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‘Reproductive/ Sexual Violence during armed conflicts: The Colombian Constitutional Court’s Decision on Helena’s Case. Do forced contraception and abortion form gender-based violence?’

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List of Abbreviations

Art.	Article
ECHR	European Court of Human Rights
EPS	Entidad Promotora de Salud, (Health Promoting Entity)
FARC	Fuerzas Armadas Revolucionarias de Colombia, (Revolutionary Armed Forces of Colombia)
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
RUV	Registro Único de Víctimas, (Single Registry of Victims)
SCSL	Special Court for Sierra Leone
SCR	Security Council Resolution
UARIV	Unidad para la Atención y la Reparación Integral a las Víctimas, (Unit for the Comprehensive Attention and Reparation of Victims)
UN	United Nations

1.1 Presentation of the Subject and structure of the thesis

On December 11 2019 the Full Chamber of the Constitutional Court of Colombia issued judgment SU599/19.[1] "Helena's"[2] Case is the first to deal with the issue of the violation of sexual and reproductive rights of women and girls ex-combatants, during the civil conflict that lasted 55 years in Colombia. In its judgment, the Court recognized that women and girls who suffered forced contraception and forced abortion by their own armed groups should be recognized as 'victims of armed conflict'.[3] More specifically in Helena's case, the plaintiff while being a FARC member against her will, was forced to use contraception and was also made to undergo an abortion. But despite this, her claim to be recognized as a victim of sexual and gender-based violence within the terms of the Victims Act (Ley de Victimas y Restiucion de Tierras, 1448 of 2011) was rejected by the Integral Attention and Reparation Unit for Victims. The decision from Colombia's Constitutional Court reflects the result of her appeal of this decision. The Constitutional Court reversed the denial of victim status and concluded that the forced contraception and forced abortion Helena suffered constituted both breaches of her fundamental rights as well as war crimes. The Court concluded that forced contraception and forced abortion constitute violations of sexual and reproductive rights for women and a form of sexual and gender-based violence in the context of IHL.[4]

The purpose of this dissertation is to provide an overview of the importance of this landmark case and to examine the correlation, if there is such, with other cases of such forms of violence from International Criminal Courts. To achieve that in the first part of this dissertation, the elements of sexual violence in the jurisprudence of the International Criminal Tribunal will be identified. Governmental practices, opinio Juris, the roadmap of rape as genocide, and the role of the international courts in that process

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[1] Judgement SU599/19 [2020] (La Sala Plena de la Corte Constitucional).

[2] Helena is the pseudonym used by the plaintiff who wanted to keep her anonym

[3] Dienek Vos, 'COLOMBIA – Colombia's Constitutional Court issues landmark decision on victims of reproductive violence in conflict' (2020) IntLawGrrls < https://ilg2.org/2020/01/11/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/https:/ilg2.org/> accessed 26/10/2020

[4] Ciara Laverty & Dieneke de Vos, 'Ntaganda' in Colombia: Intra-Party Reproductive Violence at the Colombian Constitutional Court' (2020) Opinio Juris https://opiniojuris.org/2020/02/25/ntaganda-in-colombia-intra-party-reproductive-violence-at-the-colombian-constitutional-court/?fbclid=IwAR3cDHgKoenXEX1nYncCiyJm5PrYUZuvH1JdQHGGDMxQVK2hWF4dseCFMAE accessed 30/11/2020

will be investigated. A comprehensive overview of the various ways in which sexual abuse in armed conflict is described and addressed by international law will be presented. Then in the second part, Helena's case will be analyzed. Emphasis will be put on parts of the ruling that deal with aspects of international law and how the victimizing acts of forced abortion and forced contraception are addressed. In the end, conclusions from the case will be presented and it will be analyzed why this case from Colombia could play a great role in the discussion of how reproductive violence could receive a broader recognition as a distinct form of violence.

1.2 Colombia's reality-FARC

For more than fifty years Colombia had been plagued by civil war between the Government and rebel groups, among which the most significant was the well-known FARC.[5] The civil war has emerged from the assassination of the presidential candidate Jorge Eliécer Gaitán back in 1948. This era of Colombian history was known as "La Violencia". The rivalry between the two main political parties -the Liberals and the Conservatives- took different forms of violence that were carried out by self-defense militia, criminal organizations, and guerilla. One of those groups was FARC whose origins can be traced to the period of "La Violencia". Although full control of national territory by FARC had been limited to a small amount of time and in limited land areas, its presence had been significant in many Colombian municipalities over long periods. The movement was supported by the Colombian Communist Party and the USSR.[6] FARC ensured its survival through drug business and other illegal actions like kidnaps and extortions. [7] However, in 2016 the aforementioned situation ended with a special agreement between the government and the guerilla group. In August 2016, in Havana, Cuba, the Colombian Government signed a peace agreement with FARC-EP, after four

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[5] Rene Provost, 'FARC Justice: Rebel Rule of Law' (2018) 8 UC Irvine L Rev 227
[6]Breanne Hataway, 'The FARC's Drug Trafficking as Political Crime: Determining the Success of Colombia's Peace Talks' , 41 N.C.J. INT'L L. 163, 167 (2015); Norman Offstein, 'An Historical Review and Analysis of Colombian Guerrilla Movements:FARC', ELN and EPL, 52 DESARROLLO Y SOCIEDAD 99, 101 (2003).at 103
[7] Breanne Hataway, 'The FARC's Drug Trafficking as Political Crime: Determining the Success of Colombia's Peace Talks', 41 N.C.J. INT'L L. 163, 167 (2015); Norman Offstein, 'An Historical Review and Analysis of Colombian Guerrilla Movements:FARC', ELN and EPL, 52 DESARROLLO Y SOCIEDAD 99, 101 (2003).at 103

years of negotiations.[8] The Colombian Peace Accord is a special agreement in terms of the Vienna Convention for the Law of the treaties[9] and in particular in terms of article 3[10]. It was introduced in the Colombian legal system as part of the “constitutional block” that generally allows for the incorporation of international law into the Colombian Constitution.[11] After the signing of that Peace Accord, Colombia proceeded to the establishment of several institutions to deal with the aftermath of the conflict. [12] One of those is The Victims Act (Ley de Victimas y Restiucion de Tierras, 1448 of 2011). It is designed to provide comprehensive reparations for victims of human rights abuses incurred during the conflict, including human rights abuses suffered by women and children. Law 1448/2011 requires that special attention be paid to the needs of specific groups and communities, such as women, survivors of sexual violence, trade unionists, victims of forced displacement, and human rights defenders.[13]

1.3 **Tutela Action**

An unfamiliar legal concept among European countries, yet very popular among Latin American countries is that of the tutela action.[14] In Colombia’s legal system citizens who claim that their constitutional rights have been violated can assert them through a tutela. It was established in the 1991 Constitution and its purpose is to provide for the “immediate protection of one’s constitutional rights when any of these are violated or threatened by the action or omission of any public authority”.[15] Tutela can be filled to

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[8] René Urueña, ‘Prosecutorial politics: The icc's influence in colombian peace processes, 2003-2017’ (2017) American Journal of International Law, 111(1), 104-125.

