

Engendering Transitional Justice in Latin America: the long road of gender inclusion

Rosario Figari Layús

Abstract

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This essay provides an overview of the gradual and complex incorporation of a gender perspective in transitional justice policies in Latin America over the past four decades. It addresses the main milestones along with the pending challenges and vacuums regarding how to provide effective redress for gender-based violence perpetrated in contexts involving armed conflict and authoritarian regimes. To this end, the essay includes specific case studies that illustrate the tensions between the shortcomings and demands of survivors to achieve accountability, truth and reparations for gender-based violence in post-authoritarian and post-conflict contexts.

I. Introduction

Political violence in the context of dictatorships and armed conflicts affects 2 men, women and LGBTQI+ persons differently. However, the different impacts and consequences of violence have not always been reflected in the formulation and implementation of legal frameworks and transitional justice measures. Indeed, as this chapter shows, the process of incorporating a gender perspective into the various mechanisms of transitional justice (“TJ”) in Latin America has been very slow and hindered by many difficulties and challenges as the process unfolded. The inclusion of a gender perspective has been the result of the constant struggles and demands of women and the LGBTQI+ movement, especially those who were victimised through political violence and human rights violations, as well as of feminist groups and human rights organisations.

The meaning of what a gender perspective implies is broad and has 3 been evolving over the years. UN Security Council Resolution 1325 of 2000 proclaims the need to adopt a ‘gender perspective’ in peace processes. Although the term “gender” is used in very general terms in the Resolution,

it was at that time focused on “women”. After twenty years, the idea of a gender perspective has expanded and goes much further, including men and individuals who, due to their sexual orientation and identity, are also affected by practices of violence, discrimination, and inequality. To include a gender perspective in TJ policies means thus a process of assessing the differential implications of violence, discrimination and inequality for women and men during conflict including also their needs and rights as well as considering those affected in any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of TJ policies in all political, economic and societal spheres so that women and men benefit equally so that inequality and violence is not perpetrated after transition. The ultimate goal is to achieve gender equality. Another relevant document using the term ‘gender perspective’ in connection with conflict is the International Criminal Court, Office of the Prosecutor’s Policy Paper on Sexual and Gender-based Crimes of 2014.¹ This approach introduces the idea that a gender perspective requires an understanding of differences in status, power, roles, and needs between males and females, and of the impact of unequal gender power relations on people’s opportunities and interactions. This perspective enables a better understanding of the gendered impacts of violence as well as the different experiences of individuals and communities in a particular conflict or authoritarian setting. Thus, a gender perspective in TJ mechanisms would involve understanding how these measures could address gender-based violence committed in the past and positively change unequal power relations between men and women in the future.

- 4 The essay is divided into three main sections. The first section provides a brief account of the main forms and political function of gender-based violence in armed conflicts and under dictatorships in Latin America. The second section goes on to trace the region’s gradual process of incorporating a gender perspective into TJ mechanisms. To this end, this section analyses the practice by looking at the gender-based approaches adopted by the different TJ instruments in place in Latin America over the past four decades, with a special focus on truth commissions, reparations and criminal prosecutions. A survey of the use of these processes regionally is

1 International Criminal Court, Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (The Hague, June 2014) 5.

presented to highlight their achievements, constraints and challenges. The final section presents conclusions and a discussion of the complexities of violence and gender roles within the framework of armed conflicts and the challenges TJ faces in trying to account for them.

II. Gender-based violence in armed conflict and under dictatorships in Latin America

Political violence and human rights violations have different effects and consequences on women, men and the LGBTQI+ community. Indeed, authoritarian regimes and armed conflicts, as well as their impacts, are profoundly gendered. In Latin America, gender-based violence has been a widely-used practice in armed conflicts and dictatorial regimes. In both of these contexts, political violence has been highly sexualised, and women's bodies have become both targets and weapons of violence. The deployment of gender-based violence has a political function since it contributes to the reaffirmation and reproduction of gender inequalities both in times of war and under authoritarian regimes, irrespective of if the latter are at war or in a period of peace. Many cases of armed conflicts, such as those of Peru, Colombia and Guatemala, show how sexualised violence and rape are employed as a means of social control over women and, therefore, as a form of violence that goes far beyond an individual act since it aims at exercising power.

Crucially, gender-based violence employed in this manner should not be viewed as an individual, private or pathological issue but as a social and systemic practice that takes place within various contexts and social groups. Gender-based violence contributes to establishing and reproducing social hierarchies and intersections of domination and subordination. Raping and abusing women and girls has, historically, been used as a weapon of war to demoralise as well as morally and physically destroy not only the direct victims but also their communities, to spread terror and reconfirm military masculinities and troops' loyalty.² This perspective of sexualised violence as a weapon contributes to our understanding of the strategic use of gendered violence in conflicts and under dictatorships. As confirmed by many testimonies provided by survivors of the dictatorships in Chile and

2 J. Boesten, *Sexual violence during war and peace: gender, power, and post-conflict justice in Peru* (New York: Palgrave Macmillan 2014).

Argentina in the 1970s and 1980s, various forms of sexualised violence were perpetrated repeatedly and systematically by agents of the armed forces against illegally detained men and women as a means of torture to extract not only information from them but also to demoralise and destroy them physically and psychologically. Within the context of the armed conflicts in Guatemala, Peru and Colombia, women and girls, particularly those from indigenous and rural backgrounds, were subjected to different forms of abuse and violence. This typically included sexualised violence, forced prostitution and various forms of slavery that included physical and psychological torture as well as women being forced to carry out household chores for months in the military quarters of their abductors.³ In addition to being victims of sexualised violence, Mayan- and Quechua-speaking women faced racial and ethnic discrimination for decades as a result of the State policies implemented in Peru and Guatemala.

