CONTRIBUTIONS OF

JUSTICE AND PEACE DECISIONS TO WOMEN'S RIGHTS IN COLOMBIA

A CASE STUDY

humanas Colombia 10 años

LAWYERS WHITHOUT BORDERS
AVOCATS SANS FRONTIERES
ABOGADOS SIN FRONTERAS
Canada

CONTRIBUTIONS OF JUSTICE AND PEACE DECISIONS TO WOMEN'S RIGHTS IN COLOMBIA. A CASE STUDY

CORPORACIÓN HUMANAS 2015
Carrera 7 No. 33-49, Oficina 201 Bogotá, Colombia
PBX (571) 8050657
humanas@humanas.org.co

DIRECTOR CORPORACIÓN HUMANAS
Adriana María Benjumea Rúa

LAWYERS WITHOUT BORDERS CANADA (LWBC) IN COLOMBIA
Carrera 21 No. 33-41, Oficina 201 Bogotá, Colombia
info.colombia@LWBCanada.ca, http://www.asfcanada.ca/en/

DIRECTOR GENERAL LWBC
Pascal Paradis

AUTHORS
Camila Alejandra Hoyos Pulido
María Adelaida Palacio Puerta

THEMATIC COMMITTEE
Adriana María Benjumea Rúa
Simon Crabb
Camila Alejandra Hoyos Pulido
María Adelaida Palacio Puerta

RESEARCH SUPPORT
Stelsie Angers
Simon Crabb
Andrés Felipe Peña Bernal
Gael Petillon
Carolina Pimentel

TEXT EDITOR
Martha Luz Ospina

LAYOUT
María Claudia Caicedo D.

ENGLISH TRANSLATION
Anthony Letts
Revision by Nicholas Crabb

PRINTED BY
Ediciones Antropos Ltda.

ISBN: 978-958-59309-0-2

Bogotá, D.C., December 2015

TABLE OF CONTENTS

LWBC PREFACE

Since 2003, Lawyers without Borders Canada (LWBC) has played an active part in the promotion and protection of human rights and the fight against impunity in Colombia. LWBC supports the work of civil society organizations (CSOs) and of defenders, lawyers, and justice operators to secure full respect of human rights of victims, particularly victims of armed conflict. LWBC also offers support in emblematic cases of gross human rights violations, international accompaniment and training.

This report is part of a project that LWBC has implemented in association with Lawyers without Borders in Brussels, with the support of the European Union, to strengthen the Rome Statute principles of the International Criminal Court in Colombia. LWBC places great emphasis on "the principle of complementarity", whereby the use of domestic legal mechanisms should be promoted first and foremost to investigate and punish those responsible for crimes against humanity and war crimes committed in Colombia.

In April 2013, LWBC and *Corporación Humanas* published a report on the repression of sexual violence in Colombia and international justice. The report examines sexual violence in the context of the Colombian armed conflict, based on the observation of a specific case of sexual violence. This report concludes that impunity remains for acts of sexual violence committed by armed actors in the context of the conflict; these acts are not investigated in proportion to their gravity; proper action is not taken to permit cases to move forward; and no

proper response has been given to the victims in terms of the protection of their rights.

LWBC and *Corporación Humanas* have continued to closely follow the progress of the investigation, prosecution and punishment of sexual crimes. This report analyzes the treatment of sexual violence against women in the context of the transitional justice process between the Colombian State and paramilitary groups, implemented in Law 975/2005- "the Justice and Peace Law". In particular, the decision of the Justice and Peace Division of the Bogotá Superior Court of, November 20, 2014 against the former paramilitary leader Salvatore Mancuso-Gómez is examined. The analysis is based on the litigation experience of *Corporación Humanas* in the representation of women victims of these crimes.

Further, this report draws attention to the special vulnerability of women in armed conflict in matters of sexual violence. Sexual violence has been used in a generalized and systematic manner against them, to subordinate the civilian population and obtain strategic advantages in war. This report also highlights that sexual violence is a phenomen on based on complex social factors and thus requires a comprehensive response that cannot be covered by the criminal law alone.

Finally, with this publication, LWBC and *Corporación Humanas* hope to raise awareness of the gravity of sexual violence against women; evidence the important challenges that remain to secure guarantees of justice, truth, reparation and guarantees of non-repetition for female victims; and provide elements of analysis for the protection of their rights in transitional justice settings.

Pascal Paradis
Director-General, LWBC

PREFACE, CORPORACIÓN HUMANAS

In addition to many violations of human rights, the armed conflict also further perpetuates historical discrimination and violence against women. Of these phenomena, sexual violence has become one of the greatest offences against women, and has disproportionately affected them.

Weapons wield decisive power in the commission of sexual crimes, since, far from being isolated acts or side-effects, these crimes are committed to achieve certain objectives as part of the multiple war strategies used by armed adversaries, legal and otherwise.

The armed conflict in Colombia has not been immune to sexual violence. Sexual violence has been a constant in the actions of armed groups. A large number of women and girls have suffered various forms of harm to their sexual liberty and integrity. Their rights have been violated by direct actions against them or by indirect actions against enemies using women's bodies as their instruments.

Sexual violence has been used to punish women and obtain information that provides advantages in war. As such, an extermination law was applied to them and the social and community networks to which they belonged that made the actions of the armed groups more difficult. Useful territory was also expropriated for the exercise of control, amongst other purposes. Further, the life projects of these women were stunted both by acts of sexual violence and by subsequent re-victimization from a range of state institutions.

The health system has not provided any effective or worthwhile answer for victims of sexual violence in Colombia. Further, the justice system has not investigated the truth of events with due diligence. In general, the State, being responsible for the prevention, investigation and punishment of violence against women, has transferred a greater burden of access to justice onto victims, who have no mechanisms or sufficient resources to act.

Since its creation in 2005, *Corporación Humanas*, contributes to access to justice for women victims of violence both within and out with the armed conflict as a fundamental part of its mandate. Through its work to document and highlight violence towards women and girls, obstacles to access to justice, specifically in cases of sexual violence in the context of armed conflict, have been identified. This has been done in order to demand that the Colombian State comply with its international obligations, and secure the right to truth, justice and reparations for the women victims of those crimes.

Since 2011, *Corporación Humanas* has used strategic litigation to uphold the rights of women victims of sexual violence. For this purpose, *Corporación Humanas* has undertaken a series of actions, which include the documentation of the context in different parts of the country where armed actors have committed sexual violence. Given the difficulty of these actions, alliances with organizations such as *Mujeres en Zona de Conflicto* and LWBC have been fundamental to our political, legal and social actions with victims.

The Spanish organization *Mujeres en Zona de Conflicto*, in collaboration with *Corporación Humanas* has developed a project in Colombia to document and provide psychological and legal support for women victims of sexual violence in the context of armed conflict. This project has been financed by the Spanish international cooperation agency AECID with the principal objective of guaranteeing access to justice for

women victims of sexual violence as a weapon of war in the Department of Magdalena.

In this project, *Corporación Humanas* has been responsible for providing psychological and legal accompaniment to groups of women victims of sexual violence in the context of armed conflict. This project aims to improve the materialization of rights of women victims via representation in court and strengthened organizational practices, which are essential to denounce sexual and other types of violence. Similarly, *Corporación Humanas* has sought to influence judicial decisions, to ensure better guarantees for the rights of women victims of sexual violence in the context of armed conflict.

Since 2012, the second fundamental alliance has been established with Lawyers without Borders Canada (LWBC), with whom we have worked in joint actions designed to make the appropriate use of legal mechanisms to punish sexual violence more visible in the context of the Colombian armed conflict.

The case studied in this report is a reflection of the joint alliances and aspirations between organizations committed to the documentation, investigation and prosecution of sexual violence in the Colombian armed conflict. This case provides contextual elements of the conflict that confirm the use of sexual violence as a paramilitary strategy; the many obstacles faced by victims seeking justice; and the use of strategic litigation from women's human rights perspective to demand that the Colombian State comply with its international obligations to investigate, try and punish sexual violence.

We thank *Mujeres en Zona de Conflicto* and LWBC for their collaboration and AECID for supporting the work with women victims of sexual violence that enabled the publication of these reflections and contributions to legal practice.

Finally, and most importantly, we wish to offer our deepest appreciation to the women victims of sexual violence whom we have accompanied for the trust they have shown *Corporación Humanas*; for sharing their points of view, words, pain and reflections; and for allowing us to hear their voices. Without their cooperation, it would not have been possible to prepare this document.

Adriana María Benjumea Rúa
Director, Corporación Humanas

SUMMARY

This report contains a case analysis of the treatment of crimes of sexual violence in the context of transitional justice between the Colombian State and paramilitary groups, by way of the Justice and Peace Law.

It provides a legal examination of the decision handed down by the Bogotá Superior Court, Justice and Peace Division, on November 20, 2014 against Salvatore Mancuso-Gómez, which found him responsible for sexual violence perpetrated by the Catatumbo Block in Norte de Santander.

The description of the case of María[1] from the point of view of the litigants aims to show the meaning and significance of justice for women victims of sexual violence. At the same time, it serves as a developmental model for litigation from a feminist legal point of view, with the objective of transforming the realities of women based on strategies with a gender focus[2].

The study of law and its evolution, the context and the previously mentioned decision of the Bogota court together have allowed

1. The real name of the victim and her location have been changed, to protect her security and intimacy.

2. The development of feminist legal strategies has been implemented by *Corporación Humanas* as part of strategic litigation in cases of sexual violence in the territories of Magdalena, Norte de Santander and Antioquia. The strategy can be seen accompaniment provided in individual cases, including psychological and legal support, contributions to the correct classification and scope of responsibility, and the use of *amicus curiae* to contribute to the Justice and Peace process, generating legal and contextual arguments with regard to the actions of different paramilitary blocks. Also, see Caicedo & Méndez, 2013.

the potential of judicial truth as a means of reparation for women to be identified. In addition, this study has enabled a view to be formed on the challenges that remain with regard to prosecuting crimes of sexual violence. This is a means by which to identify good judicial practice in the Justice and Peace courts and to highlight legal failings, which should not be replicated in current or future negotiations with other armed groups.

The case of María is documented in two sections. The first section provides the factual elements and identifies the geographical context (the region of Catatumbo), as well as the political and military context (the actions of the AUC Catatumbo Block). The law as applied in the case is also explained so to better understand the reasoning applied in the decision.

For this purpose, the facts are also set out, making reference to the area surrounding La Gabarra, *Norte de Santander*, and the characteristics of the actions of the Catatumbo Block. The sexual crimes attributed to Salvatore Mancuso-Gómez, the legal elements and basis that gave rise to his indictment are also set out. This in turn enables an analysis of the principle of legality and its application in the Justice and Peace process. The second section concludes with an analysis of applicable law in this transitional justice process and its legislative evolution.

In the second section the decision of the Bogotá Superior Court is analyzed in terms of the impact of prosecuting a case of sexual slavery and the relationship with the State's obligations with respect to women's rights in transitional justice. The objective of this section is to highlight the main challenges involved in the litigation of cases of sexual violence from the perspective of the rights of women to justice and the relationship with truth and reparations.

The impact of the acts against María being prosecuted as sexual violence and the attribution of responsibility to the then

commander of the Catatumbo Block are studied. Subsequently, the matter of reparations is examined.

Finally, conclusions are presented to illustrate lessons learned and draw attention to the remaining challenges facing women.

CONVENTIONS AND ABBREVIATIONS

Abbreviation	Full name	Appears in text as
AUC	Autodefensas Unidas de Colombia	AUC (paramilitaries)
CC	Criminal Code of Colombia	CC
DIH	International Humanitarian Law	IHL
ELN	Ejército de Liberación Nacional	ELN (guerrillas)
EPL	Ejército de Liberación Popular	EPL (guerrillas)
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia	FARC (guerrillas)
FGN	Fiscalía General de la Nación	Prosecution Service
IACHR	Inter-American Commission on Human Rights	IACHR
ICC	International Criminal Court	ICC
ICTJ	International Center for Transitional Justice	ICTJ
ICTY	International Criminal Tribunal for Yugoslavia	ICTY
ICTR	International Criminal Tribunal for Rwanda	ICTR
IHRL	International Human Rights Law	IHRL
OTP-ICC	Office of The Prosecutor, International Criminal Court	OTP-ICC
RS	Rome Statute	RS
SCJ	Supreme Court of Justice	SCJ
URDP	Unique Register of Displaced Persons	URDP

INTRODUCTION

On November 20, 2014, the Justice and Peace Division of the Bogotá Superior Court found 12 members of the *Autodefensas Unidas de Colombia* (AUC (paramilitaries)) guilty of serious crimes against the civil population. This court also identified an organized power structure under the paramilitary leader Salvatore Mancuso-Gómez and structures and patterns of macro-criminality[3]. These aspects were made visible through crimes of homicide against protected persons, enforced disappearance, illicit recruitment, enforced displacement and gender-based violence (GBV)[4], which were expressions of serious, systematic and generalized violations of international human rights law (IHRL) and international humanitarian law (IHL).

3. According to Decree 3011/2013, patterns of macro-criminality are defined in the following terms: "... The set of criminal activities, practices and modes of criminal action repeatedly committed in a given territory and over a certain period of time, from which it can be deduced that there are essential elements of policies and plans implemented by the illegal armed group responsible for them. The identification of the pattern of macro-crimes has made it possible to concentrate investigative effort on those most responsible for the development or execution of a criminal plan; and it has helped to reveal the structure and *modus operandi* of an illegal armed group and the relationships which made its operation possible. The identification of the pattern of macro-criminality should seek to achieve a proper clarification of the truth of events in the context of the internal armed conflict, and to determine the degree of responsibility of the members of the illegal armed group and their collaborators (Article 16)." See Prosecution Service 2012; and the European Court of Human Rights, 1978 Para. 159.

4.The (Colombian) Prosecution Service has established patterns of macro-criminality. One of them is gender-based violence, which contains all offences of a sexual nature. For the purposes of analysis in this case, reference will be made to the category of sexual violence against women, since the concept of gender-based violence is a broader category that includes other types of crime and victims, not simply women.

The decision states that, in the context of armed conflict, gender-based violence is exercised mainly against women, and is expressed through offences such as sexual slavery, rape, abortion without consent and abusive and violent sexual acts.

It is no easy task to investigate, prosecute and punish crimes committed against women, *because* they are women. This is particularly true when there is a lack of understanding of the circumstances or purpose that the dispute over a woman's body serves for those involved in combat, or of the dimensions of those crimes committed fundamentally against women.

Law 975/2005, the Justice and Peace Law, is a set of rules approved to benefit members of armed groups in exchange for an effective contribution to truth, justice and reparation, as well as disbanding the organizations to which they belong. Given that the law was part of the agreements for demobilization of paramilitary groups, it applied mostly to members of those groups.

After 10 years of the Justice and Peace Law, there has been relative progress in terms of truth[5].

In fact, more is known about the dynamics and consequences of the paramilitaries than 10 years ago. However, in other areas important challenges remain relating to justice, reparation and guarantees of non-repetition which continue to be conspicuously absent from the proceedings[6].

---

5. Other organizations, such as the International Center for Transitional Justice (ICTJ) has identified the following: "... Judicial authorities have made important efforts to show results and to contribute elements that disclose the origins, workings and power structures of the paramilitary groups (...). A view of decisions made over time, both of the courts, and the Criminal Cassation Division of the Supreme Court of Justice, show their evolution towards increasingly high and more demanding standards." (Gaitan 2014:52).

6. Also, according to ICTJ, there has been modest progress made in the systematization of the obligations of the State in matters of investigation and punishment and the protection of victims´ rights, with decisions that consider offences which are the object of court decisions as crimes of an international nature and evolution in the construction of context (ibid. 52-53).

As of May 2014[7], Colombia's Prosecution Service -by prioritizing 15 of those most responsible [8] of sexual crimes- reported 452 events under arraignment and 393 events in "concentrated hearings"[9]. These figures stand in contrast to the five judgments[10] handed down by August 2015, where such crimes had been brought to trial.

One of these decisions related to the judgement given on November 20, 2014, which included 645 acts of sexual violence. Of these, 162 were attributed to the North Block, 31 to the Catatumbo Block, 17 to the Córdoba Block and 3 to the Montes de Maria Block[11]. *Corporación Humanas* represented three women victims in these cases, including María.

María's case was selected as, in procedural terms, it highlights lessons to be learned and challenges remaining in terms of strategic litigation. A legal study of the case enables an assessment of how the Justice and Peace process has investigated and prosecuted crimes involving sexual violence against women. This study also provides us with a reference point on the scope of the decision of the Bogotá Superior Court in November 2014, to provide reparation, construct truth, and achieve a transition towards peace in relation to women.

---

7. Prosecution Service, November 2014.

8.The candidates are Salvatore Mancuso, Ramiro Vanoy, Rodrigo Pérez-Alzate, Luis Eduardo Cifuentes. Arnubio Triana-Mahecha, Ramón María Isaza, Herbert Veloza-García, Diego Fernando Murillo, Miguel Angel Melchor Mejía-Múnera, Edward Cobos-Téllez, Hernán Giraldo-Serna, Freddy Rendón-Herrera, Elda Yenis-Mosquera, Ely Mejía-Mendoza and Olimpo de Jesús Sánchez.

9. In a "concentrated hearing" the prosecutor delivers the indictment for the charges investigated and requests the judge to order the preventive detention of the accused at an appropriate detention center (Art. 18.2 Law 975/2005, amended by Art. 18 of Law 1592/2012).

10. (1) Bogotá Appeal Court, Justice and Peace Division, 2014a; (2) idem 2014c;;(3) idem 2014d; (4) idem 2014e; (5) idem 2015.

11. These Blocks are all part of the overarching AUC organization.

PART I

Case analysis. The crimes against María and the legal framework for court proceedings

1. Context

1.1. The sexual slavery of María under the control of the paramilitary commander ("Cordillera")[12]

At the time of the events, María was 21 and came from a peasant-farming family. She had plans to marry. She was young, lived a quiet life and had close family relationships. She worked as a maid in a household in the town of Cúcuta in North-East Colombia, which enabled her to make a living and send some money home.

In 2000, María lived in Cúcuta and her family in the rural district of La Gabarra in the Municipality of Tibú, Department (Province) of *Norte de Santander*. Her parents, and younger siblings lived on a farm called "La Estrella" where they worked and would meet up. Her other siblings lived nearby with their own families. María's family relationships were governed by the traditions and practices of that region.