[9] Vienna Convention on the Law of the Treaties 1969

[10]Laura Betancur Restrepo ‘The Legal Status of the Colombian Peace Agreement’(2017) 110 AJIL Unbound 188

[11] ibid
file:///C:/Users/Pin/Downloads/legal%20status%20of%20the%20colombian%20deal%20status.pdf

[12] Christine Chinkin, Keina Yoshida ‘Colombia’s recent ruling on reproductive violence and forced recruitment is a significant step for ex-combatant women and girl’ (2020) LSE Latin America and Caribbean blog <https://blogs.lse.ac.uk/latamcaribbean/2020/02/19/colombias-recent-ruling-on-reproductive-violence-and-forced-recruitment-is-a-significant-step-for-ex-combatant-women-and-girls/ > accessed 29/11/2020

[13] Dienek Vos, ‘COLOMBIA – Colombia’s Constitutional Court issues landmark decision on victims of reproductive violence in conflict’ (2020) IntLawGrrls < https://ilg2.org/2020/01/11/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/https:/ilg2.org / > accessed 26/10/2020

[14] Patrick Delaney ‘Legislating for Equality in Colombia:Constitutional Jurisprudence, Tutelas, and Social Reform’(2008) The Equal Rights Review, Vol. One

[15] Article 86, Constitution of Colombia.

any Court in Colombia and can take any form, even oral. This happens to make the whole process affordable to anyone. Then the Constitutional Court reviews each tutela and decides which ones should be examined. When a tutela is granted, the person who filled it gets an order. This order is for the party that violates his/her rights for the cessation of this violation and compliance with what the constitution and the court demands.[16] The simplified process makes tutela highly accessible and thus successful within the Colombian legal framework.

Although tutela action is a particularly popular method in Colombia's legal reality, it has two important limitations as to its function. Firstly, it can be evoked only when a fundamental right-as defined in the 1991 Constitution- is being violated. And second, as article 86 of the Colombian Constitution dictates, a tutela action can only be used when there is no other judicial mechanism available for one to claim its rights.[17]

1.4 Helena's case summary

Below the case of Helena will be analyzed. Helena is a pseudonym used by the plaintiff of case SU599/19 brought before Colombia's Constitutional Court of Justice, who had been forcibly recruited into the FARC at the age of fourteen. Helena, born in 1988, was a member of FARC against her will for approximately five years from 2003 until 2007. It was in April 2003 when FARC forces forcibly recruited her and took her to a camp[18] of FARC where her training to "the rules of the guerrilla, the work in the camps and the use of weapons" lasted three months.[19] During her unwanted recruitment at the FARC Helena -as every female member too- was prohibited to have children and for that reason was subjected to forced contraception. She was forced to inject «Mesigyna» a type of contraceptives during her whole unwanted stay and participation at the FARC

[16] Margaret Hagan (2019) 'A Journey through Colombia's Constitutional Court's tutela design challenge' Medium < https://medium.com/legal-design-and-innovation/a-journey-through-colombias-constitutional-court-s-tutela-design-challenge-c3f4d20d73bd > accessed 26/11/2020

[17] Patrick Delaney (2008) 'Legislating for Equality in Colombia:Constitutional Jurisprudence, Tutelas, and Social Reform' The Equal Rights Review, Vol. One

[18] Camp of the X Front of Block H. Full name is not provided in the decision since identity of the plaintiff needs to be protected

[19] Paragraph 1.3 of the Decision

that lasted approximately five years. As Helena confessed[20] injection of the aforementioned contraceptive was a common policy for all women that were recruited at the FARC camps. Testimonies from female former guerrilla fighters at the FARC confirm Helena's allegations regarding the reproductive policy the group followed through the many years of its action. [21]

It was in 2007 when Helena found out she was pregnant a fact that she realized when she was already six months pregnant. The plaintiff was transported to Municipality B. to meet the commander and other guerrillas who ordered that she would have an abortion. The plaintiff was objecting to that decision for almost two hours and despite the fact that she had been threatened to face the death penalty if she did not comply with the commander's directions. Eventually and without her consent, the guerrillas that were present forcibly injected her with some drugs, made her take some pills, and applied "Cytotec" vaginally. By the time Helena woke up a doctor informed her that while she was unconscious, a cesarean section had been performed on her to extract the dead fetus. The doctor also informed her that since throughout the surgery she had lost a significant amount of blood, he had no option but to close the incision of the abdomen hurriedly.

Subsequently, Helena was authorized to return to her family's house in municipality A., in order to recover from the surgery. But a month and a half later, the upper part of the incision opened, and a bulge was generated causing the plaintiff intense pain. Since that moment her health deteriorated and as a result, at the beginning of 2009, Helena moved to *Municipality J*[22] to visit a doctor who would evaluate her health condition and would prescribe her pain medication. Upon returning home two guerillas showed up at her house to inform her that she had to return to Vereda K to the FARC.[23] But since Helena did not wish to go back to the ranks of the FARC, she decided to run away. She returned to *Municipality J.*, where she stayed for approximately one month, until April 2009. But FARC guerillas threatened the members of her family that they would kill them If

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[20]'Helena, a story of forced abortion in Colombia'(2019) [Online Video] YouTube. Available at: https://youtu.be/OCln2Yb5umg accessed 26/11/2020

[21] Brodzinsky Sibylla 'For Farc rebels, peace deal brings baby boom after 52 years of pregnancy ban' (2017) *The Guardian* < https://www.theguardian.com/world/2017/feb/10/farc-peace-deal-baby-boom-pregnancy-ban > Accesed 26/11/2020

[22]Ciudad M. Full name is not provided in the decision since identity of the plaintiff needs to be protected

[23] Paragraph 1.8 of the Decision

they did not reveal where she was hiding. Consequently, *Helena* decided to go to *City L*, where her older sister was living, and stayed there for three years to avoid another recruitment at the ranks of FARC. Subsequently, she moved to city M. because she couldn't find a job back to city L. Throughout this time, her family received numerous death threats from the FARC for refusing to reveal her whereabouts.[24] She only stopped hiding when the Peace Accord was signed in 2016.

Helena applied for membership at E.P.S[25]. in early May 2017. But it was only until the end of June of the same year that she received the membership card. In the interregnum between the application for membership and the delivery of the card, the plaintiff received private medical consultation from gynecologist thanks to a non-profit organization that assists victims of sexual violence. The private doctor ordered a series of examinations to diagnose her, that could be done only after her inclusion to EPS, one month after her first medical appointment. After a lot of bureaucratic difficulties that the plaintiff faced, she finally managed to get an appointment with an EPS gynecologist on the 6th of December 2017. But even then, the EPS doctor did not agree with the examinations the private doctor -who had examined the plaintiff first- had ordered. On the contrary, he suggested a different kind of examination. His diagnosis was that the symptoms were not severe, the pain Helena was facing was normal and as such, would remain for the rest of her life. But since the pain Helena was feeling was severe and because the scheduling of new medical appointments was delaying very much, the plaintiff was forced to go to the private health system, with the support of the same organization mentioned above. After a series of gynecological and urological examinations, it was concluded that Helena had stones in the bladder, formed by the sutures used to sew the incision made during the cesarean section to which he was subjected and, therefore, surgery was ordered. After encountering multiple barriers and obstacles to access the required health services, she finally underwent the surgical procedure.