- 7 Gender-based violence is intersectional, i.e. not all women, men and LGBTQI+ persons are affected in the same way and with the same intensity. Women belonging to marginalised groups within society, whether due to their social class, age, ethnicity, language, migratory status or even geographical origin, can suffer additional forms of violence and discrimination, even in peacetime. Indeed, LGBTQI+ individuals are constantly exposed to violence and discrimination during peacetime and when it comes to armed conflict or post-conflict contexts they are often a part of the least protected of all groups within society, face additional perils created by the breakdown of law and institutions. This vulnerability has been recognised by the UN Human Rights Council, which stated that:

“[S]igmatization and discrimination on the basis of sexual orientation increase gender-based violence in post-conflict and post-disaster situations, negatively affecting LGBT persons in the provision of food assistance, shelters and humanitarian aid”.⁴

- 8 Thus, the precariousness and risk for women and LGBTQI+ persons are further exacerbated in contexts where security deficiencies resulting from widespread violence and impunity prevail, institutional capacity is limited and there is a lack of State support, which is especially the case in rural areas. In times of crisis and political violence, the number and type of perpetrators increases and the possibilities to seek aid and access basic

3 Ibidem,

4 UN Human Rights Council 2014, paragraph 57.

support services are significantly reduced. This prevalence or increase in gender-based violence in different contexts and situations is well captured by the concept of 'the continuum of violence',⁵ which is useful in highlighting the persistence of gender-based violence across war, post-conflict and peacetime. In fact, in post-conflict contexts, women who experienced gender-based violence during a conflict continue to be exposed to different forms of violence from family members, criminal elements and gangs as well as institutional discrimination.⁶

How gender-based violence is understood and the relevance assigned to it by those who design and implement TJ mechanisms in post-authoritarian and post-conflict contexts is decisive to determine what kind of responses will be given to it, be they institutional, judicial, social or individual, as well as the extent to which such violence is socially condemned or tolerated, denounced or silenced. Thus, the following section looks at how Latin American political and social understandings of gender-based violence have shaped justice, truth and relations policies implemented throughout the region.

III. The lengthy path towards a gendered TJ approach in Latin America

Transitional justice emerged gradually as a normative paradigm to respond to the rights and demands of victims of human rights violations and political violence caused by authoritarian regimes and internal armed conflicts that took place in Latin America in the second half of the twentieth century. The first policies and initiatives in the search for truth and justice for dictatorship-era crimes were implemented in the 1980s in South America, particularly in Argentina and Uruguay. Over time, these mechanisms were replicated in other Latin American countries and the TJ paradigm was consolidated, with the region having the largest repertoire of TJ policies at its disposal worldwide. Instruments such as truth commissions, public apologies, memorials, civil actions, criminal prosecutions and reparations programmes for victims of mass human rights violations have become familiar parts of the vocabulary of many transitional processes when ad-

5 C. Cockburn, *The Continuum of Violence: A Gender Perspective on War and Peace*. In M.W. Giles and Jennifer Hyndman (Eds.) *Sites of Violence: Gender and Conflict Zones* (Berkeley and Los Angeles: University Press 2004) 22–44.

6 J. Boesten, *Sexual violence during war and peace: gender, power, and post-conflict justice in Peru* (New York: Palgrave Macmillan 2014) 9.

addressing the legacies of violent pasts. The formulation and implementation of transitional justice measures are not, however, haphazard affairs. These are processes in which power struggles between a range of actors and interests are conducted, each with its particular time frame and socio-political context. In this sense, just as State violence and armed conflicts are profoundly gendered, so too are transitional justice policies in their discourses, practices and outcomes. As mentioned above and will be shown below, the incorporation of a gender perspective into transitional justice mechanisms in Latin America has not been easy. It has been a process that has evolved and changed over the past forty years regarding the questions of how gender-based violence is conceptualised in the transitional justice paradigm and how its victims should be included and obtain redress.

- 11 The TJ processes conducted in Latin America in the past four decades have undergone a gradual process of recognition of gender-based violence. In the 1980s, dealing with the legacy of gender-based violence perpetrated by dictatorial regimes in the Southern Cone was not a priority but rather a taboo, and it was therefore excluded from political agendas and policies involving reparations, truth and justice. In the 1990s and early 2000s, the issue became more visible thanks to the efforts of women's collectives and survivors. Such efforts became embodied in different transitional justice measures, such as the reports of the commissions in Guatemala and Peru and – to a lesser extent – their recommendations⁷ and reparations policies.⁸ Initially, the notion of gender-based violence was narrowly construed and equated with sexual violence, more specifically, with rape. It was somewhat later that transitional justice policies began to adopt a broader perspective encompassing different forms of gendered violence and victims. Thus, the voices of LGBTQI+ persons slowly became more visible in transitional justice mechanisms put in place throughout the region. Examples of this have been the reports of the truth commissions in Ecuador (whose report was published in 2010) and Colombia (ongoing) as well as the recommendations contained in the report of the Brazilian Commission (2014). Hence, social, feminist and LGBTQI+ movements paved the way for a more inclus-

7 D. Gomez, J. Gonzalez and others, 'Reflexiones y recomendaciones en clave feminista descolonial para las recomendaciones del informe final de la Comisión de la Verdad en Colombia.' (Policy Brief, Colombian-German Peace Institute Capaz 2021)

8 A. Oettler & R. Figari Layús, Género y la evolución de la justicia transicional. El caso de reparaciones a víctimas de violencia política sexualizada en Argentina, Guatemala, Perú y Colombia. In: Blanke, Svenja / Kurtenbach, Sabine (Eds.): *Violencia y desigualdades en América Latina* (Buenos Aires: Nueva Sociedad 2017)

ive approach to gender-based violence which goes beyond rape to include the victims of other forms of violence.

