

# PROMOTING DOMESTIC ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE: THE CASES OF GUATEMALA, PERU, AND COLOMBIA

DANIELA KRAVETZ \*

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\* Daniela Kravetz is an international criminal justice and gender practitioner, and a former prosecutor of the Office of the Prosecution of the UN International Tribunal for the former Yugoslavia. The views expressed in this paper are solely those of the author. The author wishes to thank Aditya Menon and Priya Gopalan for their valuable feedback on an initial version of this paper. The author also wishes to thank Julissa Mantilla, Gloria Cano, Jennifer Bravo, Evelyn Recinos and Gina Cabarcas for sharing their experiences in promoting gender justice in their respective countries.

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## I. INTRODUCTION

On June 19, 2016, the international community marked the first International Day for the Elimination of Sexual Violence in Conflict. This day aims to raise awareness of the devastating reality of this violence, to stand in solidarity with the victims and to acknowledge those working to address this violence. The date was chosen to commemorate the June 19, 2008 adoption of United Nations Security Council Resolution 1820, a landmark resolution in which the Security Council stressed that sexual violence could significantly exacerbate conflicts and impede peace processes.<sup>1</sup> Most importantly, this resolution called for prosecutions of those responsible for such acts and highlighted the need to end impunity “as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.”<sup>2</sup>

Criminal prosecutions provide an important measure of redress for victims of mass atrocities.<sup>3</sup> They also fulfill a broader purpose: to help build and restore peace and the rule of law. Prosecutions are necessary to demonstrate the intolerance for violations of human rights in peacetime. This is particularly important in the case of sexual violence. Impunity for sexual violence reverberates in homes and on the streets, and contributes to these crimes being viewed as less serious.<sup>4</sup> When sexual violence is not addressed, it is

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1. See S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008).

2. *Id.* ¶ 4.

3. Serge Brammertz & Michelle Jarvis, *Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*, in PROTECTING HUMANITY: ESSAYS IN INTERNATIONAL LAW AND POLICY IN HONOUR OF NAVANETHAM PILLAY 95, 113 (Chile Eboe-Osuji ed., 2010).

4. JELKE BOESTEN, SEXUAL VIOLENCE DURING WAR AND PEACE: GENDER, POWER AND POST-CONFLICT JUSTICE IN PERU 99 (2014); see Romi Sigsworth & Nahla Valji, *Continuities of Violence against Women and the Limitations of Transitional Justice: The Case of South Africa*, in GENDER IN TRANSITIONAL JUSTICE 115, 119-20 (Susanne Buckley-Zistel & Ruth Stanley eds., 2012) (noting that “how a post-conflict society deals with sexual violence, in particular rape and rape victims, directly affects the gender regimes (re)established in peacetime”, and arguing that it is necessary to recognize the continuities of violence during and after conflict when developing mechanisms of redress in post-conflict contexts.).

‘normalized’ in post-conflict contexts, often resulting in increased levels of violence against women.<sup>5</sup> Accountability for these crimes is therefore critical to building a more just society and to redirecting the shame and stigma suffered by victims towards the perpetrators.<sup>6</sup>

This paper examines the progress made in establishing accountability for sexual violence committed in the internal conflicts of Peru, Guatemala, and Colombia. The common ways in which sexual violence occurred and has been responded to in the three countries provide useful lessons for domestic practitioners in other jurisdictions. These countries share common social and cultural factors influencing the prevalence of sexual and gender-based violence, specifically against women and girls. In particular, the intersecting inequalities of gender, race and class played a key role in rendering certain communities particularly vulnerable to this

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5. See, e.g., U.N. Secretary General, *Report of the Secretary-General on the implementation of Security Council resolutions 1820 (2008) and 1888 (2009)*, ¶14, U.N. Doc. A/65/592-S/2010/604 (Nov. 24, 2010) (reporting “[i]n Haiti, the use of rape as a tool of intimidation by the de facto military regime (1991- 2004) reportedly “normalized” a cycle of violence against women that has been replicated by criminal elements.”); *Progress of the World’s Women: In Pursuit of Justice*, U.N. WOMEN 84 (2011), <http://www2.unwomen.org/~media/headquarters/attachments/sections/library/publications/2011/progressoftheworldswomen-2011-en.pdf?v=1&d=20150402T222835> (indicating that “as demobilized combatants return home, post-conflict contexts are often characterized by ongoing and sometimes increased levels of violence and insecurity for women”); *Care and Protection of Children in Crisis Affected Countries: A Good Practice Policy Change Initiative*, CPC NETWORK, 20 (2008), [http://pdf.usaid.gov/pdf\\_docs/Pnado992.pdf](http://pdf.usaid.gov/pdf_docs/Pnado992.pdf) (documenting the high rates of gender-based violence in Liberia four years after the end of the conflict); *“Now, the World is without Me”*: *An Investigation of Sexual Violence in Eastern Democratic Republic of Congo*, OXFAM, 2, 19, 39-40 (Apr. 2010), <http://responsibilitytoprotect.org/DRC-sexual-violence-2010-04.pdf> [hereinafter “*Now, the World is without Me*”] (analyzing a 17-fold increase in civilian rapes in the Eastern Democratic Republic of Congo between 2004 and 2008 and a significant decrease in rapes by combatants, and arguing that these rates show a reversal in society’s norms and values due to ongoing impunity).

6. See Gabriela Mischkowski, Address at The Bangladesh Genocide and the Issue of Justice International Conference, Heidelberg, The Trouble with Rape Trials – The Prosecution of Sexual Violence in Armed Conflict from the Perspectives of Female Witnesses (July 4-5, 2013) (arguing that “to prosecute the wrongdoers means to affirm that wrong was indeed done. It means to show solidarity with the victims and to revoke solidarity from those who committed the crimes.”).

violence in conflict.<sup>7</sup> These factors have also contributed to the persistent lack of attention these crimes have received from justice authorities in the post-conflict periods. Although conflict-related sexual violence has historically rarely been prosecuted, and impunity remains high, legal practitioners have begun to use international law to establish accountability for sexual violence in each country. The different legal and evidentiary approaches applied in sexual violence cases have been informed by the practice and jurisprudence of international and regional human rights and criminal courts. Finally, in all three countries, women's and victims groups have played a key role in calling on authorities to ensure justice, truth and reparation for victims. Victims have participated and exercised their rights both as witnesses and as civil parties in trial proceedings.

This paper has two parts. Part I explains the context in which sexual violence occurred in each conflict. It discusses the prevalence of sexual violence, its diverse manifestations, the categories of victims, and the perpetrators. It also discusses how authorities in each country have documented and responded to sexual violence. Part II focuses on how international law is being used to prosecute conflict-related sexual violence in each country. It examines the existing legal frameworks and analyzes how these frameworks are being applied to charge and prove sexual violence crimes, and to establish criminal liability. The paper concludes with reflections on how the experiences of Guatemala, Peru and Colombia can be used by other national systems seeking to establish accountability for these crimes.

## II. SURFACING GENDERED NARRATIVES OF VIOLENCE

To move forward as a society, it is important to acknowledge past violations.<sup>8</sup> How a society narrates and commemorates its past will influence its path towards a peaceful future.<sup>9</sup> When reflecting on the

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7. See discussion *infra* Part I.

8. See Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 COLUM. J. GENDER & L. 813, 823 (2006) (observing that “among the greatest challenges of transitional justice [is to] honor the injuries and crimes of the past while creating the possibilities for new ways of being in the future”).

9. See *Online Debate: Does Collective Remembrance of a Troubled Past Impede Reconciliation*, INT'L CTR. TRANSITIONAL JUST. (May 4, 2016),

past, we must take into account the gendered dimensions of violations. We have come a long way in acknowledging that while everyone suffers during periods of armed conflict and repressive regimes, “this suffering takes varied forms and gender is one of the influencing factors.”<sup>10</sup> Failing to take into account the distinct experiences of women and men, girls and boys, in conflict results in incomplete narratives of violence and renders the gendered aspects of violations invisible.

This section outlines the picture of sexual violence in each conflict. Evidence of these crimes first came to light through truth seeking and historical memory processes. The truth commission reports addressing human rights abuses in the conflicts in Guatemala and Peru revealed brutal sexual violence, in particular against women from indigenous and rural communities.<sup>11</sup> In Colombia, reports from human rights organizations and the Constitutional Court’s rulings highlighted the extensive amount of sexual violence perpetrated by armed actors in the conflict, the different categories of victims and the multiple uses of this violence.<sup>12</sup> These documentation efforts played an important role in making visible the nature, scale and patterns of sexual violence in each conflict. They also marked a turning point in the perception of these crimes and generated great expectations regarding their prosecution, which were not always met. The findings regarding the legal characterization of crimes and those responsible also influenced the approaches later adopted by legal

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<https://www.ictj.org/news/online-debate-remembrance-reconciliation> (providing opinions for and against collective remembrance).

10. Brammertz & Jarvis, *supra* note 3, at 97-98 (noting that “over the past decade, the impact of armed conflict on women has become a significant item on the UN’s agenda”).

11. *See generally* COMISIÓN DE ESCLARECIMIENTO HISTÓRICO, GUATEMALA: MEMORIA DE SILENCIO (1999), <http://www.centrodememoriahistorica.gov.co/descargas/guatemala-memoria-silencio/guatemala-memoria-del-silencio.pdf> [hereinafter CEH Final Report] (addressing gross sexual violence abuses, specifically against Mayans); Comisión de la Verdad y Reconciliación [Truth and Reconciliation Commission], Informe Final [Final Report] (2003), <http://cverdad.org.pe/ifinal/> [hereinafter CVR Final Report] (focusing on sexual violence perpetrated during the Peruvian conflict).

12. *See generally* *Basta Ya! Colombia: Memorias de Guerra y Dignidad*, CENTRO NACIONAL DE MEMORIA HISTÓRICA Ch. 2 (2013), <http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-colombia-memorias-de-guerra-y-dignidad-2016.pdf> [hereinafter Historical Memory Group 2013].

practitioners to address this violence.

#### A. GUATEMALA

The 36-year long civil war in Guatemala (1960-1996) took a tremendous toll on the civilian population, a toll that included widespread sexual violence.<sup>13</sup> The conflict involved right-wing government forces and various left-wing guerrilla groups seeking democratic reforms and social justice. From the mid-1960s onwards, within the context of its counterinsurgency campaign, Guatemalan government forces unleashed a violent campaign against the civilian population, mainly targeting the Mayan and peasant Ladino communities.<sup>14</sup>

The 1994 Oslo Agreement between the government and the guerilla established the Commission for Historical Clarification (*Comisión para el Esclarecimiento Histórico*, CEH), tasked with documenting human rights abuses in the conflict.<sup>15</sup> Despite its gender-neutral mandate, the CEH decided to include a gender analysis in its 1999 Final Report, uncovering a larger truth that included women's experiences.<sup>16</sup> The Commission found that the

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13. See Amandine Fulchiron et al., *Weavings of the Soul: Memories of Mayan Women Survivors of Sexual Violence During the Armed Conflict*, IDRC (2009) (providing a gendered analysis of the Guatemalan conflict and its impact on Mayan women).

14. See CEH Final Report, *supra* note 11, at Ch. 1; RODDY BRETT, *THE ORIGINS AND DYNAMICS OF GENOCIDE: POLITICAL VIOLENCE IN GUATEMALA* 122-38 (2016) (analyzing in detail the government's counterinsurgency campaign and its impact).

15. See Recuperacion de la Memoria Historia, *Conflict Research Consortium Book Summary: Proyecto Interdiocesano Recuperación de la Memoria Histórica (Guatemala)*, OTPIC, <http://www.colorado.edu/conflict/peace/example/remhi.htm> (last visited Nov. 1, 2016) [hereinafter *Conflict Research Consortium Book Summary*] (stating that the Guatemalan Historical Clarification Commission (CEH)—whose mandate covered the period from the start of the armed conflict to the signing of the peace agreement in 1996—based its investigations, analysis and findings on a report, *Never Again*, published by an unofficial precursor to the CEH, the Recovery of Historical Memory (*Recuperación de la Memoria Histórica*—REMHI), led by the Human Rights Office of the Catholic Archdiocese); see also MEMORY OF SILENCE: THE GUATEMALAN TRUTH COMMISSION REPORT (Rothenberg ed., 2012) (providing an edited English version of the CEH's final report).

16. The CEH published its final report on 25 February 1999. See Vasuki Nesiah et al., *Truth Commissions and Gender: Principles, Policies, and Procedures*, INT'L CTR. TRANSITIONAL JUST. 41 (July 2006) (highlighting the

government-led counterinsurgency campaign resulted in gross human rights abuses against civilians, as well as in the genocide of various Mayan communities in four regions of the country.<sup>17</sup> It also found that state agents perpetrated widespread and systematic sexual violence as part of its counterinsurgency campaign.<sup>18</sup> The CEH documented 1465 cases of sexual violence, including cases of rape, sexual slavery and torture.<sup>19</sup> In addition, it identified two modalities of rape: selective rapes (which targeted specific victims, such as female human rights defenders and female detainees) and massive rapes (referring to the indiscriminate and systematic use of rape alongside other violations, for example during attacks on Mayan villages).<sup>20</sup> Regarding ethnicity, 88 per cent of victims of sexual violence were Mayan, 10 per cent were Ladina and 1 per cent belonged to other groups.<sup>21</sup> While the main focus of the CEH's report was on female victims, it acknowledged the existence of cases of male sexual violence.<sup>22</sup> The CEH concluded that, along with torture, rape was one of the human rights violations that most

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importance of addressing gender violence and providing strategies for future truth commissions to analyze this issue).

17. See CEH Final Report, *supra* note 11, Section IX at ¶¶ 1731-57 (Statistical summary); see also CEH Final Report, *supra* note 11, Section XVIII at ¶ 2901 (Violations against the Rights of Existence, Integrity and Cultural Identity of Indigenous Peoples); CEH Final Report, *supra* note 11, Section XXI (Genocide) (determining that over 200,000 Guatemalans were killed in the conflict, mostly of Mayan ethnicity, and the repression was so overwhelming it reached the definition of genocide); BRETT, *supra* note 14, at 141 (arguing that “the genocide strategy represented, at least in the short term, an effective and successful policy decision through which to eliminate the threat of revolution and impede the transformation of Guatemala’s oligarchic social order into a land ruled by subversives, ‘indians’ and primitives.”).

18. See CEH Final Report, *supra* note 11, at ¶¶ 2351, 2393 (Sexual Violence against Women). These acts were not isolated but part of a planned strategy by government forces. See also CEH Final Report, *supra* note 11, at ¶¶ 2398, 2476-78.

19. CEH Final Report, *supra* note 11, at ¶ 2388 (Sexual Violence against Women).

20. See *id.* at ¶¶ 2401-12, 2469-2477, 2479 (Sexual Violence against Women). The CEH highlighted that the type of harm inflicted on the victims was determined by their gender. For example, during massacres, government forces would separate men and women. While both groups would be killed, the women were raped prior to being killed.

21. *Id.* at ¶ 2390.

22. See *id.* at ¶ 2351, 2376 (Fig. 1: percentage of documented violations by sex).

contributed to generating and maintaining state terror during the conflict, and that it was committed with the intention to destroy the victims' identity and dignity in a profound way.<sup>23</sup>

Justice for conflict-related crimes, in particular for sexual violence, has been elusive in the years following the end to Guatemala's civil war. With a troubled history of violence against women, crimes of sexual violence have largely remained unpunished, and victims have faced significant barriers to access justice.<sup>24</sup> To break the silence surrounding these crimes, a Tribunal of Conscience for Women Survivors of Sexual Violence during the Armed Conflict in Guatemala was held on 4-5 March 2010 in Guatemala City.<sup>25</sup> This civil society initiative was organized by different women's and survivors' organizations seeking to push for accountability for these crimes, and it marked an important moment in the truth-telling process of past crimes. Its main objectives were to allow women to speak about sexual violence they had suffered during the conflict, to raise awareness of issues of justice and redress for women survivors within their communities, and to prepare the groundwork for these crimes to be prosecuted domestically.<sup>26</sup> Since then, two court cases, the *Ríos Montt* and the *Sepur Zarco* cases, have addressed sexual violence crimes, with different outcomes.

The *Ríos Montt* case was the first domestic trial against a former head of state for crimes of genocide.<sup>27</sup> In May 2013, the High Risk

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23. See MEMORY OF SILENCE: THE GUATEMALAN TRUTH COMMISSION REPORT, *supra* note 15, at 153 (explaining the consequences of torture and rape); see also CEH Final Report, *supra* note 11, at ¶¶ 2482-83 (Sexual Violence against Women) (noting the profound impact of sexual violence on the victims and their communities).

24. See, e.g., Alison Crosby & M. Brinton Lykes, *Mayan Women Survivors Speak: The Gendered Relations of Truth Telling in Postwar Guatemala*, 5 INT'L J. TRANSNATIONAL JUST. 456, 457-58 (2011) (highlighting the role of Guatemalan civil society in pushing for accountability for sexual violence in response to entrenched impunity and weak state response).

25. See *id.* at 456-76 (explaining the Tribunal's structure and purpose). The tribunal was organized as a mock trial, with prosecutors, judges and testimonies of women survivors and experts.

