

Sexual violence in armed conflict and transitional (criminal) justice: The Colombian case

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Abstract

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For a long time, criminal justice mechanisms have struggled to adequately address sexual violence in armed conflict. This paper analyses the discussions surrounding persistent impunity gaps and asks whether, and to what extent, transitional justice mechanisms are apt fora to ensure accountability for these particular crimes. It does so by examining the functions of transitional (criminal) justice mechanisms in general and particularly the Colombian experience. In short, having examined both the Colombian Justice and Peace Framework and the Special Jurisdiction for Peace, this paper concludes that these mechanisms are good examples of how transitional (criminal) justice can enhance accountability for sexual violence crimes, although challenges in doing so remain.

I. Introduction

Sexual violence in armed conflict can take many different forms and pursue a variety of purposes. Despite its prevalence in many armed conflicts around the globe, history has shown that criminal legal systems struggle to ensure accountability for those committing such crimes. Emerging from the discussions on accountability for sexual violence in armed conflict, a glimmer of hope has come to the forefront, complementing international criminal tribunals, namely domestic transitional justice mechanisms with a criminal justice component. This text seeks to analyse such mechanisms' potential, with a particular focus on the example of two Colombian transitional criminal justice systems.

Our analysis proceeds as follows: First, we give an overview of the phenomenon of sexual violence in armed conflict, including a consideration of the population groups historically most affected by sexual violence and

how it is used as a weapon of war.¹ Following on from this, we turn to the Colombian armed conflict² and the role sexual violence played therein.³ From here, our focus moves to more closely examine and detail the functions and purposes of transitional (criminal) justice as well as its potential to ensure accountability for sexual violence crimes, especially vis-à-vis ordinary criminal justice systems.⁴ Based on the foregoing, we then turn to the two Colombian transitional criminal justice mechanisms, namely, the Justice and Peace framework and the Special Jurisdiction for Peace, to analyse to what extent they have achieved accountability for sexual violence crimes. We argue that both mechanisms clearly show the potential transitional (criminal) justice has to eradicate impunity for these particular crimes, even though challenges remain in doing so. Based on the foregoing, we conclude that transitional (criminal) justice mechanisms are, at least in theory, extremely useful tools to enhance accountability in cases of conflict-related sexual violence while highlighting some of the obstacles that such mechanisms encounter that impact their effective implementation and hamper them from fully achieving their goals.⁵

II. Sexual violence in armed conflict

- 4 Sexual violence refers to any sexual or sexualised contact that occurs without the consent of one of the persons involved. The World Health Organization defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion [...]”.⁶ Common examples are rape, sexual slavery, forced prostitution, forced nudity

1 United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) 2007, General Recommendation 19.

2 For a general overview of the Colombian armed conflict, see: Jonathan Calderón Rojas “Etapas del conflicto armado en Colombia: hacia el postconflicto” (2016) 62 *Latinoamérica. Revista de estudios latinoamericanos*. 227–257.

3 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008.

4 Karima Bennouna, ‘Do we Need new International Law to Protect Women in Armed Conflict?’ (2006) 38 *Case Western Reserve Journal of International Law* 370.

5 UN SC [2021], Report of the Secretary-General on conflict-related sexual violence, S/2021/312 (30 March 2021) (hereinafter ‘Report on conflict-related sexual violence’).

6 WHO World Report on Violence and Health (2002) 149, https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf (last accessed 13 February 2022).

and sexual harassment. Importantly, while both perpetrators and victims can be of either gender, sexual violence is most frequently perpetrated against women and girls – both during war and peace, a situation that can be largely explained by the historical oppression and discrimination of girls and women.⁷

While this asymmetrical situation of oppression and discrimination leads 5 to rights violations that are sexualised in nature, even during peacetime, it increases in extraordinary situations of mass violence, such as armed conflicts.⁸ Such situations exacerbate discrimination and, therefore, violence against women,⁹ meaning that armed conflicts often have a disproportionately large impact on women and girls in terms of sexual violence.¹⁰ In the words of the UN Secretary-General, “[e]xperience shows that in conflict and post-conflict situations, and in periods of political or civil strife and instability, women and girls are exposed to heightened risks of violations of their human rights and higher levels of violence, including sexual violence”.¹¹ Accordingly, the phenomenon of sexual violence multiplies and the numbers of cases increase drastically in armed conflicts, as such situations generate specific risks for women and girls, often putting them in a particularly vulnerable position.¹² Sexual violence can be used by armed actors to show power and dominance over female bodies, especially when, for example, females are perceived as the property of their fathers and husbands or as chattel for the use of men in general, they are often “part of the spoils of war to which soldiers are entitled. Deeply linked to this view is the idea that women are the property of victorious warriors.”¹³ Accordingly, through sexual violence, female bodies are treated as a part of the territory

7 The Committee on the Elimination of Discrimination against Women has established that violence against women is a form of discrimination, CEDAW 2007 General Recommendation 19.

8 Colombian Constitutional Court [2008] Auto 092, 14 April 2008.

9 Bennoune, ‘Do we Need new International Law to Protect Women in Armed Conflict’ (n 4) 370.

10 UN SC, ‘Report on conflict-related sexual violence’ (n 5), ‘Although men and boys are also targets of gender-based and sexual violence in conflict situations, the victims of such violence continue to be disproportionately women and girls’.

11 *ibid.*

12 Alana Fangrad, *Wartime rape and Sexual Violence. Wartime Rape and Sexual Violence: An Examination of the Perpetrators, Motivations, and Functions of Sexual Violence Against Jewish Women During the Holocaust* (AuthorHouse 2013) 31.