The next section briefly examines the evolution, dynamics and challenges of implementing a gender perspective that addresses the violence suffered by women and LGBTQI+ groups in three of the most significant transitional justice instruments adopted in Latin America: truth commissions, reparations programmes for victims and trials for the prosecution of human rights abuses. 12

1. Engendering Truth in Latin American Truth Commissions

Truth commissions are State-sponsored temporary bodies whose objectives are primarily focused on satisfying victims' and a given society's right to truth as well as preventing new acts of violence. To this end, commissions normally collect testimony from victims and other relevant actors that is then used as a basis for drafting and publishing a report that includes recommendations designed to ensure non-repetition. Although truth commissions have been important for many victims and societies to uncover the truth on serious human rights violations, they have not been exempted from criticism and debate, especially with respect to their approach to gender-based violence. This criticism has been particularly salient in Latin America which, over the past few decades, has been the site of over a third of all the truth commissions ever convened worldwide. At least 13 Latin American countries have set up official truth commissions at some time over the past 40 years. As Table 1 shows, of the 14 official truth commissions implemented until now, only eight have explicitly referred to the pattern of gender-based violence during armed conflicts of dictatorships in their final reports.

Table 1: The gender perspective of Latin American Truth Commissions in the last four decades

Period	Country	Commissions name	Gender perspective	
			Yes	No
1980s	Argentina	Comisión Nacional sobre la Desaparición de Personas (CONADEP)		X
1990s	Chile	Comisión Nacional de Verdad y Reconciliación (Informe Rettig)		X
	El Salvador	Comisión de la verdad para el Salvador		X
	Guatemala	Comisión de Esclarecimiento Histórico (CEH)	X	

Period	Country	Commissions name	Gender perspective	
			Yes	No
2000s	Uruguay	Comisión para la Paz		X
	Chile	Comisión Nacional sobre Prisión Política y Tortura (Informe Valech)	X	
	Peru	Comisión de Verdad y Reconciliación (CVR)	X	
	Paraguay	Comisión de Verdad y Justicia	X	
	Ecuador	Comisión de la Verdad: ni silencio ni impunidad	X	
2010s	Brazil	Comissão Nacional da Verdade	X	
	Honduras	Comisión de la Verdad y la Reconciliación		X
	Bolivia	Comisión de la Verdad	X	
	Colombia	Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición	X	
	Mexico	Comisión por el Acceso a la Verdad y el Esclarecimiento Histórico y Justicia	Not available yet	
Total		14	8	5

Source: Elaborated by the author

- 13 The first truth commissions for dictatorship-era crimes were set up in the Southern Cone, in particular in Argentina, in the 1980s before being later replicated in other Latin American countries. After the Argentinian military dictatorship (1976–1983), in which State repression and the enforced disappearance of thousands of individuals became a systematic

and widespread practice, the new constitutional government of President Raúl Alfonsín (1983–1989) created the *Comisión Nacional sobre la Desaparición de Personas* (National Commission on the Disappearance of Persons, “CONADEP”) to address the demands for truth by thousands of survivors, relatives of the disappeared and human rights organisations. While many women gave their testimony to CONADEP about the sexual abuses they suffered while they were held captive, such testimony did not attract the same public attention as other types of crimes such as torture or enforced disappearance.⁹ This explains why none of the recommendations made by CONADEP included a gender perspective. This was the rule rather than the exception in truth commissions throughout the entire Southern Cone in the 1980s and 1990s. Indeed, gender-based violence committed within the framework of the Chilean, Uruguayan and Brazilian dictatorships was entirely overlooked by the authorities and did not form a part of the transitional justice instruments implemented in these countries.

Guatemala was the first country to explicitly address gender-based violence within the framework of the armed conflict which ran from 1960 to 1996. With the 1996 peace agreement, two reports were published about the mass human rights violations perpetrated during the armed conflict: The “Guatemala, Nunca Más” [“Guatemala, Never Again”] report, prepared by the Inter-Diocesan Project of Recovery of Historical Memory (Proyecto Interdiocesano de Recuperación de la Memoria Histórica, “REMHI”) in 1998 and the “Memorias del Silencio” [“Memories of Silence”] report, issued in 1999 by the Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico, “CEH”). The REMHI report was the first one in Latin America to make the violence that resulted from the terror strategies implemented by the Guatemalan State against women, in particular indigenous women, publicly visible. According to the report, of all the women that were killed, approximately 31 % had been subjected to sexual abuse.¹⁰ However, while the CEH report also addressed the systematic

9 L. Balardini, A. Oberlin and L. Sobredo, ‘Gender Violence and Sexual Abuse in Clandestine Detention Centers’ in Center for Legal and Social Studies and International Center for Transitional Justice (eds), *Making Justice Further Discussions on the Prosecution of Crimes against Humanity in Argentina* (Siglo Veintiuno Editores 2011) 119.

10 REMHI – Proyecto Interdiocesano de Recuperación de la Memoria Histórica, ‘Guatemala Nunca Más.’ (REMHI 1998) 210.

sexual violence perpetrated against Mayan women, neither report included recommendations for the redress of gender-based violence.¹¹

- 15 As in the Guatemalan case, the final report prepared by Peru's Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación, CVR) in 2003 included a specific chapter on sexualised violence that occurred during that country's armed conflict (1980–2000), some 83 % of which was perpetrated by State agents.¹² The report noted that sexualised violence was widespread, especially in rural areas and was often perpetrated in police stations and judicial offices where hundreds of women were abused while they were accused of having close bonds with guerrilla members.¹³ However, and despite the high public profile of these practices, of the 85 recommendations made by the CVR, only one contained a gender perspective aimed at implementing a literacy program for adolescent and adult women in rural areas.¹⁴ In addition, it is worth noting that the CVR report was the first one in the region to make visible, albeit in a minimal manner, acts of violence and discrimination committed against LGBTQI+ persons.¹⁵ It may be argued that from this point in time, all subsequent truth commissions established in Latin America could no longer ignore the issue of gender-based violence, at least that suffered by women as a result of political- and State-instigated violence. As such, these types of crimes became a subject included in almost all of the reports prepared by commissions after 2003.
- 16 Chile provides an example of this evolution in the treatment of gender-based violence by Latin American truth commissions. Chile's first mechanism in this regard, the National Truth and Reconciliation Commission

11 D. Gomez, J. Gonzalez and others, 'Reflexiones y recomendaciones en clave feminista descolonial para las recomendaciones del informe final de la Comisión de la Verdad en Colombia.' (Policy Brief, Colombian-German Peace Institute Capaz 2021)

12 CVR- Comisión de la Verdad y la Reconciliación, 'Informe Final,' (Comisión de la Verdad y la Reconciliación 2003) Volume I, 277.