26. See *id.* at 457.

27. See Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Medioambiente [First Tribunal for Crime, Drug Trafficking and Environmental Offences], "José Mauricio Rodríguez y José Efraín Ríos Montt," C-01076-2011-00015 (Guat.) [hereinafter *Ríos Montt* case]. A separate but related case against Ríos Montt and others was brought in Spain under the Spanish law for universal



Tribunal “A” found José Efraín Ríos Montt, former president of Guatemala, guilty for committing genocide against the Mayan Ixil population during his *de facto* 1982-1983 rule and for crimes against the duties of humanity, sentencing him to 80 years in prison.<sup>28</sup> His co-accused and former chief of military intelligence, José Mauricio Rodríguez Sánchez, was acquitted.<sup>29</sup> The trial was marred with challenges by the defence.<sup>30</sup> The conviction against Ríos Montt was short-lived, as just a few days later in a controversial ruling, the Constitutional Court ruled that his due process rights had been violated and invalidated the proceedings, effectively vacating the judgment.<sup>31</sup> After several false starts, a retrial against both accused

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jurisdiction. In 1999, Mayan activist and Nobel Peace Prize winner Rigoberta Menchú and others filed a lawsuit before the Spanish National Court against Ríos Montt and others for crimes of genocide, terrorism and torture. In June 2011, two NGOs, the Center for Justice and Accountability and Women’s Link Worldwide, filed a request before the Spanish National Court for the charges to be revised to include crimes of sexual violence, and presented the evidence of two expert witnesses. Although the Constitutional Court of Guatemala has declared that Spain lacks jurisdiction in this case, and has not complied with arrests warrants issued by Spain, the case in Spain remains open. See *Genocidio en Guatemala: Ríos Montt Culpable*, FIDH, 6-7 (2013), [https://www.fidh.org/IMG/pdf/informe\\_guatemala613esp2013.pdf](https://www.fidh.org/IMG/pdf/informe_guatemala613esp2013.pdf); see also *Incorporación de los Crímenes de Género en el Caso del Genocidio Guatemalteco (1960-1996)*, WOMEN’S LINK WORLDWIDE (Aug. 5, 2011), [http://www2.womenslinkworldwide.org/wlw/new.php?modo=detalle\\_proyectos&dc=22](http://www2.womenslinkworldwide.org/wlw/new.php?modo=detalle_proyectos&dc=22).

28. Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Medioambiente [First Tribunal for Crime, Drug Trafficking and Environmental Offences], 10/5/2013, “José Mauricio Rodríguez y José Efraín Ríos Montt,” C-01076-2011-00015, 702-705 (Guat.) [hereinafter Ríos Montt Judgment].

29. See *id.*, at ¶¶ 702-05.

30. See *Judging a Dictator: The Trial of Guatemala’s Ríos Montt*, OPEN SOC’Y JUST. INITIATIVE, 9-11 (2013), <https://www.opensocietyfoundations.org/sites/default/files/judging-dictator-trial-guatemala-rios-montt-11072013.pdf> (criticizing the defense’s excessive use of “amparos” or habeas corpus writs to challenge constitutional or legal rights); see also Marco Antonio Canteo, *Impactos del juicio por genocidio en el sistema de justicia de Guatemala*, in *RETOS ACTUALES DE LA JUSTICIA POR CRÍMENES DEL PASADO (REVISTA DE LA FUNDACIÓN PARA EL DEBIDO PROCESO (DPLF))* 47-48 (2013) (noting that the defense was allowed to abuse the legal process and filed numerous motions and challenges).

31. See Emi MacLean, *Guatemala’s Constitutional Court Overturns Rios Montt Conviction and Sends Trial Back to April 19*, INT’L JUST. MONITOR (May 21, 2013), <http://www.ijmonitor.org/2013/05/constitutional-court-overturns-rios-montt-conviction-and-sends-trial-back-to-april-19/> (last visited Oct. 4, 2016) (overturning the ruling based on Montt’s challenge that the appellate court’s order was not fully complied with by the trial court, even though the appellate court

began in March 2016.<sup>32</sup> In 2015, Ríos Montt had been declared unfit to stand trial, so the retrial was unlikely to result in a conviction against him and the proceedings were held behind closed doors.<sup>33</sup> The civil parties challenged the legality of these proceedings and argued that Rodríguez Sánchez should be tried separately and publicly. In June 2016, the Appeals Court granted the request by the civil parties and suspended the trial indefinitely.<sup>34</sup> The future of the case is now uncertain. It exemplifies the weakness of the Guatemalan justice system in providing redress to victims, in particular in cases involving high-level accused.<sup>35</sup>

The *Sepur Zarco* judgment marks a historic precedent that breaks

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recognized the trial court as having fully complied); *see also* Mike McDonald, *Guatemala's Top Court Annuls Rios Montt Genocide Conviction*, REUTERS (May 21, 2013), <http://www.reuters.com/article/us-guatemala-riosmontt-idUSBRE94K04I20130521> (explaining the trial should be suspended until all challenges in the case have been settled).

32. *See* Jo-Marie Burt, *Ríos Montt Genocide Retrial Starts Amidst Controversy*, INT'L JUST. MONITOR (Mar. 21, 2016), <http://www.ijmonitor.org/2016/03/rios-montt-genocide-retrial-starts-amidst-controversy/> (discussing the procedural background to the restart of the proceedings and the challenges raised by civil parties to the legality of the proceedings).

33. *See* Sophie Beaudoin, *Court Orders Rios Montt and Rodriguez Sanchez Retrial to Begin in January 2016*, INT'L JUST. MONITOR (Aug. 26, 2015), <http://www.ijmonitor.org/2015/08/court-orders-rios-montt-and-rodriguez-sanchez-retrial-to-begin-in-january-2016/> [hereinafter *Rios Montt and Rodriguez Sanchez Retrial*] (explaining the legal basis in Guatemalan law for the special procedure applied in this case).

34. *See* Jo-Marie Burt, *Appeals Court Upholds Suspension of Ríos Montt Genocide Trial*, INT'L JUST. MONITOR (June 3, 2016), <http://www.ijmonitor.org/2016/06/appeals-court-upholds-suspension-of-rios-montt-genocide-trial/> (noting that the civil parties argued that conducting a trial under an illegal format would likely result in a mistrial or a suspension of the proceedings); *see also* Manuela Cencetti, *La Dignidad Ixil Mantiene la Esperanza de un Juicio por el Genocidio en Guatemala*, DIAGONAL (May 19, 2016), <https://www.diagonalperiodico.net/global/30405-guatemala-efrain-rios-montt-testigos-nebaj-genocidio-ixil.html>.

35. *Cf. Judging a Dictator: The Trial of Guatemala's Rios Montt*, *supra* note 30, at 2, n.10 (explaining that before the trial of Ríos Montt, almost “all the nearly 30 people convicted for crimes committed during the country’s internal armed conflict were low-level soldiers, police, paramilitaries, or members of the civilian patrols established by the military” and highlighting the exception of the conviction of former military commissioner, Felipe Cusanero, in August 2009 for forced disappearance); Canteo, *supra* note 30, at 48 (noting that the Rios Montt trial made evident the weaknesses in the Guatemalan justice system).

with the entrenched impunity for sexual violence.<sup>36</sup> It is the first case in Guatemala to focus primarily on sexual violence crimes against indigenous women perpetrated during the country's internal conflict. The crimes took place in Sepur Zarco, a small Mayan Q'eqchi' community located in eastern Guatemala. This community suffered extreme repression during the conflict, particularly during the 1980s. The case concerns crimes of rape, sexual and domestic slavery, murder, and cruel and degrading treatment perpetrated by the military stationed outside the village. The case arose from a lawsuit filed in 2011 by two Guatemalan women's rights organizations, Women Transforming the World (*Mujeres Transformando el Mundo*) and the National Union of Guatemalan Women (*Unión Nacional de Mujeres Guatemaltecas*), who are co-representing a group of victims. The accused are the former commander of the Sepur Zarco military base, retired lieutenant colonel Esteelmer Francisco Reyes Girón, and the former military commissioner in the area, Heriberto Valdez Asig.<sup>37</sup> In 2014, the two accused were arrested in connection with these crimes,<sup>38</sup> and they were tried and convicted of all charges in February 2016.<sup>39</sup> The case is currently under appeal. Both cases are discussed in further detail in Part II.

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36. Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Medioambiente [First Tribunal for Crime, Drug Trafficking and Environmental Offences], Feb. 26 2016, "Esteelmer Francisco Reyes Girón, Heriberto Valdez Asig", C-01076-2012-00021 (Guat.) [hereinafter Sepur Zarco Judgment].

37. See *Guatemala Makes History with a Landmark Military Sexual Violence Trial*, WOLA (Feb. 1, 2016), <https://www.wola.org/2016/02/guatemala-makes-history-with-a-landmark-military-sexual-violence-trial/> [hereinafter *Guatemala Makes History*] (noting this is the first time in Guatemala that crimes of sexual violence have been tried as international crimes); see also Monitoring Guatemala, *2 Found Guilty in Historic Sepur Zarco Sexual Slavery Case*, GHRC (Mar. 3, 2016), <https://ghrcusa.wordpress.com/tag/violence-against-women/>.

38. See *Sepur Zarco Sexual Slavery Case*, GUAT. HUM. RTS. COMM'N, <http://www.ghrc-usa.org/our-work/important-cases/sepur-zarco/#sepurzarcocohistory> (last visited Sept. 23, 2016) (providing a historical timeline of the developments in the case).

39. See Sepur Zarco Judgment, *supra* note 36, at 503, 507-08. The Tribunal sentenced both accused to 30 years in prison. Valdez Asig was also sentenced to 210 additional years in prison for the enforced disappearance of seven men, and Reyes Girón to an additional 90 years for the murder of three other women. See also Sophie Beaudoin, *Sepur Zarco Trial to Start in February*, INT'L JUST. MONITOR (Nov. 17, 2015), <http://www.ijmonitor.org/2015/11/sepur-zarco-trial-to-start-in-february/> (summarizing the case's history and expected testimony at the trial).

The victims in the *Sepur Zarco* and *Ríos Montt* cases showed incredible courage in challenging impunity for these crimes three decades after they occurred. Without their unwavering perseverance and advocacy, these cases would not have been possible. However, Guatemala's progress in coming to terms with its violent past has been painfully slow.<sup>40</sup> It remains to be seen whether these precedents will open the door to further prosecutions concerning sexual violence.

### B. PERU

Peru's twenty-year conflict began in the 1980s with violent insurgencies led by a left-wing rebel group known as Shining Path (*Sendero Luminoso*).<sup>41</sup> During its crackdown on this armed group, the Peruvian state perpetrated systematic abuses against the civilian population, in particular against those suspected of collaborating with the rebels.<sup>42</sup> Small, rural and indigenous communities of the Andes and Amazon were particularly affected by this violence.<sup>43</sup>

The Peruvian Truth and Reconciliation Commission (*Comisión de Verdad y Reconciliación*, CVR), set up in 2001,<sup>44</sup> made important inroads in identifying sexual violence as a human rights violation in the conflict and in recording individual cases.<sup>45</sup> Up until the CVR's

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40. See *Judging a Dictator: The Trial of Guatemala's Rios Montt*, *supra* note 30, at 1 (noting progress has been slow in Guatemala in prosecuting conflict-related atrocities).

41. See generally CVR Final Report, *supra* note 11, at Vol. I, Part I, Ch. 1, 59-77.

42. See *id.* at Vol. VI, Part IV, Ch. 1.

43. See *id.* at Vol. VIII, Part II, Ch. 2.2.

44. The CVR was established to investigate human rights abuses perpetrated between 1980 and 2000 by the State, the Shining Path and the Movimiento Revolucionario Túpac Amaru (MRTA). See Julissa Mantilla Falcón, *La judicialización de la violencia sexual*, PUNTES: EDICIÓN ESPECIAL 45 (June 2015); see also CVR Final Report, *supra* note 11, at 25-27; *Creación de la Comisión de la Verdad en el Perú*, Decreto Supremo No. 065-200-PCM (June 4, 2001); see also *Modifican Denominación de la Comisión de la Verdad por la de la Comisión de la Verdad y Reconciliación*, Decreto Supremo No. 101-2001-PCM (Aug. 31, 2001).

45. See CVR Final Report, *supra* note 11, at Vol. VI, Part IV, Ch. 1.1.5, 277-78, 343-44 (stating that during the conflict, there was a practice of sexual violence, mainly against women, perpetrated primarily by state agents and, to a lesser degree, by members of subversive groups. In examining the multiple purposes of this violence, the CVR concluded that these acts were aimed at punishing,

establishment, sexual violence crimes were considered isolated events, unconnected to the conflict, and the full scale of the phenomenon was unknown.<sup>46</sup> Although not an official part of its mandate, the CVR paid particular attention to gender in its 2003 Final Report.<sup>47</sup> By interpreting its mandate broadly, it uncovered widespread sexual violence against women, “especially young, indigenous women, perpetrated by the army and the police.”<sup>48</sup> It also uncovered ample evidence of sexual violence by the Shining Path, despite the group’s often-contradictory rhetoric against it.<sup>49</sup> The

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intimidating, pressuring, and humiliating the population); *see generally* Katya Salazar Luzula, *Gender, Sexual Violence and Criminal Law in Post-Conflict Peru*, in *THE LEGACY OF TRUTH: CRIMINAL JUSTICE IN THE PERUVIAN TRANSITION* 56-69 (Lisa Magarrell & Leonardo Filippini eds. 2006) (describing the work of the CVR in addressing sexual violence).

46. *See* Mantilla Falcón, *supra* note 44, at 42; *see also* CVR Final Report, *supra* note 11, at Vol. IV, Part VI, Ch. 1.1.5, 275 (noting that one of the factors that contributed to rendering sexual violence invisible in the conflict was that it often occurred alongside other human rights violations (massacres, arbitrary detentions and torture), which resulted in a lack of attention paid to sexual violence. It also stated that sexual violence was often viewed as collateral damage of armed conflict, and not as a human rights violation).

47. *See* CVR Final Report, *supra* note 11, at Vol. VI, Part IV, Ch. 1.1.5, 263-72. The CVR applied international law to support its gender-inclusive interpretation of its mandate. In particular, it relied on international and regional human rights instruments to define sexual violence as a form of torture, and on the jurisprudence of the international criminal *ad hoc* tribunals for the former Yugoslavia and Rwanda to characterize sexual violence as a crime against humanity and as a war crime. In its Final Report, the CVR included two sections on gender: the first analyzes how women and men experienced the conflict in a differentiated manner; the second deals specifically with different forms sexual violence against women, including rape, sexual slavery, forced cohabitation, forced pregnancies, and forced abortions. It also addressed cases of male sexual violence. *See also* Mantilla Falcón, *supra* note 44, at 42-45; *see also* Nesiiah, *supra* note 16, at 4 (noting increased attention paid to gender in the CVR’s report but highlighting Peruvian feminists belief that the truth commission process was a lost opportunity for a more systematic and thorough engagement).

48. BOESTEN, *supra* note 4, at 3; *see* CVR Final Report, *supra* note 11, at Vol. VI, Part IV, Ch. 1.1.5, 277-78, 304-57 (describing in detail the sexual violence by state agents); *see also* Mantilla Falcón, *supra* note 44, at 42-45. Mantilla notes that the explanations state agents provided to the CVR regarding sexual violence give insights into their perception of the lack of gravity of these crimes. For example, members of the police who testified before the CVR stated that sexual violence was the consequence of “the irrationality of the males and the distance from their partners, as well as the solitude of the remote areas where they were posted.” Many did not view rape as a form of torture.

49. *See* BOESTEN, *supra* note 4, at 4 (contrasting the Shining Path’s strict rules

CVR's findings showed that racial and cultural discrimination of Andean and indigenous populations played a fundamental role in this violence.<sup>50</sup>

In total, the CVR documented 538 cases of wartime rape, including 11 cases against males.<sup>51</sup> While the CVR did not explicitly state that sexual violence by state agents had been systematic, it did indicate that acts of sexual violence might have reached the level of a systematic practice in some provinces of Ayacucho, Huancavelica and Apurímac in the context of the government's counterinsurgency campaign.<sup>52</sup> This finding is significant in establishing the liability of senior-level leaders for these acts. At the completion of its mandate, the CVR referred forty-seven cases to the Ministry of Public Prosecution for further assessment and investigation, three of which involved sexual violence against women: MMB (involving crimes of sexual violence as torture against a female detainee); military bases of Manta and Vilca (involving widespread sexual violence); and Chumbivilcas (involving massacres, enforced disappearances and sexual violence).<sup>53</sup> These cases are examined in further detail in Part II.

Despite the CVR's findings, the Peruvian judiciary has persistently ignored sexual violence crimes perpetrated during the conflict. Key trials concerning grave violations have focused on other crimes, such as massacres and enforced disappearances.<sup>54</sup> The

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against adultery, rape, prostitution, and homosexuality, with their involvement in these forbidden activities which led to forced marriages, forced pregnancies, infanticide, sexual torture and sexual slavery); *see also* CVR Final Report, *supra* note 11, at Vol. VI, Part IV, Ch. 1.1.5, 277-78, 280-300 (providing a detailed description of the different contexts and forms of sexual violence by subversive groups). The report also refers to cases of sexual violence by the MRTA.

50. According to the CVR's estimates, 80% of the over 69,000 dead and disappeared were young men of indigenous descent. Most of the women affected by the conflict lived in the departments of Ayacucho, Huancavelica and Apurímac, three of the poorest areas in the country. Their profile was fairly similar to that of the men: low income, mostly Quechua speakers (73%), from rural areas (80%). *See* CVR Final Report, *supra* note 11, at Vol. VIII, Part II, Ch. 2.2; *see also* Salazar Luzula, *supra* note 45, at 57 (suggesting the sexual violence in Ayacucho, Huancavelica and Apurímac constituted a systematic practice); *see also* CVR Final Report, *supra* note 11, at Vol. VIII, Part II, Ch. 2.1, 47-48.

51. CVR Final Report, *supra* note 11, at Vol. VIII, Part II, Ch. 2.2, 66.

52. *See id.* at Vol. VI, Part IV, Ch. 1.1.5, 304.

53. *See* Mantilla Falcón, *supra* note 44, at 42.

54. *See id.* (noting that current cases in Peru are mainly focused on crimes by

CVR's Final Report has become a crucial platform for the human rights movement in Peru. Relying on this report, civil parties have launched a number of other cases of sexual violence, and some are currently pending before the courts but proceeding slowly.<sup>55</sup> Although in 2004 the judiciary established specialized courts for cases of grave human rights abuses perpetrated in the conflict,<sup>56</sup> in practice this reform has not sped up trials nor improved accountability for sexual violence.<sup>57</sup> In several decisions,<sup>58</sup> the Inter-American Court of Human Rights has addressed the persistent failure

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government security forces, as members of subversive groups have been prosecuted, albeit not for sexual violence crimes).

55. See Mantilla Falcón, *supra* note 44, at 42; see also discussion *infra* pp. 18-21.

56. See Defensoría del Pueblo, Resumen Ejecutivo: Informe Defensorial No 162, A diez años de verdad, justicia y reparación. Avances, retrocesos y desafíos de un proceso inconcluso (Defensoría del Pueblo, 2013), 22-25, [www.verdadyreconciliacionperu.com/admin/files/articulos/1771\\_digitalizacion.pdf](http://www.verdadyreconciliacionperu.com/admin/files/articulos/1771_digitalizacion.pdf) (describing challenges and delays in trials concerning grave human rights abuses).