This peaceful family life was shattered by the entry of paramilitary groups in the region. From 1999–2000, family relationships deteriorated and the situation in La Gabarra

12.The case has been recorded in a number of judicial documents as part of the legal representation before the Justice and Peace proceedings, in respect of the harm done to María and to other members of her family.

worsened. The conflict was savage, mainly affecting the peasant-farming population who received threats and stigmatization. María's family was no exception: two of her brothers and her father were kidnapped and tortured by the paramilitaries of the AUC Catatumbo Block and two other brothers were forcibly recruited by the guerrillas. After a few months, the family was attacked again by paramilitaries from that Block, commanded by "Cordillera", who invaded their farm and stole their animals and other possessions.

This event coincided with the flight of María's elder brothers to Cúcuta following threats from paramilitary groups. On the day of a paramilitary raid, María's parents were not at home as they were attending a medical appointment. Local residents, however, recognized the paramilitary commanders. Indeed, despite the fear after this type of event, efforts were usually made to find out the reasons behind the robbery and to explore the possibility of recovering what they had lost via payment of some sort of "protection money"[13].

As a result, María's father asked her to go to La Gabarra to find out what had happened to the animals. She agreed and went there with her sister-in-law and two of her younger brothers. Shortly after reaching the village, they were told to speak to Abel Miro-Sepúlveda ("Cordillera"), as he ordered the operation against María's family farm.

She found "Cordillera" and he asked her "Who are you?". She answered that she was a member of the family from La Estrella. Upon her reply, "Cordillera" drew a gun on her, accused her of being a guerrilla and condemned her there and then. He declared: "You can't leave here, because I'm going to give the order: you will stay here with me until I tell you that you can move from this village".

13. Extortion was a common practice among the illegal armed groups.

"Cordillera" also ordered one of his men to take María by boat to the edge of the municipality. There, the other commanders, "Camilo" and "Mauro", could decide on what to do with her. María was then separated from her two brothers and her sister-in-law, who were sent to the house of a family acquaintance.

For the rest of the day, María was controlled and kept under the surveillance of various men. She was tied up, exposed to the sun, and given nothing to eat or drink. While exposed to these conditions, she was covered and stung by ants.

As the Block commanders never appeared, "Cordillera" gave the order that afternoon for María to be returned to La Gabarra. Upon her return, she was locked in a room in a house, and her captors told her she would be killed if she tried to escape. Two days later, "Cordillera" appeared in her place of captivity. According to María, he was drunk, and the first thing he said was that "no one could resist him" and that she must stay with him.

"Cordillera" was insistent, that she "was to be his, or if not he would kill her and leave her in the street like a dog, or in the river". María was shocked and begged him to let her leave and not force her to stay. In answer to her pleas, "Cordillera" told her that she had the night to think about it, but his men had orders to kill her if she left La Gabarra.

The man who looked after the house knew of María's family and had met her brothers. When he heard of "Cordillera's", offer he advised her to yield to his wishes, as he was had no doubt that "Cordillera" was capable of having her killed. To console her, he told her that, after a time, "Cordillera", would get bored with her and that it would be better for her to make the effort to "give the impression she was in love with him".

The next morning, María met her brothers again and was told that "Cordillera" had kidnapped her sister-in-law, supposedly

as a punishment for having come back to La Estrella to pick up some things. María returned to "Cordillera" and begged him not to do anything to her sister in law. In exchange, she promised to discuss his proposal.

During this meeting, María was pressured and agreed to stay. She felt obliged to tell her brothers and sisters to leave and that her decision was to stay and work with "Cordillera". She promised that they would see each other again later.

From that point, María was repeatedly raped by "Cordillera". The sexual violence was accompanied by a series of physical violence and threats. "Cordillera" repeatedly told her he would kill her or members of her family if she ran away or told anyone that she was being held against her will.

When "Cordillera" was away, he ordered her to be locked up in the same place. He repeatedly stated: "I am in charge, and all you have to do is obey". In fact, at that time, "Cordillera" was recognized as the paramilitary commander in the village and as a man who would not tolerate anything other than complete obedience.

After a time, "Cordillera" began to take her out of the house. When they were in the village María had to sit beside him and pretend to be his partner. Further, he warned her that any indication that she was not there by her own free will would result in her death.

While in captivity, María found out that one of her younger brothers was sick. She asked "Cordillera" to let her see her family, but he refused. Desperate, she told him that if she could not see her family, then she would rather that he killed her. After this incident, her minders warned her to not cause such a situation again, as it was very likely that she would be killed. Again, they comforted her by saying that "Cordillera" would eventually tire of her and release her. María, terrified,

followed their advice and resigned herself to the situation. She started to act like a housewife and "Cordillera" started to give her money and clothes. As soon as she had gained some of his trust, she asked him again to allow her to visit her family and he finally accepted. This was how, after five months of captivity, "Cordillera" allowed María to travel to her sister's house in Cúcuta.

While there, "Cordillera" permanently controlled her, watched over her sister's house, and made frequent calls to find out about María. Upon asking her to return, she invented excuses to prolong her stay. This resulted in her telling "Cordillera" that she was pregnant and that, for their son's safety, it would be better for her to stay in Cúcuta.

María thus had the chance to plan a change of residence. She fled to a place out with the control of "Cordillera", and stayed there in hiding until the day she was told that he had killed himself.

María was forced to submit to the desires of her perpetrator, but many people in the village and in her family thought the decision to stay with him was her own. Indeed, the family had received a message that she wished to stay at "Cordillera's" side. For years, María was therefore the object of condemnation. She only dared to tell the truth to her mother, who made her promise not to tell anyone as she feared that this might endanger both of their lives.

During María's enslavement by "Cordillera", she had no chance of meeting her partner again – the man who, as mentioned above, she had planned to marry. Subsequently, María was found to have a pre-cancerous lesion in her uterus and had an operation. María associates this condition with the sexual violence to which she was subjected. In addition, she is also still suffering the psychological consequences of those events.

María now lives in a town in *Norte de Santander* and is a housewife with a partner and a ten-year-old son. Despite the scars which the sexual violence left her, she has shown remarkable strength by breaking her silence and demanding her rights.

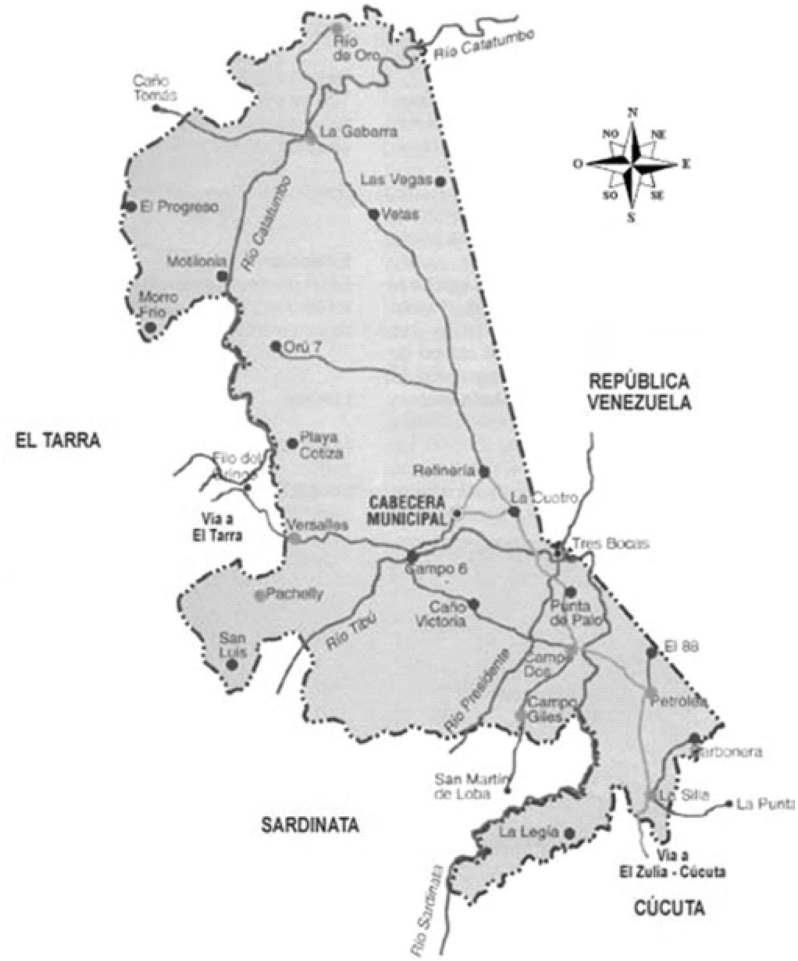
1.2. La Gabarra, Norte de Santander. A place dominated by the paramilitaries

Graph 1. Political-administrative division of Northern Colombia

Source: Bogotá Superior Court, Justice and Peace Division (2014 D).
The territory of Colombia is divided into Departments, Municipalities, Indigenous Territories and Regions.

The farm La Estrella is located in the rural district of La Gabarra, Municipality of Tibú, Department of *Norte de Santander*. This was where María was held prisoner and sexually enslaved. The Department of *Norte de Santander* is located in North East

Colombia, and borders on the Department of Cesar to the west, Santander and Boyacá to the south and Venezuela to the north and east.



Graph 2. Municipality of Tibú: Source: Office of the Mayor of Tibú, *Norte de Santander*

Tibú is part of the region of Catatumbo, which is one of the richest regions in natural resources in Norte de Santander. There are major coal reserves there, as well as oil reserves, water sources and endemic species. The region is an important enclave, as it is close to the Venezuelan border. A large part of

its territory is a forestry reserve, where indigenous reservations and the Catatumbo National Park are found (Ombudsman, 2006:1).

The name "La Gabarra" is derived from one of the vessels that transported goods and passengers up and down the Catatumbo River (Compromiso Corporación para el Desarrollo del Oriente, 2009). Historically, there has been little State presence in the region and its marginalization is evident from the high levels of unsatisfied basic needs, with a little over 50% of the population living in precarious conditions. This percentage is even higher in the municipalities of Tarra, Hacarí and San Calixto where poverty exceeds 80% (UNDP, 2014a).

State presence has been mainly military and is designed to protect a range of economic interests in the area (National Historic Memory Centre 2015:53). In fact, the State had previously been supplanted by foreign businesses, and later by armed actors who defined the context of violence in which the entire region was immersed (Asociación para la Promoción Alternativa Minga & Fundación Progresar, 2008, 34). The armed groups were attracted by the region's natural wealth, coca-leaf crops and geostrategic position that favored drug trafficking and the oil and gas trafficking (National Historic Memory Centre, 2015, 30).

Since the 1970s, the *Ejército de Liberación Nacional* (ELN) guerrillas were present in the region following their move from Southern Bolívar. Front 33 of the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) moved in to the Department following the so-called "Seventh Conference" of that organization in 1982 and before the break-down of the truce between the government of then-President Belisario Betancourt in 1987.

From the 1990s onwards, the area of Sarare became a target of influence of the FARC's Front 45. The *Ejército Popular de*

Liberación (EPL) began to have a presence in *Norte de Santander* in the mid-1980s with the Libardo Mora Toro Front. From 1995 onwards, the Ramón Gilberto Barbosa Front (Asociación para la Promoción Alternativa Minga & Fundación Progresar, 2008:58) was created, and the drug-traffickers' interest in the frontier increased as their business became more profitable.

This happened in a setting of violence and unmet rights, typically characterized by the absence of State guarantees and a weak institutional structure, in contrast to the ever-stronger presence of military units stationed in the territory (Compromiso Corporación, 2009).

In this scenario, during the 1990s, peasant-farmers organized marches in favor of presenting the "Plan for development and peace for Catatumbo" to the State. Their plan contained proposals for the eradication of the crops used for illicit purposes, State support for productive projects and the strengthening of communities. The State, however, interpreted these initiatives as a threat to security and declared that the peasants' social mobilization was influenced or directed by guerrilla groups, which resulted in the progressive criminalization of social protest and struggle (Compromiso Corporación, 2010:36).

In addition, in the mid-1990s, the presence of armed men in the Municipality of Ocaña who identified themselves as members of the South Cesar Self-Defense groups began to be noticed. In 1994, this group formed the *Autodefensas Campesinas de Córdoba y Urabá* (ACCU) (ibid: 44); in 1999, these groups entered *Norte de Santander* calling themselves "AUC". During this time, their mission was to attack the ELN guerrillas; the banks of the river Tarra were the main theatre of confrontation (Caicedo & Méndez, 2013, 22).

In May 1999, the AUC consolidated an operational corridor between Urabá and Catatumbo. Despite the Ombudsman's

early warning system[14] being activated and alerts sounded by the Diocese of Tibú, this corridor was the scene of an outbreak of violence designed to divide the north and center of the country and penetrate "the guerrilla rearguards in the South and East, and the zones of expansion in the North." (Ibid: 47).

The zone was thus occupied with the deliberate logic of taking over illegal businesses, such as the plantation and commercialization of coca-leaf and the smuggling of motor gasoline and vehicles (National Historical Memory Centre, 2015:73-80; 107-157). In addition, the mobility of the civilians was controlled, and the passage of guerrillas blockaded (Caicedo & Méndez, 2013:49).

La Gabarra became a key area for these paramilitary incursions and enabled the Catatumbo Block to expand westward and southward in the Department (ibid, 50). In this context, sexual violence was part of the strategy of the Catatumbo Block to control the local population and it helped them to achieve their military, political and economic objectives.

Some of the testimonies made available to *Corporación Humanas* speak of the control over women, in the form of rape, forcible cohabitation, forced pregnancies and abortions. Of particular note were the practices of obtaining information and sexual violence perpetrated in paramilitary roadblocks or control points, as being expressions of territorial control and control over the life of the local population (Ibid. 59-61).

14. An instrument with which the Ombudsman collects information, verifies it and carries out a technical analysis of it in relation to situations of vulnerability and risk among the civil population as a consequence of the armed conflict; and the authorities concerned are warned of their duty to coordinate and provide prompt and comprehensive attention to communities affected (Office of the Ombudsman, undated).

1.3. Sexual violence as a strategy of war

Colombia has experienced armed conflict for the last fifty years. In this war, women have suffered particularly, as in all conflicts, due to their bodies representing one of the spoils of war. Indeed, it has been shown, for example that paramilitary groups in certain parts of the country use sexual violence as a means of maintaining and exercising control over territory. Further, the disproportionate suffering of women in this war has been recognized by national institutions such as the Constitutional Court (Constitutional Court 2009a).

In this regard, *Corporación Humanas* in its guide for the treatment of cases of sexual violence (*Guía para llevar casos de violencia sexual*, published in 2009), states that sexual violence has been committed in four circumstances: attack, territorial control, deprivation of liberty and within the ranks. In these circumstances, sexual violence is committed for nine different purposes: to establish domination, regulation, to buy silence, to obtain information, to exact punishment, to expropriate, to exterminate, to reward and to enhance cohesion. The last two purposes are specific to intra-rank activities (*Corporación Humanas*, 2009b).

One of the tools to evidence the existence of this reality has been to contextualize and make visible sexual violence as a strategy. The body of a woman, and in general the problems affecting women, have been "naturalized" and excluded from the legal and political analysis of the conflict. An investigation focused on context will help identify practices beyond the simple motives of aggression and which confirm the use of sexual violence as a practice that pursues interests underlying the war.

According to the United Nations, in general terms, in armed conflict, sexual violence usually tends to "spread terror, cause the breakup of families, destroy communities, and in some

cases, change the ethnic composition of the next generation" (United Nations, 2014b).

The Inter-American Commission on Human Rights (IACHR) has recognized that sexual violence committed in the context of a conflict is intended to harm the enemy, dehumanize the victim and sow terror in the community – or all of these things. Further, sexual violence is used as a war strategy by all actors in the armed conflict. The Commission stressed the following:

> "Within the armed conflict, all the circumstances that have historically exposed women to discrimination and to receive an inferior treatment, above all their bodily differences and their reproductive capacity, as well as the civil, political, economic and social consequences of this situation of disadvantage, are exploited and manipulated by the actors of the armed conflict in their struggle to control territory and economic resources." (IACHR, 2006: Para. 46).

According to the Norwegian Council for Refugees (NCR, undated) there is more evidence today of the use of sexual violence against women as a weapon of war. For example, in Colombia, there have been reports that two out of every ten displaced women have fled from their homes or lands because they have victims of sexual violence or from the fear of sexual violence (Ombudsman's Office, 2008).

This figure shows how one of the strategies of war used by armed groups is sexual violence against women, which sows fear in the community, forces people to become displaced to escape from it and thus allows other groups to take over the land of those who flee, taking advantage for their own economic activities. The UN Secretary-General recognized this when he told the Security Council:

> "... In Colombia, illegal armed groups have used sexual violence to forcibly displace populations from lucrative mining or agricultural zones (United Nations, 2013: Para. 9)."

Further, the Secretary General drew attention to the recent phenomenon that "different illegal armed groups have used sexual violence against family members and other relatives to exercise control over their families, and those of their subordinates in specific places".

Finally, he expressed his concern that members of the illegal armed groups systematically organize acts of sexual violence, or threaten to commit them against leaders of women's groups and activists, or their families (ibid. Para. 26).

The Office of the Prosecutor of the International Criminal Court (OTP-ICC), also recognizes in its report on the preliminary examination in Colombia that armed groups "committed acts of sexual violence for the following motives":

> "…to sow terror within communities to facilitate military control; to force people to flee to facilitate acquisition of territory; to wreak revenge on adversaries; to accumulate trophies of war; to exploit victims as sexual slaves; to injure the 'enemy's honor'" (International Criminal Court, Office of the Prosecutor 2012, Para. 80).

1.4. The Catatumbo Block of the AUC

According to statements made by Salvatore Mancuso, the Catatumbo Block consolidated its presence with troops from Ituango, Córdoba and Urabá. These troops were trained in Cordoba, Sucre and Montes de María (Departments of Córdoba and Bolívar respectively) for over three months by army personnel and guerrillas brought by aka "Rodrigo Doble Cero", commander of the Metro Block and one of the founders of the AUC. Mancuso also stated that equipment and weapons were supplied by the Castaño brothers, also founders and leaders of that organization (Verdad Abierta, undated).

The Catatumbo block attempted to create a corridor for drugs exports and to chase out the Central command of the ELN, and "protect" cattle breeders and merchants in the area (Bogotá

Superior Court, 2014d: Para. 312). Since the first attack on May, 29 1999, they took part in serious confrontations.