13 J. Ríos & R. Brocate, *Violencia sexual como crimen de lesa humanidad: los casos de Guatemala y Perú* (Journal CIDOB d' Afers Internacionals, 2017) n.º 117, 93.

14 CVR- Comisión de la Verdad y la Reconciliación, 'Informe Final,' (Comisión de la Verdad y la Reconciliación 2003) Volume IX, 121.

15 Under the heading "Acts of terror against sexual minorities" a brief section discusses the actions perpetrated by the guerrilla group Túpac Amaru Revolutionary Movement (Movimiento Revolucionario Túpac Amaru -"MRTA") against some LGBTQI+ persons (CVR- Comisión de la Verdad y la Reconciliación, 'Informe Final,' (Comisión de la Verdad y la Reconciliación 2003) Volume II, 432) as part of a campaign of social extermination.

(Comisión Nacional de Verdad y Reconciliación), also known as the 1990 Rettig Commission, focused on cases of extrajudicial executions and enforced disappearances but without making any express references to the gender-based violence suffered by victims of the Pinochet dictatorship. A decade later, having taken note of the experiences of the Peruvian and Guatemalan commissions, the Valech Report I was published by the second Chilean truth commission in 2005. This report revealed the previously hidden issue of the use of sexualised torture as a systematic practice applied against political prisoners. While the new report focused on the rapes and sexual depredations suffered by women, it also addresses the sexualised torture experienced by men.¹⁶ Almost all of the women that testified before the second commission stated that they had been subjected to sexualised violence or, more specifically, to rape.

Further significant progress in implementing a gender perspective was made by Ecuador's Truth Commission (Comisión de la Verdad Ecuador, "CVE"), established in 2007 to investigate the human rights violations that occurred during the government of León Febres Cordero (1984–1988). While the final report contains a chapter on sexualised and gender-based violence like its predecessors, it takes a step beyond by including a section on violence and discrimination against LGBTQI+ persons from 1990 to 2000.¹⁷ This was the first case in which a commission recommended the implementation of public policies and legislation to establish mechanisms to prevent discrimination against the LGBTQI+ community as well as secure that community's participation in debates related to gender-based violence.¹⁸ Of the 155 recommendations made by the commission, 20 included a gender approach and were aimed at the physical and psychosocial rehabilitation of victims, guaranteeing them educational and work oppor-

16 Comisión Nacional sobre Prisión Política y Tortura, 'Informe de la Comisión Nacional sobre Prisión Política y Tortura (Valech I),' (Comisión Nacional sobre Prisión Política y Tortura 2005) 289–298.

17 In particular, the report examined the Plan "Más Seguridad" ["More Security"] implemented in the city of Guayaquil, which vested the police with broad discretion to detain and impose fines on individuals that were perceived as a threat to public morals and security (CVE 2014, 292–311). This plan led to the detention, torture and sexual abuse of many LGBTQI+ persons.

18 CVE-Comisión de la Verdad Ecuador, 'Informe de la Comisión de la Verdad, Ecuador: sin verdad no hay justicia,' (Ecuador : Ediecuatorial, 2010), paras. 117 & 150

tunities as well as economic compensation for the sexual violence they suffered.¹⁹

- 18 The final report of Brazil's National Truth Commission (Comissão Nacional da Verdade "CNV") also features a chapter on gender-based violence perpetrated under the military dictatorship that held power from 1964 to 1985. Under the heading "Dictatorship and homosexuality", the CNV report examines the brutal violence perpetrated by the State against these communities that the military regime considered to be a 'threat' to its conservative ideology and the society it was trying to build. The report adopts a broader perspective on gender-based violence and the sexual orientation of the victims during the Brazilian dictatorship by highlighting four specific forms of repression against minorities with particular sexual orientations: a homophobic discourse which associated sexual diversity with an 'international communist agenda'; discrimination and the violation of the right to work for individuals who were dismissed from their jobs as a result of their sexual orientation; the censorship of works of art with homosexual content; and the violence and raids perpetrated by the police against LGBTQI+ persons. On that basis, the CNV recommended the implementation of institutional and legal reforms, such as repealing legislation discriminating against LGBTQI+ persons, the enforcement of legislation on gender identity, offering public apologies to the victims as well as the repair and/or construction of commemorative monuments. While the gender approach does not have a central or cross-cutting role here, similar to all the above-mentioned commissions, its relatively prominent place in the 29 recommendations made by the CNV can be regarded as a significant step in making gender-based violence more visible and treating it more appropriately from a structural perspective.²⁰

- 19 Colombia's Truth Clarification Commission (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición, "CEV"), which began its work in 2018 and issued a report in the months that followed, adopted one of the most forward-looking approaches to gender-based violence. Thanks to the establishment of a sub-commission on gender as early as in the negotiations held in Havana (2012–2016), the final agreement of the CEV contains a cross-cutting gender perspective, including the estab-

19 D. Gomez, J. Gonzalez and others, 'Reflexiones y recomendaciones en clave feminista descolonial para las recomendaciones del informe final de la Comisión de la Verdad en Colombia.' (Policy Brief, Colombian-German Peace Institute Capaz 2021)

20 Ibidem, 9.

lishment of a Gender Work Group to make visible the experiences women and LGBTQI+ persons went through during the armed conflict. In July 2022, the 11 volumes of the commission's final report were published, one of which deals with gender-based violence during the armed conflict. Under the title "My body is the Truth. Experiences of women and LGBTQI+ people in the armed conflict" the various impacts of violence on these groups are recounted, as well as the struggles of women's organizations and LGBTQI+ groups for a more egalitarian and diverse country. While this represents significant progress, it remains to be seen how this approach will be reflected in the Commission's implementation of its recommendations.