57. See Gisela Astocondor Salazar et al., *La judicialización de la violencia sexual en el conflicto armado en Perú: A propósito de los recientes estándares internacionales de derechos humanos desarrollados en la jurisprudencia de la Corte IDH*, 53 REVISTA IIDH 213, 218 (2011). Between 2005 and 2013, the National Criminal Chamber issued 97 rulings concerning cases of grave human rights abuses, none of which included sexual violence charges. A report issued by the UN Economic Commission for Latin America and the Caribbean in 2012 indicated only 16 cases of conflict-related sexual were under investigation, of which 13 were in the preliminary investigation phase by the Public Prosecution Office and 3 were before the judiciary. See also Mantilla Falcón, *supra* note 44, at 44; see also Defensoría del Pueblo, *supra*. 56, at 20-21; DIANE ALMÉRAS & CORAL CALDERÓN, SI NO SE CUENTA, NO CUENTA: INFORMACIÓN SOBRE LA VIOLENCIA CONTRA LAS MUJERES 44 (2012), [http://repositorio.cepal.org/bitstream/handle/11362/27859/1/S2012012\\_es.pdf](http://repositorio.cepal.org/bitstream/handle/11362/27859/1/S2012012_es.pdf).

58. See, e.g., *J v. Peru*, IACtHR Series C No 275, Judgment (Preliminary Objection, Merits, Reparations and Costs, 27 November 2013), 126 ¶15 (instructing the Peruvian State to “conduct an effective criminal investigation into the acts committed against Ms. J. that violated her personal integrity in order to establish criminal liability”); *Case of the Miguel Castro-Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs, 25 November 2006), Inter-Am. Ct. H.R., (ser. C) No. 160, at 166 ¶ 8 (Nov. 25, 2006) (calling on the Peruvian State to investigate the facts in the case, and identify those responsible and conduct criminal proceedings against them); *Fernando and Raquel Mejía v Peru* (Decision of 1 March 1996) Report No 5/ 96, case no 10.970, in *Annual Report of the Inter-American Commission on Human Rights 1995 OEA/ Ser.L/ V/ II.91*, 182-8, at Section VII ¶3 (recommending that the Peruvian State conduct a thorough, rapid and impartial investigation into the sexual abuse of Raquel Mejía in order to identify and punish the perpetrators).

of the Peruvian State to properly tackle sexual violence and has called on the State to comply with its duty to investigate and prosecute these violations. This inaction and indifference sends victims an implicit message that their crimes are of secondary importance.<sup>59</sup>

### C. COLOMBIA

The origins of Colombia's 50-year conflict are complex, and its impact on the civilian population devastating. An armed struggle between government forces and different left-wing guerrilla groups began in the 1960s, arising from demands for social and land reforms. The most significant groups to emerge were the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, FARC) and the National Liberation Army (*Ejercito de Liberación Nacional*, ELN). In the 1980s, as a backlash to the actions of guerrilla groups and the inaction of government forces, different right-wing paramilitary groups were formed in the areas of greatest guerrilla presence, eventually consolidating as the United Self-Defense Forces of Colombia (*Auto Defensas Unidas de Colombia*, AUC) in the late 1990s. Violent competition for control of territory and resources (including drug-trafficking routes) ensued between guerrilla groups and paramilitaries, with paramilitaries at times acting jointly with government forces.<sup>60</sup> Civilians have borne the brunt of this violence.<sup>61</sup>

Sexual violence has been a prevalent and constant feature in the conflict. In its rulings, Colombia's Constitutional Court has recognized the extensive and systematic nature of sexual violence in

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59. See BOESTEN, *supra* note 4, at 119 (arguing that impunity for cases of sexual violence is mainly shaped by the institutional sexism and racism that permeate the judiciary, as much as wider society in which these crimes were perpetrated).

60. See Historical Memory Group 2013, *supra* note 12, at Ch. 2 (documenting the origins dynamics, and different periods of the conflict); Tribunal Superior de Bogotá [T. Sup. Bogota] [Superior Tribunal of Bogotá], Sala de Justicia y Paz febrero 24, 2015, 110016000253200883612-00 (Colom.), ¶¶ 212, 313-14, 355-56 [hereinafter Villa Zapata Judgment] (referring to different forms of criminal collaboration between government forces and paramilitaries in the region of Arauca).

61. See Historical Memory Group 2013, *supra* note 12, at Ch. 1 (documenting the vast impact of the conflict on the civilian population, the patterns of violence and the perpetrator groups).



the conflict,<sup>62</sup> and has stressed that sexual violence has taken on multiple forms and has been perpetrated by all armed actors.<sup>63</sup> The Historical Memory Group (*Grupo de Memoria Histórica*)—a non-judicial body established in 2005 to contribute to the reconstruction of the truth of the conflict—has documented the multiple forms and purposes of sexual violence perpetrated by the different armed actors.<sup>64</sup> Different human rights organizations have also documented

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62. In a landmark ruling in 2008, the Constitutional Court stressed that sexual violence is “a habitual, extensive, systematic and invisible practice in the context of the Colombian armed conflict”. In a confidential annex to this decision, it referred 183 incidents of sexual violence to the Attorney General’s Office for investigation and prosecution. In a follow-up ruling in 2015, the Constitutional Court highlighted the ongoing prevalence of sexual violence, noting that all parties to the conflict were responsible for such crimes. It also referred 442 incidents of sexual violence to the Attorney General’s Office for follow-up. *See* Corte Constitucional [C.C.][Constitutional Court], Auto 092, abril 14, 2008, M.P.: M. J. Cepeda Espinosa, Sala Segunda, Protección de los derechos fundamentales de las mujeres víctimas del desplazamiento forzado por causa del conflicto armado [hereinafter Auto 092/2008] (referring to the prevailing high rates of sexual violence by armed actors against displaced women); *see also* Corte Constitucional [C.C.][Constitutional Court], Auto 009, enero 27, 2015, M.P.: L. E. Vargas Silva, 6-13 [hereinafter Auto 009/2015] (highlighting the lack of progress by authorities in providing redress and justice to victims of sexual violence); Tribunal Superior de Bogotá [T. Sup. Bogotá] [Superior Tribunal of Bogotá], Sala de Justicia y Paz, diciembre 1, 2011, 1100160002532008-83194 (Colom.), ¶ 87 [hereinafter Peña Tobón Judgment] (acknowledging that sexual violence has been a constant feature in the Colombian conflict).

63. *See* Auto 092/2008, *supra* note 62, at III.1.1.1-2.

64. The Historical Memory Group was tasked under Law 975 of 2005 with producing a report on the origins and causes of the armed conflict in Colombia. While it has not fulfilled the role of a truth commission, it has conducted independent research on human rights abuses with a victim-oriented approach. It has also produced a number of reports addressing gender-based violence in the conflict. In 2013, this entity became the National Center for Historical Memory. *See, e.g., Mujeres y Guerra. Víctimas y Resistentes en el Caribe Colombiano*, CENTRO NACIONAL DE MEMORIA HISTÓRICA (2011), <http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-colombia-memorias-de-guerra-y-dignidad-2016.pdf> [hereinafter Historical Memory Group 2011] (documenting human rights abuses by paramilitary groups against women and girls in the Caribbean Coast); *Crímenes Que No Prescriben: La Violencia Sexual del Bloque Vencedores de Arauca*, CENTRO NACIONAL DE MEMORIA HISTÓRICA, 59-87, 107-60 (2015), <http://www.centrodememoriahistorica.gov.co/descargas/informes2016/crimenes-que-no-prescriben/crimenes-que-no-prescriben.pdf> (documenting gender-based violence against women by different armed actors in Arauca province, northern Colombia); *see also* Pilar Riaño Alcalá and María Victoria Uribe, Constructing Memory amidst War: The Historical Memory Group of Colombia, *INT’L L. TRANSITIONAL JUST.*, 1, 9 (2016),

the large-scale commission of sexual violence<sup>65</sup> and its organized nature.<sup>66</sup> While documentation efforts have predominantly focused on female victims, there is now increased recognition of male sexual violence in the conflict.<sup>67</sup> Different aspects of this violence have also

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<http://ijtj.oxfordjournals.org/content/10/1/6.full.pdf+html> (explaining the role of the Historical Memory Group and its investigative work with a focus on victims' narratives).

65. See, e.g., Olga Amparo Sanchez, et al., *First Survey on the Prevalence of Sexual Violence against Women in the Context of the Colombian Armed Conflict, 2001-2009*, OXFAM, 7 (2011), [http://www.peacewomen.org/assets/file/Resources/NGO/vaw\\_violenceagainstwomenincolombiaarmedconflict\\_2011.pdf](http://www.peacewomen.org/assets/file/Resources/NGO/vaw_violenceagainstwomenincolombiaarmedconflict_2011.pdf) (indicating that high prevalence of sexual violence between 2001-2009 in the municipalities with the presence of armed groups); see also *This is what we Demand: Justice! Impunity for Sexual Violence Against Women in Colombia's Armed conflict*, AMNESTY INT'L, 23 (Sept. 2011), [http://www.amnesty.nl/sites/default/files/public/1109\\_rap\\_colombia.pdf](http://www.amnesty.nl/sites/default/files/public/1109_rap_colombia.pdf) [hereinafter *This is What We Demand*] (highlighting the entrenched impunity for conflict-related sexual violence by all armed actors in Colombia).

66. See *Colombia: Scarred Bodies, Hidden Crimes: Sexual Violence against Women in the Armed Conflict*, AMNESTY INT'L, 3, 7, 11, 17 (October 13, 2004), [https://www.amnesty.nl/sites/default/files/public/2004\\_colombia.pdf](https://www.amnesty.nl/sites/default/files/public/2004_colombia.pdf) (arguing that armed groups have perpetrated sexual violence to sow terror, obtain territorial control, inflict revenge on adversaries, and exploit victims, among other reasons); see also *Guía para llevar casos de violencia sexual*, CORPORACION HUMANAS, 23-27 (2009), [http://www.humanas.org.co/archivos/Guia\\_para\\_llevar\\_casos\\_de\\_violencia\\_sexual.pdf](http://www.humanas.org.co/archivos/Guia_para_llevar_casos_de_violencia_sexual.pdf) (indicating that sexual violence has been perpetrated by armed groups within four contexts: during attacks on localities, to obtain territorial control, in detention, and within ranks); see also Historical Memory Group 2013, *supra* note 12, at 80-84 (describing different contexts in which sexual violence has been perpetrated by paramilitaries); see also Auto 092/2008, *supra* 62, at III.1.1.1-2 (referring to different patterns of sexual violence by armed actors in the conflict); see also Auto 009/2015, *supra* note 62, at 15-27 (referring to the contextual risk factors that contribute to sexual violence by armed actors and the different scenarios in which these crimes are committed).

67. See, e.g., Tribunal Superior de Bogotá [T. Sup. Bogota] [Superior Tribunal of Bogotá], Sala de Justicia y Paz diciembre 16, 2014, 11001-22-52000-2014-00058-0 (Colom.), ¶¶ 956, 988, 991 [hereinafter *Triana Mahecha Judgment*] (recognizing that men and boys can also be victims of sexual violence, and providing specific recommendations to the Attorney General's Office on how to examine evidence of male sexual violence, and providing specific recommendations to the Attorney General's Office on how to examine evidence of male sexual violence); see also *Villa Zapata Judgment*, *supra* note 60, ¶ 666 (referring to the prevalence and lack of visibility of male sexual violence); see also Fiscalía General de la Nación, Resolución 01774, Protocolo de investigación de violencia sexual: Guía de buenas prácticas y lineamientos para la investigación penal y judicialización de delitos de violencia sexual, (June 14, 2016) ¶ 48-52 [hereinafter *2016 Sexual Violence Protocol*] (acknowledging that one of the myths about sexual violence is that men and boys cannot be victimized, and providing

emerged, such as the vulnerability to sexual violence of marginalized communities—in particular the Afro-Colombian and indigenous communities<sup>68</sup>— and the targeting of women and men because of their sexual orientation.<sup>69</sup>

As in Guatemala and Peru, Colombian judicial authorities have routinely ignored these crimes, and impunity has been rife.<sup>70</sup> In

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guidelines to investigators and prosecutors on how to address male sexual violence).

68. See e.g., Historical Memory Group 2013, *supra* note 12, at 278-81; see also *Sexual Violence in Colombia: Instrument of War*, OXFAM, 3 (Sept. 9, 2009), <https://www.oxfam.org/sites/www.oxfam.org/files/bp-sexual-violence-colombia.pdf> (referring to the triple discrimination against women from Afro-Colombian and indigenous communities because of their gender, ethnicity and their situation of poverty); see also Historical Memory Group 2011, *supra* note 64, at Chs. 2, 3 (documenting gender-based violence by paramilitaries against women in the Caribbean Coast region); see also U.N. Secretary General, *Conflict-Related Sexual Violence: Report of the Secretary-General*, ¶ 17, U.N. Doc. A/66/657-S/2012/33 (Jan. 13, 2012) (referring to the disproportionate impact of sexual violence on Afro-Colombian and indigenous women and girls).

69. Several recent decisions of the transitional justice system have highlighted the prevalence of violence against persons on the basis of their sexual orientation. See, e.g., Triana Mahecha Judgment, *supra* note 67, ¶¶ 220-21, 229, 1042 (describing murders of men by paramilitaries on the basis of their sexual orientation, and recommending that the Attorney General Office treat violence on the basis of sexual orientation as a specific category of violation); see also Triana Mahecha Judgment, *supra* note 67, at 957 ¶ 55-6 (calling on the Attorney General's Office to focus on examining possible patterns of violence against LGBT community based on their sexual orientation), see also Villa Zapata Judgment, *supra* note 60, ¶¶ 657-66, 749-53 (referring to different forms of violence against the LGBT community by armed actors, and reviewing domestic jurisprudence regarding crimes by paramilitary groups against persons on the basis of their sexual orientation); see also Tribunal Superior de Bogotá [T. Sup. Bogota] [Superior Tribunal of Bogotá], Sala de Justicia y Paz, noviembre 20, 2014, 11-001-22-52-000-2014-00027 (Colom.), ¶¶ 1903-09 [hereinafter Mancuso Judgment] (finding that AUC members murdered a victim because of his sexual orientation as part of their "social cleansing" policy); see also Tribunal Superior de Medellín [T. Sup. Medellín] [Superior Tribunal of Medellín], Sala de Justicia y Paz, febrero 2, 2015, 110016000253200680018 (Colom.), at 1331-1333 [hereinafter Vanoy Murillo Judgment]; see also Corte Constitucional [C.C.] [Constitutional Court], septiembre 15, 2015, Sentencia T-025 DE 2004 (Colom.), ¶¶ 14-15 [hereinafter Sentencia T-025 DE 2004 (referring to violence by paramilitaries against members of the LGBT community)]; see also Auto 009/2015, *supra* 62, at 14-15 (referring to reports of violence by armed actors against women on the basis of their sexual orientation).

70. See, e.g., *Acceso a la Justicia para Mujeres Víctimas de Violencia Sexual, Sexto Informe de Seguimiento al Auto 092 y Primer Informe de Seguimiento al Auto 009 de la Corte Constitucional- Anexos Reservados*, MESA DE SEGUIMIENTO,

January of 2015, Colombia's Constitutional Court noted "with alarm" the persistence of sexual violence as a serious form of gender discrimination, and urged authorities to not only address these crimes, but to comply with their obligations to prevent and ensure their non-repetition.<sup>71</sup> In the context of its ongoing preliminary examination in Colombia, the Prosecutor of the International Criminal Court (ICC) has repeatedly called on Colombia to comply with its international obligations to prosecute sexual violence.<sup>72</sup>

Given the increased pressure to step up its efforts, the Attorney General's Office has taken measures to prioritize the investigation of sexual violence.<sup>73</sup> While investigations and prosecutions before the ordinary justice system have proceeded at a slow pace,<sup>74</sup> some

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13-17 (March 2016) [hereinafter Working Group's 2016 Report] (noting the almost total impunity in the over 600 sexual violence cases referred to the Attorney General's Office by the Constitutional Court in its rulings Auto 092 of 2008 and Auto 009 of 2015); see also *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process*, ABCOLOMBIA, 1-2, 13-16 (November 2013) (reporting high levels of impunity for sexual violence and significant barriers for victims to access justice); see also *Situation in Colombia: Interim Report*, ICC: OFFICE OF THE PROSECUTOR, ¶ 19 (November 2012) [hereinafter *Situation in Colombia: Interim Report*] (noting the limited number of proceedings concerning "rape and other forms of sexual violence committed in the context of armed conflict, despite the scale of the phenomenon").

71. See Auto 009/2015, *supra* 62, at 7; see also Sentencia T-025/2004, *supra* 69, ¶ 7; see also Daniela Kravetz, *Recent Developments in Colombian Jurisprudence for Conflict-Related Sexual Violence*, INTLAWGRRLS (Apr. 15, 2015), <https://ilg2.org/2015/04/15/recent-developments-in-colombian-jurisprudence-on-conflict-related-sexual-violence/> (noting that the Constitutional Court has played a significant role in giving sexual violence crimes visibility).

72. See *Situation in Colombia: Interim Report*, *supra* note 70, ¶ 19 (reporting that the Colombian Constitutional Court and United Nations Human Rights Committee have noted the "inadequacy of prosecutorial and judicial activity in relation to these crimes"); see also Statement by United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict Zainab Hawa Bangura: Breaking the Silence on Sexual Violence in Colombia (March 3, 2015) [hereinafter *Breaking the Silence on Sexual Violence in Colombia*] (stressing that Colombian authorities must work to end the silence and impunity surrounding sexual violence crimes).

73. See Working Group's 2016 Report, *supra* note 70, at 76-79 (examining the prioritization strategy adopted by the Office of the Attorney General in 2015 focused on the cases of conflict-related sexual violence); see also 2016 Sexual Violence Protocol, *supra* note 67 (aiming at providing prosecution and investigation staff with best practice guidelines in cases of sexual violence).

