Symposium on Reproductive Violence in International Law: Beyond Sexual – Reproductive and Obstetric Violence in Russia's Aggression against Ukraine

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This post forms part of the Opinio Juris Symposium on Reproductive Violence in International Law, in which diverse authors reflect on how the International Criminal Court and other jurisdictions have responded to violations of reproductive health and reproductive autonomy. The symposium complements a one-day conference to be held

on 11 June 2024, in which legal practitioners, scholars, activists, and survivors will meet in The Hague and online to share knowledge and strategies for addressing reproductive violence in international criminal law. Interested readers can register to attend the conference online without cost.

> "The most shocking event was the shelling of the maternity hospital. Several expectant mothers with injuries were brought to us. Among them was the woman whose photo was published all over the media. Sadly, she died along with her child. We helped, we tried hard to help her. Her pelvis was completely shattered, she had lost her right leg, and her lower abdomen was wounded."
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> *Oleksandr, doctor, Mariupol Regional Hospital*

The Full-scale Aggression and the Visibility of Gender-based Crimes (GBC)

The scale and devastation of Russia's full-scale invasion of Ukraine in February 2022 has amplified the very existence of both the Russia-Ukraine armed conflict and related atrocities. This augmented attention brought in by the all-out invasion had been missing previously, despite both the armed conflicts and a spectrum of atrocities having been ongoing for nine years. Since 2022, the reporting of and domestic, international and universal jurisdiction action upon alleged atrocities have increased in an unparalleled way. This concerns also some of the most stigmatised and underreported crimes such as conflict-related sexual violence (CRSV).

Domestically, Ukraine's ever vibrant civil society and prosecution have been developing a response to CRSV at an impressive speed and nuance, compared to the first phase of the armed conflict in 2014-2021. This includes adopting the first ever CRSV Prosecution Policy in 2023, listing CRSV among prosecutorial priorities for 2023-2025, prioritising victims' and witnesses' well-being over the number and pace of criminal proceedings and launching a pilot urgent reparations scheme for CRSV survivors.

These commendable steps require further layered additions. First, through uncovering a wider spectrum of CRSV experienced by different victims – and reflecting it in charging. For instance, sexual mental torture of Ukrainian males forced to watch rape of their female relatives is often mentioned in notices of suspicion and judgments but not considered in charges (which prevalently focus on penetrative sexual violence against women). Second, crucially, intersectional gendered lenses should be consistently applied in all conflict-related prosecutions to uncover possible gendered dimensions of other crimes, whether adjacent or not to CRSV. This particularly concerns reproductive and obstetric violence.

Further Surfacing of Gender-based Harms: Reproductive and Obstetric Violence

International Law

While CRSV investigations' principal focus is the harm to sexual autonomy, the concept of reproductive violence goes beyond (p. 235). The ICC OTP's new 2023 GBC Policy explains that such violence violates reproductive autonomy and targets individuals for their actual or potential reproductive capacity (para. 35). Reproductive violence can stand on its own, *e.g.* in imposed contraception or impeded access to reproductive healthcare. It can also add additional painful dimensions to CRSV, *e.g.* when rapes are perpetrated to also impregnate, damage reproductive organs or impact victims' willingness to (not) have children. Jurisprudence, policymakers (*Ongwen*, paras. 2722, 1101; GBC Policy, para. 37) and scholars (such as Altunjan and Grey) agree that different aspects of reproductive violence may be prosecuted in two ways. First, using established focused charges, which, under the Rome Statute, are forced pregnancy and enforced sterilisation as war crimes and crimes against humanity and genocide by preventing births. And, second, by highlighting reproductive dimensions of other core international crimes, serious violations of international humanitarian law (IHL) and gross violations of international human rights law (IHRL).

On an even wider scale, "aspects of conception, pregnancy, delivery, birth, and post-delivery create inevitable vulnerabilities for women and children" in armed conflict through obstetric violence. Treaty and customary law envisages special gendered treatment of women as required by their sex. Such treatment spans from dignified sanitary conditions for female detainees, who are to be accommodated separately from men, to special food, healthcare and transportation provisions for pregnant women, mothers and children (Geneva Convention (**GC**) III, arts. 14, 25, 29; GC IV, arts. 16, 23, 50; Additional Protocol I, art. 70). While unsanitary conditions and scarce healthcare are endangering for any individual, they are particularly detrimental for pregnant, post-partum and nursing females and children.

Much of the aforementioned international law regulation requiring special care for women, maternity and children and prohibiting reproductive and obstetric violence has been brutally violated in Russia's aggression – along with brutal CRSV.

War-affected Ukraine

From the outset of the aggression in 2014 and especially since the full-scale invasion, Russia has demonstrated little regard for female, maternal and child well-being, sometimes having expressly indicated the desire to modify Ukrainians' procreation.

The WHO has confirmed 1,682 attacks on Ukraine's healthcare system, launched amid a wider campaign to target civilian and critical energy infrastructure. The undermined healthcare system, destroyed in some parts of the country and overwhelmed in others, the lack of healthcare professionals due to their killing or relocation and acute anxiety amid endless air raid sirens across Ukraine contribute to problematic conception, difficult pregnancies, increased miscarriages, emergency C-sections, premature deliveries, maternal and child mortality and health complications (OHCHR, para. 36; UN Commission of Inquiry on Ukraine (UN CoI), para. 788). Russia has shelled maternity

hospitals and recreational areas with no military targets there, killing pregnant women and children (UN CoI, paras. 133, 195-200). This has led to an acute reality where 75% of Ukrainian children now have mental health issues (p. 9).