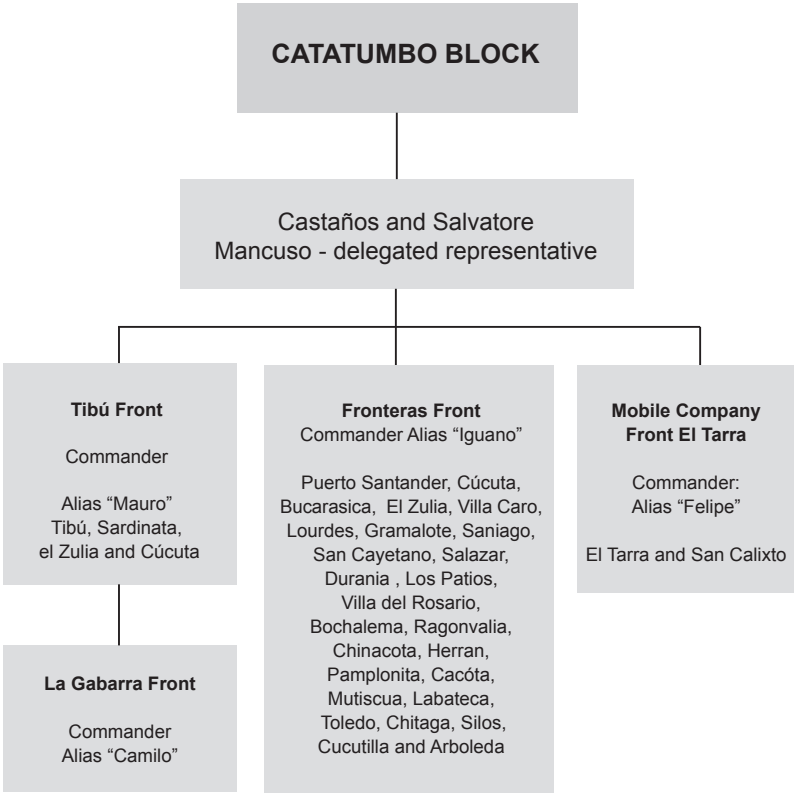
The consolidation of this Block was evidenced by way of acts of extreme violence against the civil population: massacres, murders, enforced disappearances and sexual violence. Based on the pretext of a counter-insurgency struggle, these actions, together with food blockades, the control of the sale of medicines, cattle-rustling, extortion, pillage, and enforced displacement caused a state of terror which enabled the Catatumbo Block to co-opt economic, social, political and military powers in the area (Caicedo & Méndez, 2013:23–131).

According to documentation collected by the Justice and Peace courts, this Block was financed by extortion and "protection money" taken from merchants and truckers, with the largest source of income coming from the plantation and sale of drug crops produced in the Catatumbo area and in towns close to Cúcuta (Bogotá Superior Court 2014d: Para. 307–308).

The presence of the Catatumbo Block caused a parallel system of taxation, restrictions on the circulation of goods, mass reduction of income caused by enforced displacement, and blockades on incoming supplies for farmers, motor gasoline, cement and the transit of goods to the rural sector, on the grounds that these small producers were guerrilla-collaborators and they were taking provisions or medicines to them (Bogotá Superior Court, 2012 Para. 170).

The provision of public services in all areas was also affected by the lack of connectivity caused by the presence of the illegal armed groups. This created a vicious circle as the offer of public services (road building, technical services for production, etc.) declined. As a result, the higher risk run by operators of these activities increased the cost of providing services and made them unaffordable for local government (ibid).

The Catatumbo Block was present in El Tarra, San Calixto, Hacarí, Tibú, Sardinata, Teorama. Puerto Santander, El Zulia, Chinacota, Pamplona, Rangonvalia, Los Patios, Villa del Rosario and San Cayetano (Bogotá Superior Court, 2014d: Para. 317-322). The structure of the Block was as follows:



Graph 3. Structure of the Catatumbo Block
Source: Bogotá Superior Court, 2014 d.

The Castaño brothers and Salvatore Mancuso headed the organization. The Commander of the Block was Armando Alberto Perez-Betancourt ("Camilo"), who also had the special function of collecting money from drug trafficking and subsidizing the fronts. Below, were the front commanders José

Bernardo Lozada Artuz ("Mauro") of the Tibú Front; Rubén Dario Dávila-Martínez ("Felipe"), of the Mobile Block; and Jorge Iván Laverde-Zapata ("El Iguano") in the Fronteras Block. "Camilo" was responsible for commanding the La Gabarra Front at the time of the events (ibid).

In descending order, the special group and company commanders (political, religious and finance) were followed by a special group engaged in activities of a certain complexity, directly under the Commanders and then the foot soldiers.

Abel Miro Manco Sepúlveda ("Cordillera") was identified as the commander of the "Escorpión" company, part of La Gabarra Front (ibid, Para. 282). He operated under the orders of ("Camilo"). Other middle-ranking commanders were Carlios Enrique Rojas-Mora ("El Gato") and Edilfredo Esquivel ("El Osito") (Caicedo & Méndez, 2013, 51).

"Cordillera" was responsible for the sexual crimes against María, and is described as being short and stocky, with a round face. He was a member of the ELN for 15 years or more, until he changed sides and joined the paramilitaries. As of that time, his name became synonymous with brutality and cruelty (Hernández, 2007:78). People identified him as the worst of the psychopaths that the paramilitaries had brought into that region.

According to testimony, at the orders of "Cordillera" they "hacked two boys to pieces alive, cutting pieces of the bodies until only the trunk remained and they chopped them into pieces and threw them into the river" (Asociación Minga & Fundación Progresar, 2008:94). The following testimony also confirms the cruelty of "Cordillera": "They shot people to death on the spot at his orders and then went on with their breakfast as if nothing had happened. They performed a caesarian on a woman, took the baby out and then impaled her through the vagina; and they burnt the baby. He said that they had to kill

evil where it began. They killed the girl and afterwards killed her father" (Hernández, 2007:99–100).

The Catatumbo Block demobilized on December 10, 2004, at the farm Brisas in Sardinata, in the rural district of Campo Dos, Municipality of Tibú, *Norte de Santander*. On January 21, 2005, a total of 1434 individuals were listed and signed for by the member-representative Salvatore Mancuso-Gómez and accepted by the Government.

At the time of the demobilization, as arranged by the member-representative, the illegal armed group handed over 1140 weapons, 1335 grenades, 200 portable radios, 11 vehicles, two boats, eight canoes, 14 outboard motors, 45 mules and 56 rural properties (Bogotá Superior Court, 2014d, Para. 96).

According to documentation provided by the journalist Salud Hernández-Mora, at the time of demobilization, "Cordillera" refused to take part and remained in the rural district of Vetas, where he later ended his life with a bullet in the head (Hernández, 2007:130–131).

2. Description of applicable law

2.1. Sexual crimes committed against María

During the Justice and Peace process Salvatore Mancuso, as the most responsible of the Catatumbo Block, pled guilty to 645 sexual offences against civilian women, of which 31 were ascribed to the actions of the Catatumbo Block. María was one of those cases.

Specifically, the acts against María were defined in law and indicted by Justice and Peace Prosecutor 54, as "violent carnal access against a protected person" (Criminal Code, Article 138); sexual slavery" (Criminal Code, Article 141), and "torture" (Criminal Code, Article 168). These classifications

were made as part of a strategy to prioritize certain crimes as contained in Prosecution Service Directive 1/2012 "by which certain prioritization criteria is adopted in cases, and a new system of criminal investigation and management of cases is created by the Prosecution Service". The Directive also set the following criteria for prioritization: subjective[15], objective[16] and complementary[17].

There now follows a description of the elements of each of the crimes of sexual violence committed by "Cordillera" against María, in terms of the Colombian legal system.

2.1.1. Violent carnal access against a protected person

Article 138 of the Colombian Criminal Code states that "He who, on the occasion of and in the course of armed conflict, commits carnal access with violence against a protected person shall be liable to imprisonment of 10–18 years and a fine of 500–1000 minimum monthly salaries...[18]". Subsequently, Article 212 defines what is meant by "carnal access"[19]. The following are the elements of this type of crime.

2.1.1.1. On the occasion of and in the course of armed conflict

The determination of the existence of armed conflict in Colombia has been widely proven and recognized by jurisprudence. It is nonetheless necessary to show that, for the

15.Particular qualities of the victim are: minor, woman, ethnic group, human rights defender, part of a displaced population, ethnic minority; and characterization of the perpetrator (most responsible, collaborator, sponsor, material author).

16.Type of crime committed, gravity, representative nature, in terms of affecting rights and mode of commission.

17.Region where the crime was committed, abundance of evidence, examination of the case by an international organization, etc.

18.Punishment was increased by Article 14 of Law 800/2004 to prison for 160-324 months and a fine of 666.66-1,500 minimum salaries.

19."Carnal Access" is understood to be the penetration by the male member of the anus, vagina or mouth, and penetration of the vagina or anus by any part of the human body or any object.

existence of this type of crime to be determined, there is an effective nexus between the occurrence of the event and the conflict. For this purpose, the Justice and Peace courts have applied the following requirements.

- First, *the capacity of the author to commit the crime on the occasion of armed conflict* must be established. In this regard, the courts have considered it sufficient that the suspect should form part of the armed structure and play an active part in the conflict (Bogotá Superior Court, 2010).

In the case of María, the direct perpetrator ("Cordillera"), was part of the AUC as a member of its Catatumbo Block, under the command of Salvatore Mancuso. Specifically, "Cordillera" was a member of the La Gabarra Front, under the command of "Camilo" and he was a middle-ranker with responsibilities for specific commissions and foot soldiers. This gave him the power to command in that area, as mentioned in the section above on context.

- Second, the court requires *the influence of the armed conflict on the decision to commit the act* be established and states that in order to prove this, there must be requisite intention in the act and its relation to the armed conflict (ibid., Para. 194).

In the specific case of María, from the circumstances it may be established that "Cordillera" acted with the requisite intention. Both the use of force and threats against María show his intention to commit acts of sexual violence in order to control the body and life of this young person.

The armed conflict was decisive for these events to be able take place. First, sexual violence is part of the war strategies implemented by the paramilitaries and in the specific case here, its purpose was to dominate María. The power of the gun in the hands of the armed group enabled him to impose his own rules; the use of women was decisive to obtain and

consolidate control over the territory of *Norte de Santander*. Any act of disobedience could be considered as a challenge to authority, or a sign of disrespect of the valor or honor of the paramilitaries and their capacity to harm. Therefore, it was impossible to exercise free consent[20].

This situation can be appreciated in María's testimony when she states that "Cordillera" told her that "nobody could stand up to him... that she was going to be his, or else he would kill her and she would end up in the street like a dog, or in the river". This is consistent with the advice of the man who looked after her: "Treat him nicely, because if you don't, he will kill you. If you can put up with that for a while, then he will eventually get bored of you."

- Third, the court requires that *the armed conflict influences the manner in which the crimes are committed*, which will identify the existence of patterns of behavior in the actions of the perpetrator (Bogotá Superior Court, 2010 Para. 195).

In this specific case, and in the words of the Justice and Peace court:

> "... The AUC made use of criminal models such as enforced disappearance, selective massacre, forced displacement, torture, illicit drug recruitment of minors, sexual aggression, theft, and so on, in regions where they were present (ibid. 68)"[21].

A pattern of paramilitary activity in the context of the armed conflict was recognized by the Prosecution Service upon establishing sexual violence as one of the patterns of macro-criminality established in plan of action for prioritizing cases under Directive 1 of October 4, 2012.

---

20. According to the arguments developed in the decision, the case of María was framed within the AUC's intention to subordinate the population of the village of La Gabarra. This matches the analysis of *Corporación Humanas* concerning the context of territorial control, in which sexual violence was used as a strategy of war.

21. (Italics added).

In the decision and based on the information collected, there is corroboration of macro-criminality practices where sexual violence is a "persistent and systematic attack, across the entire paramilitary deployment, incorporating notions of a gender mindset, giving pride of place to the use of sexual violence and gender-based violence" (Bogotá Superior Court 2014d, Para. 1291). The decision shows how the paramilitaries committed sexual crimes against women in the region, using the same *modus operandi*. As evidence of this, already mentioned, there are the 31 crimes of sexual violence ascribed to the Catatumbo Block.

- Finally, the fourth element mentioned by the court consists of determining whether *there was any influence of the armed conflict on the purpose of the act* (Bogotá Superior Court 2010, Para. 196). Salvatore Mancuso, in his statements, states that the objective of the paramilitary groups' actions was "to fight the guerrillas at any time and in any place, with or without weapons in combat or otherwise, in uniform or in civilian dress..." (Ibid. 131).

To comply with this order, the AUC embarked upon a systematic and generalized victimization of the civilian population, with selective murders, torture, kidnapping, displacements, disappearances and sexual violence (Bogotá Superior Court, 2014d Para. 252). In addition to being one of the ways of fighting the guerrillas, these criminal actions also enabled them to achieve specific objectives, such as territorial control and the control of economic, political and social power in the area.

The sexual violence used against María helped to achieve this purpose, since it sent a message to the community that the paramilitaries could control any women they wanted. Therefore, any refusal was considered an attack on their territorial control and power (Caicedo & Méndez 2013: 61).

2.1.1.2. Carnal access through violence

Colombian jurisprudence has considered that, in sexual crimes, the violence element includes any action used to bend, subject or break the will of the victim in order to achieve a desired result[22]. This is the means by which the victim's resistance to a sexual act is overcome, her resistance disappeared or eliminated. It may be physical or moral[23]. Physical violence means the application of force or oppression to restrict physical freedom or integrity and eliminate will. The moral element refers to an act with psychological consequences to obtain the same end[24].

The element of violence in the crime of violent carnal access against a protected person is evident in the force exercised by "Cordillera" to rape María. This force is evident from physical aggression and the threats to kill her and her family, should she attempt to escape or anyone find out that she was there by force. María was subjected to constant sexual violence as a result of the use of force and threats of force against her and her family.

Another element that evidences the coercion exercised by "Cordillera" comes from the advice given by the man who looked after the house where María was held: he suggested that she would be wise to give in to the perpetrator's wishes as the only way of saving her life.

22. *Corporación Humanas* has constructed this argument on the basis of decisions such as : Supreme Court, Criminal Cassation Division, 1006, idem 1997, idem 2003, idem, 2006a, idem 2006c, idem 2008b, idem 2008c, idem 2009b, idem 2009c. Also see Corporación Humanas 2010c.

23. Supreme Court Criminal Cassation Division 2008ª See Corporación Humanas 2010:101.

24. The analysis was carried out by *Corporación HUMANAS* based on the case law from the superior and lower courts in three cities in cases of sexual crimes against girls and women (2010:101).

2.1.1.3 Against a protected person

The Colombian Criminal Code, following international humanitarian law norms[25], understands that protected persons are:

> "Members of the civilian population, persons who do not take part in the hostilities and civilians in the power of the adverse party, the wounded, sick and shipwrecked personal no longer in combat; religious and health personal, journalists and accredited war correspondents, combatants who have laid down their arms, because of capture, surrender, or any similar reason; persons considered as stateless or refugees before the beginning of the conflict;[26] .

María did not take part in the hostilities: she worked as a maid in a household far from any armed actor and was part of a peasant family of who lived on their farm La Estrella, in the rural district of La Gabarra.

She and her family were the victims of several armed actors present in that area. On the one hand, the FARC allegedly recruited her 12-year-old twin brothers and various members of the family victims were victims of kidnapping, torture, displacement and, as with María, a victim of rape, sexual slavery and torture at the hands of the paramilitaries of the Catatumbo Block of the AUC.

The State has recognized the family and, in particular María, as being victims of the Colombian armed conflict. This is demonstrated by their inclusion in the displaced persons register (RUPD) as victims of enforced displacement. Further, the father and other members of the family are recognized as victims in the Justice and Peace jurisdiction by reason of their displacement and having lost their property. María is part of

25. 1949 Geneva Conventions (I Art 13, (II Art. 13) Protocol I Art 51; Protocol II Art. 13. Common International Humanitarian Law Principle 1; ICRC, EICJ, Art. 38.

26. Congress of the Republic, Law 599 of 2000: paragraph Art. 135.

the civilian population and therefore protected by international humanitarian law and Colombian criminal law.

2.1.2. Sexual slavery or forced prostitution

In addition to the crime of violent access against a protected person, the acts committed against María between May and October 2000, also match the definition of sexual slavery contained in Article 141 of Law 500/2000, which states the following:

> ARTICLE 141. ENFORCED PROSTITUTION OR SEXUAL SLAVERY. Increased sentences by article of Law 890 of 2004 from January 1, 2005. The text is the following: whoever by the use of force and on the occasion and in the course of the armed conflict obliges a protected person to render sexual services will be liable to imprisonment of 160 to 324 months, and a fine of 666.66 to 1500 minimum monthly salaries".

The elements that define this type of crime are (a) on the occasion of and in the course of armed conflict, (b) against a protected person, (c) through the use of force and (d) to provide sexual services. Given that the first three of these elements have already been explained, the fourth element requires to be explained, which regards the rendering of sexual services.

The *rendering of sexual services*, within the crime "sexual slavery" refers to an act of forcing a person to engage in sexual activities in favor of the aggressor. The Special Rapporteur Against Contemporary Forms of Slavery states the following:

> "... Sexual slavery is also encompasses situations where women and girls are forced into 'marriage, domestic servitude and other forced work that ultimately involves forced sexual activity, including rape by their captors." (United Nations, 1998).

According to the Rome Statute, sexual slavery includes (a) exercising the attributes of rights of ownership over one or more individuals, to purchase sell and/or barter them, or all of those things, or to impose a similar type of deprivation of liberty on them; (b) the author has made these persons engage

in one or more acts of sexual nature (International Criminal Court (2000)[27].

In the case of María, the aggressor had full control over her movements: he kept her locked up and had someone responsible for looking after her and keeping her under surveillance. He told the girl that she could only move when he allowed her to do so; she was deprived of any capacity to decide on her own sexual freedom and was forced to yield to the sexual desires of "Cordillera".

María was forced to act as the partner or companion of "Cordillera", and to cohabit with him, including forcible acts of a sexual nature.

2.1.3. Torture of a protected person

At the time of the events, torture was defined in Colombia according to Decree 2266/1991:

> "Article 24. Torture. He who subjects another to physical or psychological torture will be liable to imprisonment up to 5-10 years, provided that the act is not a crime punished with a greater punishment."

Colombian jurisprudence has subsequently stated in relation to this definition:

> "... For the repression of torture, it is not required that the perpetrator has any special qualities, nor that any particular method be used for that aggression, or that torture be conducted for specified motives or reasons, the simple harm done to the legal right protected allows the definition of a crime to fit the suppositions of fact that structure it." (Supreme Court, 1991).

From this text, being subjected to physical or psychological torture requires to be proved, as will now be described.

Regarding physical or psychological torture, the Supreme Court of Justice has defined torture as "subjecting the victim to the will of another" (Supreme Court of Justice, 1989) and

27. Elements of crimes UN Doc PCNICC/2000/1/Add.2 Article 8 2)b)xxii)-2.

physical torture as bodily suffering. Psychological torture is defined as that which produces internal suffering, such as fear or the sensation which affects the psychological normality of the victim and is a product of a threat (Supreme Court of Justice, 2004).