74. See Working Group's 2016 Report, *supra* note 70, at 14 (noting that from the 634 incidents of sexual violence referred to the Attorney General's Office in

progress has been made under the transitional justice framework established by Law 975 of 2005 (known as the Justice and Peace Law) to prosecute demobilized paramilitaries.<sup>75</sup> Several cases prosecuted under this framework have resulted in convictions for sexual and gender-based violence against former senior members of the AUC.<sup>76</sup> These cases have highlighted the reasons why paramilitaries engaged in sexual violence, the various categories of victims, and its impact on local communities.<sup>77</sup>

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the Constitutional Court's Orders 092 and 009, only 2,2% have resulted in convictions); *see also Report on Preliminary Examination Activities*, ICC: OFFICE OF THE PROSECUTOR, ¶ 154 (2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (noting that "progress in the investigations and prosecutions of cases in the ordinary justice system over the reporting period is limited").

75. *See* L. 975/05, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] (Colom.) [hereinafter Justice and Peace Law].

76. The following cases prosecuted under the transitional justice framework of Law 975 have resulted in convictions for crimes of sexual and gender-based violence: Villa Zapata Judgment, *supra* note 60; Triana Mahecha Judgment, *supra* note 67; Mancuso Judgment, *supra* note 69; Tribunal Superior de Bogotá [T. Sup. Bogota] [Superior Tribunal of Bogotá], Sala de Justicia y Paz, septiembre 1, 2014, 11001-22-52000-2014-00019-00 (Colom.) [hereinafter Cifuentes Galindo Judgment]; Tribunal Superior de Bogotá [T. Sup. Bogota] [Superior Tribunal of Bogotá], Sala de Justicia y Paz, mayo 29, 2014, 11-001-60-00253-2007 (Colom.) [hereinafter Isaza Arango Judgment]; Tribunal Superior de Bogotá [T. Sup. Bogota] [Superior Tribunal of Bogotá], Sala de Justicia y Paz, diciembre 7, 2011, 110016000253-200681366 (Colom.) [hereinafter Fierro Flores Judgment]; Peña Tobón Judgment, *supra* note 62. In other cases, evidence of sexual and gender-based violence has been considered to establish the contextual elements of war crimes and crimes against humanity and the patterns of violence by paramilitary groups. *See* Tribunal Superior de Medellín [T. Sup. Medellín] [Superior Tribunal of Medellín], Sala de Justicia y Paz, abril 28, 2016, 110016000253200680068 (Colom.) [hereinafter Arroyo Ojeda Judgment]; *see also* Vanoy Murillo Judgment, *supra* note 69, at ¶ 2510 (declaring gender-based violence as a pattern of macrocriminality of the *Bloque Mineros* of the AUC). All judgments are available here: [http://www.fiscalia.gov.co/jyp/direccion-de-fiscalia-nacional-especializada-justicia-transicional/ley\\_justicia\\_y\\_paz/](http://www.fiscalia.gov.co/jyp/direccion-de-fiscalia-nacional-especializada-justicia-transicional/ley_justicia_y_paz/) (last visited 15 July 2016).

77. *See* Mancuso Judgment, *supra* note 69, at ¶¶ 1290-96 (finding that the AUC used different forms of sexual and gender-based violence as a war tactic to gain control of territory, intimidate civilians, humiliate adversaries and destroy the social fabric of communities). In the *Villa Zapata et al* case, the tribunal examined the different forms of sexual and gender-based violence used by paramilitaries of the *Bloque Vencedores de Arauca* to spread terror among the population. In some instances, women who were suspected of having ties to left-wing guerilla groups were tortured and brutally gang-raped by paramilitaries, and some were murdered and dismembered after being raped. To explain why the victims had been targeted, the tribunal examined the context of violence and discrimination against women

In addition, the case against the notorious former paramilitary leader Marco Tulio Pérez Guzmán (“El Oso”) has set an important precedent in promoting accountability for sexual violence.<sup>78</sup> This case focuses on crimes of sexual and gender-based violence against Afro-Colombian women and girls perpetrated by paramilitaries from 2000 to 2004 in the Montes de María region, Colombia’s Caribbean coast.<sup>79</sup> Under the transitional justice system, accused can benefit from a reduced sentence (five to eight years) provided they demobilize and fully disclose the truth about their crimes.<sup>80</sup> While

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surrounding the crimes and concluded that the gender of the victims had influenced the types of harm inflicted on them. Through this violence, paramilitaries sought to both punish the women and humiliate the men of the opposing side. Villa Zapata Judgment, *supra* note 60, at ¶¶ 881-904, 907-10, 913, 919-20, 924-28; *see also* Villa Zapata Judgment, *supra* note 60, at ¶¶ 940-41; *see also* Vanoy Murillo Judgment, *supra* note 69, at 1274-1331 (examining different forms of sexual and gender-based violence perpetrated by the *Bloque Mineros* of the AUC against women and girls); *see also* Vanoy Murillo Judgment, *supra* note 69, at 1300-1301 (referring to the murder of female community leaders because of their perceived association with guerrilla groups); *see also* Vanoy Murillo Judgment, *supra* note 69, at 1306-1037 (indicating that local families provided their virgin daughters to paramilitary commanders to show their loyalty and in exchange for protection).

78. *See* Marcelle Cohen, *Sexual Violence: The Invisible, Mute, and Exempt Crime Against Humanity*, ROBERT S. STRAUSS CTR. (Aug. 4, 2015), <https://www.strausscenter.org/strauss-articles/sexual-violence-the-invisible-mute-and-exempt-crime-against-humanity.html> (highlighting that Pérez Guzmán’s inability to admit his sexual abuse of women, despite admitting to systemic murders and other crimes, resulted in the first time an ex-paramilitary leader lost the benefits of the Justice and Peace Law for failing to acknowledge crimes of sexual violence).

79. Pérez Guzmán (El Oso) is accused of regularly abducting women and girls from a village under his group’s control and holding them for prolonged periods at his military base, where he subjected them to repeated rapes, mistreatment and forced labor. These crimes formed part of a broader context of violence by paramilitaries against civilians in the region. Paramilitaries used different forms of violence to obtain territorial control—including killings, abductions and torture—and imposed exemplifying punishments based on the gender of the victims. In particular, they used sexual violence as a means to punish women who “failed to respect” the social rules they imposed. This violence became an expression of their power over the women in the region. *See* Historical Memory Group 2011 Report, *supra* note 64, at 158-69.

80. Law 905 of 2005 was adopted to facilitate the reintegration of members of armed groups into civilian life, and contains provisions regarding the investigation, prosecution and sentencing of members of armed groups who decide to demobilize. The Constitutional Court issued several rulings interpreting the law. Its ruling C-370 of 2006 is particularly significant as it held that the Law did not design an effective incentive system for promoting full and accurate confessions

initially tried under this system, Pérez Guzmán lost the benefits of Law 975 for failing to tell the truth about the rapes he was charged with, and his case was referred to an ordinary court for trial.<sup>81</sup> He now faces up to 20 years in prison if found guilty.

On August 24, 2016, the government and the FARC signed a peace agreement in Havana, Cuba, putting an end to the longest running civil war.<sup>82</sup> The parties have agreed that there will be no amnesty for serious international crimes, including for sexual violence. However, the peace negotiations revealed complex tensions between holding actors accountable for past war crimes and advancing the peace process. For this peace to last, the parties need to promote accountability of those most responsible for serious international crimes—from both the FARC and the state— and need to ensure that the full range of crimes are addressed, including crimes of sexual violence. At the time of writing, the government and the ELN have initiated peace discussions.

### III. ADJUDICATING SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME AND ESTABLISHING LIABILITY

Despite the prevailing impunity for sexual violence, efforts are being made in each of the case study countries to prosecute these crimes. In seeking accountability, legal practitioners have been confronted with how to use their domestic legal framework to

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by the accused, and required that to be eligible for benefits, demobilized fighters had to provide complete and accurate confessions. *See* Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006, Sentencia C-370/06 (Colom.); *see generally* *Latin America Report N°49: Transitional Justice and Colombia's Peace Talks*, INT'L CRISIS GROUP (Aug. 29, 2013), <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/transitional-justice-and-colombia-s-peace-talks> (analyzing the implementation of Law 975 since its adoption).

81. *See* *Recent Developments in Colombian Jurisprudence for Conflict-Related Sexual Violence*, *supra* note 71 (citing the Barranquilla Tribunal ruling that Pérez Guzmán would not benefit from the Justice and Peace Law because “the accused must fully disclose the truth about their crimes”).

82. *See generally* *Excerpts from the August 24 Announcement of a Final Peace Accord between the Government and the FARC*, WOLA (Aug. 25, 2016), <http://colombiapeace.org>; *see also* Nicholas Casey, *Colombia and FARC Reach Deal to End the Americas' Longest War*, N.Y. TIMES (Aug. 24, 2016), <http://www.nytimes.com/2016/08/25/world/americas/colombia-farc-peace-deal.html>.

accurately characterize sexual violence as an international crime. This has been a complex exercise. It has required finding a coherent balance between advocating for progressive interpretations of domestic criminal provisions without sidestepping the principle of legality. It has also required understanding how international law can be used to support charges of sexual violence and to reflect the varied manifestations of sexual violence in conflict. The adjudication of sexual violence as an international crime in the cases discussed below has served to reflect the gravity of the criminal conduct and to acknowledge the harm caused to the victims. These cases have also challenged the misconception that sexual violence is an incidental by-product of armed conflict and of less gravity than other violations.

Establishing liability for sexual violence has also posed significant challenges and obstacles. While the tendency in the case study countries has been to pursue physical perpetrators, progress has been made in recent years in holding senior officials accountable for sexual violence. In cases against senior-level leaders who were not physical perpetrators or present at the scene of the crimes, practitioners have had to focus on linking the crimes to the accused. This has required choosing the appropriate mode of liability and obtaining evidence to connect the conduct of the accused to the sexual violence. These cases have demonstrated the connections between sexual violence and the objectives of criminal campaigns unleashed by armed groups, and have highlighted the role sexual violence played in these campaigns. These cases have also helped overcome the misconception that only physical perpetrators can be held accountable for sexual violence.

#### A. USING INTERNATIONAL LAW TO INTERPRET AND APPLY CRIMINAL PROVISIONS IN GUATEMALA

In Guatemala, the Criminal Code contains a provision to prosecute war crimes and crimes against humanity, Article 378, entitled “Crimes against the Duties of Humanity”.<sup>83</sup> This article is an open

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83. CÓDIGO PENAL (Criminal Code) art. 378 (Guat.) [hereinafter Guatemalan Crim. Code] (“Crimes against the Duties of Humanity: Whosoever violates or infringes humanitarian obligations, laws or covenants regarding prisoners or hostages of war or those wounded in battle, or whosoever commits any inhuman act against the civilian population or against hospitals or places designated for the



provision in that it does not describe in detail the conduct proscribed, but makes reference to sources of international law. This provision has been interpreted as allowing courts to adjudicate acts constituting war crimes or crimes against humanity under customary or conventional international law binding on Guatemala.<sup>84</sup>

In the aforementioned *Sepur Zarco* case, Article 378 was used to bring charges of sexual violence. During the pre-trial phase, the prosecution and the civil parties relied on Article 378 to argue that conduct amounting to rape, sexual and domestic enslavement, and cruel and degrading treatment was recognized as crimes against humanity under customary international law when the crimes were committed, and that this provision allows a court to define the proscribed conduct by reference to international law binding on Guatemala. During the stage of proceedings intended to determine whether there is a basis for committing a person to trial, the First Instance Judge permitted the case to go to trial on the basis of these specific charges. He reasoned, in part, that Article 378 is a “blank penal law,”<sup>85</sup> and that while it does not describe the conduct in detail, there was nothing barring its application to these crimes.<sup>86</sup>

In its decision issued on February 26, 2016, the High Risk Tribunal “A” convicted both accused—Reyes Girón and Valdez Asig—for the crimes charged under Article 378. The Tribunal found that in 1982, the army attacked the community of Sepur Zarco, killing or forcibly disappearing a group of male Mayan Q’eqchi’ leaders who had taken steps to obtain recognition of their land rights.<sup>87</sup> Other men were detained and severely mistreated.<sup>88</sup> The

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wounded[,] will be sentenced from 20-30 years in prison.”).

84. See *Monitoreo de la Justicia Transicional en Guatemala, Tomo II: Derecho a la justicia para las víctimas del Conflicto Armado Interno*, IMPUNITY WATCH, 16-18, 20-21, 63 (2014), [http://www.impunitywatch.org/docs/Research\\_report\\_informe\\_monitoreo\\_IW\\_JUSTICIA\\_Dec\\_2014.pdf](http://www.impunitywatch.org/docs/Research_report_informe_monitoreo_IW_JUSTICIA_Dec_2014.pdf).

85. Juzgado Primero de Primera Instancia Penal Oct. 14, 2014, *Narcoactividad y Delitos contra el Ambiente por Procesos de Mayor Riesgo* [First Tribunal for Crime, Drug Trafficking and Environmental Offences] Oct. 14, 2014, Expediente No. C-01076-2012-00021, Resolución de Fase Intermedia (Guat.).

86. See Rios Montt Judgment, *supra* note 27, at 707 (showing a consistent interpretation of the law). At the time of writing, legislative reform is underway in Guatemala to implement the Rome Statute domestically.

87. See *Sepur Zarco* Judgment, *supra* note 36, at 126, 128-30, 198-200, 209-11, 214-15, 218-19, 223, 235, 239-40, 260-61, 264, 267-68, 273, 292, 474 (describing, among other things, that local landowners felt threatened by these

women in the community suffered a different fate. The army burned down their homes and their belongings.<sup>89</sup> They also raped the women during the attack against the community.<sup>90</sup> One woman was repeatedly raped in front of her two young daughters, and was subsequently killed along with her daughters.<sup>91</sup> In the absence of their husbands, the soldiers considered the women to be at their disposal, and they forced the women to take turns washing, cooking and cleaning for them at the Sepur Zarco military base, giving them no financial compensation.<sup>92</sup> They also subjected the women to repeated sexual violence at the base.<sup>93</sup> The women were also raped in their homes, sometimes in front of their children, and by the river when they went to wash clothes.<sup>94</sup> Several families sought refuge in the mountains, and suffered from malnutrition and starvation.<sup>95</sup> These abuses continued for six years, until the soldiers withdrew from Sepur Zarco.<sup>96</sup> As a result of this violence, the women suffered

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demands and had called upon the army to suppress them).

88. *See id.* at 345-54.

89. *See id.* at 219-20, 225, 230, 233, 235, 239-40, 255-56.

90. *See id.* at 485; *see also* Elisabeth Patterson, *The Sepur Zarco Trial from an Indigenous Law Perspective*, AVOCAT SANS FRONTIERS (Apr. 27, 2016), <http://www.asfcanada.ca/fr/blogue/billet/the-sepur-zarco-trial-from-an-indigenous-law-perspective/317> (describing how the victims expressed themselves in Q'eqchi', and how the issue of translation was particularly important during trial because the victims often used euphemisms to speak about the rapes, such as the term "Barz'unleek" which, taken literally, translates as "they played with me," but in fact means "they raped me").

91. Sepur Zarco Judgment, *supra* note 36, at 200-01, 205, 283-86, 352, 482-83.

92. *See id.* at 200, 206, 259, 279.

93. *See id.*, at 205, 211, 216, 220-21, 240, 259, 479 (recounting several women's encounters when they went to the base to cook every three days and, each time, different soldiers raped them and other women at gunpoint).

94. *See id.* at 200, 207, 209, 220-21, 224, 230, 235, 255, 265-66, 269, 271, 273, 478; *see also* Jo-Marie Burt, *Victim Witnesses Tell of Atrocities at Sepur Zarco*, INT'L JUST. MONITOR (Feb. 9, 2016), <http://www.ijmonitor.org/2016/02/victim-witnesses-tell-of-atrocities-at-sepur-zarco/> (describing one woman's experience that soldiers would often pass by her house and rape her, saying that "[t]he [soldiers] told me if I didn't let them [rape me] they would kill me," she said. "Sometimes they tied me down and put a rifle on my chest. . . . They knew which ones of us [women] were alone. . . . They treated us like animals. . . . It was so painful. They did this to me because I was alone"); *see also* Sepur Zarco Judgment, *supra* note 36, at 211-13.

95. *See* Sepur Zarco Judgment, *supra* note 36, at 270-73, 275, 480.

96. *See id.* at 206, 256-57.

serious physical and psychological harm.<sup>97</sup> They also suffered cultural harm, seeing their lives within the community destroyed.<sup>98</sup> The Tribunal held that the Guatemalan army perpetrated these crimes against Mayan Q'eqchi' women as a means of exercising control and power over the community.<sup>99</sup> It also acknowledged the victims' courage in testifying publicly about their experiences and in breaking the silence about these crimes.<sup>100</sup>

Two evidentiary issues in relation to this case are worth highlighting. First, to minimize the trauma for the victims, the tribunal allowed the prosecution and the civil parties to introduce the testimonies of the victims at trial using pre-recorded videos in lieu of oral testimony (called anticipatory evidence under Guatemalan law), and it found this evidence to be reliable and internally consistent.<sup>101</sup> One of the victims died before the start of the trial, and the tribunal admitted her pre-recorded testimony, finding it reliable.<sup>102</sup> Second, the parties adduced a range of other sources of evidence to prove the charges, including testimonial, forensic and documentary evidence.<sup>103</sup> In particular, the prosecution and the civil parties called

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97. See *id.* at 200, 207, 256, 273 (describing the psychological repercussions of violence against women).

98. See *id.* at 476-77; see also Patterson, *supra* note 90 (noting that the victims have been unable to remarry or recover their plot of land, and have "often had to live with their mother, beg to survive, or work for other members of the community as servants").

99. See Sepur Zarco Judgment, *supra* note 36, at 473.

100. See *id.* at 489 ("it is necessary to emphasize that we, the judges, have observed that the women victims broke down during their testimonies, expressing their pain, suffering, solitude and helplessness, not only because of what occurred to them at that time, but also because of their powerlessness before armed men who changed the course of their lives, without caring about the consequences of their actions") (unofficial translation).