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[24] Women's Link Worldwide press release 'Women and girls who were victims of sexual violence within illegal armed groups should be considered victims of the conflict in Colombia and therefore entitled to reparations' < https://www.womenslinkworldwide.org/en/news-and-publications/press-room/women-and-girls-who-were-victims-of-sexual-violence-within-illegal-armed-groups-should-be-considered-victims-of-the-conflict-in-colombia-and-therefore-entitled-to-reparations > accessed 26/11/2020

[25] Entidad Promotora de Salud, is a type of government sponsored health insurance available in Colombia

For the victimizing acts of forced contraception and abortion that happen to her while she was in the ranks of FARC, Helena intended to be recognized as a victim and thus seek reparation through the legal procedure provided by Law 1448/2011. According to Colombia's legal system, the process through which victims of FARC's action could seek remedy was the Unit for the Comprehensive Care and Reparation of Victims (hereafter UARIV).[26] Helena applied to the UARIV for inclusion in the RUV[27] for the victimizing acts of illicit recruitment of minors, forced abortion, and displacement. In relation to the process before the UARIV, on March 23, 2017, the plaintiff requested her inclusion in the UARIV and made the statement to the RUV, identified with the number FUD - NG 000729277, in *Municipality B* in *Department* C. On November 22, 2017, the plaintiff was notified of UARIV's decision not to include her in the RUV. The denial was based on the fact that according to article 2(3) of law 1448/2011, victim status could not be provided to ex-members of illegal armed groups unless they fulfill the requirements of article 61. This did not apply to Helena's case and besides the declaration was out of time which is in breach of the terms established in article 155 of Law 1448 of 2011. However, the application was denied without further investigation on the existence of any circumstance of force majeure that would allow the declaration to be submitted out of time and yet be in accordance with the Law 1448 of 2011. As a consequence of this and the fact that UARIV did not rule on all the victimizing facts declared, the interested party, Helena, filed an appeal against the resolution that denied her registration. However, the appeal was decided against her, confirming the first resolution. At this stage, legal representatives of Helena filed a tutela action to invoked the protection of the fundamental rights to be fully recognized and repaired as a victim of the armed conflict, health, personal integrity, the vital minimum, decent life, education, and housing.

1.5 Legal issue

The legal representatives requested that: (i) the fundamental rights invoked be protected and that, therefore, (ii) the E.P.S. guarantee comprehensive health care to the plaintiff

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[26] Unidad para la Atención y Reparación Integral a las Víctimas, The agency charged with the registration of victims under Law 1448/2011

[27] Registro Único de Víctimas, Registry for the Victims

and the UARIV, include her in the RUV, make her a beneficiary of all the measures enshrined in Law 1448 of 2011 and its regulatory decrees, including those special for victims of sexual violence, and recognize her as a victim by the victimizing acts declared, that is, those of forced recruitment, abortion, and displacement.

It is necessary to specify that enrollment in the RUV is the right tool to guarantee the protection of the fundamental rights of the victims of the internal armed conflict since it is essential to access the protection and guarantee mechanisms for care, assistance, and comprehensive reparation through administrative channels, enshrined in Law 1448 of 2011. The aforementioned fundamental rights were violated with the decision of non-inclusion made by the UARIV, even though the plaintiff is the victim of the armed conflict due to the recruitment of minors, abortion, and forced displacement. The refusal has prevented the plaintiff from accessing care, assistance, and reparation measures to restore her rights and receive humanitarian aid, with which she would guarantee the other fundamental rights that she considers violated; such as education, housing, and the vital minimum.

2 Human rights standards and the use of criminal law

Judgments typically include factual and legal findings of special significance to the case and the law at hand, which have been proved by the prosecutor beyond a reasonable doubt. It must be done with great caution to extrapolate any findings from them concerning the existence, extent, scale, and patterns of sexual violence perpetrated against civilians in armed conflicts. For example, there is a legal element in the general category of crimes against humanity which requires that the alleged criminal activity must have been part of a widespread or systematic attack against any civilian population. A conviction for abuse or other sexual violence as a crime against humanity is also not equal to a crime against humanity. The purpose of this part of the dissertation is to describe the elements of sexual abuse in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).

In all three trials, a range of concluded case decisions provide findings of sexual abuse committed against civilians in associated armed conflicts. Sexual violence is the product of convictions for genocide, crimes against humanity, and war crimes. In the three trials, abuse of a sexual nature against people sometimes takes various forms and constitutes or is part of separate crimes. For instance, rape and other forms of sexual abuse constitute or form part of crimes of incarceration, enslavement, sexual slavery, and persecution as crimes against humanity; as crimes of war, torture, and outrages against human dignity; and as genocide, severe physical or mental harm.

Specific decisions underline the importance and legal obligation of superiors to deter or discipline their subordinates for crimes, including sexual crimes. Superiors and other offenders who were in positions to control others, in some cases, not only failed in their task but also abused, sexually enslaved, and perpetrated other sexual abuse against civilians directly. The purpose of this subject of the dissertation is to identify the elements of sexual violence in the jurisprudence of the International Criminal Tribunal. It investigates governmental practices, opinion Juris, the roadmap of rape as genocide, and the role of the international courts in that process. It offers a comprehensive overview of the various ways in which sexual abuse in armed conflict should be described and addressed by international law. and then moves to investigate the Columbia case.

2.1 **Sexual violence in definitions of genocide, crimes against humanity, and war crime**

Genocide and the acts through which genocide is committed are defined in the Convention on the Prevention and Punishment of the Crime of Genocide, one of the most important human rights mechanisms approved by the United Nations[28]. The

[28] Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948, available at https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf

Genocide Convention was drafted on December 9, 1948, in response to World War II and the atrocities committed by the Nazis[29].

Rape in times of armed conflict can be seen as the absolute humiliation not only of the women but also of the men of the enemy. Women are always exposed to the consequences of armed conflict. In addition, the rape of women carries a message: a man-to-man statement that the "other side" is incapable of protecting the female population, thus hurting the male pride of the adversary[30].

The armed conflicts in the former Yugoslavia and Rwanda have drawn the international community's attention to the use of rape as a deliberate strategic strategy to undermine community ties, weaken resistance to aggression and commit genocide.[31]. However, the rape of women in times of armed conflict was not a new phenomenon. During World War II, the Japanese systematically raped civilian women in Korea, China, and the Philippines. Rape has also been shown in Bangladesh's war of independence, in civil armed conflicts such as those in Liberia and Uganda[32].

From 1949 onwards, the four Geneva Conventions form the core of humanitarian law or, as it is sometimes called, the law of armed conflict[33]. Although rape is now recognized as a war crime, it is not specifically listed as such in the Geneva Conventions and subsequent Protocols. The Geneva Conventions regulate the conduct of war from a humanitarian point of view by protecting certain categories of persons, such as the wounded and sick members of the armed forces on the battlefield, the wounded, sick and shipwrecked, prisoners of war and prisoners of war. Each Convention lists in detail the violations that are characterized as "serious violations" or war crimes. The serious infringements or war crimes referred to in the above Conventions are subject to universal jurisdiction and persons who commit or order to commit any of these infringements are subject to criminal penalties. Despite the ban on rape under various international treaties, there were no domestic or international criminal prosecutions for

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[29] Russel – Brown Sherrie, Rape as an Act of Genocide, Berkley Journal of International Law, Vol. 21, Issue 2, 2003, p. 360
[30] Seifert Ruth, War and Rape. Analytical Approaches' Geneva, Switzerland: Women's International League for Peace and Freedom (1993)
[31] Watts Charlotte, Zimmerman Cathy, Violence against women: global scope and magnitude, The Lancet, Vol. 359, April 6, 2002
[32] Ibid.
[33] Geneva Conventions of 12 August 1949, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf

rape in armed conflict until the late 1990s.[34]. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were the first international tribunals to prosecute rape as an international crime in armed conflict, even if violence does not explicitly refer to any rules governing these courts[35]

The ICTY, ICTR, and SCSL were commonly established to prosecute international crimes of genocide, crimes against humanity, and war crimes.[36] "As noted by the SC in SCR 1820," rape and other forms of sexual abuse may be a war crime, a crime against humanity, or a constitutive act of genocide.[37] The definitions of genocide, crimes against humanity, and war crimes are set out in the Laws of the ICTY, ICTR, and SCSL in three cases examined later in the present text, respectively. The parts of the definitions outlined in the boxes apply to some of the underlying crimes punishable by sexual abuse.