2. Reparations for gender-based violence

If engendering the work of the truth commissions in Latin America has been slow and full of omissions, reparations laws and programmes have fared no better.²¹ International law defines reparations as a set of material and symbolic modes of redress for victims of human rights violations.²² States are under an obligation to provide measures that guarantee reparations to victims of grave violations of human rights and/or international humanitarian law.²³ However, while the right to reparations is anchored in international law, the implementation of that right is in essence a matter of domestic law and policy. In this respect, national governments possess a good deal of discretion and flexibility in meeting their obligations to provide effective remedies and in giving substance to the right to reparations. Although reparations programmes and laws in Latin America have grown in both number and scope to cover a still-growing number of issues related to violence suffered in armed conflicts and under dictatorships, States throughout the region have been slow in effectively addressing the consequences of gender-based violence.

21 C. Correa, 'Reparative Justice. From Principles to Practice Challenges of Implementing Reparations for Massive Violations in Colombia.' (International Center for Transitional Justice, October 2015)

22 United Nations, Guidance Note of the Secretary General. Reparations for Conflict-Related Sexual Violence, (June 2014) 1.

23 T., **Van Boven**, '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' (United Nations Doc. E/CN.4/2005 L., 2005), paragraph 15, 7.

- 20 Reparations policies for the victims of the Argentine, Chilean and Uruguayan dictatorships did not include a gender perspective. Argentina enacted legislation in the 1980s and 1990s that awarded financial compensation to relatives of the disappeared, political prisoners and appropriated children born during the captivity of their mothers. However, such measures lacked a gender perspective. Similarly, while Chile did implement broader reparations measures, such as access to education or psychological treatment through the Comprehensive Healthcare and Reparations Programme, (Programa de Reparación y Atención Integral en Salud y Derechos Humanos)²⁴ in addition to financial compensation, such measures were not supported by a gender approach.²⁵ Peru's Truth Commission implemented a Comprehensive Reparations Plan (Plan Integral de Reparaciones, "PIR") for women surviving rape and for individuals born as a result of these rapes (Law No. 28592 Art. 6, 2003); however, no other forms of sexual violence were considered at the time. The PIR also created a Single Registry of Victims (Registro Único de Víctimas, "RUV") which, in 2012, expanded the categories of sexual violence eligible for reparations. To date, the only form of sexual violence that has not been added to the categories covered by the RUV is forced sterilisation.
- 21 In the case of Guatemala, the peace agreement underscored the importance of eliminating gender-based discrimination and including women's demands and needs as a vital element for peacebuilding. Against that background, the State created institutions whose central aim was to protect and grant reparations to women in Guatemala, the Presidential Secretariat for Women (Secretaria Presidencial de la Mujer), the Office of the Defender of Indigenous Women (Defensoria de la Mujer Indígena) and the National Compensation Programme (Programa Nacional de Resarcimiento "). While with the creation of these institutions the importance of addressing the harm caused by sexualised violence is acknowledged, their performance and effectiveness in practice was very poor. After two decades of operation, the respective programme has only benefited 20 % of the estimated victims (Gutiérrez 2019) and no other measures to redress the mental and emotional harm inflicted upon victims of sexualised violence through the provision of services involving psycho-social support have been implemented.

24 This programme was created by Chile's Health Ministry in 1991 for victims of human rights violations.

25 Comisión Nacional sobre Prisión Política y Tortura, 2005, 624–625.

Like in the case of its truth commissions, Colombia has also made significant progress in terms of applying a gender perspective to reparations for both women and LGBTQI+ persons. Article 13 of the 2011 Victims' and Land Restitution Law (Law No. 1448) represents an important effort of the Colombian government to provide reparations to different groups of victims of the internal armed conflict, including women and LGBTQI+ persons. Law No. 1448 adopts a gender-sensitive approach, including intersectional characteristics of age, ethnicity, sexual orientation and disability with women's rights being addressed in two particular ways. Firstly, sexualised violence in the context of armed conflict is covered in the scope of Article 38 and subsequent articles that refer to the principles that should guide the collection of evidence in accord with the Rome Statute and relevant protocols of the International Criminal Court. Secondly, Articles 114 through to 118 ("Regulations for Women in Restitution Processes") refer to the prioritisation of women for administrative and judicial procedures involving land restitution. In general terms, the measures contemplated in this legal framework include preferential access in the administrative and judicial phases of the land restitution process, additional security measures to ensure that women claimants can return to their land and preferential access to credit. However, the interplay of historical discrimination against women (that is, cultural norms, social practices and the non-enforcement of gender-equity laws) and the immense impact of sexual violence on women represent a particular set of disadvantages that affect displaced women during return and land-restitution processes and procedures. Thus, there has been harsh criticism regarding the effective implementation of these provisions for gender-equitable outcomes, in particular with respect to the ongoing violence in rural areas, particularly for women who claim and defend their right to the land. The increase in attacks, including the murder and sexual harassment of women leaders who demand the restitution of land to female owners and fight for the environment has been reported by many organisations.

Thus, one of the main challenges regarding reparations policies, as it is with other transitional justice instruments in Latin America, is the inclusion of a broader and deeper understanding of both gender-based violence and gender inequality coupled with their manifold impacts on the victims thereof. As shown above, there are a number of reparations programmes focused on sexualised violence, however, it is relevant not to underestimate other damaging factors, such as the socio-economic impacts of sexualised violence targeting women, which can undermine their chances for recovery

and reintegration into their family, community and citizenry as a whole in post-conflict contexts. Indeed, many women and LGBTQI+ persons in post-conflict situations in Latin America usually experience extreme problems regarding poverty and their health. Their increased burdens are often largely ignored and they are deprived of their basic needs, fundamental rights, protection as well as access to services, justice and economic security.