In the case of María, it is seen from the outset that "Cordillera" meant to subordinate her will through acts that constitute torture. The physical torture was expressed by the acts of physical aggression against her, including sexual acts to which he subjected her during the five months that she lived in slavery.

Further, psychological torture was expressed in the death threats, harassment, and control over her movements by "Cordillera", even when she was in her sister's house. María lived with the ever-present fear that "Cordillera" would attack her or her family. The threats gave rise to a state of permanent uncertainty and insecurity, which crushed any need she might have for autonomy.

Further, María had to pretend to be "Cordillera's" partner as her only means of survival. María lived with the ever-present hope that "some day he would get tired of her, and let her go", which was another form of psychological torture. While for "Cordillera" this was a way of ensuring that her slavery would pass unnoticed, for María it represented an ongoing rupture with her family, surroundings, relationships and life.

It should be noted that when a single act or omission, or series of acts or omissions transgresses criminal law provisions, or the same provision repeatedly, there is a concurrence of criminal conduct (Congress of the Republic, 2000, Article 31).

In this case, there is heterogeneous concurrence of the crimes of violent carnal access against a protected person, sexual slavery and torture. Heterogeneous concurrence occurs when

a single form of conduct matches more than one type of crime. In this specific case, the carnal access and sexual slavery are also torture.

As stated by *Corporación Humanas*, sexual violence and the ends pursued by its perpetrators are not subsumed into a single criminal offence. Therefore, there must also be recognition of the impairment of the sexual freedom and integrity of the victim, as well as the impairment of her autonomy and personal freedom (2009b: 64).

2.2. Applicable provisions of law

As indicated, the proceedings relating to the criminal acts suffered by María took place in the course of a transitional justice process. The provisions of law that contain the definition of the sexual crimes will be examined.

2.2.1. Law 599/2000

In terms of Colombian law, between May and October 2000, María was a victim of the crimes of violent carnal access of a protected person, torture of a protected person, enforced prostitution or sexual slavery, deportation, expulsion, or enforced displacement of civilian population, illegal detention and loss of due process as set down in in Articles 137, 138, 141, 149 and 159 of Law 500/2000, this being the Colombian Criminal Code in force at that time.

Given that Law 500/2000 came into force in July 2001, strictly speaking it would not possible to indict using the crimes contained in that Code. Nonetheless, the judgment passed on Salvatore Mancuso in Justice and Peace, analyzed events in the light of provisions of international human rights and international humanitarian law and ruled in favor of a flexible approach to the principle of legality. This was justified by the

nature and scope of these proceedings whereby a transition from conflict to peace is sought[28].

This approach has generated an on-going debate in legal and academic circles, specifically in relation to the flexibilization of the principle of legality.

To understand the decision in María's case, the meaning and scope of the principle of flexible or extended legality is required to be understood, as well as the legal basis for its application in Colombia and in other proceedings relating to human rights violations.

2.2.1.1. The principle of legality: elements and definition

According to legal tradition, the principle of legality offers substantive procedural and legal guarantees against arbitrary action through two prime objectives: (a) the guarantee of legal certainty, that is, that a person who engages in a given form of behavior is in a position to know whether it is lawful or not; and (b) the legal consequences of the same (Constitutional Court, 2000; Ward, 2006:222-223).

The principle of legality also has its foundations in international law as per the Universal Declaration of Human Rights[29], the International Covenant on Civil and Political Rights[30], the

28. See, for example, Bogotá Superior Court 2012[a]; Supreme Court of Justice, 2010b; Bogotá Superior Court 2014b.

29. "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

30."1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed….. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". (UN 1976 Art. 15).

American Convention on Human Rights[31], the European Convention for the Protection of Human Rights and Fundamental Freedoms[32]and the Rome Statute. Further, it has been argued that the principle of legality is an example of international custom (Gallante, 2013:20). With regard to the Rome Statute, Articles 22–24 refer to the principle of legality.

The Pre Trial Chamber of the ICC confirmed that the principle of legality should meet the requirements of Article 22 (1), namely, the pre-existence of the rule; that the rule should be in writing; that it should describe clearly, precisely and exhaustively the prohibited conduct and the associated punishment; and must be strictly interpreted (International Criminal Court 2007; Para. 303). The Colombian Constitutional Court's interpretation of the principle of legality in the Rome Statute follows this same line (Constitutional Court 2002: 4.5.1).

In Colombia, the principle of legality is recognized in the preamble of the Constitution. It provides that "the people of Colombia in exercise of the sovereign power to decree, sanction and promulgate." and in, Article 29, that:

> "Due process will be applied to all manner of judicial and administrative actions. Nobody may be tried except in accordance with the laws that existed prior to the alleged act, before a competent judge or tribunal, and strictly observing the forms proper to each trial".

Article 6 of Law 599/2006, takes up this principle of the Constitution: "Nobody may be tried except in accordance

31. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed (OAS 1969 Art. 9).

32. "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations." (Council of Europe 1950. Art. 7).

with the laws that existed prior to the act accused, before a competent judge or tribunal, and strictly observing the forms proper to each trial."

The principle of legality in the Colombian legal system includes the following elements:

- *Nullum crimen sine previa lege:* No act may be considered a crime unless it has been expressly and previously declared to be so by the law.

- *Nulla poena sine previa lege*: No punishment may be applied unless it has been set down in an existing law.

- *Nemo iudex sine lege*: Criminal law may only be applied by organs and judges as provided for by law for that purpose.

- *Nemo damnetur nisi per legale iudicium*: Nobody may be punished except by virtue of a trial in accordance with law.

-The principles of favorability and non-retroactivity also form part of the principle of legality in its widest sense. (Forer, López-Díaz et al. 2010:39).

2.2.1.2. The principle of flexible or extended legality in international courts

From a comparative international experience, including national courts[33], international courts[34], the universal system[35] and the European system[36], there are decisions that support the use of the principle of extended legality in the case of international crimes. Therefore:

33. BOSNIA. Court of Bosnia & Herzegovina, 2009, CANADA. High Court of Canada – Criminal Division 2009; SPAIN, Audiencia Nacional – Criminal Division (Plenary), 1998: FRANCE. Court of Cassation – Criminal Division, 1976: ENGLAND, House of Lords, 1992; ISRAEL, Supreme Court of Israel, 1962.

34. ICTY – Appeal Chamber 1995; ICTY 1998 para. 177.

35. Human Rights Committee, 2003.

36. European Court of Human Rights 2010: idem, 2001; idem, 2006.

> "[The principle of flexible legality] does not require a specific type of rule (for example, a written rule with the standing of law), to determine the punishable nature of conduct before it is committed. What is required is that the conduct should be a crime, in accordance with the relevant sources of criminal law in the national or international legal order" (Olásolo, 2013:27).

The use of the so-called principle of flexible or extended legality, in line with the decisions of the European Court of Human Rights or the European Tribunal (2010, 2001, 2006), ICTY (2003)[37], the Special Court for Sierra Leone (2014: Para. 35, 30 and 38), and the Special Court for Lebanon (2011, Para. 132), requires the following elements:

> "…(i) accessibility for the Accused of the national or international rule that makes the conduct punishable at the time of commission and (ii) foreseeability for the Accused, that upon committing the act, this would result in criminal liability, in accordance with applicable law (Olásolo, 2013:27)."

From the experience of *Corporación Humanas*, the use of the principle of flexible or extended legality can be an important tool in the fight against impunity, and in favor of the rights of victims, particularly in the face of the reluctance of States to incorporate international crimes into their domestic law.

> While the ability of States to enforce international criminal law is not technically precluded by the failure to implement norms criminalizing crimes against humanity, genocide and war crimes, commonly referred to as 'core crimes', the practical impact of such failures is to dramatically limit the jurisdictional basis upon which prosecutions can proceed. 2008:302–203.

This has given effect to the principle of international law contained in the Vienna Convention on the Law of Treaties (1969) that States cannot justify the use of domestic law to avoid compliance with international obligations[38].

---

37. Interlocutory decision on jurisdiction in relation to the responsibility of a superior, para. 32-36; see http://.icty.org/x/cases/hadzinbhasanovic_kubura/acdec/en/030716/.htm

38. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." (Art. 27).

The Inter-American system has on several occasions referred to the principle of legality[39] and interpreted it very strictly as a guarantee of due process. This can be seen from the following pronouncement about the Inter-American Commission:

> "…For the IACHR the pillar of the principle of *nullum crimen sine jure* is the need to ensure that individuals can orientate their conduct in accordance with a certain and up to date legal order, in which both social condemnation and the consequences are expressed. On this basis, the IACHR has noted that drafting criminal charges requires a clear definition of the criminal conduct in written legal rules, which sets out the elements and distinguishes itself from conduct that is not punishable or unlawful conduct that is subject to non-penal punishment. In this way, the application of the criminal law, according to the Commission, should strictly attend to the provisions of that law, verifying, with the greatest possible rigor, that the conduct of the person incriminated matches the type of crime, so that there is no criminal punishment of acts which are not punishable in the legal order…" (Olasolo, 2013, 32).

In a similar vein, others also call for the adoption of domestic legislation in order to criminalize conduct and establish specific punishments (Relva, 2003; Arajärvi, 2010).

However, it is important to note that the Commission's appreciations had been made in specific contexts, such as the case of anti-terrorism laws in Peru approved in in response to a *coup d'état*, which was composed of ambiguous and indeterminate anti-terrorism legislation. It must be remembered that the inter-American system has adopted the principle of interpretation *pro personae* and this means that the analysis of the case must attend to its particular circumstances[40].

39. IHL Court 2005b, paras 187-101; idem 2005a, paras 90-91; 2004b, paras 126; idem 2004a, Paras 70-82; idem 1999 paras 119-121; idem 2008 para 125.

40."…In case of doubt as to which rule recognizes or regulates the human rights to be applied, whether in constitutional law or in international human rights law incorporated into domestic law, preference should be given to that which best protects the person and that allows that person to best to enjoy the right, in an application consistent with the values and principles that form the basis of every legal order. " (Aguirre Arango undated, 76).

Regarding the rights of victims, the Inter-American System of Human Rights stresses that where there are victims in situations of vulnerability, due to systematic or generalized violence, it is fundamental for the legal order to offer adequate and effective remedies and that the legal proceedings for the crimes should match their gravity[41].

Therefore, in contexts such as Colombia, the principle of flexible legality has been applied to guarantee effective access to justice and other rights of victims of serious human rights violations in the context of an armed conflict, such as the sexual crimes analyzed in this document. Other points of view, however, consider that the extended application of this principle may cause certain tensions with the right to defense and due process of those accused of these crimes.

2.2.1.2.1. Use of the principle of extended legality in Colombia

In Colombia, repeated jurisprudence supports criminal charges constituting grave breaches in the context of the armed conflict being classified as crimes against international humanitarian law, as established in the Criminal Code of 2000, despite the acts in question taking place before this law came into effect.

The Supreme Court of Justice supported this application in the case against Cesar Pérez-Garcia (Supreme Court of Justice, 2010) and this precedent was followed by the Bogotá Superior Court Justice and Peace Division, in the following terms:

> "Facts 2, 3, 4 and 6[42], which occurred prior to July 25, 2001 when domestic law had not yet codified crimes against international humanitarian law, and, following the guidelines of the Supreme Court of Justice in a recent pronouncement, these crimes must

41. "…. Among the various options to achieve the objective, the choice should fall on that which least restricts the right protected; the restriction should be in proportion to the interest that justifies it and be closely matched to the achievement of that legitimate objective". (IHL Court 1985, para.46.

42. These facts refer to massacres performed personally by the accused or ordered by him.

also be classified as war crimes. This does not violate the principle of legality, as the 1949 Geneva Conventions came into force for Colombia on May 8 1962 by way of Law 5/1960, and their Protocols, particularly Protocol II of June 8, 1977, which entered in to force in Colombia as of February 15, 1996 in Law 171/1994. This implies that the State has a duty to prevent and combat violations of international humanitarian law, which became effective on those dates, as "*it is acceptable that one may predicate the application of the content of these instruments as a source of law, attending to the moral obligation of the legislator to adapt the laws to their content. So, it would be possible to apply the content of an international treaty recognized by Colombia with regard to a crime prohibited and sanctioned therein, even though there is no existing internal law in existence in regard to it, without violating the principle of legality*". In accordance with Article 240 of the Colombian Constitution, this Convention forms part of what is being called 'the constitutional corpus', and in consequence, it prevails over the domestic order, and its limitation is prohibited in states of exception. From this, the Colombian State acquires an obligation '*to adapt rules of a lower order in the domestic legal system to the content of international humanitarian law, in order to strengthen the material application of those values*'. Now, if the State fails to comply with its duty to codify the type of crime which violates international humanitarian law, this does not mean that such conduct will remain unpunished. The situation is that impunity should be understood not only as an absence of investigation or sanction, but equally, as when the investigation and sanction do not correspond to the gravity of the illicit act. This belittles its importance in the national and international context." (Bogotá Superior Court 2010:95-96)[43].

This formula has been used in other cases[44], in Justice and Peace proceedings, and its application gave rise to the charges against Salvatore Mancuso in the case of María, with a special impact on the prosecution of acts of sexual violence against women under the mode of sexual slavery.

43. Emphasis from the original text.

44. Bogotá Superior Tribunal (2012ª). The decision concludes that the type of crime is homicide against a protected person, although the act was performed before the crime carrying that definition came onto the statute book (Law 500/2000) . For the court, this act was an offence against common article 3 of the Geneva Conventions and Article 4.2 of Additional Protocol II. "This classification does not impair the principle of legality because the requirement that the State prevent, investigate and punish violations of international humanitarian law arises from the moment at which the 1949 Geneva Conventions and their Additional Protocols – specifically Protocol II – came into force for Colombia# (58ff). Supreme Court of Justice (2010, 32 and 34). Bogotá Appeal Court 2014b: 15; Medellín appeal court, 2015:232; Also see critiques of this appreciation in the context of Colombia, Velásquez-Velásquez, 2012.

Corporación Humanas notes that the use of the principle of flexible legality in this case contributed to the construction of truth, and ensured compliance with the State's obligation to investigate, prosecute and punish human rights violations adequately.

The definition and investigation in the terms described above has meant that the sexual violence committed against María could be investigated in proportion to its gravity. In practical terms, the punishment was unchanged, given that the alternative punishment regime established in the Justice and Peace Law (5–8 years of imprisonment) was applied, However, linking the crime to a criminal charge under international humanitarian law is decisive in transmitting a message to society that such acts are serious and punishable. This is quite certainly a form of reparation and a guarantee of non-repetition for such acts. The second part of this text will deal with these elements in greater depth.

2.2.1.2.2. Difference between the principle of extended legality and other formulas of a similar nature

The application of the principle of flexible legality must be distinguished from that of other legal practices, such as subsumption or double subsumption[45], with this being understood as:

> "...Conduct which falls within a crime under domestic legislation and in parallel corresponds with international norms, so that it may be classified as genocide, a crime of against humanity or a war crime and gives full effect to the specific legal regime of international crimes…" (Fundación Para el Debido Proceso Legal, 2009:179).

As such, one may indict "national crimes which have adopted the description of international crimes, regardless of their individual *nomen iuris*, provided that the principle of

45. Note that LWBC has applied subsumption in cases such as Haiti.

proportionality of the punishment is respected" (Forer, López Díaz et al. 2010:47).

> "In this sense, in the judgement or the indictment, reference must be made to the international nature of the crime, with a description of its elements, context, the characteristics of the civilian population and the general or systematic nature of the events, in order to satisfy truth, justice, reparation and non repetition for the victims, as developed by international and domestic law" (ibid. 47).

There are examples of this practice in national systems and in Latin America[46], including Colombia[47]. The argument in favor of subsumption is that the use of a type of crime codified in domestic law provides the required certainty as to the unlawfulness of conduct, and its consequences, particularly in terms of the punishment[48] (Forer, López Díaz et al. 2010:47; Bassiouni ed. [2008]: 302–303).

Some, however, consider that the subsumption of international crimes into domestic criminal charges may disregard their gravity.

2.2.2. Law 975, Law of Justice and Peace

Law 975/2005 provides the legal framework for the reincorporation of members of organized illegal armed groups who effectively contribute towards securing peace. While this framework was not restricted to the AUC paramilitary groups, it became the basis for the process of negotiation with them.

Law 975 establishes a legal framework applicable to those who demobilize and make a commitment to satisfy the right to

46. ARGENTINA Oral Tribunal for Federal Crime, 2006; CHILE, Supreme Court , 2006; PERU, Special Criminal Court, 2009.

47. "…. It is possible to refer to crimes classed in ordinary criminal law as "homicide" or "bodily harm" also as crimes against humanity especially where at the time they were committed Colombia had already signed treaties that accentuate the systematic and general nature of the assault as criteria differentiated from common crime and conduct that at the level of macro.-crime affects human rights to a superlative degree (Supreme Court of Justice 2013:28).

48. With special emphasis on crimes against humanity and the Rome Statute in Colombia, see LWBC, 2014:24.

truth, justice and reparation of the victims, as well as providing an alternative punishment of 5–8 years imprisonment.

The procedure established in this law is based on a confessional approach, in which those who apply undertake to contribute to the truth, in exchange for certain benefits. Despite the progress made in respect of truth, this law has also drifted off into half-truths divorced from their context and dynamics.

The Justice and Peace process has two stages: one administrative and the other judicial. In the administrative stage, there is individual or collective demobilization; the individuals involved are recorded on a list, which is then delivered to the Prosecution Service. This delivery gives rise to the second stage – the judicial stage – in which the Prosecution Service engages in a series of activities to determine the veracity of the evidence, liability, punishable conduct, sources of finance and other enquiries about proceedings in ordinary courts.

When these procedures have been completed, the candidate under Law 975 enters the process of "free statement", in which initially he or she is questioned as to their willingness to adhere to the Justice and Peace procedure and subsequently to all the criminal acts which she or she has committed or been aware during their time as a member of the armed group. With the results of the "free statement", and any items of evidence obtained by the Prosecution Service, there follows an arraignment hearing, including a request for the adoption of precautionary measures with regard to assets surrendered.

After that hearing, the Prosecution Service continues the investigation and verifies the acts admitted by the accused, along with other crimes within the jurisdiction. The information is then disclosed at the indictment hearing, in which the Prosecution Service formally indicts the accused for the crimes under investigation.

Subsequently, the Justice and Peace judge, at the request of the victims or their counsel, the Ombudsman, or the Prosecution Service holds a reparations hearing. The following procedural step takes the form of a public hearing for judgment and individual sentencing, in which the arguments supporting the finding of guilt are given, along with the principal or accessory penalties. Alternative punishment and the supporting reasons for them, the decision on the comprehensive reparation of victims and the surrender of ownership of assets are also dealt with.