'The [ICTY] shall have the power to arrest, or to perform any of the other acts referred to in paragraph 3 of this Article, persons who commit genocide as stated in paragraph 2 of this Article,' reads the genocide provision of the Law of the ICTY (article 4). Genocide shall mean any of the following acts committed to the destruction, in whole or in part, of the political, ethnic, racial or religious population as such: (a) the killing of members of the group; (a) the killing of members of the group; (b) the causing of severe physical or mental damage to members of the group; (c) the deliberate infliction, in whole or in part, of the living conditions of the group calculated to bring about its physical destruction; (d) the imposition of birth disincentive measures within the group; (e) the forcible transfer of children from the group to another group. The following acts are punishable: (a) genocide; (b) plot to commit genocide; (c) open and public incitement to commit genocide; (d) attempted genocide; (e) complicity in committing genocide.

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[34] O' Connor Vivienne, Prosecution of Rape as a War Crime, INPROL - International Network to Promote the Rule of Law, July 2012
[35] Ibid.
[36] Valchovà, M & Biason, L (eds). Women in an Insecure World: Violence against Women Facts, Figures and Analysis. Geneva Centre for the Democratic Control of Armed Forces (DCAF). September 2005
[37] Ward, J & Marsh, M. Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources. Briefing Paper Prepared for Symposium on Sexual Violence in Conflict and Beyond, 21–23 June 2006, Brussels (Belgium). UNFPA

The ICTR clause (Article 2 of the ICTR Statute) is the same.

There are differences in the meanings of crimes against humanity in the respective laws, particularly about crimes of sexual assault.

The provisions on crimes against humanity found in the Law of the ICTY (Article 5) read: 'The [ICTY] shall have the power to prosecute persons responsible for the following crimes, whether foreign or internal, when committed in an armed conflict and directed against any civilian population: (a) murder; […] (c) slavery; (f) torture; (g) rape; (h) political, ethnic and religious persecution; (i) other inhumane acts.[38]

Article 3 of the ICTR Law is the same, except that it does not contain the provision that the crime is committed in the sense of an armed conflict and that it lists the grounds on which a widespread or systemic assault must be carried out against any civilian population, namely 'national, political, ethnic, racial or religious grounds.'

Article 2 of the SCSL Law differs in that its general portion (chapeau) does not expressly require that such a crime be committed "during military conflict" (unlike its counterpart in the ICTY), or "on national, political, cultural, racial or religious grounds" (unlike its counterpart in the ICTR). The sub-paragraphs(g) are much more comprehensive, dealing with different types of sexual crimes, and (h). They read: "(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecution on political, racial, ethnic or religious grounds".

"The ICTY, ICTR, and SCSL Laws do not apply to the" war crimes "category of atrocity crimes. The different types of crimes arising from international humanitarian law referred to in this study as "war crimes" often vary from one court to another.

The differences in definitions have some major consequences. As a relevant effect of the difference in the meanings of the three forms of atrocity offenses between the courts, an example is best illustrated. In the SCSL, slavery involving sexual violence can be punished as sexual slavery as an offense against society. However, as in the ICTY Law, there is no underlying crime of sexual slavery as a crime against humanity, the ICTY

[38] Askin, KD & Koenig, DM (eds). Women and International Human Rights Law. Volumes 1-3. Transnational Publishers. 1999

can not do so; as part of, for instance, the broader crime of enslavement as a crime against humanity, it can and has been punished.

The various kinds of sexual abuse are demonstrated by three decisions, two from the SCSL and the other from the ICTR. The first relates to sexual harassment and outrage toward personal dignity: The office stated that: “Concerning the elements of sexual slavery [. . .] the Trial Chamber is similarly satisfied that sexual slavery is an act of humiliation and degradation so serious as to be generally considered an outrage upon personal dignity. The [ICTY] Trial Chamber in [the Kvocka case] held that “perform[ing] subservient acts,” and “endur[ing] the constant fear of being subjected to physical, mental or sexual violence” in camps were outraged upon personal dignity. Sexual slavery, which may encompasses [sic] rape and/or other types of sexual violence as well as enslavement, entails a similar humiliation and degradation of personal dignity.”[39]

The second example involves other inhumane acts such as crimes against humanity, including crimes with sexual elements, such as forced marriage, which are not specifically included elsewhere in the SCSL Statute's section on crimes against humanity:

“The jurisprudence of the [ICTY and ICTR] shows that a wide range of criminal acts, including sexual crimes, has been recognized as “Other Inhumane Acts.” These include [. . .] sexual and physical violence perpetrated upon dead human bodies, [. . .] forced undressing of women and marching them in public, forcing women to perform exercises naked, and [. . .] torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions”[40].

Sexual violence often forms part of repression as a crime against society's convictions. Persecution is a violation of the universal human right to be discriminated against on one of the grounds referred to in the ICTY, which is geographical, racial, and religious

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[39] Office of the Special Adviser on the Prevention of Genocide: http://www.un.org/preventgenocide/adviser/

[40] OCHA: http://ochaonline.un.org/

and also includes ethnic grounds under the ICTR and SCSL.[41] Persecution includes serious violations of a sexual nature, but not limited to sexual behavior.[42]

Concerning each of the underlying offenses, such as rape and sexual slavery, the concepts of genocide, crimes against humanity, and war crimes in the Law do not set out all the general legal elements of each category or legal elements. Each court's case-law does so.

2.2 The intent of perpetrators of sexual violence in armed conflicts

The law of the ICTY, ICTR, and SCSL allows judges when determining whether to convict or acquit, to make judgments as to the purpose and/or knowledge of the accused; the required intent and/or knowledge requirements differ from crime to crime. Torture, for example, is defined as:

"intentional infliction [. . .] of severe pain or suffering, whether physical or mental, for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person."[43]

Discrimination because someone is a woman is covered too.[44]

As stated in the sense of torture by rape, and concerning the forbidden torture purposes:

"[. . .] torture utilizing rape is a particularly grave form of torture [. . .]. The violation of the moral and physical integrity of the victims makes rape a particularly serious crime. Rape is an inherently humiliating offense, and humiliation is generally taken into account when assessing the gravity of a crime."[45]

The importance of this is that judges do not usually make conclusions or statements that go beyond the needs of the law concerning the accused's intent and/or facts. The personal interests of the accused seldom play any part in decisions of guilt or innocence, as distinct from motive. For example, where an accused facing charge of rape and rape

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[41] ICRC: www.icrc.org
[42] ICRC, Women and war subsite: http://www.icrc.org/Eng/women
[43] . ICTJ (International Center for Transitional Justice): www.ictj.org
[44] Joint Consortium on Gender Based Violence: www.gbv.ie
[45] Sexual Violence Research Initiative, subsite on Sexual Violence in Conflict Settings: http://www.svri.org/emergencies.htm

as torture insists that he abused women for sexual pleasure, claims such as whether he intended to rape women (in connection with the charge of rape) and whether he intended to punish, threaten, humiliate or discriminate against women by assaulting women (in connection with the charge of torture) are not taken into account by the law.

2.3 Relevant Cases

It is pertinent to analyze the legal rationale followed by regional human rights courts in adjudicating cases of rape. The Inter-American Human Rights Commission exercises authority over the rights guaranteed by the Belem do Para Convention and other regional human rights instruments of the American Convention on Human Rights. The Inter-American Human Rights Commission[46] exercises authority over the rights guaranteed by the Belem do Para Convention and other regional human rights instruments of the American Convention on Human Rights[47]. The Raquel Martí de Mejía v. Perú case[48], generally quoted for its analysis of the guarantee of the right to be free from rape by the American Convention, did not identify the rape elements. Mejía v. Perú believed that the act of rape may violate the torture protections prohibited by Article 5 of the American Convention. The responsibility for torture was attributed to the state. Rape has thus fulfilled one of the features of violence, which include: 1) a deliberate act by which a person is inflicted with physical and mental pain and suffering. Two other features of violence were held to be such an act; 2) committed for a purpose, and 3) committed at the instigation of the former by a public official or by a private citizen." [49]

The Court ruled that females violated their human integrity because of forced nudity in Miguel Castro Prison v. Peru,[50] a jail case in which female visitors to a male detention center became caught in a two-day revolt. The Court did not identify sex-based actions when determining that forced nudity was an act of sexual harassment, but focused on the principles put forth by the ICTR in the Akayesu, such as sexual abuse.[51]

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[46] Organization of American States, American Convention on Human Rights, 22 November 1969, O.A.S.T.S. No, 36, 1144 U.N.T.S. 123.