13 María Julia Moreyra, *Conflictos armados y violencia sexual contra las mujeres* (Editores del puerto 2007) 3.

of a war, as just another space to achieve a war-driven goal.¹⁴ With this in mind, and to understand the root causes of sexual violence against women and girls in armed conflict, it is important to look beyond the political and military factors driving a conflict and scrutinise the social, often patriarchal systems, that underpin all forms of gender-based violence.¹⁵

When there is a direct or indirect link between these crimes and an armed conflict, the term ‘conflict-related sexual violence’ comes into play.¹⁶ More concretely, this means that sexual violence takes place in the context of an armed conflict and is perpetrated by those actors who take an active part in it.¹⁷ Sexual violence can be linked to an armed conflict clandestinely because an actor is simply willing and able to engage in these crimes, or it can be pursued as a deliberate strategy to further an actor’s wartime goals. As such, sexual violence can manifest as an individual attack or be a part of a widespread practice. When sexual violence is used directly or indirectly as a strategy of war, it becomes a means of waging war.¹⁸ In the same way, it can also be “evident in the profile of the perpetrator, [...] the profile of the victim, who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, or targeted on the basis of actual or perceived sexual orientation or gender identity [...]”.¹⁹ For example, in armed conflicts that seek the extermination of a specific population group, sexual violence can become a genocidal tool²⁰ or, alternately, it can be used as a tool to dehumanise a particular group. An example of this is forced nudity,²¹ a practice that can be used both to entertain troops while simultaneously punishing and humiliating the victims.²² Sexual violence can also be used to undermine a society, break its will to resist, reward

14 María Camila Correa Flórez, “Violencia Sexual contra las mujeres en el conflicto armado: crimen de guerra y arma contraria al DIH” (2014) 49 *Derecho Penal Contemporáneo* 165–194.

15 For a more detailed explanation of this, see: María Camila Correa Flórez, “Los delitos de violencia sexual en el marco del conflicto armado en la legislación penal colombiana” in Isabel Cristina Jaramillo Sierra and María Camila Correa Flórez (coords), *Sexo, Violencia y Castigo* (Ediciones Didot 2020).

16 UN SC, ‘Report on conflict-related sexual violence’ (n 5).

17 Janie Leatherman, *Sexual Violence and Armed Conflict* (Polity Press 2011) 9.

18 Fangrad, *Wartime rape and Sexual Violence* (n 12) 32.

19 UN SC, ‘Report on conflict-related sexual violence’ (n 5) 3.

20 *The Prosecutor v Jean Paul Akayesu* [1998] ICTR Trial Judgment, Decision 2 September 1998, para. 731.

21 *ibid.*, para. 688.

22 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008.

soldiers for their service and/or obtain valuable information. Moreover, it can be applied as a tactic of forced displacement “or [to] forcibly relocate civilian members of a community or ethnic group”,²³ facilitating control of territories that would otherwise contain an ‘undesirable’ or hostile civilian population – a common aim of armed conflicts. It is important to note that victims can be both civilians and members of armed groups.²⁴ When sexual violence is used as a means of waging war, it can sometimes even become a weapon of war.

III. Sexual violence in the Colombian armed conflict

Colombia’s domestic armed conflict was the longest running in Latin America, dating back more than 50 years. Multiple non-state actors were involved: guerrillas, paramilitary groups and guerrilla dissident groups, among others. As to sexual violence, the two guerrilla groups of *Fuerzas armadas revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) and *Ejército de liberación nacional* (ELN), as well as the demobilised paramilitary groups were notoriously active in perpetrating sexual violence during the conflict, as were the State’s military forces, albeit to a lesser degree.²⁵

As is usually the case, women and girls were – and still are – the most frequent victims of sexual violence. Colombia’s National Center for Historical Memory registered 15,076 victims of sexual violence in the context of the armed conflict between 1985 and 2016 – 91.6 % of them (13,810) being women or girls.²⁶ They were often subjected to rape, forced reproductive planning/pregnancy, sexual exploitation, forced prostitution, sexual slavery, forced abortion and, consequently, all suffered from high infection rates from sexually transmitted diseases. Many of the above-cited crimes were

23 UN SC 2008, Resolution 1820.

24 *The Prosecutor vs. Bosco Ntaganda* [2019] ICC Sentencing Judgment, Decision 7 November 2019, paras. 126–129.

25 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008. For a detailed account of sexual violence against women, girls and LGBTIQ+ persons in the context of the Colombian armed conflict, see: Colombian Truth Commission [2022]. Final Report “Hay futuro si hay verdad – Mi cuerpo es la verdad”. <https://www.comisiondelaverdad.co/mi-cuerpo-es-la-verdad> (last accessed 5 August 2022).

26 Centro Nacional de memoria histórica, *La guerra inscrita en el cuerpo. Informe nacional de violencia sexual en el conflicto armado* (2017) 500, <https://centrodememoriahistorica.gov.co/wp-content/uploads/2020/05/la-guerra-inscrita-en-el-cuerpo.pdf> (last accessed 13 February 2022).

committed in the context of forced recruitment by guerrilla and paramilitary groups.²⁷ In some cases, these acts were part of large-scale attacks, usually employed as a part of intimidation strategies or as reprisals against actual or suspected supporters of the opposing side or against women accused of being collaborators and informants for one of the actors. Additionally, the use of sexual violence to secure territory and resources, coerce victims into a particular course of action and/or obtain information was often used as a strategy of war. Once victims of any of these practices, women were at risk of being victimised again by other groups in retaliation for the first perpetrator's action. Perpetrators specifically targeted women who were a part of social, community or political organisations or who served as leaders and human rights promoters. In these cases, sexual violence was used as a form of revenge and as a strategy to silence the voices of opponents and critics.²⁸

- 8 Age, ethnicity and sexual orientation, as well as gender identity, constituted further risk factors for sexual violence. In cases involving indigenous and Afro-Colombian women and girls, violence was not only exercised against their bodies because they are female but also “as an expression of the structural discrimination that is imposed on them for ethnic reasons”.²⁹ For example, sexual violence against Afro-Colombian females “is linked to racist stereotypes and the assignment of roles that arise from historically and socially constructed imaginaries since the time of the slave trade”.³⁰ Similarly “their presence in peripheral regions of the country, where armed actors are also present, and the conditions of poverty and social exclusion faced by a large part of the Afro-Colombian population” were risk factors raising the likelihood of Afro-Colombian women becoming victims of sexual violence.³¹ Likewise, LGBTIQ+ persons have become victims of sexual violence during the armed conflict, mostly perpetrated by the illegal armed groups. In these cases, they used sexual violence to punish the sexual orientation or gender identity of the victims as they deviated from the groups’ accepted heteronormative patterns.³²

27 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008.