In occupation, contrary to IHL (IV Hague Convention Regulations, art. 43), Russia repeals Ukrainian legislation and applies its own laws. Under the so-called "passportisation" policy, the occupying authorities condition access to hospitals upon the receipt of Russian citizenship (OHCHR, para. 115). This severely limits Ukrainian women's access to reproductive healthcare, including to pregnancy planning and other pregnancy, maternity, baby and child health services. Furthermore, with the traditional masculine mindset prevailing among the large section of the Russian society and its leadership, the strong role of the Russian Orthodox Church and the need to maintain population growth amid the loss of people to warfare and emigration, calls to limit abortion in Russia have risen. If implemented, such initiatives will also affect Ukrainian women in occupation seeking to end pregnancies, including those resulting from wartime rape.

Russians' brutal CRSV in occupation and detention should be further analysed for its reproductive dimensions, in design and/or in effect. Reports emerged of male castrations and springing chemicals into vaginas of female rape survivors to prevent them from having children. Russians have accompanied CRSV and other crimes, including against pregnant Ukrainian women, with assertions that Ukrainians should stop procreating and 'Nazi' children should not be born (OHCHR, para. 50; EUCCI, p. 50). As children have been both victims and witnesses of CRSV, such severely traumatic experience will likely affect their ability and desire to have intimate partners and start their own families.

Detention-related violence against both sexes has grave reproductive dimensions. The latter importantly contribute to the characterisation of certain detention abuse as torture or inhuman treatment (UN CoI, paras. 79-80; Special Rapporteur on Torture). Many Russian authorities fail to keep male and female detainees separately, thus exacerbating women's anxiety about personal safety and chances of possible sexual and other violence. Some detention authorities limit access to hygiene products and prohibit women to wash during their periods (UN CoI, paras. 612, 614). Together with inhuman – overcrowded and unsanitary – conditions of detention and limited shower and toilet facilities, such treatment exposes women, especially menstruating and pregnant ones, to a higher risk of gynaecological, fertility and other health issues. Male detainees' intimate body-parts are specifically targeted, which can cause sexual and reproductive dysfunctions. Such harm appears to be not a possible by-product of violence, but an intended outcome of a thoroughly chosen torture technique. Ukrainian male survivors of attempted castration and other genital violence report that perpetrators accompanied their mistreatment with assertions that they wanted to stop these captives from procreating (UN CoI, para. 67).

Ways Forward, for Ukraine and Beyond

Prosecutor Khan has explained that the new, largely revised ICC OTP's GBC Policy is a product of the mutually nourishing intellectual collaboration between civil society, academia, survivor communities and prosecution. Such collaboration is key to uncovering

reproductive, obstetric and other harms experienced by Ukrainian women, men and children – and sensitising domestic proceedings and wider redress respectively.

The caseload of 133,000+ conflict-related crimes would be an unfathomable challenge for any legal system. It is particularly so for criminal justice professionals who have to learn the intricacies of atrocity prosecution as such crimes are mounting, amid constant shelling and fear that their relatives or they might be targeted. Even in these circumstances, Ukraine's investigators, prosecutors and judges have already demonstrated both the resolve and the ability to address some of the most challenging conflict-related crimes such as CRSV. It is now up to Ukraine's international law practitioners and academics, proactive civil society and numerous international advisors to inspire one step further, to uncover gendered pains going beyond encroachments on sexual autonomy.

Further intricate investigations are required consistently to see whether a particular form of abuse – from repeated rapes to genital violence to castration to forcing a person witness sexual assaults of loved ones – was chosen to also harm victims' reproductive organs or impact their ability or willingness to have children. As much of Russia's CRSV also amounts to torture, asking such questions will help explore the role of reproductive violence in inflicting severe mental and physical pain, including on a widespread or systematic level. Domestic and any possible international proceedings exploring genocidal dimensions of Russia's actions in Ukraine would benefit from analysing the role of reproductive violence not only in preventing births, but also in causing serious bodily and mental harm to Ukrainians as a national group. Miscarriages, premature births, maternal and child illnesses and mortality due to shelling and impeded or inexistent healthcare should be considered in the assessment of civilian harm, proportionality of attacks and viability of precautions.

Seeing a bigger picture of reproductive, obstetric and other gendered harms is important not only for prosecutions, but for also for Ukraine's emerging reparations framework. A pilot urgent interim reparations initiative is commendable in its aim to support particularly vulnerable CRSV survivors amid ongoing warfare. However, the pilot is to be revised and expanded to benefit victims of other atrocity crimes, with a wider spectrum of harms. A renewed urgent interim and other reparation schemes should take a more nuanced account of varied reproductive and obstetric needs (pp. 12-13).

Finally, one should remember that international action on reproductive issues remains limited due to states' stance on matters of reproductive autonomy and, ultimately, women's agency to make independent informed decisions about their own bodies (Grey, p. 234, 263-264). Such a stance feels particularly drastic, and divisions can get particularly heightened in times of warfare. Ukraine should be mindful of this – for the sake of its people. Partners of servicepersons who were killed or whose reproductive function was affected in hostilities should be entitled to conceive from frozen reproductive cells of their beloved without impediments. While Ukraine's demographics, with 6.5 million refugees and 14.6 millions needing humanitarian assistance, is waning, worrying singular proposals to limit abortion is not a solution. Instead, the government should provide a viable vision of the country's in-conflict resilience and post-conflict

recovery, both to be co-led by the nation's vibrant civil society, with an inherent female leadership. Seeing light in their defiant reality and having a vision of the future, Ukrainians will be able to make further family decisions, when the time is right, for them and the nation.