101. See *Victim Witnesses Tell of Atrocities at Sepur Zarco*, *supra* note 94 (explaining that the testimonies were videotaped at preliminary evidentiary hearings in 2012, at which time the accused were represented by public defenders, and the videotaped testimonies were accepted as evidence in this manner due to the advanced age of the victims and in an attempt to prevent their re-traumatization); see also Sepur Zarco Judgment, *supra* note 36, at 263, 272, 275, 471, 485.

102. See *Victim Witnesses Tell of Atrocities at Sepur Zarco*, *supra* note 94; see also Sepur Zarco Judgment, *supra* note 36, at 260-64.

103. See Sepur Zarco Judgment, *supra* note 36, at 420-23, 433-72 (including evidence of military plans designed by the Guatemalan army that formed the framework of its counterinsurgency campaign and set out the measures of control to be implemented *vis-à-vis* the Mayan population); see also Sepur Zarco

more than a dozen expert witnesses.<sup>104</sup> Among other issues, the court relied on this expert testimony in relation to: the elements of the crimes charged under international law; the assessment of the credibility of victims of gross human rights abuses; the broader context of violence in which the crimes of sexual violence occurred; the impact of the crimes on the victims and their community; and the military and political structures in place during the relevant period.<sup>105</sup> These expert witnesses provided the judges with the contextual evidence necessary to find that the crimes charged fell within the scope of Article 378.

#### B. USING INTERNATIONAL LAW TO ADDRESS PAST CRIMES IN PERU

As in Guatemala, Peruvian criminal law does not explicitly recognize sexual violence as an international crime. Two different criminal codes are applied in Peru in cases of serious human rights abuses, the 1924 and the 1991 Codes. Their application depends on the period of commission of the crimes. While different forms of sexual violence are listed as ordinary crimes in both, neither code recognizes these crimes as international crimes. The 1991 Code contains crimes against humanity provisions regarding other categories of crimes of non-sexual nature.<sup>106</sup> The lack of a proper legal framework makes it more difficult to address past crimes of sexual violence; if charged as ordinary crimes, these crimes can be subject to the statute of limitations.<sup>107</sup> In addition, charging conflict-related sexual violence as an ordinary crime fails to take into account the broader context of violence in which it occurred.

Given the absence of clear provisions, practitioners have been

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Judgment, *supra* note 36, at 405-06.

104. *See id.*, at 417-18. The approach of leading extensive expert evidence was also followed in the Ríos Montt case.

105. *See id.* at 473-77.

106. *See* Peru 1991 Crim. Code. arts. 319-24 (recognizing the following crimes as crimes against humanity: genocide, torture, enforced disappearance, discrimination and genetic manipulation); *compare* 1924 Peru Crim. Code art. 194 (containing more restrictive provisions to prosecute sexual violence, such as the limiting the definition of the crime of rape to be gender-specific, requiring the victim to be female) *with* Peru 1991 Crim. Code art. 170 (providing a gender-neutral definition of rape as to the perpetrator and the victim). This difference can have implications as to the crimes charged under each code.

107. *See* Mantilla Falcón, *supra* note 44, at 44.

confronted with how to charge past crimes as international crimes without violating the principle of legality.<sup>108</sup> They have tried to overcome this hurdle by arguing for an “adapted” principle of legality grounded on the Peruvian Constitutional Court’s interpretation of the primacy of international human rights treaties over domestic law.<sup>109</sup> Concretely, practitioners have argued that crimes of sexual violence can be prosecuted as international crimes before Peruvian courts provided that the charges are grounded in international law binding on Peru and that the required contextual elements for international crimes are met. In practice, prosecutors charge the criminal conduct under domestic criminal provisions—for example as rape—while characterizing the act as a crime against

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108. The issue of the legal characterization of human rights violations as crimes against humanity was raised in relation to the massacres committed by a paramilitary death squad known as the Colina group in Lima’s Barrios Altos district and at La Cantuta University in the early 1990s. The jurisprudence in relation to these events has been relied upon in subsequent cases where crimes have been charged as crimes against humanity. In 2009, the Special Criminal Chamber of the Supreme Court sentenced former President Alberto Fujimori to 25 years for these massacres. It held that while these crimes were characterized as aggravated murder and grievous bodily harm under domestic law, they amounted to crimes against humanity under international customary law. *See* Sala Penal Especial de la Corte Suprema [S.P.E.C.S.] [Special Criminal Chamber of the Supreme Court], abril 7, 2009, “Fujimori, Alberto c. Borja, Luis Antonio León,” Rol de la causa: AV 19-2001, ¶¶ 711, 714, 717 (Peru) [hereinafter *Fujimori Judgment*]. However, in 2012, in a related case against Vladimiro Montesinos, the former head of national intelligence, and other members of the Colina group, the Permanent Criminal Chamber of the Supreme Court held that the Barrios Altos and La Cantuta massacres did not amount to crimes against humanity, among other reasons, because the actions of the Colina group targeted terrorists and not civilians. Human rights advocates brought the case before the Inter-American Court of Human Rights, which found that the Supreme Court’s 2012 decision departed from prior jurisprudence that had characterized these crimes as crimes against humanity. It also found that the 2012 Supreme Court’s decision violated the rights of the victims and their families to truth, justice and reparation. The Supreme Court eventually overturned its 2012 ruling, finding that these crimes amounted to crimes against humanity. *See* *Barrios Altos v. Peru*, Monitoring Compliance with Judgment, Judgment, ¶¶ 32-48, 58-63 (Sept. 7, 2012), [http://www.corteidh.or.cr/docs/supervisiones/barrios\\_07\\_09\\_12.pdf](http://www.corteidh.or.cr/docs/supervisiones/barrios_07_09_12.pdf).

109. Tribunal Constitucional [T.C.] [Constitutional Court], abril 25, 2006, “Colegio de Abogados de Arequipa c. el artículo 22, inciso c), de la Ley N.º 26397, Orgánica del Consejo Nacional de la Magistratura,” Rol de la causa: 0025-2005- PI/TC y 0026-2005- PI/TC, constitucional, ¶¶ 25-34 (Peru) (holding that international human rights treaties binding on Peru form part of the internal legal framework).

humanity by arguing that the contextual elements are met. An alternative approach has been to charge sexual violence as torture, which has been recognized as a crime against humanity under domestic law since 1998.<sup>110</sup> This legal characterization of sexual violence as an international crime results in the inapplicability of the statute of limitations.<sup>111</sup>

In an emblematic case concerning the Manta and Vilca military bases, crimes of sexual violence are being pursued as crimes against humanity.<sup>112</sup> This case involves two military bases established in neighboring communities in the rural highland province of Huencavelica between 1984 and 1995.<sup>113</sup> Members of the army at

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110. Legal practitioners have taken different approaches to characterizing sexual violence as torture. For example, in one ruling from 2007, the Supraprovincial Criminal Prosecution Office of Huencavelica, characterized acts of sexual violence as torture and declared the non-applicability of the statute of limitations. *See* Mantilla Falcón, *supra* note 44, at 44. However, in another case dealing with abuses at the Manta and Vilca military bases between 1984 and 1988, a provincial judge held that the rapes could not be characterized as torture, contrary to what the prosecution and the civil parties had argued. While recognizing that the statute of limitations does not apply to serious violations of human rights, the judge found that the crime of torture could not be charged in this case because it had only been incorporated into the Criminal Code in 1998, after the facts in the case took place. The judge retained the charges of rape as ordinary crimes and characterized them as crimes against humanity, relying on international law. *See* Segundo Tribunal Supraprovincial Penal [S.T.S.P.] [Second Supraprovincial Criminal Tribunal], noviembre 9, 2009, “Sabino Valentin Rutti,” Rol de la causa: 2010-00312- 10, Auto de apertura de instrucción, 8-10, 15-17 (Peru).

111. *See* Fujimori Judgment, *supra* note 108, at ¶¶ 711-16 (holding that under international customary law, crimes that occur in the context of a widespread or systematic attack against the civilian population are not subject to a statute of limitations); *see also* Barrios Altos v. Peru, Monitoring Compliance with Judgment, Judgment, ¶ 41 (Aug. 4, 2008), [http://corteidh.or.cr/docs/supervisiones/barrios\\_04\\_08\\_08\\_ing.pdf](http://corteidh.or.cr/docs/supervisiones/barrios_04_08_08_ing.pdf) (holding that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations).

112. René Zubieta Pacco, Violaciones en Manta y Vilca: juicio a militares inicia mañana, *El Comercio* (July 7, 2016), <http://elcomercio.pe/sociedad/huancavelica/violaciones-manta-y-vilca-juicio-militares-inicia-manana-noticia-1915125>. *Cf.* BOESTEN, *supra* note 4, at 118 (noting the numerous delays in the prosecutor’s investigation into these events).

113. BOESTEN, *supra* note 4, at 117. At the time of the events, the districts of Manta and Vilca were small, rural communities with no running water, sewage, or electricity. *See generally* Mercedes Crisóstomo Meza, *Mujeres y Fuerzas Armadas*

these bases are accused of systematic crimes of sexual violence against the population, as well as of other gross human rights abuses.<sup>114</sup> Many women were raped by soldiers in the bases, in their houses, and even in public spaces.<sup>115</sup> In its Final Report, the CVR identified twenty-four victims of sexual violence, and concluded that, “sexual violence was a persistent and daily practice in the region of Manta and Vilca, perpetrated primarily by the army from military bases in the area”.<sup>116</sup> Prosecutors and the civil parties have argued that these crimes amount to crimes against humanity because they were committed in the context of widespread and systematic human rights abuses against the Manta and Vilca communities.<sup>117</sup> Despite numerous delays, the trial against members of the Peruvian military for these crimes began in July 2016.<sup>118</sup> A conviction regarding these events would mark an important precedent in recognizing sexual violence as a crime against humanity in Peru.

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en un Contexto de Violencia Política: Los Casos de Manta y Vilca en Huancavelica 6-43 (Instituto de Estudios Peruanos, Working Paper No. 210, 2015).

114. Cuarto Juzgado Penal Supraprovincial de Lima [Fourth Supraprovincial Criminal Tribunal of Lima], 2009, Auto apertorio de instrucción del caso de las mujeres violadas en las comunidades de Manta y Vilca, ¶ 11.

115. See BOESTEN, *supra* note 4, at 117 (describing the perpetrators crimes).

116. CVR Final Report, *supra* note 11, Vol. VIII, Part II, Ch. 2.1, 86 (characterizing these acts as both rape and torture and noting that sexual violence constituted a pattern of action by military personnel in the area, who took advantage of their power to commit these crimes). Many of the victims were suspected of being *senderistas*, and in some cases the soldiers raped them to extract information from them, or to intimidate them; CVR Final Report, *supra* note 11, Vol. VIII, Part II, Ch. 2.1, 65, 86.

117. See Carlos Rivera Paz, Fiscalía presentó acusación en caso Manta y Vilca (March 12, 2015), <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1572> (describing the challenges faced in investigating this case); see also CVR Final Report, *supra* note 11, Vol. VIII, Part. II, Ch. 2.1, 99 (documenting the context in which the rapes took place within the broader context of sexual violence against women during the conflict).

118. Fernando Alayo Orbegozo, Manta y Vilca: Fiscalía pide que juicio sea por lesa humanidad, *El Comercio* (July 9, 2016), <http://elcomercio.pe/sociedad/peru/manta-y-vilca-fiscalia-pide-que-juicio-sea-lesa-humanidad-noticia-1915594>; Cristina Valega Chipoco & Julio Rodríguez Vasquez, *Violaciones sexuales en Manta de 20 años de impunidad?*, ENFOQUE DERECHO (June 16, 2016), <http://enfoquederecho.com/penal/violaciones-sexuales-en-manta-y-vilca-el-fin-de-mas-de-20-anos-de-impunidad/>; see BOESTEN, *supra* note 4, at 117-18 (noting some major reasons why the prosecution fails to bring charges in so many instances of sexual violence); see generally Mantilla Falcón, *supra* note 44, at 45 (providing procedural background of the case).

Two further emblematic cases could also set important precedents: the *Chumbivilcas* and the *Los Cabitos* cases. In both cases, prosecutors and the civil parties have argued that the crimes amount to crimes against humanity, and both are currently in the trial phase.

The *Chumbivilcas* case concerns crimes perpetrated by a military patrol that went into various communities in the province of Chumbivilcas, Cuzco department, searching for “subversive elements” during a ten-day period in April 1990.<sup>119</sup> During this period, members of the military patrol perpetrated widespread abuses against civilians, including extrajudicial killings, torture and enforced disappearances.<sup>120</sup> The soldiers also raped some of the women in these communities.<sup>121</sup> The prosecution has argued that the pattern of human rights abuses perpetrated by the military, the number of victims, and the tactics employed in the context of its counterinsurgency campaign amount to a widespread and systematic attack on the civilian population, and that the crimes should therefore be characterized as crimes against humanity.<sup>122</sup>

The crimes in the *Los Cabitos* case were perpetrated in Andean Peru at the military base Los Cabitos, located in Huamanga, Ayacucho Department.<sup>123</sup> The base functioned as a detention and torture center for those suspected of belonging to subversive groups, as well as a site for extrajudicial killings.<sup>124</sup> The accused in the case include former senior members of the Peruvian military.<sup>125</sup> In 2003, the CVR documented 138 cases of torture, enforced disappearance and killings between 1983 and 1985 at Los Cabitos, but further

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119. See CVR Final Report, *supra* note 11, Vol. VII, Ch. 2.42.

120. See *id.*

121. See *id.*

122. Segunda Fiscalía Superior Penal Nacional [Second Superior National Public Prosecution], Jaime Manuel Pando Navarrete y otros por delitos contra la humanidad en la modalidad Desaparición Forzada y otros, Exp. No. 037-2008, Dictamen N. 07-2014-2°FSPN-MP/FN, March 5, 2013, 7-8.

123. See BOESTEN, *supra* note 4, at 109-10 (detailing the gross atrocities that occurred at the military base).

124. See CVR Final Report, *supra* note 11, Vol. VII, Ch. 2.9.

125. This case was initially investigated in the 90s, but later shelved. A report from the Inter-American Commission regarding this case prompted authorities to reopen the investigation in 1996, only to later close it. A probe into these events was finally re-launched after the publication of the CVR's Final Report in 2003. See CVR Final Report, *supra* note 11, Vol. VII, Ch. 2.9; see also IACHR Report, *supra* note 119 (discussing the petitioner's position on the issues).



victims have been identified since.<sup>126</sup> Human rights organizations have brought forward evidence of sexual violence against women at the base.<sup>127</sup> The trial in this case is currently underway, although proceeding slowly.<sup>128</sup>

While these developments are promising, the Peruvian judiciary has yet to adjudicate sexual violence as a crime against humanity. A challenge prosecutors are facing is to convince judges that sexual violence formed part of the broader context of human rights abuses perpetrated against the civilian population during the conflict. For example, in the 2015 *Vallejo Cortéz* case, the accused was acquitted of the sexual violence charge because the judges failed to properly apply the contextual elements for crimes against humanity. Vallejo Cortéz, then a military captain, was charged with committing the crimes of murder, attempted murder, torture and rape as crimes against humanity against villagers in the province of Vilcashuamán, Ayacucho, in May 1989.<sup>129</sup> Among other crimes, he was accused of raping a female villager in her home while he searched for subversive material.<sup>130</sup> During his trial, Vallejo Cortéz pled guilty to

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126. CVR Final Report, *supra* note 11, Vol. VII, Ch. 2.9; BOESTEN, *supra* note 4, at 109-10 (noting that forensic scientists have identified the bones of 109 people, though some people estimate around 300 people were killed).

127. The sexual violence evidence has been heard in support of the overall pattern of crimes against humanity. *E.g.*, Gloria Cano et al., *Cuartel Los Cabitos: Lugar de Horror y Muerte* (D & L Publicaciones E.I.R.L. 2014) (expanding on the details of the case); see *Caso Cabitos, Asociación Pro Derechos Humanos*, <http://www.aprodeh.org.pe/index.php/casos-judicializados/ayacucho/86-prueba-de-articulo-en-caso-ayacucho> (last updated Oct. 5, 2016) (providing a case summary).

128. Several of the accused, as well as several family members of the victims, have died during the course of the trial proceedings. *See, e.g.*, Marie Castillo, *Solo quedan 5 procesados en el caso Los Cabitos*, LA REPUBLICA (June 29, 2015), <http://larepublica.pe/impres/politica/11409-solo-quedan-5-procesados-en-el-caso-los-cabitos>; see Jo-Marie Burt & María Rodríguez, *Juicio por el Caso Los Cabitos. Crónicas de las audiencias en Ayacucho (Partes 1 & 2)*, ASUNTOS DEL SUR BLOG (Aug. 27-28, 2012), <http://asuntos.sudwebs.com/blog/tag/jo-marie-burt/> (giving details about the trial).

129. *See* Sala Penal Nacional [National Criminal Chamber], Cesar Augusto Vallejo Cortez, Penal No. 49-2013, Sentencia, enero 27, 2015 [hereinafter *Vallejo Cortez Judgment*].

130. According to the prosecution, Vallejo Cortéz, together with several subordinates, had been drinking at a local establishment in the village, outside their military base. After some hours, Vallejo Cortéz entered the private home of the owner of the establishment, claiming to search the home for material supporting subversive groups, and raped her. To cover up his crime, he accused her of being a

all charges. In its 25-page sentencing judgment, the judges found the accused guilty of all charges, except the rape.<sup>131</sup> While finding that the crimes occurred in the context of serious human rights abuses by the military against the civilian population, the judges found that the rape—unlike the other crimes—was an isolated incident and was not perpetrated pursuant to “systematic orders” from the military, nor in the context of a coordinated military operation.<sup>132</sup> The judges concluded that the rape amounted to an ordinary crime and that therefore the statute of limitations for such crimes applied.<sup>133</sup> An appeal in this case is pending.

Finally, the Peruvian judiciary has not yet addressed other forms of state-sponsored gender-based violence. One example is the mass forced sterilizations program implemented during the Fujimori regime in the 1990s, in which over 200,000 women and 20,000 men—mostly from poor and indigenous backgrounds—were sterilized without their informed consent.<sup>134</sup> Over the years, women’s rights

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*senderista*, and burned down her store. He also ordered his soldiers to open fire on some villagers celebrating a birthday in a neighboring house, also accusing them of being *senderistas*. Several villagers were killed and others injured in this incident. Vallejo Cortéz later reported to his superiors that the Shining Path had perpetrated these crimes. According to the prosecution, to further cover up the crimes, the military later arrested several relatives of the deceased and tortured them, forcing them to sign statements that members of the Shining Path were responsible for the crimes. They also arrested the rape victim and took her to their military base, where they raped her in a bid to silence her. *See id.* at 4-7.

