute, abortion access has been deemed a fundamental right and many treaty bodies, UN experts, and courts have called for the decriminalization of abortion as a matter of state obligation. They have found that state restrictions on access to abortion, particularly in cases of rape, incest, and life and health endangerment, constitute violations of the rights to be free from torture,<sup>12</sup> to health,<sup>13</sup> to life,<sup>14</sup> and to non-discrimination.<sup>15</sup>

The draft treaty must not codify language that is at odds with human rights standards.

## Concrete Actions to Promote Gender Justice

The last stage of the drafting process of the Draft Convention on Crimes against Humanity demonstrated that gender considerations are essential to bring the treaty in line with modern conceptions of international law. However, using the removal of the definition of gender as a model, more must be done to ensure that gender is mainstreamed throughout the Draft Convention.

**To ensure that forced pregnancy is properly criminalized as a crime against humanity, states should:**

- **Conduct a gender audit of the Draft Convention on Crimes against Humanity to ensure that gender is effectively mainstreamed and that the articles reflect the progressive legal developments on gender since the adoption of the Rome Statute**
- **Only recommend the adoption of the Draft Convention with “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy” removed from the definition of forced pregnancy contained in Article 2(2)(f)**
- **Enact or amend domestic legislation on crimes against humanity to criminalize forced pregnancy unconditionally**
- **Continue to stand up forcefully for abortion care as an equitable remedy to which survivors of forced pregnancy are entitled as a matter of right**

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1. With three non-substantive exceptions to adapt to the different context, e.g. replacing “Statute” with “draft articles.”

2. First Report of the Special Rapporteur, Mr. Sean D. Murphy, Int’l Law Comm’n, 67th Sess., May 4-June 5, July 6-Aug. 7, 2015, U.N. Doc. A/70/10 (Feb. 17, 2015).

3. Letter from Susana SáCouto, Director, War Crimes Research Office, to Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and Legal Counsel, United Nations (Dec. 1, 2018).

4. Letter from Jocelyn Getgen Kestenbaum, Faculty Director, Benjamin B. Ferencz Human Rights and Atrocity Prevention Clinic, to Huw Llewellyn, Director, Codification Division UN Office of Legal Affairs (Nov. 30, 2018).

5. Id.

6. Int’l Law Comm’n, Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading, 71st Sess., Apr. 29-June 7, July 8- Aug. 9, 2019, U.N. Doc. A/CN.4/L.935 (May 15, 2019). For a more detailed argument, see Global Justice Center, Submission to the International Law Commission: The Need to Integrate a Gender-Perspective into the Draft Convention on Crimes Against Humanity (Nov. 2018), <http://globaljusticecenter.net/files/GJC.CAHSubmission.11.30.2018.pdf>.

7. Milan Markovic, Vessels of Reproduction: Forced Pregnancy and the ICC, 16 MICH. ST. J. INT’L L. 439, 448 (2007).

8. Id.

9. Soh Sie Eng Jessie, Forced Pregnancy: Cofidiction in the Rome Statute and its Prospect as Implicit Genocide, 4 NZJPL 311 (2006).

10. Milan Markovic, Vessels of Reproduction: Forced Pregnancy and the ICC, 16 MICH. ST. J. INT’L L. 439, 447 (2007).

11. See, e.g. Statute of the Special Court for Sierra Leone art. 2(g), Aug. 11, 2010; France, Code pénal, Article 212-1(7); Republic of Congo, Loi N°8-98 du 31 octobre 1998, Article 6(g); Czech Republic, Criminal Code, Sec 401(1)(d); Finland, Criminal Code, Chapter 11 (War Crimes and Crimes against Humanity), Section 3; Georgia, Criminal Code, Article 408; Lithuania, Criminal Code, Article 100; Montenegro, Criminal Code, Article 427; and Serbia, Criminal Code, Article 371.

12. CEDAW Comm., General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para. 18, UN Doc. CEDAW/C/GC/35, July 14, 2017.

13. Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Aug. 3, 2011, UN Doc. A/66/254; HRC 66th Sess. (2011).

14. Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, June 6, 2017, UN Doc. A/HRC/35/23; HRC 35th Sess. (2017).

15. CEDAW Comm., General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para. 18, UN Doc. CEDAW/C/GC/35, July 14, 2017.