28 *ibid.*

29 Colombian Constitutional Court [2015] Auto 009, Decision 5 August 2015.

30 María Camila Correa Flórez, “Los delitos de violencia sexual en el marco del conflicto armado en la legislación penal colombiana” (n 14) 107–108.

31 Colombian Constitutional Court [2015] Auto 009, Decision 5 August 2015.

32 Colombia Diversa, *Los órdenes del prejuicio: los crímenes cometidos sistemáticamente contra personas LGBT en el conflicto armado colombiano* (2020), <https://colombia->

In addition, there has recently been detailed information on sexual violence perpetrated by members of the FARC-EP against women within the guerrilla group – often because their bodies were perceived as ‘available’. In addition, reproductive violence is reported to have systematically occurred, especially forced contraception and forced abortion.³³

Despite the high numbers and widespread use of sexual violence in the context of Colombia’s armed conflict, impunity levels for perpetrators are very high for several reasons. One is that victims’ distrust of the judicial system keeps them from submitting criminal complaints. Too often, the system proved to be a means for re-victimisation as victims had to fear reprisals from perpetrators as well as the shame, isolation and social stigmatisation that often goes in hand with sexual violence crimes. In other cases, acts of sexual violence have been investigated but not properly prosecuted, being ‘quietly swept under the carpet’, especially when included in widespread acts of violence. As a final note to this problem, other factors that contribute to impunity in Colombia are the lack of formal systems to care for survivors of sexual violence, the lack of training for officials to effectively deal with such crimes and the lack of convictions that result from those cases that are brought to trial.³⁴

IV. Transitional criminal justice: A driving factor for accountability of sexual violence crimes?

After armed conflicts or repressive regimes have come to an end, the question arises of how post-conflict justice can be achieved. While this is a broad and noble goal, the demands associated with it can be very taxing to meet as ensuring accountability, addressing the harm done in the past and preventing the resurgence of violence in the future all require sustained and

diversa.org/colombiadiversa2016/wp-content/uploads/2020/07/LIBRO-WEB-1.pdf (last accessed 13 February 2022); Colombia Diversa, *Vivir bajo sospecha. Estudios de caso: personas LGBT víctimas del conflicto armado en Vistahermosa y San Onofre* (2017), https://colombiadiversa.org/c-diversa/wp-content/uploads/2021/01/Vivir-bajo-sospecha_-INFORME-CONFLICTO-Conflicto-armado-en-colombia_LGBT.pdf (last accessed 13 February 2022).

33 Centro Nacional de Memoria Histórica, *Memoria histórica con víctimas de violencia sexual: aproximación conceptual y metodológica*, (2018) 32, <http://centrodememoriahistorica.gov.co/wp-content/uploads/2020/02/memoria-historica-con-victimas-de-violencia-sexual.pdf> (last accessed 13 February 2022).

34 Colombian Constitutional Court [2015] Auto 009, Decision 5 August 2015.

concerted effort.³⁵ In this context, the term transitional justice (TJ), first coined in the early 1990s, has become a buzzword for a concept that has gained importance ever since. It refers to a legal mechanism that identifies and suggests ways to respond to large-scale or systematic human rights violations in the aftermath of violent conflicts and repressive regimes.³⁶ It is based on a comprehensive approach comprising several areas relevant to a peaceful society and the rule of law and employs a broad range of tools, including institutions such as truth commissions, (criminal) tribunals and reparation programmes. Depending on the particular context, such tools can be implemented to guarantee and enforce the rights to seek and obtain justice, truth, reparation and non-recurrence of the crime (i.e., the broader goals of TJ).³⁷

- 12 One of the main pillars of TJ is the right to justice, including establishing criminal accountability and the eradication of impunity.³⁸ With this, criminal law plays a crucial role in contexts where large-scale or systematic human rights violations are yet to be overcome. Importantly, however, TJ's criminal legal component is not solely concerned with prosecution and punishment in either a traditional or strict sense. Instead, criminal accountability in TJ contexts is designed to hold perpetrators accountable and to recognise, publicise and stigmatise the wrongdoing while simultaneously contributing to the restoration of peace, providing some measure of closure for the victims and ensuring non-recurrence.³⁹ Hence, while criminal law is essential in TJ settings, its objectives go beyond seeking formal prosecution

35 Alette Smeulders and Fred Grünfeld, *International Crimes and other Gross Human Rights Violations* (Martinus Nijhoff Publishers 2011) 449.

36 Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2000), 3 et seq.; Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, 'Transitional justice theories: An introduction' in: Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, *Transitional justice theories* (Routledge 2014) 1; Kai Ambos, *El Marco Jurídico de la Justicia de Transición. Especial referencia al caso Colombiano* (Temis 2008) 27 et seq.; International Center for Transitional Justice (ICTJ), *What is Transitional Justice?*, <https://www.ictj.org/about/transitional-justice> (last accessed 17 September 2021).

37 Buckley-Zistel, Koloma Beck, Braun and Mieth, *Transitional justice theories* (n 36) 1; United Nations General Assembly, Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff', UN Doc. A/HRC/21/46 (9 August 2012), par. 21.

38 UN SC, Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies' (hereinafter 'The rule of law'), UN Doc. S/2004/616 (23 August 2004), paras. 8, 12.