The application of this regulatory framework has gone through different stages regarding the treatment of sexual violence. Initially, with the application of Law 975/2005, given the lack of context provided in cases and the absence of a gender perspective, sexual violence did not form part of the investigations and was omitted from subsequent proceedings. The demobilized paramilitaries did not confess to those crimes, Prosecutors did not enquire about them and the few reported cases were investigated in isolation, with no direct relationship to the armed conflict[49].

The advocacy work by women's rights and human rights movements highlighting the need for proper prosecution of these cases made the impunity in such cases and the absence of a rights and gender perspective in their treatment even more

49. According to the Office of the Prosecutor ofthe International Criminal Court,…" The [Constitutional] Court underlined that conflict-related violence disproportionately affected displaced girls, women and Afro-Colombian and indigenous women and girls. 292 The Court ordered the government to take measures to protect, assist and restore the rights of displaced women and ordered the Attorney General to carry out relevant activities to factually verify the occurrence of the crimes and to pursue investigations into 183 specific cases of sexual violence against women and girls.293 By January 2012, only four of the 183 cases transmitted to the Attorney General … had been brought to trial" National action . (Para 216) National proceedings under the ordinary justice system for rape and other forms of sexual violence have been equally limited (Para. 218). The level of prosecutorial and judicial activity pertaining to the commission of rape and other forms of sexual violence appears disproportionate to the scale of the phenomenon, (ICC, 2012).

visible. This was seen in the limited activity in such cases, which lacked a proper appreciation of the complexity and gravity of the sexual violence committed in the context of the conflict.

This can be seen in two respective decisions given in 2012 (Bogotá Superior Court, 2012b and 2011). These decisions are evidence of gaps in terms of accountability, as only the person directly responsible was tried or was found guilty by omission of control over his troops. This indicates that there still remains a restricted vision of what sexual violence means in the conflict, the practices adopted by organizations and the level of accountability for the various members of the structure involved.

In this regard, and according to information supplied by civil society organizations, the Inter-American Commission on Human Rights determined that, among the situations which cause this impunity: there was "a failure by the legal framework in the Justice and Peace Law approved on the occasion of the demobilization process of the paramilitaries, and a latent risk that the new legal frameworks adopted by the present Government may perpetuate and expand the scale of impunity" (IACHR, 2013, Paras. 874, 354–355).

In the same 2013 report, the Commission determined that progress made in investigations of sexual violence remained deficient, that there remained a high level of uncertainty in respect of this type of crime, and that very few cases of sexual violence were yet the object of reparation (ibid, Para. 894, 363).

2.2.3. Law 1592/2012: reforms to the Justice and Peace Law

Seven years after the expedition of the Justice and Peace Law, obstacles, impunity rates and a low level of satisfaction of the rights of victims were all evident. By December 2012, only 14 decisions had been handed down, with only two of those

relating to sexual violence (Bogotá Appeal Court 2012b and 2011).

In this scenario, the Colombian Congress issued Law 1592/2012 in December 2012, which modified Law 975/2005, and set prioritization criteria for investigations and prosecutions. At the same time, the reform included differential criteria to guide the proceedings, and special measures for the protection of groups exposed to the greatest risk, including women, children, the disabled, social leaders, and human rights defenders (Congress, 2012, Art. 5).

These reforms also set out modes to terminate proceedings (ibid), the causes for the revocation of alternative punishments and the application of legal benefits (ibid Art. 26). As an additional measure to attempt to streamline proceedings, the law was extended to cover those who demobilized after 2005.

Further, there were reforms to comprehensive reparations, now called an "incident for damages caused to victims". In this instance, there was provision for verification of the evidence presented by victims and unification of the system of administrative reparation contained in the Victims and Land Restitution Law (Law 1448/2011)[50].

50. With the changes made to *the incident for comprehensive reparation* to an *incident of identification of the harm caused* after control of partial or full acceptance of the charges had been completed, the district Superior Tribunal in question will, at the same hearing, start the incident: the victim will indicate the harm caused by the crime, and, if the accused does not accept what the victim claims, the victim must prove the damage. The incident then ends with a decision identifying the harm done – without any determination or quantification of damages. And the version given by the victim in the hearing with the intention to help clarify the pattern of macro-criminality involved in the actions of the illegal armed groups, and contexts, causes and motives. Once the incident is decided, according to the procedure, the files are sent to the Special Administrative Unit for Attention and Comprehensive Reparation to Victims and/or the Special Administrative Unit for the Management of Restitution of Dispossessed Lands, those being the authorities responsible *for applying the various measures of transitional justice adopted by the State*". (Constitutional Court 2014).

In relation to prioritization, Law 1592/2012 established the use of patterns of macro criminality for investigation and indictment (Articles 10, 11 and 18) and provided that priority for indicting should be for those most responsible. The Prosecution Service was given competency to establish criteria for setting priorities and was required to create a "comprehensive plan for prioritized investigations" (Article 13).

The prioritization exercise consisted of the investigation of 16 members of organized illegal armed groups. They were individuals most responsible for systematic crimes perpetrated directly or through others under their command, including Salvatore Mancuso. The prioritized crimes included enforced disappearance, enforced displacement, kidnapping, unlawful recruitment, gender-based violence, and those that represented the most serious offences at a regional level.

Deadlines were set for serving indictments, requests for exclusion of candidates and substitution of precautionary measures by preventive detention. Fourteen working groups of prosecutors, administrative officers and judicial police were responsible for compliance with these objectives. They carry out investigations taking account of the complexity of cases and the structures analyzed, and also set up timetables for follow-up (Prosecution Service, 2012b).

2.2.4. Decree 3011/2013

The Executive used this Decree to regulate aspects of the reforms to the Justice and Peace Law and to articulate these measures with others in a context of transitional justice; for example, Law 1448/2011 (the Victims and Land Restitution Law).

This same Decree specifies the procedural stages of the Justice and Peace courts: – the administrative and the judicial stage. The judicial stage focuses on the definition of context, patterns

of macro-criminality and requisite elements such as, among others: type of crime, the group's objectives, *modus operandi*, ideological objective, financing mechanisms, concealment of the crime and excesses in the implementation and execution of orders.

The Decree also sets out the application of causes to terminate criminal proceedings and the assessment of compliance with requirements in order to substitute detention measures.

In the area of comprehensive reparation, the law refers to the identification of the harm caused and the assignation of responsibilities to the Special Unit for Attention and Reparation for Victims. Regarding the materialization of comprehensive reparations, the law determines that victims taking part in the Justice and Peace process may request to be included in the Victims' Register, in accordance with procedures set forth in Law 1448 and its regulatory decrees. It also indicates the steps for preferential access to the comprehensive reparations program through the administrative route.

Decree 3011 also establishes the creation of an institutional coordination committee for Justice and Peace, whose function is to promote the articulation and coordination of actions of the State agencies intervening in these special criminal proceedings.

PART II

The decision of the Bogotá Superior Court of November 20, 2014 and the impact of that decision on women's rights

María's case set out a specific legal problem: how to prosecute this case, in terms of the correct criminal charge in a scenario in which sexual violence was not being effectively made visible?

For *Corporación Humanas* this entailed a litigation strategy that would include a number of arguments to:

a) Overcome the lack of awareness of sexual violence in the context of the armed conflict;

b) Ensure that the facts of the case came within the definition of sexual slavery, because this was what the victim effectively suffered;

c) Ensure the application of international standards and the jurisprudence of the Colombian courts on the principle of legality, within the logic of truth, as a guarantee in transitional justice proceedings;

d) Ensure indictments using the mode of indirect perpetration against those most responsible, as prioritized under Law 1592/2012.

It was of vital importance that this case should set a judicial precedent, which would be able to be replicated in other legal scenarios. Given that this was a macro-decision, the impact of sexual violence in the context of the armed conflict and the

limited number of cases brought to trial, this case should ideally set out legal guidelines for other cases of a similar nature.

The absence of a strategy by the Justice and Peace Prosecutors to prosecute sexual violence was evident ever since Law 975/2005 was first applied. The demobilized paramilitaries were aware that their sentences would be reduced in exchange for laying down their arms, confessing to human rights violations and promising reparations for victims. However, it was difficult for them to recognize that they had committed crimes of sexual violence, and they were not asked any questions in court about this form of violence. It was only much later, as a result of pressure from women's and human rights organizations that questions began to be asked regarding sexual violence.

The Prosecution Service had limited its investigations to a few cases of sexual violence where the paramilitaries had confessed. However, it was much more complicated to ensure proper investigations or formal charges in those cases where there were no confessions, due to the absence of any investigative strategy.

The regulation of sexual offences in criminal law has required a process of reform, which still continue today. This process has been slow and full of historical nuances; for example, its construction has been characterized by the interaction between international and domestic law.

For *Corporación Humanas*, the acts in María's case have to be recognized as sexual slavery. Establishing the truth about what happened to her implies that the conduct which she suffered should be recognized as such. It cannot be said that this was simply a case of rape, as this would disregard the impact on her as a woman being reduced to "the state of a freely available object".

The decision in María's case is set down in the judgment of presiding Justice Lester María González Romero of the

Justice and Peace Division of the Bogotá Superior Court , in the prioritized case against Salvatore Mancuso-Gómez and others[51]. This macro-sentence contains a methodology for the analysis of patterns of macro criminality, which studied and ruled on five patterns, namely:

a) Massacres and murder

b) Enforced displacement

c) Enforced disappearance

d) The recruitment of minors

e) Crimes of gender-based violence

The charges against the 12 applicants under the Justice and Peace Law related to 1426 criminal acts involving 8518 direct victims, detailed as follows:

a) For the crimes of enforced disappearance: charges were brought for 609 criminal acts, relating to a total of 975 persons disappeared.

b) Enforced displacement: charges were brought for 405 criminal acts, relating to the displacement of 7,048 individuals.

c) Charges were brought for 149 acts of unlawful recruitment, relating to 150 victims.

d) Charges were brought for 175 criminal acts of gender-based violence, relating to 205 victims.

51. Jorge Iván Laverde Zapata, José Bernardo Lozada Artuz, José Gregorio Mangones Lugo, Leonardo Enrique Sánchez Barbosa, Sergio Manuel Córdoba Ávila, Miguel Ramón Posada Castillo, Julio Manuel Argumedo García, Uber Enrique Bánquez Martínez, Edgar Ignacio Fierro Florez, Hernando de Jesús Fontalvo Sánchez,and Oscar José Ospino Pacheco former commanders of the AUC Catatumbo, Norte, Cordobas and Montes de María Blocks.

e) Finally, 86 charges of murder were brought for criminal acts, relating to 140 victims.

These charges were freely and voluntarily accepted by all applicants, who were assisted by counsel, and were made in the presence of a representative from the Public Ministry.

1. The importance of María's case being defined as sexual slavery

In this regard, some elements in Part 1 of the text have already been examined. Based on the experience of *Corporación Humanas*, the criminal charge relating to the acts which María suffered was based on the application of the principle of flexible legality. This allowed the sexual violence committed against her to be charged as the crime of slavery.

Nonetheless, the legal justification that permits this formula has been questioned. In this section, the implications for the respect and recognition of women's rights in transitional justice will be discussed and the potential challenges will be analyzed.

Transitional justice is a special form of justice[52]. From a legal perspective, it is materialized through the establishment of special rules, procedures and institutions. These are considered special as they allow the application of different standards to those established in common regimes. The validity of these rules will be ensured provided that they are capable of permitting transition, such as from a state of conflict to a state of peace. The fundamental pillars of this model are truth, justice and reparation for victims.

52. Broader definitions can also be found, including other elements. According to the United Nations System, transitional justice is "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. " (United Nations 2011:4.

Historically, States and society have devised formulas for transitional justice to resolve conflict. This has enabled accountability for acts against humanity and the evolution of the laws on human rights. Formulas for transitional justice are not unique; indeed, they have varied substantially depending on place and the situation to be resolved. However, *Corporación Humanas* notes that most analogous experiences have been characterized by an absence of protagonism by women and a failure to listen and recognize the harm suffered by women, in the search for a transition that will change subordinating relationships[53].

Sexual violence is the crime that has been least visible in these contexts. Recognition that sexual violence was a form of harm with a particular impact on women required judicial activism. Ad hoc tribunals were the ideal setting for the evolution of laws that had been initially devised from a male-centered point of view. Despite this, even now transitional settings exist where discussions and proposals have ignored the issues relating to responsibility for sexual violence as a strategy of war.

The experience in Guatemala is one of the most telling and it serves as a warning to Colombia. For example, 19 years have passed since the signing of the Guatemala peace accords and only in 2015 did the first case of sexual violence, sexual slavery and torture against women during the conflict came to court[54].

53. One notable exception regarding participation by women in the transition to peace at the end of conflict that lasted decades is The Philippines between the Government and the Moro Islamic Liberation Front. More than a third of the official negotiators were women. This is much more than the usual situation in negotiations, where most are men and very few are women. However, their participation was supported by a long history of women´s local and national leadership in Philippines including the actions of two Presidents who invested political capital in the resumption of negotiations with the rebel group (Miambo-Ngouka, 2015).

54. See the case of the Zepur Sarco Community in which there were attempts to attribute responsibility to the State of Guatemala for rape, sexual enslavement and domestic enslavement of women of the Zepu Sarco by troops from an army detachment in the Department of Izabal. The events of Zepu Sarco took place 30 years ago and proceedings have been ongoing for 16 years now.

In this sense, any measure that impedes the recognition of the true dimensions of sexual violence perpetuates this form of violence. Such measures may take the form of impunity giving rise to a *de facto* amnesty, which are prohibited by international law and international humanitarian law (IACHR, 1998: Para. 173; 11 1997: Para. 170).

It is important to stress that justice for women involves issues that go beyond ordinary criminal justice, such as the components of truth and reparation.

The construction of truth requires the need to document and to recognize situations and their consequences. Judicial truth is equally important when constructing memory. The courts are a suitable forum to send a decisive message to society by condemning such acts. The State has the duty to not minimize the impact of any such acts and therefore it is fundamental that this conduct should be set out and narrated in accordance with its real dimensions and the most appropriate denomination.

In cases of sexual violence, when a criminal charge is set out appropriately that suitably characterizes the gravity, this will not necessarily mean the imposition of a greater penalty. However, it will contribute to the construction of judicial truth and memory of the conflict regarding crimes committed against the women and the scars left on them.

As regards the legal action, as mentioned above, the need to reaffirm women's rights has its origins in their historical lack of recognition in society, economy and culture. As a result, a dynamic exists whereby woman and their respective needs have not been assessed on the same level as men. These questions, therefore, have not been raised or discussed in public, which has prevented women from effectively enjoying their rights. The gender gap that persists in society today

has been exacerbated by armed conflict and this generates disproportionate consequences for women.

When the law, particularly criminal law, regulates and generates policies to tackle social problems, it bases its action on the needs of the public. Here, the fact that most issues relating to women have been relegated to the sphere of private affairs is an aggravating factor (McKinnon, 2006:4). This has occurred particularly in that the private is associated with the intimate, thus concealing the situations of disadvantage that affect women (Fries & Matus 1999:51-53). This also makes it impossible for issues affecting women to be transferred to the public arena for analysis and debate.

Regarding sexual violence, society has taken years to recognize that women are autonomous regarding their bodies and the need to dismantle this exclusion and disadvantage by effective legislation.

Sexual crimes require to be analyzed from two points of view: the first is *individual*, and is related to the defects and scars left by sexual violence on women; the second is *collective*, and implies considering the phenomenon from the point of view of its causes, effects, the role of men and women in society, and from specific circumstances such as armed conflict.

Corporación Humanas's legal assessment of applying the principle of flexible legality to charge such acts is also based on the obligation of transitional justice to respond to women's needs and to ensure a differential focus as required by law.

In the specific case of María, as part of transitional justice proceedings, the prosecution had to illustrate the magnitude and consequences of sexual violence against women as a weapon of war in the conflict. This was not just a matter of rape: it was a matter of violence, in which María had been reduced to an object deprived of her freedom and obliged to provide

sexual services. Further, the characteristics of the act fit with the elements of the crime of sexual slavery.

The use of this offence in the criminal charge did not alter the punishment, as already prescribed for in Law 975/2005. The use of this offence in the criminal charge in the specific case of María ensured her right to truth.

The legal recognition of the gravity of these acts, as was confessed by the accused Salvatore Mancuso, exposed the serious dimensions of the use of women's bodies by the Catatumbo Block. There is no doubt that this contributes to the construction of collective memory.

For María, this decision was a form of truth that allowed her to reclaim herself as an individual and destroy the stereotype which had stigmatized her for so long. She had not been seen as a victim, as she was considered to have a consensual relationship with her perpetrator. The decision of the Bogotá Superior Court meant she no longer had the obligation to prove that her captivity was not a voluntary one, but rather she had remained there deprived of her freedom.

In legal terms, these transitional justice proceedings gave María a clear and effective remedy that ensured due process for herself, as well as a progressive legal analysis and decision in line with human rights, and specifically women's rights practice as promoted by international tribunals.

2. Challenges left by the Bogotá Superior Court's decision in relation to other crimes of sexual slavery

It is concerning to note that the progressive elements in María's case may face serious challenges in order to be replicated. A feminist strategy to prosecute sexual violence implies that, ideally, legal advocacy and analysis will result in a simpler way of bringing similar cases to court.

Therefore, although it may be said that the case gave rise to a favorable decision for María, doubts arise as to the merits of the decision. The legal arguments in the merits on the application of the principle of extended legality have been set out specifically for all crimes– with the exception of sexual crimes.

The fact that the analysis has been left out of the judgment weakens the decision and means that in any appeal, sexual crimes may not have the same legal protection as other crimes of the same gravity[55].

It is concerning that an opportunity has been lost to generate a more complete and convincing judicial precedent capable of being replicated. This omission may result in tribunals being unable to replicate this strategy. This may in turn imply that litigants come up against very conservative judicial settings and will have to start the debate on the use of this type of crime from the scratch.

Finally, it is disappointing that the case law on the use of the principle of flexible legality has been restricted in respect of sexual crimes. This restriction makes it more difficult to demarcate both its scope and limits.

3. The criminal responsibility of Salvatore Mancuso for crimes of sexual violence committed by subordinates

The problems regarding accountability and the way in which the heads of organized power structures may be implicated in crimes committed by their subordinates in situations of mass violations of human rights have been approached from a number of theoretical points of view[56]. The most common

55. Attempts were made to speak to Justice Lester González in order to understand whether this was an accidental omission or whether, on the contrary, there was some intention behind the text: but it was not possible to do so.

56. See Rosenbaum 2010; and LWBC 2014 for an analysis.

way is via the responsibility of the superior or command responsibility[57], indirect perpetration[58] or identification of a joint criminal enterprise[59].