131. *See id.* at 18 (noting the accused was also acquitted of the charge of abuse of authority).

132. *Id.* at 19. The reasoning followed by the judges in dismissing the sexual violence charge in this case is not consistent with international criminal law. To amount to a crime against humanity, it is not the sexual violence per se that must be shown to be widespread or systematic, but rather the attack of which the sexual violence formed part. *See Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Appeals Judgment by Judges Shahabuddeen, Guney, Daqun, Meron and Schomburg, ¶ 102 (July 7, 2006); *see Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Appeals Judgment, ¶ 96 (June 12, 2002).

133. *See Vallejo Cortez Judgment*, *supra* 130, at 23.

134. *See ALEJANDRA BALLÓN, MEMORIAS DEL CASO PERUANO DE ESTERILIZACIÓN FORZADA 32-34* (Alejandra Ballón ed. 2014), <http://bvirtual.bnp.gob.pe/bnp/faces/pdf/esterilizacionforzada/index.html#34>

(arguing that the implementation of the state run sterilization program had a distinct gendered impact because it targeted a significantly higher percentage of females); *see also* Javier Lizaraburu, *Forced sterilization haunts Peruvian women decades on*, BBC NEWS (Dec. 2, 2015), <http://www.bbc.com/news/world-latinamerica34855804> (detailing the timeline of events that led to the investigation

groups have repeatedly called for these crimes to be investigated and prosecuted as crimes against humanity and as genocide, and for Fujimori and his former health ministers to be held accountable for these crimes. In 2014, the Public Prosecution Office closed a pending investigation into these crimes, allegedly due to lack of evidence. The civil parties later filed a complaint against this decision, forcing the Public Prosecution to reopen its investigation.<sup>135</sup> However, in late July 2016, the public prosecutor in charge of the case ruled that Fujimori and his former health ministers would not face charges for their state-run sterilization program, closing the case. The prosecutor indicated that individual medical personnel was responsible for the “isolated” cases of sterilization and recommended that several doctors be charged.<sup>136</sup> The civil parties have filed an appeal against this decision before the Public Prosecution Office.

### C. USING INTERNATIONAL LAW TO PROSECUTE SEXUAL VIOLENCE AS A WAR CRIME AND AS A CRIME AGAINST HUMANITY IN COLOMBIA

In Colombia, crimes of sexual violence have been recognized as war crimes and crimes against humanity under different legal regimes. The Colombian Criminal Code (Law 599 of 2000) expressly lists crimes of sexual violence as war crimes.<sup>137</sup> In addition, Law 1719 of 2014 on Access to Justice for Victims of Sexual Violence—a law aimed at reducing impunity for sexual

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of the sterilizations).

135. See José A. Burneo Labrín, *Esterilización Forzada en el Perú: Delito de Lesa Humanidad, Estudio para la Defensa de los Derechos de la Mujer*, DEMUS (2008), <https://1996pnsrpf2000.files.wordpress.com/2011/07/demus-esterilizacion-3b3n-forzada-en-el-perc3ba-delito-de-lesa-humanidad.pdf>; see also *Peru Reopens Criminal Investigation Into Mass Forced Sterilizations*, CENTER FOR REPRODUCTIVE RIGHTS (May 13, 2015), <http://www.reproductiverights.org/press-room/peru-reopens-criminal-investigation-into-mass-forced-sterilizations>; see also *Mestanza Chávez v Peru*, Case 12.181, Inter-Am. Comm’n H.R., Report No. 71/03, OEA/Ser.L., Friendly Settlement (2003), [http://www.cidh.oas.org/annualrep/2003\\_eng/Peru.12191.htm](http://www.cidh.oas.org/annualrep/2003_eng/Peru.12191.htm).

136. Dan Collins, *Women vow to fight on in Peru after Alberto Fujimori absolved over forced sterilisations*, GUARDIAN (Aug. 3, 2016), [https://www.theguardian.com/global-development/2016/aug/03/women-vow-to-fight-on-in-peru-after-fujimori-absolved-over-forced-sterilisations?CMP=tw\\_t\\_gu](https://www.theguardian.com/global-development/2016/aug/03/women-vow-to-fight-on-in-peru-after-fujimori-absolved-over-forced-sterilisations?CMP=tw_t_gu).

137. 599 C. PEN. título II (2000); see De las Normas Rectoras de la Ley Penal Colombiana, 100 C. PEN. art. 1 (1980) (citing to law that was in force before the adoption of the 2000 Criminal Code).

violence and at guaranteeing the rights of victims—expanded these war crime provisions to include a fuller list of sexual violence crimes.<sup>138</sup> However, the recognition of sexual violence as a crime against humanity has been recent and controversial, and has required a flexible interpretation of the Criminal Code, as this Code does not contain a provision on crimes against humanity.<sup>139</sup> An important amendment introduced by Law 1719 in this respect was the requirement that judges declare that sexual violence amounts to a crime against humanity in their cases when the contextual elements of these crimes are met.<sup>140</sup> For this purpose, these contextual elements are interpreted in accordance with the Rome Statute.<sup>141</sup> Arguably, this imposes an implicit duty on prosecutors to charge sexual violence as a crime against humanity when the elements for these crimes are satisfied.<sup>142</sup> This does not mean that Law 1719 incorporated crimes against humanity into the Criminal Code, nor that an accused person can be convicted for crimes against humanity. Rather, it means that prosecutors must charge crimes under the individual war crimes categories in the Criminal Code and can request that the judge declare that those crimes also amount to crimes against humanity. Colombian courts have accepted this practice and have held that a sexual violence crime perpetrated in the context of

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138. See L. 1719 arts. 2-10, junio 18, 2014, 49 Diario Oficial [D.O.] (Colom.) (introducing the following war crimes: abusive rape on minors under the age of 14; sexual acts with minors under the age of 14; sexual slavery; forced prostitution; trafficking for sexual exploitation; forced sterilization; forced pregnancy; and forced nudity).

139. However, in different sections, the Criminal Code lists certain categories of crimes recognized as crimes against humanity in Article 7 of the Rome Statute, such torture (article 178), murder (article 103), enforced disappearance (article 165), and forced displacement (article 180). None of these provisions require that the crimes must take place in the context of a widespread or systematic attack against a civilian population. See *Delitos contra Personas y Bienes Protegidos por el Derecho Internacional Humanitario*, 599 C. PEN. arts. 103, 165, 178, 180 (2000). *But see* Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (recognizing specific crimes as crimes against humanity).

140. See L. 1719, art. 15.

141. See *id.*

142. Compare L. 1719, art. 15 (stating that prosecutors must prove that the acts were committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack), *with* Rome Statute, art. 7(2)(a) (requiring the attack to be carried out “pursuant to or in furtherance of a State or organizational policy”).

the conflict can amount to both a war crime and a crime against humanity.<sup>143</sup>

To prove that an act of sexual violence amounts to a war crime, Colombian prosecutors must demonstrate that the act of sexual violence was committed against a protected person under international humanitarian law and that it was closely related to the armed conflict.<sup>144</sup> To establish the protected status of victims, prosecutors are required to show that the victims were civilians or persons not taking an active part in the hostilities.<sup>145</sup> Given that sexual violence is prohibited in any circumstance, the Attorney General's Office has acknowledged its duty to investigate cases of sexual violence against any individual, regardless of their status.<sup>146</sup> This is significant because different armed groups have been accused of perpetrating sexual violence against female combatants and child soldiers within their ranks.<sup>147</sup>

To meet the conflict nexus requirement, prosecutors have had to

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143. See Villa Zapata Judgment, *supra* note 60, ¶¶ 754-58; see also Mancuso Judgment, *supra* note 69, ¶¶ 1316-20; see also Peña Tobón Judgment, *supra* note 62, ¶¶ 82-103.

144. Prosecutors are not required to prove that the accused had knowledge of this connection, which is a legal requirement under international criminal law. Proving the existence of an armed conflict is straightforward, as the Supreme Court has declared it a fact of common knowledge. See 2016 Sexual Violence Protocol, *supra* note 67, ¶ 218.

145. See C. PEN. 2000, art. 135 (stating that the category of "protected persons" includes civilians, persons not taking active part in the hostilities, civilians in the power of the opposing side, persons hors de combat, as well as other persons recognized as such in the 1949 IV Geneva Convention and in the 1977 Additional Protocols I and II); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977 art. 4, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (providing fundamental guarantees for persons not taking an active part in the hostilities); see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 75 U.N.T.S. 135 (defining "protected person"); see generally 2016 Sexual Violence Protocol, *supra* note 67, ¶¶ 221-23.

146. In this respect, the Attorney General's Office has recognized that sexual violence is prohibited in all circumstances in armed conflict, regardless of the status of the victims. See Sexual Violence Protocol, *supra* note 67, ¶ 223; see also Arroyo Ojeda Judgment, *supra* note 76, 567 (indicating that, on the basis of the evidence, the prosecution should have charged the rape of a girl child soldier by a member of her own armed group).

147. See Luis Andrés Fajardo Arturo & Rosa Yineth Valoyes Valoyes, *Violencia Sexual como Crimen Internacional Perpetrado por las FARC* 18 (2015).

accurately contextualize the crimes and make the connection between the crime and the broader context of violence in which it took place. The *Niño Balaguera et al* case illustrates the importance of viewing the crimes in context.<sup>148</sup> The case concerned two former members of the paramilitary group known as the Black Eagles. They were accused of abducting, raping and torturing a woman, after murdering members of her family. In its November 2014 decision on appeal, the Supreme Court's Criminal Chamber overturned a ruling from a lower court that had failed to find that the crimes amounted to war crimes.<sup>149</sup> The Chamber examined the broader context of violence in which the crimes occurred to establish the conflict nexus requirement. Following the jurisprudence of the *ad hoc* international criminal tribunals, the Chamber found that the armed conflict played a substantial part in the perpetrators' ability to commit the crimes,<sup>150</sup> in their decision to commit the crimes,<sup>151</sup> in the manner in which these were perpetrated<sup>152</sup> and in the purpose of the violence.<sup>153</sup> It concluded that the prosecution had correctly charged the crimes as war crimes, and convicted both accused for these crimes, increasing their sentences.

To establish the contextual elements for both war crimes and crimes against humanity, prosecutors have focused on cases in which they are able to demonstrate the existence of a pattern of violence

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148. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, noviembre 12, 2014, M.P: F. Caballero, Radicación No. 39392, 19 (Colom.).

149. *See id.* at 5 (concluding that the prosecution had incorrectly charged the crimes as war crimes rather than as ordinary crimes, and basing its decision on the fact that the victim and her family were not directly engaged in the hostilities at the time of the crimes, reasoning that they were therefore not protected persons).

150. *See id.* at 56-57 (finding that their membership in the paramilitary group had allowed the perpetrators to commit the crimes, as the paramilitary group exercised control over the region where the crimes were perpetrated and over the civilian population, including the women).

151. *See id.* at 55-56. Due to the conflict, the perpetrators were in a position of power over the victim; this factor was decisive in their ability to carry out the crimes.

152. *See id.* at 59. The accused perpetrated the acts of sexual violence on the victim after murdering members of her family. Given the coercive circumstances surrounding the sexual violence, the victim was unable to consent to these acts.

153. *See id.* at 56-57. The perpetrators acted pursuant to an order of a superior to intimidate the family of the victim. The accused took advantage of this situation to kidnap, torture and rape the victim.

and show that charged incidents of sexual violence are connected to the broader context of violence. Documenting patterns of violence has assisted prosecutors in identifying: the contexts in which the violence is committed; the manner in which the crimes were perpetrated; the connections between sexual violence and other human rights violations; the categories of victims; and the perpetrator groups.<sup>154</sup>

With regard to certain acts of sexual violence as war crimes,<sup>155</sup> prosecutors are required to prove the violent nature of the act in order to show that the victim was incapable of genuinely consenting. Recent reforms have recognized that the violent nature of the sexual act can be established by the surrounding coercive circumstances. Specifically, Law 1719 defines the notion of “violence” in similar terms to the ICC’s definition of coercion in the context of rape.<sup>156</sup> Applying international standards, Law 1719 also states that consent cannot be inferred by reason of any words or conduct of a victim—where this consent is not voluntary and free—nor by reason of the silence or lack of resistance by a victim.<sup>157</sup> In the case of children

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154. See 2016 Sexual Violence Protocol, *supra* note 67, ¶¶ 57, 59-60 (highlighting the importance of contextualizing sexual violence to accurately characterize the crimes and to link the crimes to senior accused, and recommending that prosecutors move away from conducting single-incident investigations and focus on documenting patterns of violence); see also Vanoy Murillo Judgment, *supra* note 69, at 1262-64 (finding that the patterns of violence in the case demonstrate the contextual elements for war crimes and crimes against humanity).

155. See C. PEN. 2000, arts. 138-41 (defining different war crime categories of sexual violence which require proof of violence: rape (art. 138), sexual slavery (art. 141A), forced sterilization (art. 139B), forced nudity (art. 139D), and forced abortion (art. 139E)).

156. L. 1719, art. 11 (defining “violence” as: “the use of force; threat of force; physical or psychological coercion, such as that caused by fear of violence; duress; illegal detention; psychological oppression; abuse of power; taking advantage of a coercive environment or similar circumstances that prevent that the victim gives genuine consent.”); see Rules of Procedure and Evidence of the International Criminal Court rs. 70-72, 2005, ICC-PIDS-LT-02-002/13\_Eng [hereinafter ICC Rules of Procedure and Evidence] (stating that consent cannot be inferred through coercion); see also 2016 Sexual Violence Protocol, *supra* note 67, ¶ 231.

157. See L. 1719, art. 18; see also Corte Constitucional [C.C.] [Constitutional Court], mayo 2, 2015, Sentencia T-453/05, M.P.: M. J. Cepeda Espinosa, ¶ 6.3, Gaceta de la Corte Constitucional [G.C.C] (Colom.) [hereinafter Orejana Troya Judgment] (holding that consent cannot be inferred from the prior sexual conduct of the victim).

under the age of 14, the law contains war crime provisions of statutory rape and of sexual acts on minors under the age of 14, as it is assumed that a child cannot consent to sexual conduct.<sup>158</sup> This reinforced protection is important in the Colombian context, as children have been particularly vulnerable to sexual violence by armed actors.<sup>159</sup>

As in the case of Peru, the application of the principle of legality has been an issue in dealing with past violations in Colombia. The 2000 Criminal Code entered into force in July 2001 and, strictly speaking, cannot be applied to crimes committed before that period. However, in some cases dealing with crimes of non-sexual nature, such as killings of civilians, courts have adopted a flexible interpretation of the principle of legality.<sup>160</sup> They have held that criminal conduct can be characterized as an international crime—for example as murder on protected person—provided that the violation in question constitutes an infringement of a rule of international

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158. See C. PEN. 2000, arts. 138-39 (defining crimes of rape on protected person under 14 years of age (art. 138A) and sexual acts on protected person under 14 years of age (art.139A)); see also Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, septiembre 26, 2000, M.P: F. Ripoll, Proceso No. 13466, 3-5, (Colom.) (holding that non-consent is inferred in cases of sexual violence against minors); see also 2016 Sexual Violence Protocol, *supra* note 67, ¶ 234 (providing a more detailed analysis).

159. See Auto 009, ¶¶ 3-3.2.2 *But see* C. PEN. 2000, art. 162. With regard to sexual violence against child soldiers, it should be noted that the Criminal Code contains a prohibition on the recruitment by armed groups of children under the age of 18 (art.162). However, the statutory rape provision only applies to those under the age of 14.

160. This rule must be contained within a treaty ratified by Colombia in force at the time of the crimes. However, the sentence applied to the crime must be that set out in the criminal provisions in force at the time of its commission. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, mayo 15, 2010, Radicación No. 33118, at 25-30 (Colom.) [hereinafter Cesar Pérez García]; Arroyo Ojeda Judgment, *supra* note 76, at 331; Tribunal Superior de Bogotá [Superior Tribunal of Bogotá], Sala de Justicia y Paz, 110016000253200680281, Sentencia, December 2, 2010, ¶¶ 188, 198-202 [hereinafter Laverde Zapata Judgment]; Vanoy Murillo Judgment, *supra* note 69, at 232; Tribunal Superior del Distrito Judicial de Bogota [T. Sup.] [Superior Tribunal Court of the District of Bogota], Sala de Justicia y Paz, agosto 1, 2014, Radicación 11-001-60-002253-2008-83201, at 16 (Colom.) [hereinafter Pestaña Coronado Judgement]; Tribunal Superior del Distrito Judicial de Bogota [T. Sup.] [Superior Tribunal Court of the District of Bogota], Sala de Justicia y Paz, julio 30, 2012, Radicación 110016000253200682222, at 136-37, 165 (Colom.) [hereinafter Giraldo Paniagua Judgment ].



humanitarian law binding on Colombia.<sup>161</sup> This interpretation is grounded on Articles 93 and 94 of the 1991 Colombian Constitution, which establish the primacy of international human rights treaties over the domestic legal order. Crimes can therefore be adjudicated as international crimes even if they were not recognized as such in the domestic law in force when the crimes were committed. There is at least one precedent, the November 2014 *Mancuso et al* case discussed below, where the accused were found guilty for the crimes of rape and sexual slavery as war crimes although the crimes were committed before this conduct was characterized as a war crime in domestic law.<sup>162</sup>

The application of the principle of legality can become an issue in relation to the new war crimes provisions introduced by Law 1719, as this law entered into force in June 2014 and does not provide for its retroactive application. The retroactive application of these new provisions will require a progressive interpretation of the prohibition against sexual violence under international law applicable to Colombia.