- 24 Colombian Law No. 1448 (in particular, Art. 6 and Art. 13) constitutes a very important step regarding the acknowledgement of the rights of the LGBTQI+ community in Colombia which faced abuse and violence in the armed conflict. Though the inclusion of LGBTQI+ persons in this law was welcomed by many international and national organisations, the specific applications of the law for these groups, as well as it producing effective results, are still to be seen in practice. The law is vague and does not include in its scope any specific programmes to ensure reparations for LGBTQI+ persons. In everyday life, LGBTQI+ persons are still exposed to hate crimes, police brutality and discrimination in the education and health system. Indeed, one of the major problems experienced by this marginalised group in Colombia is the high level of violence towards them in both urban and rural conflict areas and the risk to LGBTQI+ persons in areas controlled by armed groups seems particularly grave. The armed groups that have gained control over territory have distributed pamphlets demeaning those perceived to be LGBTQI+ persons or LGBTQI+ defenders, threatening to kill them or declaring them valid military targets. However, armed groups in Colombia are not the only problem in this regard as numerous complaints have also been collected regarding attacks on the LGBTQI+ community and activists supporting it by government security forces and their militias. As such, progress has been made but much more still needs to be done.

3. Criminal trials and the difficult task of prosecuting sexualised violence

- 25 Justice in domestic courts is one of the most prominent demands of victims seeking to obtain accountability for human rights violations in Latin America. When it comes to gender-based and sexualised violence, it is also historically one of the most difficult demands to meet. Starting with the decisions rendered in the Nuremberg trials, none of them included this

type of violence. Apparently, Latin America is the region of the world with the largest number of prosecutions for crimes against humanity and other international crimes committed in the context of armed conflicts and/or dictatorial regimes.²⁶ However, cases of gendered-based violence have still proven to be the most difficult to bring before Latin American courts even if it was proved to be a systematic practice under an authoritarian regime and/or in an armed conflict. Of the nine Latin American countries that have engaged in criminal prosecutions for crimes against humanity,²⁷ only four (Argentina, Peru, Guatemala and Chile) have prosecuted perpetrators of gender-based violence.²⁸

In the case of the dictatorships of the Southern Cone, especially Chile 26 and Argentina, there is a significant difference in the progress made with the criminal prosecution of sexual violence. According to the records of the *Transitional Justice Observatory*, between 1995 and 2021, a total of 430 criminal verdicts were handed down for cases involving crimes against humanity committed against 862 victims during Pinochet's dictatorship (Collins, Ordóñez et. al 2021, 66). More than 25 years since the first of such trials in Chile began, the first and, to date, only ruling was handed down in November 2020 that explicitly convicted four former agents of the dissolved National Intelligence Directorate (Dirección Nacional de Inteligencia) for their liability in the application of torture using sexualised violence against six women who were detained in the clandestine detention centre known as "La Venda Sexy" between 1974 and 1975 (Poder Judicial de Chile 2020). Furthermore, the sexualised torture of male prisoners remains taboo in judicial circles and no decisions have been passed in cases involving this. In contrast, Argentina has made more significant progress in this respect,

26 V. Michel, and K. Sikkink. Human Rights Prosecutions and the Participation Rights of Victims in Latin America." *Law & Society Review* 47, no. 4 (2013) 874.

27 These are Argentina, Chile, Uruguay, Peru, Guatemala, Colombia, El Salvador, Haiti and Paraguay. R. Figari Layús, 'Transitional Justice in Latin America: Toward What Kind of Justice?' In: T., Louis, M., Molope, S., Peters, Stefan (Eds.): *Dealing with the Past in Latin America, Southern Africa and Germany*. Baden-Baden: Nomos: 2021) 25.

28 J. Boesten, 'Transformative gender justice: criminal proceedings for conflict-related sexual violence in Guatemala and Peru, (Australian Journal of Human Rights 2021), 27:3, 487–504; Procuraduría de Crímenes contra la Humanidad, 'Son 121 los condenados por violencia sexual en las sentencias por crímenes de lesa humanidad' (*Ministerio Público Fiscal*, 4 March 2021); Poder Judicial de Chile, 'Ministro Mario Carroza aplica perspectiva de género al dictar condena por secuestro y tortura en la "Venda Sexy"' (*Noticias del Poder Judicial*, 5 November 2020)

but many challenges still lie ahead. Of the 254 court decisions handed down between 2006 and 2021 for crimes against humanity, there have been only 36 convicting those responsible for sexualised violence (Procuraduría de Crímenes contra la Humanidad 2021).²⁹ These convictions, although significant in comparison to those in Chile, still represent a low number considering that, as evidence and testimonies have shown, the practices of abuse, rape, groping and forced abortion were widespread and systematic during the dictatorship (Ibid). One reason for the few convictions for rape and gender-based violence both in Chile and Argentina is that many judges have included sexualised violence within the definition of torture, thus not treating it as an independent offence and prosecuting those responsible for that specific form of violence.³⁰ This contributes to masking the prevalence of sexualised violence and, at the same time, leaves this specific kind of violence unpunished.

- 27 The struggle of those who have suffered sexualised violence in the context of armed conflicts to have their case heard before a court in Latin America is also a difficult one. So far, cases of sexualised violence have been taken up by national courts only in Peru, Guatemala and Colombia. Although bringing these cases to court has been a success for the victims, women's advocacy groups and human rights organisations, the majority of these cases have, to date, unfortunately not yielded any convictions. Compared to the total number of cases, cases of sexual violence remain extremely low, as the following Guatemalan and Peruvian cases show. As of May 2018, Guatemalan courts had tried 21 cases³¹ of serious human rights violations from the internal armed conflict (Impunity Watch 2018, 65). Of these, only four have entailed sexualised violence, namely the cases involving the Ixil genocide (2013), Sepur Zarco (2016), Molina Theissen (2018) and the indigenous Mayan Achi women (2022). A watershed case

29 The 36 decisions, representing 14 % of the total number of decisions handed down, dealt with crimes of sexualised violence against 136 victims: 112 women and 24 men (Procuraduría de Crímenes contra la Humanidad 2021).