In the case of María, although the direct perpetrator of the violence against her was Abel Mirko Manco-Sepúlveda ("Cordillera"), identified as a middle-ranking member of the La Gabarra Front of the Catatumbo Block, the person legally held to account for these acts as the most responsible[60] was Salvatore Mancuso-Gómez of that block.

Indirect perpetration by control over the will, in virtue of control over organized power structures, and improper material co-perpetration were used to attribute criminal responsibility to

57. The responsibility of the superior for acts of subordinates is a formula for the attribution of responsibility applied by courts, *ad hoc*, in judging serious violations of human rights and international humanitarian law. The ICTY set a parameter of interpretation of responsibility as the duty that a superior has to avoid the commission of crimes and to punish them as if they have been committed directly.

58. For an analysis of the theory and its application by the ICC, and Colombian and comparative jurisprudence, see LWBC: 2015.

59. The theory of individual criminal responsibility in a joint criminal enterprise is applied in cases where the person responsible did not necessarily assist, incite or participate but contributed in some other way to the commission of the crime.This theory seeks to extend responsibility to all members of a criminal group with regard to crimes directly committed by that group, and also with regard to crimes committed by any of its members, provided that these actions were foreseeable and the individual was aware that they in one involved in activities of a criminal enterprise. In this way, responsibility was recognized by the Nuremberg International Tribunal in the trial of Almelo, the trial of Otto Sandrock, and three other British soldiers in the crime of in the trial for war crimes in I Law Reports of Trials of War Criminals, see supra Note 142 at 35, 40. Also see ICTY 1999 Para. 210; and again, 1997, Para. 188.

60. Prosecution Service Directive 00001 of October 4, 2012, established the concept of the "most responsible,", as follows: concept of most responsible is applied with regard to two different categories, namely: (1) the person who, within the command and control structure of the criminal organization, knew or could reasonably have foreseen the perpetration of crimes in the course of execution of operational plans; (2) exceptionally, this refers to individuals who have committed particularly notorious crimes, regardless of the positions they held in the criminal organization. Additionally, for an analysis of the concept of those most responsible, see LWBC, 2014: Chapter 8.

Salvatore Mancuso[61]. These concepts may be used as "they may serve to identify the individual who makes policies, that upon being implemented, result in the commission of criminal acts and is known as the "person behind" to the extent (sic) that he dominates the will of those who form the organized power structure".

This means Salvatore Mancuso was responsible as a perpetrator because he committed the crime through a subordinate and was therefore also accountable for having acted culpably and with the requisite intention.

These formulas allow commanders and superiors to be held responsible. They are based on the theory of control over the act[62], as recognized by the Rome Statute in Article 25(3)(a)[63]. By

---

61. With regard to definitions of *improper material co-perpetration:* "... Improper material co-perpetration occurs when, between individuals concurrent in the commission of a crime, there is the division of labour, a figure also known as a " *criminal enterprise*" since everyone performs part of the crime, even those who engage in objectively unimportant tasks or atypical tasks, such as when a person pretends to be the victim of an attack in the on the premises of the bank and distracts the attention of the guards, while his colleagues take control of the situation and managed to appropriate the money for themselves illegally " (Supreme Court of Justice, 2007). "... Punishable conduct is performed in common with others and with the division of labour by various persons who engage in it as their own, even though the intervention of each of them taken separately does not execute the entire set of actions contained in the related definition of a crime, but the requirements for structuring that crime do not include certain, or determinate complex crimes..." (Supreme Court of Justice, 2006).

62. The theory of attribution of individual responsibility in terms of control over the act is recognized by the Rome Statute of Article 25(3)(a), which states: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible".
Additionally, it should be noted in this regard, and following the jurisprudence of Supreme Court of Justice of Colombia in Velásquez Velásquez, that two concepts are involved in improper co-perpetration, namely: "(1) one which is based on the theory of control over the act, which calls the person who has functional control of the act, a co-perpetrator; and (2) another, which calls any person who intervenes in the punishable act with the simple presence of the subjective requirement a co-perpetrator" (2009:877-883).

63. "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible" (Rome Statute, Article 25(3)(a), also LWBC, 2015.

virtue of this, a person who has control over the commission of a crime is also a perpetrator.

In this regard, Jescheck states:

> "... The act is therefore considered an act of will, which leads to the event. Further, it is not only the will to lead that is decisive to be the perpetrator, but also the material importance of the role of each person who intervenes in the act. Therefore, a person may be a perpetrator, in light of the importance of his objective contribution, as he contributes to the control over the act (Jescheck 1981 81:85).

This doctrine has defined the three circumstances in which a person can be said to have control over an act, namely:

- *Control over the act*, which occurs when the will and execution of the crime coincide in a single person with this person being the direct perpetrator.

- *Functional control*, which is applied to situations in which a number of people conspire to commit a crime, acting in accordance with a common plan and agreeing their contribution to the execution of the crime, such as in the case with co-perpetration (Caicedo & Méndez, 2013, 37).

- *Control over will*, which occurs when the perpetrator performs the conduct using another person as an instrument by way of coercion or by misleading him, using a person not open to prosecution, or acting through an organized power structure[64].

Specifically in relation to organized power structures, the responsibility of the "person behind" allows responsibility to be attributed to both a superior who has power over the organized power structures and to a subordinate who was the direct perpetrator of the punishable act.

64. For an analysis of indirect perpetration by control over an organization, see LWBC 2015.

In relation to the commission of sexual crimes by the Catatumbo Block, Salvatore Mancuso was called to answer for the creation and execution of an organized power structure that responded to the general guidelines defined by the Central Command of the AUC paramilitary groups of which he was part. In addition, the sexual crimes were framed within a general order to specifically attack the civilian population and to consolidate their power structures in the region (Caicedo & Méndez, 2013:48).

It may therefore be stated that Salvatore Mancuso had total confidence that his subordinates would follow his orders. The sexual crimes committed against women in the Catatumbo region were the result of a policy designed within the group. As such, the use of sexual violence as a weapon of war was promoted and tolerated (ibid.).

This is evident in the case of María, in which as previously mentioned sexual violence was used to subordinate the local population and secure and maintain territorial control. Indeed, in the AUC regulations sexual violence was not expressly prohibited. Therefore, since there was *carte blanche* regarding the use of sexual violence, it was Mancuso's duty to prevent his troops from engaging in it.

4. Reparations and guarantees of non-repetition in the decision

The right to reparation acquires a dominant role in the context of transitional justice, as it may guarantee victims of human rights violations to return to the situation prior to their victimization. When this is not possible, compensation will be provided as necessary to compensate for the harm caused. These are basic requirements for a transition towards peace and reconciliation.

For its part, the Inter American Court of Human Rights has established that "reparations, as the term indicates, consist of

measures designed to make the effects of violations disappear. Their nature and amount will depend on the harm caused in material as well as non-material claims." (IHR Court, 2006. Para. 175).

If reparations are to be comprehensive, they must implement measures designed to restore the situation to the state of things prior to the violation and to avoid repetition. These measures have been indicated by the United Nations General Assembly, in basic principles and directives on reparations (2005), including as essential elements restitution[65], compensation[66],rehabilitation[67], satisfaction[68] and measures for

---

65. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. (United Nations General Assembly , 2005, par. 19)

66. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (*a*) Physical or mental harm; (*b*) Lost opportunities, including employment, education and social benefits; *c*) Material damages and loss of earnings, including loss of earning potential; (*d*) Moral damage; (*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services. (Ibid. par 20)

67. *Rehabilitation* should include medical and psychological care as well as legal and social services. (Ibid. par 21)

68. *Satisfaction* should include, where applicable, any or all of the following: (*a*) Effective measures aimed at the cessation of continuing violations; (*b*) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;(*c*) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (*d*) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (*e*) Public apology, including acknowledgement of the facts and acceptance of responsibility; (*f*) Judicial and administrative sanctions against persons liable for the violations; (*g*) Commemorations and tributes to the victims; (*h*) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels. (Ibid. par 22)

non-repetition[69]. This situation has been ratified by Colombia's Constitutional Court:

> "…Victims […..] have a fundamental right to obtain adequate, effective and speedy reparation for damage suffered since they were not obliged to suffer it. Reparation must be sufficient, effective, rapid in proportionate to the damage suffered; and include restitution of the person affected to the condition in which he or she was prior to the violation, compensation for physical and moral damages, the rehabilitation of victims and the adoption of measures of non-repetition." (Constitutional Court 2009b).

There has been appreciable progress in international systems in terms of reparation and the recognition of violence against women as a violation of human rights, but there are still gaps and areas that need improved treatment. The differentiated impacts of violence in the context of armed conflict – such as sexual violence – have recently been broached by the United Nations, but are not yet expressly reflected in the will of States in processes of transition (Impunity Watch, 2014).

This is a product of the lack of visibility so typical in gender matters, reflected in the State actions during the 1980s and 1990s, when these impacts were ignored and female victims were left on the sidelines of transitional processes (*Corporación Humanas*, Chile, 2008:28).

---

69. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention: (*a*) Ensuring effective civilian control of military and security forces; (*b*) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (*c*) Strengthening the independence of the judiciary; (*d*) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (*e*) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (*f*) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (*g*) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (*h*) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law. (Ibid. par 23)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the United Nations Declaration against Violence and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women all specifically relate to matters of violence against women. This is also the case with the Rome Statute that incorporates conduct affecting mainly or solely women (ibid; 69). These instruments have been the basis for reports that provide more detailed analysis on specific aspects of the right to reparation.

The Inter-American Commission on Human Rights (IACHR) has made progress in this regard, indicating that in the case of women victims of sexual violence it is essential to grant reparations as a means of transformation, seeking to modify the context of discrimination that makes sexual violence possible and allows its reproduction. Therefore, as a measure for non-repetition, it states that there must be "a competent impartial and properly-trained system of administration of justice with regard to the particular characteristics of the problem of sexual violence, equipped with the human and financial resources needed to respond to cases of sexual violence quickly and effectively" (IACHR, 2011. Para. 19).

The right to reparation is intrinsically related to the right to justice. It includes, according to the principles mentioned, effective recourse to the courts, public administration and other forums, in accordance with domestic law. It also includes the establishment of procedures to lodge effective demands for collective reparation (United Nations, 2005: Principle 12).

It must be emphasized that adequate, effective and rapid reparation is designed to promote justice, and that it must be in proportion to the gravity of the violations and the harm suffered. States therefore have a duty to make reparations to victims for actions or omissions in terms of international human rights and international humanitarian law. Further, these principles

require that "States should endeavor to establish national programs for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations" (ibid: Principle 16).

In the context of transitional Justice, Colombia has established a series of measures to guarantee reparation to victims. These are contained in Law 975/2005, which is complemented by Law 1448/2011 (Victims and Land Restitution Law). These provisions approach the question of reparation from a judicial and administrative point of view. Their purpose is to respond to systematic and massive violations of human rights in the context of the internal armed conflict.

Here, transitional justice implies the articulation of judicial and non-judicial measures. As the Constitutional Court itself has said in light of the complexity of transitional justice and the need to respond to mass violations, this means that transitional justice may not be focused exclusively on criminal justice measures. Therefore, to satisfy the rights of victims, criminal justice must be applied jointly with measures for truth, reparation and non-repetition (Constitutional Court, 2014).

Despite this, the mechanisms adopted by Colombia to guarantee effective and comprehensive reparation to the victims of human rights violations in the context of the conflict, and specifically women victims of sexual violence, have not been effective and have not been designed to achieve the objectives of transitional justice of effective transition to peace and reconciliation (*Corporación Humanas,* Chile, 2008:115ff).

As the Auditor General's Department stated in its report examining Law 1448, many of the difficulties in the implementation of the Victims and Land Restitution Law are derived from the existence of tensions between judicial reparation and administrative reparation. These are tensions

that highlight the need to guarantee prompt and timely reparation for victims and the duty to investigate systematic crime and comply with judicial standards in respect of comprehensive reparation (Auditor General, Inspector General and Ombudsman, 2012:263).

These tensions, far from resolving themselves, have intensified with the transfer of jurisdiction to the Special Administrative Unit for Comprehensive Reparation and Attention to Victims. This Unit has made reparations as established by courts for amounts far smaller than established by case law, placing a disproportionate burden on the victim who is required to undertake yet another administrative procedure to secure effective reparations.

4.1. Individual reparation and judicial truth as a measure for reparation: appropriate definitions

According to the United Nations High Commissioner of Human Rights, the right to reparation has two dimensions. The first is substantive and determines reparation for harm done, guaranteeing the components mentioned above. In addition, the second is procedural and is a means of guaranteeing the substantive element. It is comprised of legal and material actions for the reparation of victims and is expressed in the concept of effective internal recourses (United Nations, 2008:6).

In transitional justice, legal process has acquired great importance as part of effective available internal remedies: "adequate, effective and prompt reparation is intended to promote justice which should be proportional to the gravity of the violations and the harm suffered." (Idem, 2005: Principle 15). The process must therefore be oriented towards establishing the truth of events. This includes framing it in the context in which they occurred and considering their gravity.

Therefore, a court decision that establishes the truth of events, as a result of serious, complete and effective investigations, and also establishes the responsibility of the perpetrators, is in itself a measure of reparation.

Disregard of these guarantees has caused the repetition of acts against women, as the message transmitted to society is that such acts do not have the same gravity as other crimes, and hence, impunity is reinforced.

According to case law, impunity should not only be understood as the absence of investigation or sanction, "but also, that investigation and sanction does not correspond to the gravity of the crime committed, belittling its importance in national and international settings" (Bogotá Appeal Court, 2010).

In this order of ideas, an essential element in reparation and guarantees of non-repetition is understanding and recognizing the way in which sexual violence has operated and the logic that applies in the context of conflict. As such, it must be recognized that women have become victims of sexual violence because, in the context of armed conflict, practices of control by men over women are exacerbated by the low value placed on their bodies, making sexual violence a strategy of war.

Among these objectives, domination, regulation, silencing of the victim, obtaining information, punishment, expropriation, extermination, reward and cohesion in contexts of attack, territorial control, deprivation of freedom and intra rank are identified (*Corporación Humanas*, 2009b).

Taken together, these findings indicate that a parameter for the criminal charges must include standards established by the Rome Statute, specifically sexual crimes as war crimes and crimes against humanity, as well as the identification of various forms of sexual violence: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any

other forms of sexual violence of comparable gravity, as also established in the Rome Statute and in elements of the crimes (Working Group for Women and Gender for Truth, Justice, Reparation and Reconciliation, 2008:152-153).

4.2 Collective reparations and the message transmitted to society and their relation to adequate investigations, prosecutions and punishment

Given that offences against human rights transcend individual considerations, it is essential to construct judicial truth, along with other tools that help to determine historical truth. This acquires particular relevance in the case of sexual violence in conflict, because, in addition to individual harm, these crimes cause a breakdown in social relations, support networks and the construction of collective life projects.

There is no definition of collective reparations in international law. According to the Secretary-General of the United Nations, the term has been used to refer to reparation offered to groups of individuals who have suffered harm as a result of violations of human rights law and international humanitarian law. In other words, the situation involves specific communities in which a group of persons live who are bound by cultural or ancestral ties. (United Nations 2014c: 10).

The recognition of victims as well as the reaffirmation of the validity of the rules breached feature among the purposes of these measures, as well as, indirectly, the importance of these rights *per se* and of victims as holders of rights (idem, 2008:26-27).

Reparations that reaffirm the validity of transgressed norms are decisive, as they take account of the armed conflict exacerbating forms of gender-based violence as historically

exercised against women. These reproduce and recreate more cruel forms of violence, committed with greater savagery and greater impunity. This shows that there is a continuum of violence that affects women in times of peace and war, and that demonstrates subordination and discrimination against them (*Corporación Humanas*, 2009b: 18).

Regarding women victims of sexual violence, collective reparation therefore implies that the right to justice is met through investigation and punishment that fits the crime. This ensures that a decisive message will be sent out to whoever committed the offence: that the actions were criminal, society is not prepared to accept them and that he or she must answer for them. Further, it implies recognition that the State failed in its duty to guarantee that person's rights and that it should therefore provide reparation for the harm done (Caicedo, 2009:8).

In addition, reparations must make victimization caused by sexual violence and by the large number of obstacles to access to justice visible. These are usually evidenced in the prejudices of public servants who reproduce the asymmetries of power within the justice system, thus allowing for the discrimination of victims.

As the UN Secretary-General, said: "There may be cases where collective measures that honor the survivors of sexual violence may reduce stigmatization in a community and encourage victims to speak openly of their experiences." (United Nations, 2014c: 10).

If discrimination and violence against women is considered to have its roots in culture and history, then justice and reparation undoubtedly have an impact on culture. The justice system has been legitimized, and therefore, what is done in the context of justice impacts on society (Caicedo, 2009:8).

The Colombian Constitutional Court has stated that the purpose of reparations is to protect the dignity and integrity of victims by way of a public rejection of the conduct that has harmed them. Reparations are therefore closely related to justice and truth – the other components of transitional justice (Constitutional Court, 2013).

The Court describes this point further, stating that the right to reparation is made effective by guaranteeing the right to justice. This includes the possibility of prompt and easy access to the courts for remedies such as investigation, trial, and adequate and proportionate punishment of those responsible within an effective and impartial procedure which guarantees the effective participation of victims.

In relation to the truth, the right to reparation demands that the causes and events that breached the rights of the victims should be established and that the identity of those responsible for those illegal acts should be determined.

The Court was therefore of the opinion that "truth and justice should be understood to be part of reparation, because there can be no comprehensive reparation without a guarantee of the clarification of events which occurred and the investigation and punishment of those responsible" (Ibid).

To that extent, the elements that affect the right to reparation include practices that disregard, conceal, minimize or justify the crimes committed. If crimes of sexual violence in the context of armed conflict are not investigated as a whole or in isolation, without taking account of the role they played in the context of the war and their respective gravity, and those responsible are not punished proportionately, justice will continue to be built upon the foundation of male hegemony, in the context of a patriarchal system that ignores the rights of women.

Women will therefore find that their right to reparation is not guaranteed and that guarantees of non-repetition will not be respected: the fact that such crimes are not brought to court as they should be conveys a permissive message to society and these crimes may therefore continue to occur.

IACHR decided that this was the case, when identifying obstacles in the framework of the application of the Justice and Peace Law, of which it drew attention to the following:

> "... The lack of interest in enquiring into acts of sexual violence by the Prosecution Service; the denial of this practice in the "free statements" made by the demobilized paramilitaries; the lack of recognition or justification of human rights and international humanitarian law violations by candidates in justice and peace, including statements made against the dignity and honor of victims, which have not received any form of sanction; and the lack of mechanisms that have in practical terms guaranteed the participation of victims in the proceedings" (2013, 367).