In relation to different categories of crimes, courts in other Latin American countries have developed similar expansive interpretations of the principle of legality.<sup>163</sup> They have recognized the importance

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161. *Id.*

162. However, the tribunal did not provide reasons regarding the legal characterization of these crimes as war crimes. *See Mancuso Judgment, supra* note 69, ¶¶ 2142-45, 2177-85, 2192-95, 2202-05, 2215-26, 2250-60, 8651-54, 8686-88; *see also* Camila Alejandra Hoyos Pulido & Maria Adelaida Palacio Puerta, APORTES DE LAS SENTENCIAS DE JUSTICIA Y PAZ A LOS DERECHOS DE LAS MUJERES 38-40, 73-76 (Corporación Humanas, 2015) (providing an analysis of this decision).

163. *See* Tribunal Oral en lo Criminal Federal No. 1 de la Plata [Federal Criminal Oral Tribunal No. 1 of La Plata], 19/9/2006, “Sentencia contra Etchocolatz por crímenes contra la humanidad” (Arg.), at 206-209 (finding that crimes in the case amount to crimes against humanity under international law, which has primacy over domestic law); *see also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], diciembre 13, 2006, “Caso Molco,” Rol de la causa: 559-2004, criminal, Estudios Constitucionales [E.S.] p. 533, ¶ 16-17 (Chile) (stating that it is sufficient for international crimes to be recognized under international customary law at the time of their perpetration to entail criminal liability); Fujimori Judgment, *supra* note 108, ¶¶ 711, 714, 717; *see also* Juez Penal 19° Turno [Criminal Court 19°], marzo 26, 2009, “Gavazzo Pereira, José Nino. Arab Fernandez, José Ricardo – Un Delito de Privación de Libertad,” Ficha 98-247/2006, ¶ 8 (Uruguay) [hereinafter Gavazzo Pereira Judgment] (finding that while domestic law does not

of examining gross human rights abuses through the lens of international law,<sup>164</sup> and have taken into account the jurisprudence of international criminal tribunals in their assessment of crimes.<sup>165</sup>

#### D. PROSECUTING SEXUAL VIOLENCE AS GENOCIDE IN GUATEMALA

Sexual violence has been prosecuted as genocide in Guatemala. As noted above,<sup>166</sup> in 2013, the High Risk Tribunal “A” found former president Ríos Montt guilty for the genocide of the Mayan Ixil population in various communities in 1982-1983. Although the Constitutional Court overturned this judgment a few days after it was issued, and the future of the case is currently uncertain, it remains an important precedent.

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recognize the crimes of torture and enforced disappearance, the criminality and punishability of these acts can be determined by international law).

164. For example, in Argentina, courts have recognized the importance of examining grave human rights abuses from the perspective of crimes against humanity because they violate fundamental values of humanity. In the *Julio Simón et al* case, in declaring the unconstitutionality of the Final Stop and Due Obedience Laws –which prevented prosecutions for human rights abuses during the military regime, federal judge Cavallo held that: “the facts must be judged incorporating in the legal analysis those rules that the international community has developed in their respect, without which it would not be possible to assess the facts in their full dimension” and that “analyzing the facts exclusively from the perspective of the Criminal Code would mean ignoring or putting aside a legal toolkit developed by the consensus of nations especially for cases of extreme gravity as the present case. It would be a valid legal analysis, but, undoubtedly, partial or insufficient.” (unofficial translation). See Juzgado Nacional en lo Criminal y Correccional Federal 4 [Federal Criminal and Correctional Court No. 4], 6/3/2001, “Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años,” 19, Biblioteca de los Derechos Humanos de la Universidad de Minnesota (Arg.).

165. See, e.g., Court Criminal Federal de Santiago del Estero [Federal Criminal Court of Santiago del Estero], 03/05/2013, “Aliandro, Juana Agustine et al., re enforced disappearances, breaking and entering, and unlawful imprisonment,” Case No. 960/11, 11-12, 137-38, 199, 224 (Arg.) (examining the recognition of sexual violence crimes as crimes against humanity in ICTY jurisprudence); see Corte Federal de Tucumán [Federal Court of Tucuman], Judgment, 19/05/2011, “Fernández Juárez, María Lilia y Herrera, and Gustavo Enrique, re: unlawful imprisonment” (Villa Urquiza Prison), 43 (Arg.) (analyzing the elements of the crime of rape in ICTY and ICTR jurisprudence) (Argentina); see also Cámara Federal de Casación Penal [Federal Court of Criminal Appeals], 17/02/2012, “Case against Molina, Gregorio,” Case No. 12821, 66–69, 74 (Arg.) (discussing the chapeau requirements of crimes against humanity articulated in ICTY jurisprudence) (Argentina).

166. See discussion *infra* Section II (D).

Relying on Article 376 of the Guatemalan Criminal Code, which defines the crime of genocide, the prosecution put forward charges of sexual violence as genocide by linking these crimes to a range of other violent acts carried out by Guatemalan military forces against the Mayan Ixil community.<sup>167</sup> It argued that sexual violence had been one of the destructive means, together with other forms of violence, used by the military to inflict serious bodily and mental harm on this community.<sup>168</sup> It also argued that, in the same manner as the other violent acts, the infliction of sexual violence had a destructive impact on the community and was carried out with the intent to destroy the community.<sup>169</sup>

In its judgment, the tribunal found that the genocidal acts perpetrated by government forces took various forms, including killings, enforced disappearances, sexual violence against women and girls, torture, cruel and inhumane treatment, destruction of crops to induce starvation, and razing of civilian villages.<sup>170</sup> The objective of this campaign was to eliminate the Mayan Ixil population, considered by the government to be the support base of the guerrilla and the internal enemy of the state.<sup>171</sup> When assessing whether sexual violence formed part of the genocidal campaign, the tribunal reasoned that the crimes were carried out for a destructive purpose and targeted not only individual victims, but also the community: government forces systematically targeted Mayan Ixil women through rape and sexual slavery because they intended to destroy the

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167. See Human Rights Prosecution Office, Unit of Special Cases related to the Conflict, Indictment, Exp. MP001/2010/23251, C-01076-2011-00015, 27 March 2012 [hereinafter “Ríos Montt Indictment”], Sections II.A (underlying acts of genocide) & IV (legal characterization and forms of responsibility) (relying on the jurisprudence of the international *ad hoc* tribunals, the prosecution also charged sexual violence as a form of torture under Article 378); see also Ríos Montt Indictment, A.2.2 (crimes of sexual violence and torture against women).

168. Ríos Montt Indictment, Section II.A.2 (infliction of serious bodily and mental harm on the members of the ethnic Mayan Ixil group); Ríos Montt Judgment, *supra* note 27, at 9-11, 49-50, 68-71, 87-88.

169. Ríos Montt Indictment, *supra* note 168, at Section II.A.2.a (harm through sexual violence); Ríos Montt Judgment, *supra* note 27, at 27-28, 34-35, 47, 71-73, 89-92.

170. Ríos Montt Judgment, *supra* note 27, at 108, 111, 113-14, 130, 137, 138, 140, 141-43, 683-84, 688-89, 699.

171. *Id.*, at 103, 107-09.

fabric of the community.<sup>172</sup> The tribunal acknowledged the intergenerational effect of sexual violence, as the women had the important role of passing on life, culture and traditions within the community.<sup>173</sup> By targeting the women, these forces sought to destroy the entire community.<sup>174</sup> In relation to Ríos Montt's role in this campaign, the tribunal found that, as the then de facto president, he was directly involved in designing and implementing a series of military operations which provided the framework for the counterinsurgency campaign that led to the genocide.<sup>175</sup> He had also failed to prevent or punish the crimes. The tribunal found that he had the required knowledge<sup>176</sup> and intent<sup>177</sup> to be held accountable for the crimes. Finally, the tribunal affirmed that acknowledging the truth about these crimes strengthened the rule of law and contributed to their non-repetition.<sup>178</sup>

This judgment represents an important recognition of the role and purpose of sexual violence in the Guatemalan conflict. It also laid the groundwork for future prosecutions by providing a broader understanding of the conflict that includes the experiences of women.

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172. *Id.*, at 131-34, 141-42, 689-90 (finding that the rapes and mutilations caused terror and physical and cultural destruction with the objective of eliminating the Maya Ixil ethnic group and noting that the military and operational plans indicated that the troops should have sexual access to Mayan women as "war booty").

173. *Id.*, at 132-34, 142, 689-91 (finding that the killing of fetuses by soldiers supported its finding of intent to commit genocide, as unborn children were considered "a seed that must be destroyed").

174. *Id.*, at 141-42, 690-91.

175. Under Ríos Montt's command, the Guatemalan army designed and carried out a series of military operations, including code-named Victoria 82, Firmeza 83, Sofia and Operation Ixil. Ríos Montt also authorized and implemented military and operational plans, and ordered the development of the National Plan for Security and Development (Plan Nacional de Seguridad y Desarrollo) and the Fundamental Statute of the State (Estatuto Fundamental de Gobierno). *Id.* at 104, 107-10, 694-706.

176. *Ríos Montt Judgment*, *supra* note 27, at 105-7, 110, 694-95, 699-703 (relying on military expert witnesses, among other sources, to find that, as the de facto head of state, Ríos Montt knew or should have known about the crimes).

177. *Id.*, at 111-12, 697, 699-700.

178. *Id.*, at 707.

#### E. ESTABLISHING LIABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE

In the case study countries, conflict-related prosecutions have primarily targeted physical perpetrators and low-level accused. However, in recent years, there has been a greater focus on prosecuting senior-level leaders who were not direct perpetrators, but who led, devised policies, ordered, or tolerated crimes.<sup>179</sup> The cases against senior leadership have forced legal practitioners to confront the common misconception that only physical perpetrators can be held accountable for sexual violence.<sup>180</sup> These cases have also underscored the importance of pursuing the criminal liability of a broad range of individuals whose responsibility can be established, instead of focusing exclusively on the physical perpetrators.

When sexual violence is perpetrated in the context of gross human rights abuses and conflict, a challenge practitioners face is to obtain evidence on the identification of physical perpetrators. This can prove difficult because the victims and witnesses may not know the identity of those who committed the crimes. The traumatic nature of the events, the passage of time and the specific circumstances surrounding the crimes can also impact a victim's ability to identify the perpetrators. For these reasons, requiring a victim to provide precise information on the identity of the physical perpetrators before acting on a complaint, as well as failing to take into account the liability of other persons involved in the crimes, can result in a denial

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179. In 2012, the Colombian Attorney General's Office adopted a directive for the prioritization of conflict-related crimes. Among other things, it instructs prosecutors to focus on those bearing the greatest responsibility for serious violations of international humanitarian law. When interpreting the legality of this directive, the Constitutional Court examined the term "those bearing the greatest responsibility" in light of the practice of international and hybrid tribunals, and held that while the Attorney General's directive focuses on prosecuting those in leadership positions, it does not imply that those who are not at that level do not bear any responsibility and cannot be pursued. *See* Directiva 001, Fiscalía General de la Nación [Attorney General's Office], 10/04/2012, (Colom.); *see also* Corte Constitucional [Constitutional Court], Aug. 28, 2012, Sentencia C-579/13, ¶ 8.2.3, (Colom.).

180. 2016 Sexual Violence Protocol, *supra* note 67, ¶ 242 (recognizing that this misconception among prosecutors and investigators—that only direct perpetrators can be pursued for crimes of sexual violence—has significantly impeded accountability for these crimes).

of justice.<sup>181</sup>

The Peruvian case of MMB illustrates this point.<sup>182</sup> In October 1992, members of the First Division of Military Special Forces kidnapped MMB, then a 19-year-old student.<sup>183</sup> They accused her of belonging to the Shining Path, beating and repeatedly raping her.<sup>184</sup> To get her to confess to certain activities, her captors threatened her and her family. She eventually confessed and was sentenced to 15 years for terrorism.<sup>185</sup> As a result of the rapes, she became pregnant and gave birth to a child in prison.<sup>186</sup>

MMB consistently maintained that members of the Peruvian army had subjected her to physical and psychological torture, including rape, in detention.<sup>187</sup> After making this complaint to the director of Chorrillos Prison, where she held on charges of terrorism, her case was referred to the Public Prosecutor for investigation.<sup>188</sup> The Public Prosecutor found that the crime of rape had been established, noting that it was corroborated by a contemporaneous medical report.<sup>189</sup> However, the prosecutor later shelved the case because “it was not possible to fully identify the suspects of this crime [. . .] one of the elements of procedural due process, namely, the individualization of the author or authors of the crime committed, is lacking. . .”<sup>190</sup> Military authorities later also investigated MMB’s allegations, but dismissed the case due to lack of forensic evidence regarding the

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181. See, e.g., Diana Guarnizo Peralta, Fourth Follow-Up Report to Auto 092 of the Colombian Constitutional Court (2011) 38 (noting that in 2012, the Colombian Inspector General’s Office reported that complaints of sexual violence victims were often refused due to lack of information on the identity of the perpetrator).

182. In criminal cases in Peru, victims of sexual violence are referred to by a pseudonym in order to protect their identity from the public. See Julieta Lemaitre, *Violence*, in 24 GENDER AND SEXUALITY IN LATIN AMERICA – CASES AND DECISIONS 192-94 (Cristina Motta & Marcarena Saez eds., 2013) (providing a summary of the procedural background to the case).

183. BOESTEN, *supra* note 4, at 112.

184. CVR Final Report, *supra* note 11, Vol. VI, Ch. 1.5, 321.

185. See, e.g., *id.* at 379; see BOESTEN, *supra* note 4, at 112.

186. CVR Final Report, *supra* note 11, Vol. VI, Ch. 1.5, 382.

187. LEMAITRE, *supra* note 182, at 193.

188. *Id.* at 380.

189. LEMAITRE, *supra* note 182, at 193 (quoting the medical report, which confirmed that “the prisoner filing the complaint is pregnant and, that as a result of these acts, has conceived a child[.]”).

190. LEMAITRE, *supra* note 182, at 193-94; see also CVR Final Report, *supra* note 11, Vol. VI, Ch. 1.5, 380.

alleged rapes.<sup>191</sup> She was eventually cleared of all terrorism charges and released.<sup>192</sup> When the CVR investigated this case, it found that MMB had been illegally detained and subjected to torture while in detention, and it called for a full investigation into these events by the competent judicial authorities.<sup>193</sup>

More than twenty years later, MMB is still seeking justice for these crimes. After numerous delays,<sup>194</sup> the Public Prosecution opened an investigation into these crimes and eventually charged several senior members of the Peruvian military with the crimes of aggravated abduction and torture as crimes against humanity.<sup>195</sup> In 2014, the trial against these accused began before a criminal tribunal in Lima.<sup>196</sup> The case is now in its final phase and is focused on establishing the responsibility not only of the physical perpetrators but also of those running the detention center where MMB was illegally detained and tortured.<sup>197</sup>

In the case study countries, legal practitioners use different legal

191. CVR Final Report, *supra* note 11, Vol. VI, Ch. 1.5, 380-81. Since the Military Justice Code in force at the time did not include the crime of rape, the military tribunal initiated an investigation for abuse of authority by military personnel. *See* LEMAITRE, *supra* note 182, at 193-94 (quoting the Examining Judge's decision "that there is no proven criminal responsibility of military personnel of the Special Forces Division," and basing his decision on the fact that a forensic report of the victim did not reveal any physical signs of the alleged rapes).

192. *See, e.g.*, CVR Final Report, *supra* note 11, Vol. VI, Ch. 1.5, 383; *see* Rosario Aronés C., *Abren Juicio a diez militares por ultrajar a una mujer en calabozo*, EL POPULAR (June 13, 2014, 5:00 AM), <http://www.elpopular.pe/actualidad-y-policiales/2014-06-13-abren-juicio-diez-militares-por-ultrajar-una-mujer-en-calabozo>.

193. CVR Final Report, *supra* note 11, Vol. VI, Ch. 1.5, 383-84.

194. *E.g.*, BOESTEN, *supra* note 4, at 112-13 (explaining the delays in the investigation of the case and the challenges faced by MMB in seeking justice); *see* Defensoría del Pueblo, *El Estado frente a las víctimas de la violencia. Hacia dónde vamos en políticas de reparación y justicia?*, Informe Defensorial, N. 128, 160-61 (2007); *see also* Salazar Luzula, *supra* note 45, 64-67 (discussing the general obstacles this case, as well as those in other similar cases of sexual violence).

195. Among other things, the accused have argued that these charges should be dismissed because in 1992, crimes against humanity were not included in the criminal code.

196. Aronés C., *supra* note 192; *see* *Caso de María Magdalena Monteza Benavides*, INSTITUTO DE DEMOCRACIA Y DERECHOS HUMANOS (1992), <http://idehpucp.pucp.edu.pe/comunicaciones/notas-informativas/caso-de-maria-magdalenamonteza-benavides-1992> (summarizing the case).

197. Aronés C., *supra* note 193.

frameworks to reflect the liability of senior leadership in sexual violence cases. In Colombia, co-perpetration and indirect perpetration are two modes of liability used in cases against senior leadership.<sup>198</sup> Co-perpetration requires proving that a plurality of persons pursue a common criminal plan, and significantly contribute to this plan while sharing the intent for the crimes to be committed.<sup>199</sup> The accused are not required to have physically committed the act of sexual violence to be held liable as co-perpetrators, but need to have significantly contributed to its commission.<sup>200</sup> Indirect perpetration refers to the commission of a crime through another person<sup>201</sup> and focuses on establishing the liability of “the perpetrator behind the perpetrator”.<sup>202</sup> As in other Latin American countries,<sup>203</sup> in recent years, Colombian prosecutors have used indirect perpetration through organized structures of power to link crimes of subordinates to senior leaders. The underlying rationale of this mode of liability as

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198. See, e.g., 2016 Sexual Violence Protocol, *supra* note 67, ¶243; see 599 C. PEN. Título II, art. 29 (2000).

199. 2016 Sexual Violence Protocol, *supra* note 67, ¶243(b).