39 *ibid.*, paras. 8, 12, 39.

and may take unconventional paths – such as the application of more suitable approaches to criminal justice attuned to the complex specifics of a post-conflict situation.⁴⁰ Importantly though, it has to be noted that this flexibility does not alter or undermine a State's obligation to investigate and prosecute severe crimes.⁴¹

Unlike ordinary criminal justice institutions, TJ mechanisms are designed to reveal patterns of widespread and/or systematic crimes, an aspect of particular relevance for sexual violence crimes given that they are often perpetrated in this manner.⁴² With this, transitional criminal justice mechanisms have the potential to play a crucial role in overcoming the often extensive and prevailing impunity gaps, as we will set out in more detail in the following section before taking a closer look at the Colombian situation in the subsequent section. 13

1. Transitional criminal justice mechanisms vis-à-vis ordinary criminal justice systems

Despite States having a responsibility to investigate and prosecute conflict-related sexual violence crimes,⁴³ their ordinary criminal justice systems often fail to comply with this duty.⁴⁴ The reasons for this are manifold, in- 14

40 Teitel, *Transitional Justice* (n 36) 50; Carlos Castro Cuenca, 'Combining the Purposes of Criminal Law and Transitional Justice in the Special Jurisdiction for Peace', in Kai Ambos and Stefan Peters (ed), *Transitional Justice in Colombia. The Special Jurisdiction for Peace*, (2022) 85 et seq. See also Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in: Kai Ambos et al. (ed), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009) 40.

41 See, for example, Inter-American Court of Human Rights (IACtHR) [2001], *Case of Las Palmeras v. Colombia*, Judgment 6 December 2001 (Merits), para. 65; IACtHR [2013], *Case of the Afro-Descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Judgment 20 November 2013 (Preliminary objections, merits, reparations and costs), paras 439, 440; See also Kai Ambos, 'The Legal Framework of TJ' (n 40) 29 et seq.

42 CEDAW Committee 2007, General Recommendation 19.

43 UN SC, Resolution 1325, S/RES/1325 (2000), 31 October 2000, para. 11; UN GA SC, Report of the Secretary-General on sexual violence in conflict, A/67/792-S/2013/149, 14 March 2013, para. III; UN SC, Report of the Secretary-General, 'The rule of law' (n 38) para. 40.

44 See, for example, UN SC, 'Report on conflict-related sexual violence' (n 5) para. 15; UN SC [2020] Report of the Secretary-General on conflict-related sexual violence, S/2020/487 (3 June 2020) para. 73.

cluding, *inter alia*, barriers to access to justice, a lack of trust in existent law enforcement authorities, rule-of-law vacuums, victim-blaming that inhibits reporting as well as cultural taboos and stigmas.⁴⁵ In view of these often systemic problems that lead to a vicious circle of impunity, TJ settings offer a promising opportunity to make progress in addressing what has become an open wound for many criminal justice systems.⁴⁶ Given their extraordinary character, transitional criminal justice mechanisms have the potential to address and overcome recurring problems entrenched in ordinary criminal justice systems. They can establish an avenue that secures accountability for conflict-related sexual violence crimes, further the visibility of such crimes and both acknowledge and condemn the harm done.⁴⁷

- 15 Many examples of post-conflict situations around the globe show how transitional criminal justice mechanisms were created to effectively deal with these crimes by filling impunity gaps that ordinary criminal justice mechanisms had left. Examples of such mechanisms include special court divisions and sexual violence crimes units (e.g. in Liberia or Bosnia and Herzegovina), as well as specialised prosecution support cells and mobile courts (e.g. in the Democratic Republic of the Congo).⁴⁸ These, and other examples that could be cited, indicate that accountability for sexual violence crimes requires first and foremost sufficient political will to address the issue and the effective implementation of corresponding prosecution strategies to do this – two factors that are often missing in ordinary criminal justice settings.⁴⁹ TJ mechanisms, in turn, are initially created by the presence of such political will while their form and function allow them to craft and implement effective prosecution strategies, thus providing a suitable forum to acknowledge existing grievances and to take corrective action. This may include gender-sensitive prosecutions; tailored training for investigators, prosecutors and judicial staff designed to address mistaken

45 *ibid.*, para. 71.

46 UN SC ‘The rule of law’ (n 38) paras. 40, 45–46; UN SC Conflict-related sexual violence (n 5) para. 16.

47 UN GA, Human Rights Council, Analytical study focusing on gender-based and sexual violence in relation to transitional justice – Report of the Office of the United Nations High Commissioner for Human Rights (hereinafter ‘Analytical study’), UN Doc. A/HRC/27/21 (30 June 2014), para. 38; UN GA/ SC [2013], Report of the Secretary-General on sexual violence in conflict (17 April 2013) para. 112.

48 Further examples can be found in Uganda, Croatia, Serbia and also in Colombia (as detailed below in Part b)), cf. UN GA, Human Rights Council, ‘Analytical study’ (n 46) para. 32.

49 UN GA, Human Rights Council, ‘Analytical study’ (n 46) para. 40.

and often stereotypical assumptions about victims, perpetrators or both; as well as mechanisms in support of effective victim participation, such as recruiting female investigative staff and providing medical and psychological support.⁵⁰ These measures can have a catalysing effect in increasing accountability for sexual violence crimes and, as a result, may become a more apt response to counter persistent patterns of impunity in this area.

Beyond transitional criminal justice mechanisms' potential to tackle recurrent problems in ensuring accountability for sexual violence crimes, the broad goals of TJ allow or even require these mechanisms to additionally identify and address structural aspects related to conflict-related sexual violence. This unique potential inherent to TJ settings is relevant in three regards. First, transitional criminal justice mechanisms are mandated not only to try singular acts but to stigmatise and delegitimise the crimes perpetrated beyond individual cases.⁵¹ Transitional criminal justice seeks to identify and condemn patterns of violence, thereby distinguishing between what constitutes a just and unjust large-scale act in conflict settings.⁵² With this, transitional criminal justice mechanisms are key factors in the quest to build a collective memory of gross human rights violations.⁵³ They are mandated to render a historical judgment on a course of action whose impact goes well beyond what an individual case in an ordinary judicial system is capable of generating.

Second, transitional criminal justice mechanisms are well suited to uncovering the root causes of the crimes committed. As TJ aims not only at achieving criminal accountability for grave crimes but also at ensuring non-recurrence, it is vital for all TJ processes to analyse violent and discriminatory patterns underlying the violent acts under scrutiny to establish not just the what, but also the why.⁵⁴ To achieve lasting peace and ensure that victims can exercise their right to justice and truth, transitional criminal

50 *ibid.*, paras. 35, 40–42, 62.