The guarantees of non-repetition therefore become a prime factor in terms of collective reparation, because in cases of violence against women they may establish that the victims in the context of the armed conflict are not only individuals, but also collectively communities. Consequently, "when one woman is a victim of violence for reasons of gender, all women are potential victims".

This logic suggests that guarantees of non-repetition are expressed in all actions of the State in matters of public policy designed to prevent, punish and eradicate violence against women. These actions include measures for effective access to justice, taking account the disproportionate effects that those offences have generated on women victims, through respectful procedures, and the management of public of servants trained with a focus on rights and gender. An approach should be adopted which takes account of the voices of women, aims for the construction of historic memory and, in consequence, ensures that past events may not be forgotten (*Corporación Humanas*, Chile, 2008:7).

4.3. Reparations granted to María [70]

The section on reparations in the decision of the Bogotá Superior Court focusses on the right to reparation according to the law and jurisprudence in determining its scope and content. Therefore, it is emphasized that reparations for the victims of armed conflict is a complex fundamental right, which includes measures for compensation, rehabilitation and satisfaction, as well as guarantees of non-repetition designed to restore the dignity of the victims.

The Superior Court also states that if any of these elements are omitted, there cannot be comprehensive reparations in accordance with the Constitution or with international standards of human rights, which are binding on the Colombian State.

The decision emphasizes that this kind of reparation can be achieved through judicial means or administrative means and identifies the model of reparation adopted by the Colombian State in which the two routes to reparation are concurrent. Here, judicial reparation is achieved through the ordinary criminal courts or the procedure set out in Law 975/2005 and Law 1448/2011; these laws seek individual restitution, clarification of the truth, investigation, and punishment of those responsible.

Administrative reparation is based on the principle of State responsibility as guarantor of fundamental rights and is carried out under Law 1448/2011 in the context of public policy designed to provide reparation to the greatest possible number of victims of the Colombian armed conflict.

In this sense, economic compensation derived from a finding of responsibility in court proceedings refers in the first instance

70. See Bogotá Superior Tribunal 2014d: Chapter IX.

only to the candidate. He or she will only be responsible for subsidiary reparations, when he or she refuses to do so, or when the assets contributed for that purpose prove to be insufficient. In that event the compensation will be processed by the administrative jurisdiction, and not through the ordinary courts.

With these clarifications, the Bogotá Superior Court specifies the patrimonial and non-patrimonial damages to be compensated.

Regarding patrimonial damages, the decision states that victims will be compensated in accordance with the figure that was established in the proceedings, being based on evidence supplied on file or provided in reparation proceedings. In the absence of such information, a sworn statement of an estimate will be taken into account[71].

Regarding non-patrimonial damages, the Bogotá Superior Court states that limits will be set for compensation as established by the Supreme Court of Justice for certain crimes (homicide against a protected person, enforced displacement and kidnapping). The court sets some formulas to determine loss of earnings, consequential damage and moral damages. This includes testimony given by the victims during reparation hearings, which are held in order to declare that the harm inflicted has been demonstrated.

In the case of María, testimony showed damage to her health as a result of a disease transmitted by "Cordillera" and the physical and moral harm as a consequence of victimization against her. María states that her brothers have been disappeared since 2009, her parents are ill and she has no house or subsidy to obtain one.

71. A sworn statement by the victim giving a reasoned estimate under oath of the amount of compensation due, and this is taken as evidence unless the other party objects to it /Office of the President, Decree 1400, Civil Procedure Code, Article 211).

However, the decision does not break down the detailed measures for reparation for each victim. This is a matter that still remains to be determined. The decision states that the court itself will quantify the amounts, which will be grouped and decided by counsel. This appears to indicate that reparation will be awarded in an act subsequent to the court's decision.

As a consequence, the court makes an order for the candidates in Justice and Peace to pay material and non-material damages caused by the crimes in accordance with the amounts established in the Motivation section of the decision. The court ordered the Administrative Unit for Attention and Reparation for Victims to pay the indemnities included in the scheme for administrative reparations within its competency and to execute other measures for reparation in the Motivation section of the decision.

The court also urged the Ministry of Social Protection and Departmental Health Offices to implement a comprehensive interdisciplinary program to support the victims of sexual violence and gender-based violence and to recognize and include the sexual discrimination that is characteristic of the violence in these regions. The Ministry of Education and Departmental Education Offices were ordered to prepare and implement an educational program on gender-based violence to raise awareness, which was designed to recognize surviving victims of such events. In addition the State, the army and the police were ordered to arrange a public act of commitment to zero tolerance for crimes of gender-based violence by civilians, armed actors, common criminals and members of the forces of law and order.

The court also urged the Ministry of Interior, the Ministry of Justice the Ministry of Agriculture and the land reform agency INCODER to recognize of the status of victims and to adopt a differential gender focus in the land restitution process,

relocation of family *nuclei* and the registration of lands, in accordance with current legislation.

The court also ordered the Special Administrative Unit for Attention and Comprehensive Reparation for Victims that acts of reparation should be performed in the Departments where a high proportion of victims were located, or in places where scene the violations were committed.

As a measure of symbolic reparation, the court also ordered that candidates under the Justice and Peace Law responsible for such offences should within three months following the effective date of the decision, publicly request forgiveness from victims of crimes of gender-based violence and admit their offences.

As a result, it can be inferred that the court should calculate individual sums of compensation in accordance with parameters established in the decision. The compensation would then have to be borne by the candidates for Justice and Peace with assets contributed for this purpose. Only where the candidate was reluctant, or the assets contributed were insufficient, would the State respond. Given that it was made clear that the compensation would be based on solidarity, administrative reparation would be then applied.

This is a matter of concern, given the absence of strategies implemented by the State to make clear and effective identification of the assets held by or on behalf of those responsible for human rights violations. This situation is made worse by the presence of front ownership and the concealment of assets which should be materially handed over to make reparations (IACHR, 2015).

In practical terms, this means that judicial reparations would be impossible in most cases given the absence of resources.

Therefore, victims will only receive indemnities through the administrative option[72].

5. Conclusions

5.1. María's case

- The decision in María's case is important, as the actions of one of the most important AUC paramilitary Blocks are seen in context: the use of sexual violence to achieve the group's objectives in the armed conflict. This helps to satisfy the right to truth.

- Strategic litigation based on a feminist approach and the human rights of women has advanced the arguments needed to bring sexual crimes in armed conflict to justice, in accordance with international standards and comparative experience. Work to gain influence for this position has allowed the deconstruction of mindsets in justice operators, who formerly looked on sexual crimes as crimes isolated from the conflict and considered prolonged cohabitation as a consensual relationship and thus not a crime. This represents progress towards the eradication of discrimination against women and helps guarantee a life free from violence.

- The system of attributing criminal responsibility in the decision of the Bogotá Supreme Court partially satisfied María's right to justice. There was no need to identify the direct perpetrator who had died; Salvatore Mancuso instead answered as the most responsible for the AUC Catatumbo Block.

---

72. This is obvious in the case of María, where most of the assets handed over by Justice and Peace candidates were already the object of extinction of ownership ordered by the Justice and Peace courts. Therefore, the only sources of reparations or extinction of ownership left are two properties and COP30 million (approximately USD 10,000), because the Prosecution Service did not produce any evidence that the owners in question were front-men (Bogotá Superior Tribunal, 2014d.:Chapter XVIII).

- This case highlights the many obstacles which women face achieving a justice in court. Although in María's case a decision was finally reached that attributed responsibility, her case was under investigation by the Prosecution Service since 2010 when her father denounced it. Investigations of the events, however, only began in 2012 due to the advocacy work and accompaniment carried out in this case. This type of delay highlights the lack of willingness to investigate cases of sexual violence.

- Although the decision shows some progress in safeguarding and upholding women's rights, in terms of the right to justice there was also failure to fully set out the application of the principle of extended legality to sexual crimes. The argument that these crimes are also a violation of international humanitarian law that require to be investigated and tried by the Colombian State, even prior to its inclusion in the Criminal Code, should not have been ignored. As a result, the legal decision was weakened and exposes similar cases to additional obstacles in the future. Further, any legal precedent in this case is limited and generates potential risks of impunity for other cases involving women. In similar cases in the future, all the litigants would have start again from scratch.

- While all symbolic reparation measures and general orders issued by competent institutions are considered important, the lack of individual orders for reparations restricts access to effective reparation. In addition to further delays, reparations will only be effective for the amounts established by the administrative route, given the scant contribution of the candidates in Justice and Peace Law and the subsidiary responsibility borne by the State.

5.2. Litigation in cases of sexual violence

- Strategic litigation aims to change structural situations. In this case, it was designed to makes changes in a context of discrimination and impunity for crimes committed against women in the armed conflict.

- Litigation of sexual violence needs to ensure that the law is interpreted in the broadest and most extensive manner. This requires the use of new criminal law tools and strategies, along with instruments to guarantee the human rights of women, with emphasis on the rights of victims of widespread and systematic offences.

- Strategic litigation should combine and harmonize elements of international human rights law, international criminal law and similar developments in case law into a comprehensive framework to establish and develop the human rights of women. This would challenge the male centered system of rules that exclude the interests of women.

- Court decisions that evidence the truth of events, and the gravity of the crimes committed, with appropriate definitions and the range of responsibilities, represent a means of reparation in themselves which strengthens the symbolic power of the law. This is due to the message that is transmitted by the effective means used to punish actions which society is not prepared to tolerate and which serve to raise awareness of the problem.

- Advocacy work carried out in the various stages of the proceedings has been decisive in modifying gender prejudices held by prosecutors and judges. This will allow this analysis to go beyond the specific case.

- Strategic litigation requires a multidisciplinary approach to achieve its goals. Psycho-social and legal accompaniment and key messages are essential to achieve the objective of prosecuting sexual violence.

5.2.1. Right to truth

- It is of paramount importance that acts should be investigated and prosecuted with the appropriate degree of gravity to demonstrate their role in the conflict. This helps to narrow the gap between judicial and real truth, as well as restoring confidence in the justice system.

- The investigation and sanction of sexual crimes against women in accordance with the principle of due diligence, reveals the magnitude and consequences of sexual violence in the armed conflict. In this regard, progress has been made towards the construction of memory, truth and guarantees of non-repetition.

- The importance of judicial truth as a means of reparation – as stressed by *Corporación Humanas* – is that the symbolic and transformational nature of justice has been a particularly important in relation to sexual violence. It provides a public face to what has been considered as private and recognizes this violence as a human rights violation and as an unacceptable crime. This will help to end impunity in sexual violence and the undervaluation of the gravity of the crime.

5.2.2. Right to justice

- Judges are of key importance to securing women's rights. To a great extent, judges can guarantee comprehensive access to justice, in accordance with international obligations contracted by the Colombian State. Failure to do so may give rise to international responsibility.

- The public naming of those most responsible is also important. It evidences the systematic use of sexual violence and allows the victims access to justice without the need to identify the direct perpetrator.

- It is essential for judicial proceedings to allow victims the means to make their own claims. Procedure, investigation, trial and sanction should allow for decisions on reparation. These decisions should restore dignity to women.

- Adequate treatment of justice in transitional justice processes will guarantee legal certainty for those involved. This will mean that such cases will not be reopened before international courts many years from now.

- It is of key importance that international bodies such as the International Criminal Court's Office of the Prosecutor, as part of its preliminary examination, continues to monitor the investigation and punishment of sexual violence as an international crime in accordance with the Colombian's State's obligations.

5.2.3. Right to reparations

Transformational reparation[73], established in various instruments, should be specified in orders in decisions. Measures should go beyond compensation and include individual and collective considerations.

- Reparations must also consider the consequences of victimization by perpetrators, and re-victimizations by the justice system.

- Issues of health or rehabilitation must place emphasis on the need for comprehensive attention. In the present context, there are no guarantees of rehabilitation for women that are adapted to their reality, given the lack of holistic services and adequate resources.

73. Understood as reparations that, in addition to returning things to the state in which they were before the right was breached, seek to change the context of discrimination that makes sexual violence possible and reproducible. It should seek the reconstruction of a life plan and specific provisions that will help to transform social relations that underlie the discrimination that made the crime possible.

5.3. Challenges

- Sexual violence in transitional justice requires differentiated treatment. This means maintaining its status as a serious crime[74], in accordance with international standards. In addition, a differentiated treatment should be afforded to victims. The investigation, trial, punishment and reparation must ensure the proper application of the law, including a gender perspective and guarantees of non-revictimization. Differentiated treatment of sexual violence transitional justice will require the following:

> (i) A clear and express commitment to eradicate sexual violence. This commitment should be in the form of measures that operate to scale down the conflict and are part of the declaration of cessation of hostilities. (ii) There should be a truth commission on sexual violence committed against women to construct memory and reconstruct the contexts, patterns and dynamics in which it was committed. (iii) Regarding justice, there should be guarantees against *de jure* or *de facto* amnesties. There must also be guarantees that legal proceedings will eliminate obstacles to justice previously faced by women and ensure recognition of responsibility and sanction, including proportionate punishment. (iv) Reparations must be transformative. (v) There must be measures that ensure non-repetition (Red Nacional de Mujeres, Sisma Mujer & *Corporación Humanas*, 2015)[75].

- Regarding the transformational capacity of reparations and guarantees of non-repetition, is should be noted that women suffered violence before the conflict. It is of prime importance to ensure that this should not happen again. Legal process, together with other transitional justice mechanisms, such as truth commissions, should promote that transformation by way of investigation, procedures and sanctions which are appropriate and proportionate to the gravity of the offence.

- The principle of flexible legality and double subsumption require further development to regulate their use, respect

74. As a war crime and a crime of against humanity, where applicable.
75. See also LWBC, 2014.

due process and ensure the rights of the victims without disregarding the guarantees in human rights treaties in relation to the investigation and punishment of international crimes in transitional justice contexts.

REFERENCES

Aguirre Arango, José Pedro. (s/f). La interpretación de la Convención Americana sobre Derechos Humanos. Corte Interamericana de Derechos Humanos, http://www.corteidh.or.cr/tablas/R22853.pdf (visited June 12, 2015).

Ambos K (2008). Imputación de crímenes de los subordinados al dirigente. Bogotá: Editorial Temis.

Arajärvi N (2010). Customary International Law and the Principle of Legality in International Criminal Courts. Academia, http:// www.academia.edu/202248/Customary_International_Law_and_the_Principle_of_Legality_in_International_Criminal_ Courts (visited August 27, 2015).

Asociación para la Promoción Social Alternativa Minga y Fundación Progresar-Capítulo Norte de Santander. (2008). Memoria: puerta a la esperanza, violencia sociopolítica en Tibú y El Tarra, Región del Catatumbo, 1998–2005. Bogotá: Comunicación Gráfica Rocío Gutiérrez Gomes Ltda.

Bassiouni C (ed.) (2008). International Criminal Law Enforcement. Leiden: Martinus Nijhoff Publishers.

Caicedo LP (2009). La violencia sexual en el conflicto armado colombiano: situación, posibilidades de judicialización y reparación para las mujeres víctimas. En Corporación Humanas (2009a), Memorias del Seminario Internacional judicialización de casos y reparación a mujeres víctimas de delitos de violencia sexual en el marco del conflicto armado,

7-34. Corporación Humanas, http://www.humanas.org.co/archivos/Memorias_%282%29.pdf (visited September 23, 2015).

Caicedo LP & Méndez M (2013). La violencia sexual, una estrategía paramilitar en Colombia. Bogotá: Corporación Humanas. Disponible en: http://www.humanas.org.co/archivos/ libro_La_violencia_sexualcompleto.pdf (visited May 28, 2015).

Centro Nacional de Memoria Histórica (2015). Con licencia para desplazar. Masacres y reconfiguración territorial en Tibú, Catatumbo. Bogotá: CNMH.

Compromiso Corporación para el Desarrollo del Oriente. (2009). La Gabarra entre el olvido y la impunidad. Corporación Compromiso, http://www.corporacioncompromiso.org/index.shtml?apc=b1-9---&x=132 (visited June 10, 2015).

Consejo Noruego para Refugiados. (s/f). Violencia sexual como arma de guerra. NRC, http://www.nrc.org.co/index.php/11-programa-informacion-orientacion-y-asistencia-legal/23-el-uso-de-la-violencia-sexual-como-arma-de-guerra-en-colombia (visited June 19, 2015).

Corporación Humanas (2009a). Memorias del Seminario Internacional Judicialización de Casos y Reparación a Mujeres Víctimas de Delitos de Violencia Sexual en el Marco del Conflicto Armado. Bogotá, February 4-5, 2009. Corporación Humanas, http://www.humanas.org.co/archivos/Memorias_%282%29.pdf (visited July 22, 2015).

Corporación Humanas (2009b). Guía para llevar casos de violencia sexual. Propuestas de argumentación para enjuiciar crímenes de violencia sexual cometidos en el marco del conflicto armado colombiano. Bogotá: Corporación Humanas.
Corporación Humanas (2010). Estudio de jurisprudencia

colombiana en casos de delitos sexuales cometidos contra mujeres y niñas. Bogotá: Corporación Humanas.

Corporación Humanas Chile (2008). Sin tregua. Políticas de reparación para mujeres víctimas de violencia sexual durante dictaduras y conflictos armados. Santiago de Chile: Corporación Humanas. Disponible en: http://www.humanas.org.co/archivos/ sin_tregua.pdf (visited July 14, 2015).

Forer, Andreas; López Díaz, Claudia & otros. (2010). Acerca de los crímenes de lesa humanidad y su aplicación en Colombia. Bogotá:

PROFIS y GTZ. Disponible en: CEJA, http://www.cejamericas.org/index.php/biblioteca/biblioteca-virtual/doc_view/7162-acerca-de-los-cr%C3%ADmenes-de-lesa-humanidad-y-su-aplicaci%C3%B3n-en-colombia.html (visited August 13, 2015).

Fries, Lorena & Matus Verónica (1999). El derecho. Trama y conjura patriarca. Santiago de Chile: Editorial LOM.

Fundación para el Debido Proceso Legal (2009). Digesto de jurisprudencia latinoamericana sobre crímenes de derecho internacional. ICCNOW, https://www.iccnow.org/documents/DIGESTO_Esp..pdf (visited August 14, 2015).

Fundación Progresar & Gobernación de Norte de Santander (2010). Tantas vidas arrebatadas. La desaparición forzada de personas, una estrategia de guerra sucia aplicada sistemáticamente en Norte de Santander. Cúcuta: Arte Impreso.

Gaitán, O. L. (2014). La construcción de Decisions de Justicia y Paz y de la parapolítica. Centro Internacional para la Justicia Transicional,https://www.ictj.org/sites/default/files/ICTJ-Informe-Colombia-Decisions-JyP-2014.pdf (visited August 28, 2015).