30 L., Balardini, A., Oberlin and L., Sobredo, 'Gender Violence and Sexual Abuse in Clandestine Detention Centers' in Center for Legal and Social Studies and International Center for Transitional Justice (eds), *Making Justice Further Discussions on the Prosecution of Crimes against Humanity in Argentina* (Siglo Veintiuno Editores 2011), 137.

31 This number does not include cases tried by military courts prior to the signing of the peace agreement, such as the Michael Devine murder case in 1990 and the Santiago Atitlán Massacre in 1991 and 1993.

was that of Sepur Zarco, which concerned the sexual abuse of 11 indigenous women at the Sepur Zarco outpost between 1982 and 1983. The court, in that case, found that the crime of sexualised violence is a crime against humanity and the Sepur Zarco case became a turning point in how domestic courts protect women's rights in cases involving sexualised violence perpetrated in armed conflicts in Latin America. Furthermore, along with the criminal conviction of the defendants, the court ordered various measures of reparations for the victims, among them was an order to the Ministry of Education to include the Sepur Zarco case in school curricula. The court also recognised 26 February as the Day of the Victims of Sexual Violence, Sexual and Domestic Slavery and ordered the Ministry of National Defence to include courses on women's rights and legislation on the prevention of violence against women in military training courses.³² Finally, in January 2022, a Guatemalan court sentenced five former members of the so-called 'Civil Self-Defence Patrols' paramilitary group to 30 years in prison for sexualised violence committed against 36 indigenous (Maya Achi) women who had been subjected to domestic slavery, sexual violence and rape. The court's decision came 11 years after the Achi survivors first began to organise their efforts to seek justice.

In the case of the prosecutions for the sexual crimes committed during the Peruvian armed conflict, progress has likewise been very poor so far.³³ Of the more than 97 rulings issued by the Peruvian courts to prosecute the crimes committed by members of government security forces between 1980 and 2000, only one of them convicted perpetrators of sexualised violence in the case known as 'MMM'. It was not until 2018 that Peru's Supreme Court upheld the prison sentences imposed on army intelligence officers for the rape and kidnapping of a university student who was arrested in Lima in 1992. Besides this case, only two other cases from the total of 97 involved allegations of sexual violence, namely the cases involving the Manta and Vilca military bases³⁴ and the case of sexual abuses committed against women peasants in the province of Chumvibilcas, however, court decisions are still pending for both. Of these two, the Manta and Vilca case,

32 J. Ríos & R. Brocate, Roberto, *Violencia sexual como crimen de lesa humanidad: los casos de Guatemala y Perú* (Journal CIDOB d' Afers Internacionals, 2017) n.º 117, 91.

33 Boesten, 'Transformative gender justice: criminal proceedings for conflict-related sexual violence in Guatemala and Peru, (Australian Journal of Human Rights 2021), 27:3: 493.

34 The case concerns the systematic rape of women peasants that were taken by the military to the military bases of Manta and Vilca in the region of Huancavelica.

which shares some similarities with the Sepur Zarco case in Guatemala, is the one that has progressed further. However, unlike in the Guatemalan case, there have been more obstacles and procedural hurdles in Peru and the level of commitment of the relevant State authorities has been poorer, all of which has hampered progress.

29 In Colombia, the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, “JEP”),³⁵ created within the framework of the 2016 peace agreement, addressed the issue of sexualised violence, in particular in its case 004. While a decision on the case is still pending, in 2019 the magistrates received a report from the Caribe Afirmativo and Colombia Diversa organisations on the victimisation of the LGBTQI+ community in the Urabá region between 1986 and 2013. The report detailed cases of the victims of homicide, sexualised violence, threats, displacement, forced labour as well as those subjected to cruel, inhuman and degrading treatment due to their sexual identity. It remains to be seen how these accounts will be reflected in future decisions of the Special Jurisdiction for Peace.

30 In general terms, it can be observed that there is still an under-representation of gender-based violence judicial decisions in the region. These experiences also reveal the legal, social and political challenges of prosecuting gender-based violence committed under dictatorships and in or after armed conflicts. Three particularly important areas deserve special examination when it comes to the prosecution of gender-based violence: (i) the recognition of the systematic character of this violence in the judicial rulings, (ii) the social stigma of reporting sexualised violence before courts and, (iii) the lack of training and awareness of personnel in transitional justice institutions.

IV. Conclusion: Challenges remaining for the implementation of a gendered TJ approach

31 Just as State violence and armed conflicts are profoundly gender-oriented, so too is transitional justice in its discourses, practices and outcomes. As this essay has shown, justice, truth and reparations policies in Latin America have long lacked an adequate gender perspective to properly address the specificity and impacts of gender-based violence perpetrated in the

35 K. Ambos and S. Peters, eds., *Transitional Justice in Colombia. The Special Jurisdiction for Peace* (Nomos, 2022).

region. The cases presented here offer a brief overview of the ongoing development of greater recognition of gender-based violence that was a political and military practice used by dictatorial regimes and in many of the armed conflicts the region has experienced. This social and political recognition, which is the result of the efforts put forth by various women's and LGBTQI+ movements, has translated into the gradual, albeit still selective, inclusion of a gender perspective in the different transitional justice mechanisms implemented in the region. This has been vital to make the plight of victims more visible and afford them reparations while simultaneously furthering efforts to ensure that these crimes do not go unpunished.