51 Teitel, *Transitional Justice* (n 36) 29–30.

52 Castro Cuenca, 'Combining the Purposes of Criminal Law and TJ' (n 40) 89. Generally on the right to truth and justice, see Kai Ambos, 'The Legal Framework of TJ' (n 40) 34 et seq.

53 Susanne Buckley-Zistel, 'Narrative truths' in Susanne Buckley-Zistel et al., *Transitional justice theories* (Routledge 2014) 145.

54 Inter-American Commission of Human Rights (IACHR), *Las mujeres frente a la violencia y la discriminación derivadas del conflicto armado en Colombia* (hereinafter 'Las mujeres frente a la violencia') [2006] OEA/Ser.L/V/II., Doc. 67, 18 October 2006, para. 233.

justice mechanisms identify, dissect and recognise the origins of the sexual violence crimes they consider. This is of particular importance as sexual violence is often related to societal discrimination against women and girls generally, as set out above, and is a key risk factor for future recurrence.⁵⁵ Hence, transitional criminal justice mechanisms can make important contributions to identifying and dismantling the underlying dynamics that enabled these particular crimes to occur in the first place.

- 18 Third, and given TJ's important future-oriented dimension, transitional criminal justice mechanisms can play a critical role by disseminating the important message to all parts of society, that sexual violence is categorically unacceptable. Such recognition can trigger gender-sensitive social reforms and more inclusive governmental policies, which are often necessary to enhance institutional accountability, help prevent the recurrence of sexual violence, (re)build trust between victims and State institutions as well as (re)establish victims' confidence in the rule of law more generally.⁵⁶ Hence, transitional criminal justice mechanisms can incentivise institutional reforms and provide the impetus needed to encourage institutional gender sensitivity.⁵⁷ In focusing on this preventive dimension, transitional criminal justice mechanisms can contribute to building more inclusive and gender-sensitive institutional and societal orders in post-conflict societies.⁵⁸

- 19 In summary and based on the foregoing, we argue that transitional criminal justice mechanisms are particularly apt for to not only ensure accountability for conflict-related sexual violence crimes but also (1) to stigmatise these crimes, (2) to unveil their root causes, (3) to trigger gender-sensitive institutional reforms aimed at preventing sexual violence in the future and (4) to highlight that it is a serious crime often committed against particularly vulnerable groups. This range of judicial goals that go well beyond simply seeking a decision in a singular case is unique to transitional

55 UN GA, Human Rights Council, 'Analytical study' (n 46) para. 5.

56 UN GA, Human Rights Council, 'Analytical study' (n 46) paras. 57–58, 60. See also ICTJ, *Transitional Justice and Prevention* (June 2021) 8; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 *The International Journal of Transitional Justice* 34.

57 For example, improvements aimed at breaking down the existing barriers to justice in cases of sexual violence, such as the reforms that have been undertaken in Liberia, Sierra Leone and Kosovo, cf. UN DP, Gender Sensitive Police Reform in Post Conflict Societies 2, 6–7; UN GA, Human Rights Council, 'Analytical study' (n 46) para. 60. See also UN GA/ SC sexual violence in conflict (n 46) para. 7.

58 UN GA, Human Rights Council, 'Analytical study' (n 46) para. 57; ICTJ, *Transitional justice and Prevention* (n 55) 8.

criminal justice mechanisms and allows them to approach sexual violence more holistically, especially when compared to the ordinary criminal justice systems. As such, transitional criminal justice mechanisms have a unique 'transformative potential' to address not only the crimes committed but also their underlying causes.⁵⁹ The awareness of the importance of understanding how and why sexual violence was used in the violent past that many TJ processes evince is remarkable and stands in stark contrast to the approach of many ordinary criminal justice systems.⁶⁰ However, despite the potential of transitional criminal justice mechanisms, they often lack effective implementation.

2. Transitional criminal justice mechanisms in Colombia and their focus on sexual violence

The Colombian case is well-suited to demonstrate the described gap 20 between the attention given to conflict-related sexual violence in transitional justice instruments as opposed to the ordinary criminal justice system. While the Colombian State is obliged to prevent, punish and eradicate violence and discrimination against women aggravated by the armed conflict,⁶¹ the impunity level, particularly for sexual violence crimes, has remained extraordinarily high, as mentioned above. Especially from a gender perspective, it is important to recall that the Inter-American Commission on Human Rights (IACHR) has indicated Colombian women should be granted the right to justice, truth and reparation, given the role they have had to assume in the armed conflict.⁶²

59 ICTJ, *Setting an Agenda for Sustainable Peace. Transitional Justice and Prevention in Colombia* (June 2021) 9–10. This may eventually lead to specifically tailored reforms in the justice and security sectors (i.e., by developing professional standards of conduct, complaint and disciplinary procedures as well as oversight mechanisms), cf. UN GA, Human Rights Council, 'Analytical study' (n 46) paras. 57–59. A concrete example would also be to disqualify individuals who have perpetrated sexual violence from serving in a security-related role, cf. UN GA SC, Report of the Secretary-General on sexual violence in conflict, 2013 (n 43) para. 128(f). Such disqualification of perpetrators from security roles can itself constitute a measure of satisfaction to victims, cf. UN Development Programme (DP), Gender Sensitive Police Reform in Post Conflict Societies, Policy briefing paper, October 2007, 2, 6–7.

60 See, for example, UN GA, Human Rights Council, 'Analytical study' (n 46) para. 35.

61 IACHR, *Las mujeres frente a la violencia* (n 53) para. 149.

62 *ibid.*, para. 85.