Gallante, Kenneth (2009). The Principle of Legality in International and Comparative Criminal Law. Cambridge: Cambridge University Press.

Guevera, José Antonio & Dal M., Tarciso (comps.) (2005). La International Criminal Court: una visión iberoamericana. México D.F: Editorial Porrúa y Universidad Iberoamericana.

Grupo de Trabajo Mujer y Género, por la Verdad, la Justicia, la Reparación y la Reconciliación. (2008). Recomendaciones para garantizar los derechos a la verdad, la justicia y la reparación de las mujeres víctimas del conflicto armado en Colombia. Bogotá: Ediciones Antropos.

Hernández Mora, Salud (2007). El negocio del terror. En VV.AA., El poder ¿para qué?, 57-133. Bogotá: Intermedio Editores.

IACHR. (2006). Las mujeres frente a la violencia y la discriminación derivadas del conflicto armado en Colombia. IACHR, http:// www.IACHR.org/women/Colombi06sp/ Women%20Colombia%20 Spa%202006.pdf (visited August 28, 2015).

IACHR. (2011). Violencia sexual en Mesoamérica. OAS, http:// www.oas.org/es/sla/ddi/docs/acceso_justicia_instrumentos_ internacionales_recursos_Informe_IACHR_mujeres.pdf (visited August 30, 2015).

IACHR. (2013). Verdad, Justicia y reparación. Cuarto informe sobre la situación de derechos humanos en Colombia. OAS, http://www.oas.org/es/IACHR/docs/pdfs/justicia-verdad-reparacion-es. pdf (visited July 22, 2015).

IACHR. (2015). Audiencia temática "Seguimiento a la implementación de la Ley 975 de 2005 en Colombia", solicitada por la Corporación Humanas Colombia, Lawyers Without Borders Canada y otras. OAS, http://www.oas.org/es/IACHR/

multimedia/ sesiones/154/default.asp (visited September 24, 2015).

Impunity Watch. (2014). Informe sobre la justicia transicional en Guatemala. Impunity Watch, http://www.impunitywatch.org/ docs/Research_report_informe_monitoreo_IW_JUSTICIA_ Dec_2014.pdf (visited September 8, 2015).

Jescheck, Hans (1981). Tratado de derecho penal. Barcelona: Ed. Boch.

LWBC (Lawyers Without Borders Canada). (2014). Paz con justicia transicional. Aportes desde el derecho internacional. LWBC, http:// www.LWBCanada.ca/documents/file/informe-paz-con-justicia- transicional-version-lancement-2014-11-25.pdf (visited September 17, 2015).

LWBC (Lawyers Without Borders Canada). (2015). Una mirada al desplazamiento forzado: Persecución penal, aparatos organizados de poder y restitución de tierra en el contexto colombiano. LWBC, http://www.asfquebec.com/documents/file/informe-LWBC- desplazamiento-forzado_2015-09-17(1).pdf (visited September 21, 2015).

MacKinnon, Catharine (2006). Are Women Human? And Other International Dialogues. Cambridge: Harvard University Press.

Mlambo-Ngcuka, Phumzile (October 14, 2015). La igualdad de género fortalece las negociaciones de paz. UN Executive Director speaks of resolution to recognize the role of women in peace. El Tiempo, October 13, 2015, http:// www.eltiempo.com/politica/proceso-de-paz/onu-mujeres-conmemora-resolucion-1325-sobre-mujeres-y-paz/16402608(visited October 21, 2015).

Office of The Prosecutor - International Criminal Court (2012). Situación en Colombia. Reporte Intermedio. ICC-CPI,

http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-B A85-35B CFD2A7922/285202/

OTP2012035032COLResumenEjecutivodelReporteIntermed. PDF (visited August 19, 2015).

Ombudsman (s/f). Sistema de alertas tempranas, SAT. Defensoría,http://www.defensoria.gov.co/es/public/atencionciudadanoa/1469/Sistema-de-alertas-tempranas---SAT. htm (visited August 24, 2015).

Ombudsman (2006). Resolución Defensorial No. 46. Situación social y ambiental de la región del Catatumbo - Norte de Santander. Acnur, http://www.acnur.org/t3/uploads/media/COI_2467.pdf?view=1 (visited July 6, 2015).

Ombudsman. (2008). Promoción y monitoreo de los derechos sexuales y reproductivos de mujeres víctimas de desplazamiento forzado con énfasis en violencia intrafamiliar y sexual. Bdigital-UNAL, http://www.bdigital.unal.edu.co/45114/1/9789589353912.pdf (visited June 12, 2015).

Office of the Comptroller, Inspector General and Ombudsman (2012). Primer Informe de seguimiento a la Law 1448 2011 de Víctimas y Restitución de Tierras 2012. Corporación Viva la Ciudadanía, http://viva. org.co/attachments/article/195/INFORME_MONITOREO_Y_ SEGUIMIENTO_LAW_1448_2011.pdf (visited June 19, 2015).

Olásolo Alonso, H. (2013). El principio nullum crimen sine iure en derecho internacional contemporáneo. Anuario Ibero-Americano de Derecho Internacional Penal, ANIDIP, Vol. 1, 18-42. Universidad del Rosario,http://revistas.urosario.edu.co/index.php/anidip/ article/view/2858/2333 (visited August 26, 2015).

Prosecution Service. (November 2014). Reply to a petition.

Red Nacional de Mujeres, Sisma Mujer & Corporación Humanas. (2015). Cinco claves para un tratamiento diferencial de la violencia sexual en los acuerdos sobre la justicia transicional en el proceso de paz. Corporación Humanas, http://www.humanas.org. co/archivos/Cinco_claves_de_la_violencia_sexual_en_los_acu- erdos_sobre_justicia_transicional-completo.pdf (visited October 6, 2015).

Relva, H (2003). The Implementation of the Rome Statute in Latin American States. Leiden Journal of International Law 16, 331 -336.

Rosenbaum, JS (2010). La responsabilidad penal del dirigente en los delitos cometidos a través de aparatos organizados de poder. In Revista de Derecho Público 25, 4–40.

United Nations (1998). Formas contemporáneas de la esclavitud. La violación sistemática, la esclavitud sexual y las prácticas análogas a la esclavitud en tiempo de conflicto armado. Final Report presented by Ms. Gay J. McDougall,Special Rapporteur. UN,http://www.unhchr.ch/Huridocda/Huridoca.nsf/Test-Frame/920303b13d0c265780256678003b3ec9?Opendocument (visited July 29, 2015).

United Nations-Security Council (2011). El Estado de derecho y la justicia de transición en las sociedades que sufren o han sufrido conflictos. S/2011/634. UN,http://www.unrol.org/files/S_2011_634SPA.pdf(visited July 23, 2015).

United Nations-Office of the High Commissioner for Human Rights (2008). Instrumentos del Estado de Derecho para sociedades que han salido de un conflicto. Programade reparaciones UN,http://www.ohchr.org/Documents/

Publications/ReparationsProgrammesSP.pdf (visited July 23, 2015).

United Nations-UNDP. (2014a). Catatumbo: análisis de conflictividades y construcción de paz. UNDP,http://www.co.undp.org/content/dam/colombia/docs/Paz/undp-co-catatumbo-2014.pdf (visited August 31, 2015).

United Nations-Programa de Divulgación sobre el Genocidio en Ruanda. (2014b). La violencia sexual: un instrumento de guerra. UN,http://www.un.org/es/preventgenocide/rwanda/about/bg- sexualviolence.shtml(visited August 12, 2015).

United Nations-Secretary General. (2013). Informe del Secretary General: violencia sexual relacionada con los conflictos. A/67/792–S/2013/149. UN,http://www.acnur.org/t3/fileadmin/ Documentos/BDL/2014/9575.pdf?view=1(visited July 22, 2015).

United Nations-Secretary General. (2014c). Nota orientativa del Secretary General: reparacionesporlaviolenciasexualrelacionada con los conflictos. UN,http://www.ohchr.org/Documents/Issues/ Women/WRGS/PeaceAndSecurity/ReparationsForCRSV_sp.pdf(visited July 22, 2015).

Verdad Abierta. (s/f). Matando civiles Mancuso llegó al Catatumbo. Verdad abierta,http://www.verdadabierta.com/justicia-y-paz/80-versiones-seccion/554-las-cicatrices-del-bloque-catatumbo (visited July 10 2015).

Velásquez Velásquez F (2009). Derecho penal. Bogotá: Comlibros.

Velásquez Velásquez F (2012). La flexibilidad del principio de legalidad y los crímenes que agravian a la humanidad. In: Cuadernosde Derecho Penal 7, 91- 105.Universidad SergioArboleda, http://revistas.usergioarboleda.edu.co/index.php/cuadernos_ de_derecho_penal/article/viewFile/399/346 (visited August 24, 2015).

Ward N, Ferdinandusse (2006). Direct Application of International Criminal Law in National Courts.The Hague: TMC Asser Press.

Colombian Jurisprudence

Bogotá Appeal Court, Justice and Peace Division (2010). Decision December 2 against Jorge Iván Laverde Zapata. Presiding: Uldi Teresa Jiménez López.

Bogotá Appeal Court-Justice and Peace Division (2011). Decision December 7 against Edgar Ignacio Fierro Flores. Presiding: Lester M. González.

Bogotá Appeal Court-Justice and Peace Division (2012a). Decision July 30 against Edison Giraldo Paniagua. Presiding: Uldi T. Jiménez López.

Bogotá Appeal Court-Justice and Peace Division (2012b). Decision December 1 against José Rubén Peña. Presiding: Lester M. González.

Bogotá Appeal Court-Justice and Peace Division (2014a). Decision May 29 contra Ramón Isaza. Presiding: Eduardo Castellanos-Roso.

Bogotá Appeal Court-Justice and Peace Division (2014b). Decision August 1 against Luis Carlos Pestana Coronado. Presiding: Gustavo Aurelio Roa Avendaño.

Bogotá Appeal Court-Justice and Peace Division (2014c). Decision September 1 against Luis Eduardo Cifuentes and others. Presiding : Uldi T. Jiménez López.

Bogotá Appeal Court-Justice and Peace Division (2014d). Decision November 20 against Salvatore Mancuso and others. Presiding: Lester M. González.

Bogotá Appeal Court-Justice and Peace Division (2014e). Decision December 16 against Arnubio Triana Mahecha and others. Presiding: Eduardo Castellanos Roso.

Bogotá Appeal Court-Justice and Peace Division (2015). Decision February 24 against Orlando Villa Zapata and others. Presiding: Uldi T. Jiménez López.

Constitutional Court (2009a). Order 092. Presiding: Manuel José Cepeda Espinosa.

Constitutional Court (2000). Decision C-996. Presiding: Antonio Barrera Carbonell.

Constitutional Court (2002). Decision C-578. Presiding: Manuel José Cepeda Vargas.

Constitutional Court (2009b). Decision T-085. Presiding: : Jaime Araújo Rentería.

Constitutional Court (2013). C-753. Presiding: Mauricio González Cuervo.

Constitutional Court (2014). Decision C-180. Presiding: Alberto Rojas Ríos.

Medellín Appeal Court-Justice and Peace Division (2015). Decision February 2 against Ramiro Vanoy. Presiding: María Consuelo Rincón Jaramillo.

Supreme Court of Justice-Criminal Cassation Division (1989). Order March 3

Supreme Court of Justice-Criminal Cassation Division (1991). Decision January 31.

Supreme Court of Justice-Criminal Cassation Division (1996). Case 9401, Decision May 8.

Supreme Court of Justice-Criminal Cassation Division (1997). Case 10672, Decision September 18.

Supreme Court of Justice-Criminal Cassation Division (2003). Case 17068, Decision November 26.

Supreme Court of Justice-Criminal Cassation Division (2004). Decision February 4.

Supreme Court of Justice-Criminal Cassation Division (2006a). Case. 24096, Decision April 6.

Supreme Court of Justice-Criminal Cassation Division (2006b). Order April 26.

Supreme Court of Justice-Criminal Cassation Division (2006c). Case. 25743, Decision October 26.

Supreme Court of Justice-Criminal Cassation Division (2007). Order August 8.

Supreme Court of Justice-Criminal Cassation Division (2008a). Case. 20413, Decision January 23.

Supreme Court of Justice-Criminal Cassation Division (2008b). Case. 21691, Decision September 17.

Supreme Court of Justice-Criminal Cassation Division (2008c). Case. 25578, Decision October 8.

Supreme Court of Justice-Criminal Cassation Division. (2009a). Case. 29308, Decision May 13.

Supreme Court of Justice-Criminal Cassation Division (2009b). Case. 21749, Decision June 10.

Supreme Court of Justice-Criminal Cassation Division (2009c). Case. 23508, Decision September 23.

Supreme Court of Justice-Criminal Cassation Division (2009d). Case. 32192, Decision October 28.

Supreme Court of Justice-Criminal Cassation Division (2010a). Sole instance order May 15 against former Congressman Cesar Pérez García.

Supreme Court of Justice-Criminal Cassation Division (2010b). Case. 33039, Decision December 16.

Supreme Court of Justice-Criminal Cassation Division (2010c). Decision December 16 against Uber Enrique Banqué. Presiding: José Leonidas Bustos Martínez.

International Jurisprudence

Audiencia Nacional-Criminal Division – Plenary - Spain (1998). Order November 5. Appeal No. 173/98-Section I – Summary case 1/98 (Juzgado Central de Instrucción No. 6) (Case against Pinochet Ugarte).

Comité de Derechos Humanos (2003). Opinion of July 31, Case of Klaus Dieter Baumgarten v. Germany. Communication No. 960/2000.

Court of Bosnia and Herzegovina (2009). Case No. X-KR-05/96- 3. Decision 29 October. Prosecutor v. Zoran Maric, Bosnia.

Cassation Court of France-Criminal Division (1976). Decision June 30, case of Touvier.

European Court of Human Rights (1978). Decision January 18 Case of Ireland v. the United Kingdom.

European Court of Human Rights (2001). Decision March 22. Case of Streletz, Kessler y Krenz v. Germany. Communications Nos. 34044/96, 35532/97 y 44801/98.

European Court of Human Rights (2006). Decision on inadmissibility 17 January. Case of Kolk y Kislyiy v. Estonia. Communications Nos. 23052/04 y 24018/04.

Tribunal Europeo de Derechos Humanos (2010). Decision May 17. Case of Kononov v. Latvia. Communication No. 36376/04.

Federal Oral Criminal Court Argentina (2006). September 19 Case of "Circuito Camps" and others (Miguel Osvaldo Etchecolatz). Case No. 2251/06.

High Court of Canada – Criminal Division (2009). Decision May 22, Her Majesty the Queen v. Désiré Munyaneza. Case No. 500-73-002500-052Case of Munyaneza.

House of Lords (1992). Case of R v R. England 1 A.C. 599.

ICTY-Appeals (1995). Decision October 2 Case of Tadic, IT-94-1-AR72.

ICTY (1997). Decision May 7 Case of Tadic.

ICTY (1998). Decision December 10 Case of Furundzija, First instance. IT-95-17/1.

ICTY (1999). Decision July 15 Case of Tadic.

ICTY (2003). Decision July 16, The Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura.

International Court of Human Rights (1985). Consultative Opinion OC-5/85 November 13. La colegiación obligatoria de periodistas (Arts- 13 and 29, American Convention on Human Rights). Series A, No. 5.

International Court of Human Rights (1997). Decision September 17, Case of Loayza Tamayo v. Peru.

International Court of Human Rights (1998). Decision March 8 Case of Paniagua Morales and others vs. Guatemala.

International Court of Human Rights (1999). Decision May 20 Case of Castillo Petruzzi vs. Peru.

International Court of Human Rights (2004a). Decision November 18 Case of De la Cruz Flores vs. Peru.

International Court of Human Rights (2004b). Decision November 25 Case of Lori Berenson Mejía vs. Peru.

International Court of Human Rights (2005a). Decision June 20 Case of Fermín Ramírez vs. Guatemala.

International Court of Human Rights (2005b). Decision November 25 Case of García Asto and Ramírez Rojas vs. Peru.

International Court of Human Rights (2006). Decision February 7 Case of Acevedo Jaramillo y and others vs. Peru.

International Court of Human Rights (2008). Decision May 6 Case of Neptune vs. Haití.

International Criminal Court – Preliminary Examinations

I. (2007). Decision 29 January. Prosecuctor vs. Thomas Luganga Dyilo, Decision on the Confirmation of the Charges. Doc. No. ICC-01/04-01/06-803-tEN.

Special Criminal Court of Peru (2009). April 7. Cases of Barrios Altos, La Cantuta y Sótanos del SIE (Alberto Fujimori Fujimori), Case No. AV 19-2001.

Special Tribunal for Lebanon - Appeals (2011). February 16, Interlocutory decision on applicable law.

Special Tribunal for Sierra Leone-Appeals. (2014). May 31, Prosecutor v. Sam Hinga Norma.

Supreme Court of Chile (2006). December 13, Case of Molco de Choshuenco (Paulino Flores Rivas et all), Rol No. 559-2004.

Supreme Court of Israel (1962). Decision May 29, Case of Attorney General of Israel vs. Eichmann.

Colombian law

Congress of Colombia (2000). Law 599, Criminal Code.

Congress of Colombia (2005). Law 975 of Justice and Peace.

Congress of Colombia (2012). Law 1592, Amending Law 975/. Prosecution Service. (2012a). Directive 001, adopting criteria to set priorities in situations and cases, and creating a new system of investigation and management of crime.

Office of the President of Colombia (1970). Decree 1400-Civil Procedure Code.

Office of the President of Colombia (1991). Decree 2266, adopting certain measure for the exercise of power in a State of Siege as permanent legislation.

Office of the President of Colombia (2013). Decree 3011, regulating Laws 975/ 2005, 1448/ 2011 and 1592/ 2012.

Prosecution Service of Colombia (FGN) (Colombia) (2012b). Plan de acción de casos a priorizar por a Unidad Nacional de Fiscalías para la Justicia y la Paz. See: http://www.fiscalia.gov.co/jyp/ wp-content/uploads/2012/04/Plan-de-Accion-de-Priorizacion- de-la-Unidad.pdf (visited July 29, 2015).

International norms

Vienna Convention on the Law of Treaties (1969).

Geneva Conventions (1949) and their additional protocols.

International Criminal Court (2000). Statute of Rome, Elements of crimes. U.N. Doc. PCNICC/2000/1/Add.2.

United Nations (1979). Convention for the Elimination of all Forms of Discrimination Against Women, CEDAW.

United Nations-General Assembly (1948). Universal Declaration of Human Rights.

United Nations-General Assembly (2005). Resolution 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

See http://www.ohchr.org/EN/ProfessionalInterest/ Pages/ RemedyAndReparation.aspx (visited August 12, 2015).