200. *Id.*

201. See C. PEN., art. 29.

202. In Colombia, this mode of liability has been developed on the basis of the legal doctrine originally developed by German jurist Claus Roxin. To establish liability on the basis of indirect perpetration requires showing the existence of a criminal organization, the control and authority exercised by accused over the criminal organization, the subordinates' compliance with the orders of the accused, and the fungibility of the direct perpetrators. It also requires showing that the accused intended the commission of the crimes. The leader must use his/her control over the criminal organization to execute crimes, and must mobilize his/her authority and power within the organization to ensure the commission of these crimes. See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, febrero 23, 2010, No. 32805, 77-78 [hereinafter García Romero Judgment]; see Tribunal Superior de Bogotá [Superior Tribunal of Bogotá], Sala de Justicia y Paz, Rad. 11-001-60-00 253-2006 810099, Hébert Veloza García, Oct. 30, 2013, ¶ 847-48, 859; see also Villa Zapata Judgment, *supra* note 60, ¶¶ 303-04; see also generally Prosecutor v. Katanga, ICC-01/04-01/07, Decision on confirmation of charges, ¶ 495-518 (Sep. 30, 2008), [http://www.worldcourts.com/icc/eng/decisions/2008.03.10\\_Prosecutor\\_v\\_Katanga2.pdf](http://www.worldcourts.com/icc/eng/decisions/2008.03.10_Prosecutor_v_Katanga2.pdf) (applying the indirect perpetration method at the ICC); see also HÉCTOR OLÁSULO ALONSO, TRATADO DE AUTORÍA Y PARTICIPACIÓN EN DERECHO PENAL INTERNACIONAL 300 (2013).

203. See, e.g., Tribunal Oral en lo Criminal Federal No. 1 de la Plata [Federal Criminal Oral Tribunal No. 1 of La Plata], ‘Camps Circuit’ and others (Miguel Osvaldo Etchecolatz), Case No. 2251/06, septiembre 19, 2006, 200-03 (Argentina); see Gavazzo Pereira Judgment, *supra* note 163, ¶ 6; see also Fujimori Judgment, *supra* note 108, ¶¶ 723-48.



applied in Colombian jurisprudence is that the perpetrator behind the direct perpetrator is responsible because he/she controls the organization that carries out the crimes and uses his/her authority and power over this organization to secure the commission of the crimes. The leadership of the criminal organization is therefore liable as the principal, rather than as an accessory.

Several cases prosecuted under the transitional justice system have applied indirect perpetration to connect senior-level accused to crimes of sexual violence by subordinates.<sup>204</sup> For example, in both the *Villa Zapata et al* and *Mancuso et al* cases, the Superior Tribunal of Bogotá applied indirect perpetration through organized structures of powers to hold paramilitary leaders accountable for sexual violence by subordinates for making use of the organization they controlled to commit the crimes.<sup>205</sup> The *Villa Zapata et al* case concerns crimes perpetrated by the *Bloque Vencedores de Arauca* of the AUC in the Arauca region, in northern Colombia. Among other criminal acts, this armed group perpetrated different forms of sexual and gender-based violence against women and girls, both within their ranks and against civilians.<sup>206</sup> The accused were eight members of this armed group. Orlando Villa Zapata, one of the commanders of this group, was found guilty as an indirect perpetrator for crimes committed by his subordinates. The tribunal found that in his leadership role, he issued orders and designed, promoted and implemented policies of violence and terror against civilians that led to the crimes, including the sexual violence.<sup>207</sup> The *Mancuso et al*

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204. See, e.g., *Villa Zapata Judgment*, *supra* note 60; *Mancuso Judgment*, *supra* note 69; *Triana Mahecha Judgment*, *supra* note 67; *Fierro Flores Judgment*, *supra* note 76.

205. As noted above, convictions in the transitional justice system are based on admissions of guilt by the accused.

206. See *Villa Zapata Judgment*, *supra* note 60, ¶¶ 784-93, 881-904, 907-08, 913, 918-20, 922, 924-28, 930-39 (containing an extensive analysis of gender-based violence in conflict); see also *Villa Zapata Judgment*, *supra* note 60, at ¶¶ 583-635, 758-61 (examining the crimes of femicide and enforced disappearance based on gender); see also *Villa Zapata Judgment*, *supra* note 60, ¶¶ 680-717, 782-89 (examining the treatment of sexual and gender-based violence in international humanitarian, human rights and criminal law); see generally *Villa Zapata Judgment*, *supra* note 60, ¶¶ 566-82 (referring to the different forms of sexual and gender-based violence in conflict).

207. *Villa Zapata Judgment*, *supra* note 60, ¶¶ 414-18, 423-24 (referring to the elements of indirect perpetration under Colombian jurisprudence); *Villa Zapata*

case concerned twelve senior members of the AUC charged with crimes perpetrated by this paramilitary group in eight regions of Colombia. These crimes included 175 incidents of sexual and gender-based violence against both female and male victims.<sup>208</sup> The tribunal found that the AUC used different criminal means to gain territorial control and strategic advantages, and to impose their rule upon the local population.<sup>209</sup> In particular, they used sexual and gender-based violence to sow terror, inflict revenge on adversaries, exploit victims, and destroy the social fabric of communities.<sup>210</sup> Salvatore Mancuso, one of the top leaders of the AUC,<sup>211</sup> was found guilty for these crimes because, in his leadership role, he issued and implemented policies that resulted in these crimes.<sup>212</sup>

In Peru, prosecutors have also relied on indirect perpetration as a mode of liability to hold senior-level leaders accountable for crimes of subordinates.<sup>213</sup> In the *Chumbivilcas, Los Cabitos* and *Manta and*

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Judgment, *supra* note 60, ¶¶ 440-67, 879, 886, 911, 923, 933, 942 (examining Villa Zapata's responsibility as an indirect perpetrator based on his leadership role in the paramilitary group and his role in issuing orders to further the criminal goals of this armed group); Villa Zapata Judgment, *supra* note 60, ¶¶ 459-61 (finding that Villa Zapata had knowledge that some of his subordinates were perpetrating sexual violence as these crimes were of common knowledge); see OLÁSULO ALONSO, *supra* note 202, at 288 (indicating that in Colombian jurisprudence, to incur liability as an indirect perpetrator in the context of a campaign of mass atrocities, it is not required to show that the senior-level leader issued precise orders to his/her subordinates to commit the crimes; it is sufficient to show that he/she provided general instructions or guidelines regarding the implementation of this campaign, for example by identifying the targeted population of this violence).

208. See Mancuso Judgment, *supra* note 69, ¶¶ 112, 1306, 2147-2958 (including the crimes of rape, sexual slavery, torture and forced abortion).

209. *Id.* ¶¶ 412, 574.

210. *Id.* ¶¶ 412, 1290-1306.

211. *Id.*, 121, 125, 133. In 2008, Mancuso and other paramilitary leaders were extradited to the US to face drug trafficking charges. He is currently serving a 15-year sentence at a US prison. He has participated in transitional justice proceedings in Colombia via video link.

212. *Id.* ¶¶ 1450-51, 8587-91, 8593, 8652 (adding that he failed to exercise control over his subordinates to prevent the crimes, but failing to explain why he was held liable as an indirect perpetrator for his failure to act); Fierro Flores Judgment, *supra* note 76, ¶ 647 (convicting the accused, a paramilitary commander, as an indirect perpetrator for the crime of rape for failing to exercise control over one of his subordinates to prevent crimes, and finding that, rather than disciplining the perpetrator, Fierro Flores kept him within the ranks of his armed group despite his criminal propensity and drug consumption).

213. See, e.g., Fujimori Judgment, *supra* note 108, ¶¶ 723-48 (discussing the

*Vilca* cases mentioned above, prosecutors have brought charges against senior military leaders on the basis of indirect perpetration.<sup>214</sup> For example, in the revised indictment in the *Chumbivilcas* case, one of the accused, Jaime Pando Navarrete, former commander of the military base in Antabamba, was charged as an indirect perpetrator through organized structures of power for the crimes of enforced disappearance, serious bodily harm resulting in death, sexual violence and murder. He exercised his authority over the military personnel at this base and, in this position of authority, he planned, organized, issued directives and implemented counterinsurgency programs that led to the commission of the crimes by his subordinates.<sup>215</sup> As noted above, these trials have not yet been completed.

There has been a tendency among Peruvian prosecutors to apply indirect perpetration in cases involving persons in positions of leadership without adequately establishing the required connections between the crimes and the accused (for example without establishing the link between the physical perpetrators and the senior leader). Also, in some cases, courts have applied more stringent standards, for instance by requiring evidence of orders by the accused to the perpetrators to commit crimes.<sup>216</sup> Clear evidentiary and legal strategies are needed to ensure that the evidence adduced against senior leaders is capable of satisfying the mode of liability charged.

In both Peru and Colombia, accused persons can be held liable for

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application of the indirect perpetration as a mode of liability in Peru); see C. PEN. art. 23 [Peru] (addresses indirect perpetration in the following language: “Any person who carries out the punishable act, by himself or through another, and those who commit it jointly. . .”); see also Aimee Sullivan, *The Judgment Against Fujimori for Human Rights Violations*, 25 AM. U. INT’L L. REV. 4, 678-80 (2010) (explaining the findings in the *Fujimori* case regarding his liability as an indirect perpetrator).

214. These cases also include charges of commission against the physical perpetrators of the crimes.

215. Fiscalía Superior Nacional [National Prosecution Office], Exp. No. 037-2008, Resolución de ampliación de acusación, 2 septiembre 2013, 6-13.

216. See, e.g., Sala Penal Nacional [National Criminal Chamber], Adrián Roman Fernandez y César Eduardo Espejo Lopez, Exp. No. 40-2013-0-5001-SP-PE-01, Sentencia, enero 19, 2016 (acquitting two military officers of the charges of aggravated murder and enforced disappearance as indirect perpetrators due to the absence of evidence of orders to commit the crimes).

their omissions if their active involvement in the crimes cannot be proved.<sup>217</sup> This liability is grounded on the duty of political and military leaders to act to protect an endangered legal interest (for example to protect the civilian population), their ability to act, and their failure to do so. The criminal codes in these countries do not recognize command responsibility, which is a specific form of omission liability and, under international customary law, can be applied where a superior failed to prevent or punish crimes committed by subordinates.<sup>218</sup> More progressive approaches to interpreting omission liability are required so that the full extent of the responsibility of senior leaders is reflected in the cases under investigation.

Finally, in Guatemala, the criminal code recognizes two broad categories of liability: commission and accomplice liability.<sup>219</sup> Article 36 sets out the different forms of commission. Command responsibility—as defined in international law—is not explicitly incorporated in the Guatemalan Criminal Code.

In the *Sepur Zarco* case, both accused were found guilty for commission under Article 36, for their acts and omissions. In relation

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217. See, e.g., Corte Suprema de Justicia [Supreme Court of Justice], Corregimiento La Gabarra, Recurso de Casación, Radicación 24448, MP. A. J. Ibáñez Guzmán, septiembre 12, 2007, Section II (Colom.) (finding the accused had the duty to protect the civilian population of La Gabarra but failed to prevent the paramilitary attack on this locality despite having the ability to do so); see Corte Constitucional [Constitutional Court], Sentencia SU-1184 de 2001, M.P. E. Montealegre Lynett, noviembre 13, 2001, ¶¶ 17-18 (finding that under the Constitution, the armed forces have the legal duty to act to prevent violations of human rights and international humanitarian law).

218. When examining the legality of the legislation implementing the Rome Statute, the Constitutional Court examined the domestic applicability of command responsibility as set out in Article 28 of the Rome Statute in Colombia. It held that Colombian jurisprudence recognizes that military commanders have the duty to act to prevent serious international crimes and that they can incur criminal liability for failing to act. It therefore found that domestic jurisprudence has established that military commanders can be held liable for their omissions, and that Article 28 is not incompatible with this jurisprudence. Corte Constitucional [Constitutional Court], Revisión constitucional del Estatuto de Roma de la Corte Penal Internacional – Revisión de la Ley 742 del 5 de junio de 2002 “Por medio de la cual se aprueba el Estatuto de Roma de la Corte Penal Internacional, hecho en Roma el día diecisiete (17) de julio de mil novecientos noventa y ocho (1998)”, Sentencia C-578/02, Expediente LAT-223, M.P.: E. Cifuentes Muñoz, julio 30, 2002, Section 6.2.

219. Guatemalan Crim. Code (Decree 17/73), art. 35.

to one of the accused, Reyes Girón, the tribunal found that, as the then commander of the Sepur Zarco military base, he was in charge of the base and of the soldiers responsible for the crimes, had extensive knowledge of the crimes, and took no action to prevent them.<sup>220</sup> In this role, he had the duty to protect the civilian population, but instead chose to allow their rights to be grossly violated. Reyes Girón could have ordered the soldiers to respect the women in the community and could have prevented the rapes and sexual slavery, but failed to do so.<sup>221</sup> The tribunal reasoned that by failing to act and by supporting the criminal conduct of his subordinates, Reyes Girón was liable for commission.<sup>222</sup> The tribunal rejected the defence's claims that the crimes were outside the control and powers of the accused.<sup>223</sup> The tribunal followed similar reasoning with respect to Valdez Asig, the former military commissioner in the area.<sup>224</sup>

The above-mentioned cases against high-level leaders provide insights into the role sexual violence played in the mass atrocity campaigns unleashed by armed actors in the different conflicts. They also show how the failure of senior leadership to respond to these crimes encourages further criminality and entrenches a culture of impunity.

#### IV. CONCLUSION

The prosecution efforts and successful outcomes in sexual violence cases in the case study countries set influential precedents to promote accountability at the domestic level, providing key lessons to practitioners in other national systems. To accurately convey the purpose and characteristics of sexual violence in the respective conflicts, practitioners are applying the international law framework domestically. In Colombia, practitioners are using international law to interpret criminal provisions, to charge different forms of sexual violence, and to reflect the connections between sexual violence and

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220. Sepur Zarco Judgment, *supra* note 36, 490-93.

221. *Id.* 492-93.

222. *Id.* (finding both accused guilty under Article 36 ¶1 and ¶3 of the Criminal Code for participating in the commission of the crimes and for significantly contributing to their commission).

223. *Id.* 491-92.

224. *Id.* 491-93.

the broader context of violence. In Peru, practitioners are applying international law to capture the gravity and role of this violence in the charges and to navigate the statute of limitations. In Guatemala, practitioners are relying on international law to flesh out and apply criminal provisions to include sexual violence, and to advocate that sexual violence was an integral part of a genocidal campaign. These examples show the importance of harmonizing domestic and international rules to appropriately prosecute international crimes.

Practitioners are making progress in holding high-level leaders accountable for sexual violence by subordinates. To do so, they have had to develop appropriate investigative and legal strategies to establish the link between the actions or inactions of accused and the crimes. Depending on the mode of liability used, practitioners have focused on obtaining evidence relevant to the accused's position and relationship with the perpetrators, the authority and powers of the accused, the accused's attitude towards and awareness of the crimes, and the chains of command and reporting systems in place. Establishing patterns of violence has served to identify the manner in which the crimes were perpetrated, the categories of victims and the perpetrator groups, as well the organized and coordinated nature of this violence. This has in turn contributed to establishing the required connections between the crimes and the high-level leaders. The cases against senior officials discussed above have demonstrated the strategic use of sexual violence in these conflicts.

Finally, the experiences of the case study countries show that criminal trials remain a key demand of victims. Through their perseverance and advocacy, victims have brought down the barriers to the domestic remedies for human rights abuses in their respective countries. However, while the prosecution of these abuses has been an important component of transitional justice efforts, it has not been the only component. Measures aimed at truth telling, and at repairing or redressing the impact of the harm caused to the victims and their communities have been equally relevant. As discussed above, in the three countries, truth-telling and historical memory processes preceded the prosecution of crimes. These processes surfaced the gendered dimensions of the conflicts in each country, acknowledging neglected abuses and providing a forum for victims to share their experiences of conflict. These processes also strengthened the determination of victims to take their cases to court, and influenced

the priority given in the context of criminal trials to reparations and redress for victims. For example, to preserve the memory of the crimes and educate the public, the *Sepur Zarco* tribunal ordered, among other measures, that educational textbooks and study programs include references to the stories of the women of Sepur Zarco, and that the local municipality build a monument in recognition of their efforts to seek justice.<sup>225</sup> In Colombia, judgments issued under the transitional justice system have similarly included varied forms of redress for victims.<sup>226</sup> These different measures have contributed to the creation of a historical record regarding past abuses and to a public understanding of the crimes and their impact in the affected communities. These measures also serve to promote the non-repetition of violence.

National systems remain the principle venue for holding individuals accountable for international crimes, including those relating to sexual violence.<sup>227</sup> As in the case study countries, national legal systems in other regions are playing an increasingly crucial role in delivering accountability for international crimes and in bridging the impunity gap where international courts cannot or will not

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225. *Id.* 510-11.

226. *See, e.g.*, Triana Mahecha Judgment, *supra* note 67, at 952-53 (ordering the Unit for Assistance and Reparations for Victims (UARIV) to implement different forms of reparations); *see* Triana Mahecha Judgment, *supra* note 67, at 954 (instructing the National Center for Historical Memory to document crimes perpetrated in the region of Magdalena Medio during the conflict); *see also* Triana Mahecha Judgment, *supra* note 67, at 957 (instructing the National Center for Historical Memory and the UARIV to identify the LGBT population affected by the conflict and to develop an integral reparation programs); *see also* Villa Zapata Judgment, *supra* note 60, 1028 (ordering the creation of a museum to commemorate the victims and prevent the repetition of crimes); *see also* Villa Zapata Judgment, *supra* note 60, 1046 (recognizing the right of victims to financial reparations); *see also* Villa Zapata Judgment, *supra* note 60, 1046-50 (ordering different state institutions to provide psychosocial, educational and medical support to the victims, as well as financial assistance to victim communities); *see also* Mancuso Judgment, *supra* note 69, 2258 (instructing different government agencies to implement an integral program to support female and male survivors of sexual violence); *see also* Mancuso Judgment, *supra* note 69, 2259 (instructing the national and regional offices of the Ministry of Education to implement educational campaigns in the affected regions to give visibility to gender-based violence in the conflict and its impact on victims).

227. U.N. Secretary-General, Sexual Violence in Conflict, ¶ 111, U.N. Doc. A/67/792-S/2013/149 (March 14, 2013).

reach.<sup>228</sup> By facing up to a violent past, these countries are slowly establishing a culture of legal justice in the aftermath of mass atrocities.

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228. See Kim Thuy Seelinger, *Domestic Accountability for Sexual Violence: The Potential of Specialized Units in Kenya, Liberia, Sierra Leone and Uganda*, 96 INT'L REV. OF THE RED CROSS 534, 593-64 (2014) (highlighting the challenges in addressing conflict-related sexual violence crimes at the domestic level and proposing measures to overcome them).