Crucially, some challenges remain that need to be addressed for TJ 32 mechanisms in the region to offer comprehensive measures with a broad gender perspective that includes the different forms of gendered violence and the multiple subjects of victimisation. In this sense, it is vital to veer away from the traditional victim-perpetrator dichotomy that presents women only as victims and men as perpetrators, since the multiplicity of the forms of violence and gender roles in contexts of extreme political violence is much more complex. Ample evidence has been submitted to truth commissions and other transitional justice institutions indicating that sexualised violence has also taken place against men in armed conflicts and under authoritarian regimes in Latin America. At the same time, saying women are only victims of sexualised violence during armed conflicts is a misnomer as this depiction fails to recognise their varied agency, particularly for female combatants and activists. Indeed, many women participate in armed groups, security forces and the military and can be perpetrators of violence against both men and women. Many women who join armed groups have previously been victims of sexual abuse or rape and/or have suffered from a lack of educational and social opportunity. Furthermore, many women's groups and several LGBTQI+ advocacy groups have mobilised at the local and national levels and become actively involved in developing strategies to demand their rights be respected and that justice, truth, peace and reparations policies be equally available to all segments of society. This raises the question of how to guarantee the participation, representation and leadership of women and the LGBTQI+ community in the processes of designing and implementing the various transitional justice mechanism that are and/or will be employed throughout the region. The role of women and LGBTQI+ movements is essential for the implementation of transitional justice policies promoting gender equality. Their under-representation in or exclusion from formal policymaking can

have long-term negative effects because the specific problems that they faced under dictatorial rule, conflict and post-conflict situations are usually overlooked. Thus, if either representation from these groups or concern for gender issues are absent in the initial stages of designing and implementing transitional justice mechanisms, the outputs of these mechanisms will, in all likelihood, reflect this. Thus, incorporating a robust gender perspective into the analysis of violence is crucial to developing appropriate and reparative truth and justice policies. Efforts to create gender-sensitive TJ mechanisms should take account of the following key aspects:

- (i) Strengthening the representation of victims' groups to better reflect their diversity in developmental stages of transitional justice mechanisms: Developing gender-sensitive policies to deal with gender-based political violence involves the design of transitional justice measures that include the needs and priorities of all victims, including women and LGBTQI+ persons. This means that these groups should be adequately represented in transitional justice institutions and relevant State bodies. Representation involves not only participation but also the creation of appropriate institutional and legal conditions for them to become leaders and decision-makers within transitional justice processes. Despite a measure of progress, gender inequalities still strongly affect and shape the participation, representation and inclusion of women and LGBTQI+ persons and their ability to have their demands heard and their rights upheld. The transitional justice experiences in Latin America reveal the great difficulties involved in adopting a gender perspective that is integral, intersectional and inclusive, not only in terms of gender-based violence but also for the implementation of policies designed to stop it where it is ongoing and ensure non-repetition in the future.
- (ii) Victim accessibility needs to be improved via the creation of conditions that facilitate the participation of women and LGBTQI+ persons in the different transitional justice stages and mechanisms. This requires an intersectional approach that considers the social, economic, religious, educational-informational and, at times, the linguistic challenges facing the victims. Accessibility also includes aspects that range from incorporating the victims' perspectives in the conduct of judicial hearings and truth commissions to providing interpreters and the funding of travel expenses where required to ensure that victims' can

effectively participate. Such participation can also become a crucial part of an integral reparations process

Further Reading

- Balardini L, Oberlin A and Sobredo L, 'Gender Violence and Sexual Abuse in Clandestine Detention Centers' in Center for Legal and Social Studies and International Center for Transitional Justice (eds), *Making Justice Further Discussions on the Prosecution of Crimes against Humanity in Argentina* (Siglo Veintiuno Editores 2011)
- Boesten J, *Violencia Sexual en la Guerra y en la Paz: Género, Poder y Justicia Posconflicto en el Perú* (Biblioteca Nacional del Perú 2016)
- Collins C, Ordóñez A and others, 'Conversar con el pasado, transformar este presente: Justicia Transicional como Justicia Constituyente' in Observatorio de Justicia Transicional de la Universidad Diego Portales (ed), *Informe Anual sobre Derechos Humanos en Chile 2021*, <<https://derechoshumanos.udp.cl/informe-anual/informe-anual-sobre-derechos-humanos-en-chile-2021/>> accessed 28 January 2022
- CVR- Comisión de la Verdad y la Reconciliación, 'Informe Final,' (Comisión de la Verdad y la Reconciliación 2003)
- Comisión Nacional sobre Prisión Política y Tortura, 'Informe Comisión Nacional sobre Prisión Política y Tortura,' (Comisión Nacional sobre Prisión Política y Tortura, 2005) <www.memoriachilena.gob.cl/archivos2/pdfs/MC0053682.pdf> accessed 28 January 2022
- Gomez, D, Gonzalez J and others, 'Reflexiones y recomendaciones en clave feminista descolonial para las recomendaciones del informe final de la Comisión de la Verdad en Colombia.' (Policy Brief, Colombian-German Peace Institute Capaz 2021)
- Impunity Watch, 'Avances y obstáculos de la justicia transicional en Guatemala. Informe de monitoreo 2014–2017' (Impunity Watch, July 2018) <https://static.wixstatic.com/ugd/f3f989_275e3a7d7f654be91f75643c8538d75.pdf> accessed 28 January 2022
- Poder Judicial de Chile, 'Ministro Mario Carroza aplica perspectiva de género al dictar condena por secuestro y tortura en la "Venta Sexy"' (Noticias del Poder Judicial, 5 November 2020) <www.pjud.cl/prensa-y-comunicaciones/noticias-del-poder-judicial/51402%20Noticia%20Judicial%20segunda%20instancia> accessed 28 January 2022
- Boesten, 'Transformative gender justice: criminal proceedings for conflict-related sexual violence in Guatemala and Peru, (Australian Journal of Human Rights 2021), 27:3: 493.
- UN Human Rights Council, 'Progress report on the research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations', (August 2014) A/HRC/27/57, 11