[47] These include the Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador', arts. 8(a), 13, 19, 17 November 1988, O.A.S.T.S. No. 69; Organization of American States, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, O.A.S.T.S. No. 67; Organization of American States, Inter-American Convention on Forced Disappearance of Persons, art XIII, 9 June 1994, 33 I.L.M. 1429.

[48] See, also Raquel Martín de Mejía v. Perú, Case 10.970, Inter-Am.C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7, at 157, 1996.

[49] The Court also found that Meija's right to privacy under Article 11.1 was violated. The Mejia Court's holding that the rape satisfied the human right prerequisites of torture was cited to by the Delalic Trial Chamber when it delivered the first ICTY conviction for acts of rape as torture.

[50] Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, 25 November 2006.

[51] Id., para. 306, citing to Akayesu, para. 688.

Recognizing that one of the victims was subjected to a simultaneous vaginal finger examination conducted by several hooded individuals, the Court also referred to the ICTR jurisprudence to describe a sexual activity as 'sexual assault,' the extent of which was clearly stated after drawing on many other sources of international human rights law.

In all matters of application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights (ECHR) exercises jurisdiction. The ECHR held that either when State agents committed rape or when the State failed to provide an appropriate remedy at the national level, State parties became liable for rape crimes. Like the American Convention, the European Convention never specifically lays down the right to be free of sexual abuse. As a consequence, rape was originally defined by the ECHR as a breach of the right to privacy. After, recognizing rape as torture and as a serious form of inhumane treatment, the ECHR adopted the success of the Inter-American Commission's jurisprudence.

In X & Y v. the Netherlands, the ECHR[52]stated that the right to security under Article 8, which guarantees 'a individual's physical and moral integrity, comprising his or her sexual existence, is limited by rape.' The Court refused to identify the rape elements.

The ECHR found, in its 1997 decision in Aydín v. Turkey, [53] that sexual harassment could also constitute a breach of Article 3 of the European Convention banning torture. In this situation, a local Turkish policeman was accused of raping a seventeen-year-old Kurdish woman who had been detained inappropriately. Since its deliberations centered on rape as a method of abuse, which is a violation of human rights, the Court did not rule on the elements of rape itself.

The M.C. case V. Bulgaria [54] included a 14-year-old girl who had mental problems who had been assaulted on a date by two men. The age of consent was 14 years old in Bulgaria. The M.C. Court held that M.C.'s psychiatric conditions should have been taken into account in the State's prosecution processes and analysis of the rape elements when interpreting evidence of whether the perpetrator's force or resistance by M.C. Had been produced. None, either at M.C. Therefore, the Grand Chamber identified a breach

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[52] X&Y v. Netherlands, ECHR, 1983.
[53] Case of Aydin v. Turkey, 25 EHRR 251, 1988.
[54] Case of M.C. v. Bulgaria, ECHR 646, 2003.

of Article 3 and Article 8, the restriction of degrading treatment and the right to protect private life, respectively, and held that Bulgaria had failed to fulfill its positive obligations to adopt criminal law to effectively investigate, prosecute and prosecute M.C.

Concerning whether M.C. The Court has consented to sexual intercourse, held that domestic law and procedure traditionally involved evidence of the use of physical force by the attacker and physical resistance on the part of the victim in rape cases. It states, however, that several European countries, including common-law jurisdictions, have now excluded from their legislation references to physical force. The Court ruled that the absence of consent, not the sine qua non of resisting force, had become a crucial factor in the definition of rape utilizing an assessment of the underlying facts. In particular, the Court has acknowledged that the positive duty of the State to take steps to ensure respect for private life must be compatible with the broader non-discrimination provisions of the Convention. Of the M.C. It is the first case to lift sexual freedom and rights as important to the responsibility of the State to arrest and prosecute sexual harassment to comply with its substantive and procedural obligations under Article 3 of the ECHR. The Court also noted that law and legal practice represent the evolving social attitudes that require the sexual autonomy and dignity of the person to be respected.

In the non-war framework, how sexual independence and rights are discussed may be of interest to conflict-related proceedings. The ICC was able to gather support from the M.C. With carrying. One must be conscious of factual circumstances, including the age or related status of the perpetrator, for example, limited mental capacity, to interpret elements of rape. This approach is expressed in Article 8(2)(b)(xxii)-1 of the Element of Crimes sub-provision, which is supplementary to the Rome Statute. It notes, in part, that assaults can be committed "by taking advantage of a coercive environment or by invading an individual who is unable to give genuine permission"[55].

Several human rights abuses have been investigated by regional human rights jurisprudence, such as torture, degrading treatment of privacy violations, factually identified by the infliction of rape. Even so, any determination of rape as an enumerated

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[55] EoC, Article 8(2) (b) (xxii)-1.

violation of human rights in and of itself or other particular gender-based abuses by international human rights courts is thin. The elements of rape as an international crime are also only measured implicitly and only if they apply to the assessment of the existence or absence of a breach of human rights, like inhumane treatment. The jurisprudence of the ad hoc Tribunals has been invoked by two regional court rulings. The 2006 Miguel Castro Prison decision referred to ICTR views on rape and sexual assault, while the 2003 M.C. decision referred to the ICTY and ICTR rape jurisprudence. Appropriately, the jurisprudence of human rights law cannot give conclusive answers to the necessity of an aspect of lack of consent under international criminal law, but their views, like the regional expression of personal freedom and sexual equality in the field of human rights, explain the scope of human universal rights that inform the prosecution of violence based on gender.

2.4 Reproductive-Sexual Violence Cases at ICTY

The break-up of the former Yugoslavia was followed by a series of foreign and non-international armed conflicts spreading over large areas such as Bosnia and Herzegovina (BiH),[56] including the Republic of Serbia, Croatia, and Kosovo. At different times, these combat wars fought distinct groups against each other. For example, Bosnian Muslims and Bosnian Croats are sometimes allied to Bosnian and non-Bosnian Serbs, and Bosnian Muslims are sometimes allied to Bosnian Croats. The most lasting connection that many people have with the break-up of the former Yugoslavia is the so-called 'ethnic cleansing' by Serbs of non-Serbs from swathes of BiH, Croatia, and Kosovo.

Most of the ICTY cases include massacres committed between 1992 and 1995 in Bosnia and Herzegovina by perpetrators of Serbian descent against civilian populations of Muslim and Croatian origin. The rulings suggest that Bosnian Croats and Bosnian Muslims were the perpetrators of the massacres and that people of Serbian origin were also victims of sexual assault. For SCR 1820, it is irrelevant if more members of one or

[56] BiH was known by different names in the 1990s. For practical reasons, it is referred to as BiH throughout this report.

the other party to the armed conflict have been charged with sexual harassment, or whether only one party's supporters have perpetrated sexual abuse against citizens.

The ICTY has concluded 75 cases. Of these, about a third or 24 cases, including multi-accused cases, include sexual assault against individuals. Accusations and allegations of sexual harassment include three out of seven cases at trial, three out of four cases pending trial, and charges against all ICTY fugitives (including former top Bosnian Serb military chief Ratko Mladic). Four out of six trial rulings subject to a real or potential appeal include sexual assault outcomes.