- 21 In contrast to the rather poor results in its ordinary criminal justice system, Colombia has had greater success in ensuring accountability for sexual violence crimes in its different transitional criminal justice processes. In this section, we will examine two specific transitional criminal justice mechanisms, namely the Justice and Peace legal framework (so-called *Ley de Justicia y Paz*) and the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP for its acronyms in Spanish) as the success of these fora can be considered remarkable in several ways.

a) The Justice and Peace Framework

- 22 In 2005, the Justice and Peace Law (Law 975 of 2005), which was supported and promoted by former President Álvaro Uribe, was passed, and established a transitional criminal justice framework.⁶³ This framework is the guiding tool for a special process that seeks to facilitate the demobilisation process of members of Colombia's former warring paramilitary and guerrilla groups. It was not created as a special jurisdiction *per se* but was integrated into the ordinary criminal justice system through the creation of the so-called Justice and Peace Chambers.⁶⁴
- 23 As to the criminal procedure of this framework, the prosecutor's office builds patterns of macro-criminality, investigates certain victimising events that fall within these patterns and then charges perpetrators based on the evidence gathered.⁶⁵ One of the patterns of macro-criminality is the so-called 'pattern of gender violence' which focuses on conduct such as rape, enforced prostitution, sexual slavery, forced nudity, forced abortion and forced pregnancy but which also includes degrading treatment, mas-

63 Ley 975 de 2005, por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios, http://www.secretariassenado.gov.co/senado/basedoc/ley_0975_2005.html (last accessed 13 February 2022).

64 Concerning the process itself, see: Kai Ambos, *Procedimiento de la Ley de Justicia y Paz (ley 975 de 2005) y derecho penal internacional Estudio sobre la facultad de intervención complementaria de la Corte Penal Internacional a la luz del denominado proceso de "justicia y paz" en Colombia* (Nomos 2010), <https://www.corteidh.or.cr/tablas/26869.pdf> (last accessed 13 February 2022).

65 For a definition of macro-criminal patterns, see Directive 01 of 2012 of the Attorney General's Office, at 6. <https://www.fiscalia.gov.co/colombia/wp-content/uploads/2012-DIRECTIVA-0001-CRITERIOS-PRIORIZACIÓN.pdf> (last accessed 13 February 2022).

sacres and kidnapping.⁶⁶ During its more than 15 years of operation, the office has prosecuted various individuals who were active in the armed conflict and committed crimes of sexual violence that fall under the macro-criminal pattern of gender violence. In at least 56 rulings, the Justice and Peace Chambers have applied this pattern and established, for example, the dynamics of sexual violence that paramilitary groups perpetrated against women, girls and persons with certain racial backgrounds. Although not all 56 cases resulted in convictions for acts of sexual violence, the phenomenon was investigated in all these cases and the mere fact that sexual violence has been considered a systemic part of the war dynamics of the actors in the Colombian armed conflict has been given significant public and legal profile. The following examples illustrate this well.

In a December 2013 judgment, a Justice and Peace Chamber in Bogotá 24 explained how sexual violence was used as a means of controlling segments of the country's population. It held that in those areas where paramilitaries exercised territorial control, women who did not comply with the dress codes these groups imposed were raped, kidnapped and forced to parade naked at parties the members of these paramilitary groups held.⁶⁷ Likewise, another Justice and Peace ruling held that the so-called 'Bloque Mineros' of the paramilitary group 'Autodefensas unidas de Colombia' forced women to strip and then run naked while being chased before being raped once they were caught. In the same region where this happened, sexual violence was also perpetrated in contexts of detention and massacres.⁶⁸ In 2017, a Chamber in Medellín recognised the existence of a macro-criminal pattern of sexual violence against black women in the Chocó region of the Colombian Pacific region. The Chamber found that the sexual assaults, to which the women and girls in this region became victims, occurred because of their physical characteristics and features.⁶⁹

These cases exemplify how the Justice and Peace framework has fostered 25 a deeper understanding of the Colombian conflict by demonstrating that some of the armed actors followed a pattern of committing sexual violence using pre-defined criteria. In doing so, the Justice and Peace Chambers have shed light on how sexual violence was used as a form of warfare to

66 Tribunal of Bogotá, Justice and Peace Chamber [2013] Ruling of December 7.

67 Tribunal of Bogotá, Justice and Peace Chamber [2018] Ruling of 6 December 2018.

68 Tribunal of Medellín, Justice and Peace Chamber [2015], Ruling of 2 February 2015.

69 Tribunal de Medellín, Justice and Peace Chamber [2017], Ruling of 30 January 2017, stating that in at least 15 of the 31 cases examined, 48.3 % of the victims were selected for their sexual and physical characteristics.

control the population. Based on the Chambers' findings, a number of perpetrators, some of them high-ranking commanders within their respective organisations, were convicted on charges of sexual violence.

b) The Special Jurisdiction for Peace

- 26 In 2010, peace talks with the FARC-EP guerrilla began under then-president Santos. The result of these talks was the signing of the Peace Agreement for the Termination of the Armed Conflict and a Lasting Stable Peace in 2016.⁷⁰ This agreement established the creation of the so-called Integral System of Truth, Justice, Reparation and Non-Repetition, which is composed of two extrajudicial institutions (a Truth Commission and a Search Unit for disappeared persons), and a judicial institution, the Special Jurisdiction for Peace.⁷¹ The JEP, which was set up in March 2018 in Bogotá, has been designed to satisfy the rights of the victims to justice, truth, reparation and non-repetition by investigating the most serious crimes committed in the context of the Colombian armed conflict and bringing to justice those who participated (directly or indirectly) in these acts.⁷² It carries out its mandate autonomously from both the ordinary criminal justice system and the Justice and Peace Chambers.
- 27 The JEP has adopted a case selection and prioritisation strategy that guides its focus and activities. The strategy gives primacy to emblematic cases and persons holding key positions in criminal organisations.⁷³ It gives particular emphasis to the gravity and representativeness of the offences, the vulnerability of the victims and the scale of the victimisation the of-

70 Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera, <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> (last accessed 13 February 2022).

71 María Camila Correa Flórez y Martín Parada Andres, "La jurisdicción especial para la paz: un modelo de justicia transicional en Colombia" (2020) 3 Revista Electrónica de Derecho Internacional Contemporáneo.