Sexual abuse, as required by the Crimes against Humanity, was found to be part of a systemic and/or systematic attack against civilian populations by the court by the accused in 16 of the 24 cases. Sexual violence has also been defined by the court or determined by the convicted to constitute or form part of war crimes.

The sexual harassment cases covered by the judgments apply mainly to Bosnia-Herzegovina, but also Croatia and Kosovo in the case under appeal. One indication of how widespread and systemic rape and other forms of sexual assault are in BiH is the case of Krajisnik. It is one of the instances in which there is a list of the terrorization of people by violent crimes, including rapes. Another case is the Brdanin case, in which it was found that armed men created an "atmosphere of fear and terror" by committing crimes against citizens of other ethnic backgrounds, including rapes.

Sexual harassment takes on different facets of the rulings. These include violence as crimes against humanity, imprisonment, enslavement, and oppression; and rape, torture, and inhumane treatment as crimes of war as outrages against personal dignity. Abuse and/or other sexual harassment has amounted to torture in some cases. These include the Bralo, Brdanin, Celebici, Kunarac, Kvocka, Milan's Simic, and Zelenovic cases.

Civilian and non-civilian officials who held positions of power at the national level, local government level, detention camps, formal military, and police units, and paramilitary units were the convicted perpetrators of sexual abuse. Based on their liability, both of them were accused of sexual assault offenses. Others were convicted based on their superior responsibility. Among the convicts, there are also lower-ranking suspects.

There are women, children (see, for example, the cases of Brdanin, Tadic, Kunarac, and Krajisnik), and men among the civilian victims of sexual assault.

In certain instances, more than one perpetrator has assaulted and/or committed other forms of sexual violence against civilians. Among these is the Zelenovic case, in which the court found that the offenses of the perpetrator, including his involvement in gang rapes and the rape of a 15-year-old girl, "were part of a series of sexual assaults that took place over a period of several months and involved multiple victims in four different locations."Other examples include Vasiljevic, Tadic, Kunarac, and Dragan Nikolic cases.

It was not rare that women were also raped or otherwise sexually abused on more than one occasion, along with or in front of other victims. The Bralo, Brdanin, Furundzija, and Kvocka cases are among the cases that stand out.

Sexual abuse, including rape, against civilians, has been found to have been conducted outdoors, in victims' houses, in offenders' homes, in detention camps and centers, and elsewhere.

More specifically: Prijedor is a city located in northwestern Bosnia and Herzegovina. On April 30, 1992, Serb forces took control and ordered the removal of non-Serbs from their positions of responsibility. After the mission was completed, thousands of non-Serb citizens were confined to the Omarska, Keraterm, and Trnopolje detention camps. Both male and female detainees were subjected to severe ill-treatment, including beatings, rape, sexual assault, torture, and executions, as well as harassment, humiliation, and psychological abuse. The creation of these camps was the result of deliberate action against the non-Serb population of Prijedor. In addition to the crimes committed in the camps, the killing of Muslims took place in other villages of Hambarine, Biščani, Ljubija, Kozarac. On August 21, 1992, a group of more than 200 unarmed men were transported from Koricancje Stijiene near Mount Vlašić, and executed by Serbian police forces and their agents, thrown into a ravine. Only 12 people survived. It was found that more than 1,500 killings took place throughout the hostilities[57].

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[57] http://www.icty.org/sid/10169

Same with Konjic: it is a mountainous and wooded area located in central Bosnia and Herzegovina, south of Sarajevo. By mid-April 1992, Bosnian Serb forces, with the help of the Serbian government, had effectively surrounded the city, cutting off both Sarajevo to the northeast and Mostar to the south. Hundreds of local Serbs, including women and the elderly, were arrested and imprisoned in former military settlements in the village following a successful military campaign by Bosnian Muslims and Croats in Bosnia to successfully lift the siege of Konjic. Between April and December 1992, detainees were killed, tortured, sexually assaulted, beaten, and subjected to inhuman and degrading treatment. Many women detained in the lebelebići camp suffered frequent rapes and ill-treatment during their detention. In the lebelebići case, three defendants - Zdravo Mikiko, Hazim Delić and Esad Landžo - were found guilty of serious violations of the 1949 Geneva Conventions and sentenced to 9, 18, and 15 years in prison respectively. Zejnil Delalic was acquitted of all charges[58].

The Brdanin, Celebici, Dragan Nikolic and Kunarac cases are examples of sexual-violence cases focused on detention camps. The court made judgments in the Brdanin case about a large number of rapes in such camps, including children. It concluded that "rapes and sexual attacks were rife in the Prijedor region camps." It is not the only case in which the court found that sexual harassment was widespread in and around detention camps. In the case of Tadic, women were taken "routinely" from the Omarska camp to be raped. The girls detained were at great risk. Several cases tend to be stemming from the Dragan Nikolic situation.

At different sites, including houses around the base, a hotel, a military headquarters, and at locations where women were taken to do forced labor, female detainees were sexually abused. Dragan Nikolic also “allowed female detainees, including girls and elderly women, to be verbally subjected to humiliating sexual threats in the presence of other detainees [. . .].” He encouraged sexually abusive conduct.

In the Krstic case, the court held that at the time of the Srebrenica genocide, atrocities, including rapes, were a natural and unavoidable result of the 'ethnic cleansing' program.

In a variety of cases, in addition to the Dragan Nikolic case referred to in paragraph 84, female detainees were held in detention and routinely raped and otherwise sexually

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[58] http://www.icty.org/sid/10167

abused by one or more offenders for periods ranging from a few days to months. The Bralo case is one example in which the court described the "brutal rape and torture of a witness and her incarceration for approximately two months to be further abused as crimes of" the most depraved kind, "at the discretion of her captors." It considered her “exacerbated humiliation and degradation” as demonstrating “a desire to debase and terrify a vulnerable woman, who was at the complete mercy of her captors”. Bralo was in a position to free her, but he failed to do so. Other examples include the Brdanin, Kunarac, and Blagoje Simic instances.

The case of Kunarac involves a conviction of enslavement as a crime against humanity, based in part on women being raped for several months while being held in private homes as if they were the property of their captors.

A finding by the court in the case of Brdanin is instructive as to the effect of supervisors not performing their responsibility to avoid and punish crimes by their subordinates.

In the Plavsic case, the defendant, former co-president of the Serbian Republic of Bosnia and Herzegovina, pleaded guilty to discrimination in 37 municipalities across Bosnia and Herzegovina as crimes against humanity in connection with crimes committed against civilian Bosnian Muslim, Bosnian Croat, and other non-Serb communities. Rapes and other sexual abuse were part of the crimes committed in the course of this 'racial cleansing' movement. The court noticed that:

“These crimes did not happen to a nameless group but to individual men, women, and children who were mistreated, raped, tortured, and killed. This consideration and the fact that this appalling conduct was repeated so frequently, calls for a substantial sentence of imprisonment. The Trial Chamber has already found this to be a crime of the utmost gravity.”

It also found that: “the seriousness of the offense is aggravated [. . .] by the senior leadership position of the accused. Instead of generally preventing or mitigating the crimes, she encouraged and supported those responsible”.

In the case of Brdanin, many men were coerced by their captors to perform sexual acts, including oral sex, with each other in front of other people concerning sexual harassment against men. There are other cases in which detained men have become victims of sexual harassment, usually involving being forced to perform sexual acts on

co-detainees by their captors. The Todorovic case, in which one instance involved the accused forcing a male prisoner to bite the penis of another inmate, is an example. Among other examples of sexual abuse against men is the Tadic case, which was an example in which it was found that men were severely sexually abused.

The five forms of genocide do not include that of ethnic cleansing, which is punished as a war crime, while it does not differ much from genocide. Ethnic cleansing has been appearing in documents of international organizations since 1992, and mainly referred to the case of Kosovo. their homes, deliberate military attacks or threats of attacks on civilians and civilian areas, and destruction of property.