72 Colombian Constitutional Court [2017], Judgment C-674/17 (14 November 2017). Constitutional review of Legislative Act 01 of 2017 "by which a title of transitory provisions of the Constitution is created for the termination of the armed conflict and the construction of a stable and lasting peace and other provisions are enacted", para. 5.1.2.3.

73 JEP, Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts, *Criteria and Methodology for Prioritizing Cases and Situations*, 28 June 2018, available at: <https://www.jep.gov.co/Documents/CriteriosYMetodologiaDePriorizacion.pdf> (last accessed 19 October 2021), paras. 36 et seq.

fences in question caused.⁷⁴ To date, the JEP has opened seven so-called ‘macro cases’ (concerning large-scale crime scenarios) that have either a thematic focus (e.g. the taking of hostages) or a territorial focus (concerning specific regions or departments). While no case has been opened yet to focus exclusively on the sexual (and gender-based) crimes committed in the context of the armed conflict, in five of the seven macro cases, sexual violence crimes are currently under investigation.⁷⁵

The JEP’s first indictment in macro case 001 concerns the taking of hostages and serious deprivation of liberty committed by the FARC guerrilla group. The JEP’s Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts (hereinafter: Chamber for the Acknowledgment of Truth) accused eight high-ranking FARC leaders of war crimes and crimes against humanity. These charges included acts of sexual violence – such as rape, torture, sexual harassment and forced nudity – that were primarily committed by male guards and commanders within the guerrilla group against female victims being held in captivity.⁷⁶ In this important decision, the Chamber acknowledged the female victims’ particular vulnerability that intensified their suffering, especially given the male-dominated and military context that increased the victims’ fear for their lives and wellbeing.⁷⁷ In light of this context, the Chamber recognised

74 Especially the number of victims, as well as the extent and concentration of the victimising events in a particular territory, cf. JEP, Chamber for the Acknowledgment of Truth, *Criteria and Methodology for Prioritising Cases and Situations* (n 73) paras. 36 et seq.

75 Namely in macro case 001 (concerning the taking of hostages and serious deprivation of liberty committed by the FARC-EP), 002 (concerning the situation in three municipalities in the department *Nariño*), 004 (concerning the situation in the region *Urabá* in the department *Antioquia*), 005 (concerning the crimes committed in the two Colombian Departments of northern *Cauca* and southern *Valle del Cauca*) and in case 007 (concerning the recruitment of girls and boys in the armed conflict). For an overview of all seven macro cases to date, see <https://www.jep.gov.co/especial-l/macrocasos/index.html> (last accessed 19 October 2021).

76 JEP, Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts, [2021], Auto 19 Case 01, determining the facts and conduct attributable to former members of the Secretariat of the FARC-EP for hostage-taking and other serious deprivations of liberty, decision of 26 January 2021, paras. 622 et seq., 647 et seq. See also Andrés Bermúdez Liévano, *A first in Colombia: Eight FARCS charged with war crimes and crimes against humanity* (JusticeInfo.net, 2 February 2021), available at: <https://www.justiceinfo.net/en/69281-first-colombia-eight-farcs-charged-war-crimes-crimes-against-humanity.html> (last accessed 19 October 2021).

77 JEP, Chamber for the Acknowledgment of Truth [2021] Auto 19 (n 76) para. 663.

that the perpetrators used sexual violence as a form of humiliation and punishment. It stressed the gravity of the acts and the severe harm, both physical and mental, caused to the victims.⁷⁸ More generally, the Chamber addressed the problem of underreporting in cases involving sexual crimes and recognised the seriousness of this particular form of violence.⁷⁹

29 This and further indictments issued by the Chamber are just the first steps in the JEP's quest to provide accountability concerning sexual violence crimes. Beyond this specific focus, the JEP has repeatedly taken into account the broader societal context when addressing sexual and gender-based crimes, for example, by establishing a connection between violent acts and societal discrimination against women and girls as well as LGB-TIQ+ persons.⁸⁰ What is yet to follow is a discussion about how these crimes and the harm experienced by the victims can best be redressed and what a meaningful restorative punishment for the perpetrators might look like.

30 While there is still a long way to go, it is reasonable to say that the JEP has already clearly demonstrated its will and ability to focus on the investigation and prosecution of sexual violence crimes.⁸¹ An example that well

78 *ibid.*, paras. 724–5, 728.

79 *ibid.*, para. 728.

80 See, for example, JEP, Communiqué 111 of 2021, *The JEP recognises that it has jurisdiction over acts of reproductive and gender violence committed against a girl recruited by the FARC-EP*, 14 October 2021, available at: <https://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-tiene-competencia-para-conocer-de-los-actos-de-violencia-reproductiva-y-de-g%C3%A9nero-cometidos-contra-una-ni%C3%B1a-reclutada.aspx> (last accessed 19 October 2021). JEP, Chamber for the Acknowledgment of Truth (2022) Auto 102. Declaring macro case 010 open, concerning crimes committed by members of the FARC-EP in the context of the Colombian armed conflict and that are not eligible for amnesties – including acts of sexual violence used by the FARC-EP to achieve social and territorial control. JEP, Chamber for the Acknowledgment of Truth (2023) Auto 03. Former FARC-EP members are charged with sexual violence and bias-based violence against LGBTIQ+ persons in Case 002.

See also Susann Aboueldahab, Gender-based persecution as a crime against humanity: A milestone for LGBTI rights before the Colombian Special Jurisdiction for Peace, EJIL: Talk!, 4 May 2021, <https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/> (last accessed 10 February 2022).

81 See, for example, JEP, Chamber for the Acknowledgment of Truth, Auto JLR-01 350 of 2021, Case 001, convening a public hearing to listen to experts on gender issues in order to deepen the investigation of sexual and gender-based crimes committed in captivity by the FARC-EP, decision of 23 December 2021.

illustrates this is the JEP's recent announcement to open a new macro case (no. 011) that will focus solely on "sexual violence, reproductive violence and other crimes committed due to prejudice, hatred and discrimination based on gender, sex, gender identity and sexual orientation in the context of the armed conflict".⁸² Accordingly, conduct that corresponds to criminal patterns motivated by discrimination, including sexual violence, will be investigated in this case.