More specifically, the indictment against Milosevic relates to the extermination and murder of hundreds of Croats and other non-Serb citizens throughout Croatian territory in the following ways: Prolonged detention and isolation of thousands of Croats and non-Serb civilians, including of prison camps in Montenegro, Serbia and Bosnia and Herzegovina, under Article 2 on serious violations of the 1949 Geneva Conventions/perpetuation of the inhumane living conditions of Croats and other non-Serb political detainees. (torture, beatings, sexual abuse and murder) / Expulsion of at least 170,000 Croats and other non-Serb citizens from the territories (Dalj, Erdut, Klisa, Lovas, Vocin, Bacin, Skabruja, Nadin Bruska and Dubrovnik), including deportation to Serbia of at least 5,000 inhabitants of Ilok and 20,000 inhabitants of Vuk . These violent movements as well as the enslavement of civilians are acts that are prosecuted, in accordance with Article 5 of the Statute on Crimes against Humanity. He was also charged with deliberate destruction of homes, other public and private property, cultural institutions, historical monuments and shrines of Croats and other non-Serb citizens.

Milosevic was also prosecuted under Article 5 for crimes against humanity. In this context, he was accused of causing serious physical and mental harm to thousands of Muslims while being held in detention camps under poor living conditions (contaminated water and food, inadequate medical care, forced labor, psychological, physical and sexual abuse). He was also charged with intentional homicide against non-Serbs, mainly Bosniaks and Croats living in Banja Luka, Bihac, Bileca, Bosanska Krupa, Bosanski Samac, Bratunac, Doboj, Foca, Sarajevo, Kalinovrad, Kotor , Srebrenica, Teslic, Visegrad and Zvornik.

The legal precedents set by the Court have extended the boundaries of international humanitarian and international criminal law, both in substance and procedure: i) The Court has established a general prohibition of torture in international law which may not derogate from a new treaty, domestic law or otherwise. ii) The Court has made significant progress in international humanitarian law on the legal treatment and punishment of sexual violence in times of war. iii) The Court precisely determined the term of the crime of genocide, and the purpose of this crime. iv) The Court has concluded that enslavement and persecution constitute crimes against humanity. v) The Court has made several contributions to procedural law issues, some of which are in the areas of witness protection, confidentiality, and disclosure of information concerning the national security of states and the guilt of the accused.

2.5 Reproductive –Sexual Violence Cases at ICTR

At the heart of Rwanda's 1994 tragedy is that genocide was committed by perpetrators of mainly Hutu origin against Rwandans of Tutsi descent. Between April and July, between half a million and one million Tutsis were killed, mainly civilians and moderate Hutus, who were seen as supporters of the Rwandan Patriotic Front headed by Tutsi or opponents of the ruling regime. Genocide, crimes against humanity, and war crimes have taken place in the form of a brutal civil war. Members of a militia group known as the Interahamwe were among the main offenders.

With a few exceptions, those suspected of massacres, including sexual harassment against civilians, are Hutu-based. It is meaningless that this is so for SCR 1820 as if sexual abuse against civilians was perpetrated by members of only one faction.

The ICTR has completed 24 cases. No more than half-13 of these cases include sexual abuse of people, including multi-accused instances.

Several out of the ten trial cases, including multi-accused cases, include sexual harassment allegations and charges. In one of these, the Karemera case, the trial chamber recently dismissed the accused's mid-trial motion to acquit them for lack of evidence, ruling that the defendant has a case to answer. The court referred to prosecution witnesses testifying to repeated rapes of Tutsi women at roadblocks in the

form of its examination of facts related to numerous genocide allegations. As a crime against humanity, the perpetrators are also charged with rape.

Four of the eight awaiting-trial accused face sexual-violence allegations. In one, rapes are part of a charge of genocide, and in another, a trial chamber recently decided to add to the indictment more detailed charges regarding multiple rapes.

There are 13 ICTR defendants at large. The indictments against at least four of them include accusations and charges of sexual assault, even with genocide. In several cases, there are reports that rapes and other types of sexual harassment have been perpetrated around the world on a wide scale. Several decisions under appeal include findings of sexual violence; see Table 2B on the cases in Bagosora and Rukondo.[59]

In four cases of guilty pleas, three of which were completed in 2006 and 2007, the prosecutor dismissed the counts of sexual assault from the charges according to plea deals with convicted individuals who had pleaded guilty to other counts. The cases involved rape as a crime against humanity, and one included rape as a war crime as well. There has been criticism of the exclusion of sexual assault from guilty plea trials at the ICTR.[60]

The accused denied any knowledge of rape during the Semanza trial. He explained that "rape has never existed in Rwandan tradition or culture." According to the court, other defense witnesses "made similar general statements, saying either that rape is unknown in Rwanda or that they did not see or hear of any violations in 1994." Concerning the 1994 armed conflict, the court found that "the unfounded claims of defense witnesses that no violations occurred in the 1994 armed conflict"

In the case of Bagosora, the court found that "it is well known that during the events in 1994, rape and other forms of sexual harassment were common in Rwanda." The Chamber determined that these acts were committed at different locations, including roadblocks in Kigali. It also held that the "case law of this Tribunal shows that sexual

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[59] See footnote 93 on Bikindi trial judgment and findings in relation to sexual violence to which accused could not be tied

[60] eg Semanza case in which the prosecution did not lead evidence in support of all sexual-violence allegations in the indictment and in which the court could not convict for rapes of four prosecution witnesses as these rapes were not properly pleaded in the indictment.

harassment was common." To support this conclusion, reference was made to the cases of Muhimana, Gacumbitsi, Semanza, and Akayesu.

In ICTR decisions, sexual abuse takes on different forms. These include: abuse, torture, inhumane actions, and oppression as crimes against humanity; rape and indignation as war crimes against personal dignity; and rape as genocide, as well as significant physical or mental harm. In one incident (the Semanza case), rape and/or other sexual assault amounted to torture.

The abuse was found to be part of a systemic and/or systematic assault against civilian communities in nine of the 13 concluded cases involving sexual-violence findings. The cases of Gacumbitsi, Muhimana, and Semanza (in which the accused led a group of individuals to rape Tutsi women) are examples.

There are many examples where rape and other forms of sexual abuse have been part of convictions of genocide. The Rutaganda case is one example. Refugees fleeing for safety to a stadium were stopped by soldiers and diverted en route. Some women were physically taken from the community and raped afterward. They were surrounded by militias and soldiers upon arrival at another spot. The Hutus were divided from the Tutsis, and the Tutsis were killed. Before they were killed, some surviving Tutsi girls were picked, set aside, and raped. The court also found that many of the women who were killed had clothes stripped from them. The accused publicly instigated the rape of Tutsi girls in the Gacumbitsi case. With a megaphone, he drove around, inciting Hutu men to rape Tutsis and to kill anyone who resisted atrociously. Then, such assaults were carried out, including sticking sticks into the genitals of the victims, and some of the victims died. The rapes of a witness and seven other Tutsi women were a direct consequence of his instigation, ranging from a 12-year-old girl to an "old lady" in a single instance by multiple rapists, and the persistent rape by one rapist over the days of a survivor. The Chamber of Appeals acknowledged that Gacumbitsi "was a primary player, a community leader who used his influence to bring about the horrific massacre and rape of thousands."

In deciding that Muhimana had the intention of committing genocide, the court took different factors into account. One of these reasons was that he "targeted Tutsi civilians by shooting and raping Tutsi victims during these assaults." A young Hutu girl, Witness BJ, whom he thought was Tutsi, was also raped, but later apologized to her when he

was told that she was Hutu. The accused specifically referred to the Tutsi ethnic origin of his victims during the course of some of the assaults and rapes.