The above shows how the prioritisation strategy allows or, indeed, even 31 requires the JEP to determine the existence of macro criminal patterns concerning the use of sexual violence crimes whenever possible. This stands in contrast to the work done in the ordinary criminal justice system.⁸³ With that, the JEP has the potential to effectively investigate, adjudicate and eventually sanction sexual violence crimes as well as to contribute in meaningful ways to the reparation due to the victims while revealing the underlying causes of Colombia's wartime sexual violence crimes. Furthermore, the other broad hope held within Colombia is that the JEP's efforts may eventually help to advance a widespread discourse on discrimination against women and girls in both societal and institutional contexts.

c) Comparative analysis

While the Justice and Peace Chambers and the JEP are very different 32 transitional criminal justice mechanisms, they both put a clear emphasis on enhancing accountability for sexual violence crimes committed in the context of the Colombian armed conflict. Both mechanisms focus on macro-criminal patterns. They have shown their willingness to examine acts of sexual violence and, more generally, the gender-specific implications this form of violence has had in the armed conflict. In addition, both mechanisms have contributed to uncovering the root causes of sexual violence by explaining the context in which the crimes occurred, the way sexual violence was instrumentalized and by examining the discriminatory patterns and dynamics underlying it. With this, the two mechanisms have

82 JEP, Chamber for the Acknowledgment of Truth (2022) Auto 103. More concretely, the JEP will begin with the so-called grouping and concentration stage, see ObservaJEP "Criterios y metodología de priorización de casos y situaciones de la Sala de reconocimiento de verdad, responsabilidad y determinación de los hechos y conductas". https://observajep.com/images/Capsula_Priorización.pdf (last accessed 5 August 2022).

83 JEP, Chamber for the Acknowledgment of Truth [2021] Auto 19 (n 76) para. 90.

clearly condemned not only the individual criminal acts under analysis but the broader dynamics they rested on, thus confirming the seriousness of sexual violence and gender-based discrimination. This is noteworthy, especially in light of the historic (international) neglect to appropriately address and prosecute conflict-related sexual violence. Importantly, both mechanisms have included an intersectional perspective in their work. The Justice and Peace Chambers acknowledged that sexual violence in the context of the armed conflict disproportionately affected persons belonging to vulnerable groups – namely Afro-Colombian and indigenous females. Hence, the system was able to identify the victims and the reasons for their attacks. The JEP recognised that sexual violence was used to punish the sexual orientation and/or gender identity of certain victims, particularly targeting LGBTIQ+ persons. When considering this as a whole, it is reasonable to conclude that both of Colombia's transitional criminal justice mechanisms have put forth great efforts and yielded meaningful results in their endeavour to ensure accountability for sexual violence crimes and have achieved far more than the ordinary criminal justice system.

- 33 Nevertheless, these mechanisms are not perfect and shortcomings remain. While both instruments rest on solid jurisdictional and institutional foundations offering great potential to ensure accountability for the perpetrators of sexual violence crimes, the practical implementation has shown flaws. Deficiencies within the Justice and Peace framework have become manifest several times when attempting to properly prosecute acts of sexual violence. This has, at times, led to an inadequate legal classification of these acts which then resulted in fewer convictions. This has unduly diminished both the effectiveness and reputation of the framework to shine a spotlight on Colombia's conflict-related crimes of sexual violence. Regarding the JEP, no macro case focusing solely on sexual (and gender-based) violence has been opened so far, despite the vast number of reports and judgments already in existence, i.e. by Colombia's Constitutional Court, that indicate the immense relevance and prevalence of this form of violence had in the armed conflict. In addition, there is a great risk that perpetrators will not recognise their involvement in sexual violence crimes. This is probably the greatest challenge for the JEP as its legal design rests in great part on the perpetrators' willingness to cooperate, tell the truth, recognise the wrongness of their actions and do what they can to help heal the victims. However, the JEP has only been operating for four years and making a final evaluation at this juncture is almost certainly premature.

In any case, both mechanisms show that where there is political will and a declared focus on prosecuting conflict-related sexual violence, many of the often-stated and supposedly insurmountable problems that prevent accountability can be overcome. The foregoing serves to amply demonstrate that Colombia's innovative plunge into TJ is a good example to show what can be done while also providing valuable lessons that ordinary justice systems can learn from. Concerning this latter point, and still within the Colombian context, gender-sensitive training of prosecutorial and judicial staff may well be a good starting point. 34

V. Conclusion

Transitional criminal justice has the potential to enhance accountability for conflict-related sexual violence crimes above and beyond what can be offered by ordinary justice systems. Because of its unique features and particular focus, it can address sexual violence crimes in a holistic way that enables a greater understanding of the dynamics and purposes of sexual violence in armed conflict. It also allows societies to identify those segments of the population that are most likely to become victims of this particular type of violence, helps to mould societal values that condemn sexual violence as a reprehensible practice and raises awareness in the post-conflict society. The Colombian experience is a good example to reflect on as the two transitional criminal justice mechanisms have undoubtedly succeeded in shedding light on conflict-related sexual violence by recognising it as part of criminal patterns and identifying the different forms and purposes it pursued. However, as noted above, challenges and shortcomings remain, and it is yet to be seen how and for how long they will deal with sexual violence crimes in the future. 35

When all is said and done, transitional criminal justice mechanisms will only be able to achieve their vitally important goals if their practice and the laws that govern it are in unison and address the specific challenges that arise as they arise. Furthermore, in light of their forward-looking function, transitional (criminal) justice mechanisms can only be a first step – the initial response that a post-conflict society has to undertake. However, more importantly, this response has to not only be carried out effectively, but needs to be embraced for a society to undergo a meaningful transformation, address the failings of the past and ensure a more just 36

ordinary criminal legal system as the result, one that effectively prosecutes conflict-related sexual violence crimes.

Further Reading

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