The court defined rape as the natural sexual assault committed on a person under conditions of coercion [61]. "Sexual violence, which includes rape, is considered any act of a sexual nature committed on a person under coercive conditions. This act should be committed: a) as part of a widespread or systematic attack, b) on a civilian population, c) for specific recorded grounds of discrimination and more specifically for national, ethnic, political, racial or religious reasons [62]".

In particular, the International Criminal Court for Rwanda in this decision recognized that "sexual intercourse worked" with the aim of destroying a people. Interpreting the acts of genocide listed as acts of genocide in the Genocide Convention and in order to include in them the act of rape, the Court recognized that sexual violence can cause "serious physical or mental harm" to an individual and in addition may kill or even be used to destroy a people[63].

2.6 **Reproductive –Sexual Violence Cases at SCSL**

The SCSL has, relatively speaking, far fewer cases than the ICTY and ICTR. Since its establishment, it has concentrated only on a small number of people who are said to be most responsible for atrocity crimes.[64]

The Civil Defense Forces (CDF), the Armed Forces Revolutionary Council (AFRC), and the Revolutionary United Front (RUF) were the most organized armed groups active in the armed conflict in Sierra Leone. Three of the cases of the SCSL are constructed around some of these groups' representatives. The CDF case involving two leaders and the AFRC case involving three leaders are two cases that have run their full course. In the RUF case (involving three leaders), the trial chamber has recently given

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[61] "Prosecutor v Jean – Paul Akayesu", par. 6.4, 597
[62] Ibid.
[63] Ibid.
[64] Resource constraints may also have influenced decisions on the number of cases to pursue; the court has always found it challenging to raise funding, seeing as it relies on voluntary contributions, unlike the ICTY and ICTR which rely mainly on funding from the regular UN budget.

its judgment[65]. For the time being, the final case at the SCSL concerns the former Liberian president, Charles Taylor.

Whether one party perpetrated more sexual abuse than the others is meaningless for SCR 1820.

Findings on sexual violence against people are included in the completed cases. In only one case, the AFRC case, convictions for sexual assault were introduced, both as crimes against humanity and as war crimes. There are also findings of sexual abuse as crimes against humanity and war crimes in the trial judgment in the RUF case. In the Charles Taylor case, the indictment contains charges of rape as well as sexual exploitation and other types of sexual abuse charged as crimes against humanity and sexual crimes charged as offenses against personal dignity as a war crime. The withdrawn charges contained charges of sexual abuse, as did the indictment in the case of the remaining fugitive.

Sexual-violence and associated convictions took various forms in the AFRC case. These are rape as a crime against humanity, which was considered by the court to be part of an assault that was both systemic and systematic; outrages against personal dignity; and other forms of sexual abuse, including collective punishment as war crimes. On the grounds of their personal and superior liability, the three representatives were held liable.

The court found that “a widespread or systematic attack by AFRC/RUF forces was directed against the civilian population of Sierra Leone at all times relevant to the indictment.” While in government, this attack was state-sponsored, “aimed broadly at quelling opposition to the regime and punishing civilians suspected of supporting the CDF/Kamajors.” After the removal of the AFRC/RUF government in early 1998, the two groups operated as non-state actors and the “focal points of violence shifted as AFRC/RUF troops moved throughout the various provinces [. . .]. [T]he continued attack against the civilian population was in most instances more frequent and brutal.”

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[65] Prosecutor vs Sesay and 2 others, SCSL-04-15-T, Judgement, 2 Mar 2009 (RUF trial judgment). (Judgment was delivered on 25 February 2009). The three accused were members of the RUF. Indictments against two other individuals who were more senior RUF members were withdrawn after the confirmation of their deaths; they were Foday Saybana Sankoh and Sam “Mosquito” Bockarie.

A future appeal is subject to the RUF trial decision. This includes numerous studies on sexual abuse against civilians committed worldwide, including rape as a crime against humanity (after the assault on Freetown in February 1999, it was found that 648 out of 1,168 patients treated were raped); sexual slavery as a crime against humanity; forced marriage as a crime against humanity; outrages against personal dignity (rape, sexual slavery)

In the context of the sexual slavery charge, the trial chamber remarked that specific offenses relating to sexual violence "are designed to draw attention to serious crimes that have been historically overlooked and to recognize the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate and instill fear in victims, their families and communities during armed conflict."[66]

The Trial Chamber noted that the evidence indicates that "sexual violence was pervasive against the civilian population in an environment in which violence, injustice, and lawlessness existed" in the sense of treating sexual violence as terrorism.

In the case of the CDF, the court declined to allow the prosecutor, in contentious rulings, to include allegations of sexual assault in the indictment or to present evidence of sexual violence at trial.

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[66] RUF trial judgment par 156. Referenced by the chamber is the following UN sources: SCR 1820 itself; Final report submitted by Ms Gay J McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, Economic and Social Council, Commission on Human Rights, Sub- Commission on the Promotion and Protection of Minorities, E/CN.4/Sub.2/1998/13, 22 June 1998, pars 7-19; Update to Final report submitted by Ms Gay J McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/21, 6 June 2000, par 20; Report of the United Nations High Commissioner for Human Rights, Systematic rape, sexual slavery and slavery-like practices during armed conflicts, General Assembly, Human Rights Council, Sub-Commission on the Promotion and Protection of Human Rights, A/HRC/Sub.1/58/23, 11 July 2006, pars 5-11.

2.7 Conclusions

A noteworthy feature of the ICTY, ICTR, and SCSL judgments of completed cases is sexual violence against civilians committed during and in conjunction with associated armed conflicts. It's part of convictions for genocide, crimes against humanity, and crimes of war. It takes plenty of types. These range from rape, sexual slavery, and forced marriage to torture, infringement of personal dignity, persecution, and serious bodily or mental harm.

Civilians were the major victims of sexual harassment in these decisions. Women and girls were the main targets. The ICTY and SCSL were also assailed by men. Many of the convictions include sexual assault committed as part of institutional or systematic assaults on civilian populations. As different examples show the sexual abuse was especially aggressive.

A notable aspect of the ICTY's relevant judgments is that sexual harassment of civilians was part of the so-called 'ethnic cleansing' of areas desired by the war powers and resulted from it. Sexual abuse focused on detention facilities is a large proportion of the reports, particularly in cases involving the sexual trafficking of women and children. In some decisions, sexual assault has been characterized as natural. However, sexual violence against civilians was also committed, as the judgments suggest, away from such detention facilities. A noteworthy feature of the ICTR is that a systematic aspect of the genocide against the Tutsi was sexual violence against civilians, most of which took the form of rape. A noticeable characteristic of the SCSL is the kidnapping of civilian women and girls and their forced marriage to combatants, in which these so-called 'bush wives' are frequently raped and subjected to other forms of sexual assault.The related decisions underline the importance of supervisors in the prevention and inability of their subordinates to prosecute crimes, including sexual crimes. In some cases, not only did supervisors and other offenders who were in positions to affect others refuse to perform their task, they abused, sexually enslaved, and committed other sexual abuse against civilians directly.

The ICTY, ICTR, and SCSL have various aspects that are of real and possible interest to SCR 1820 and its implementation. Some instances are the following. When it formed the three courts, the UN had different goals in mind. These include helping to end

accountability for abuses, including sexual abuse, perpetrated against civilians in armed conflicts by bringing to justice leading perpetrators, and ensuring victims' redress.[67] The bulk of their investigations, trials, and jurisprudence include offenses, as opposed to 'combatants', perpetrated by members of the parties to the associated armed conflicts against civilians. Sexual harassment, like rape, is a notable aspect of the work of the three courts. Ending protection and ensuring accountability and punishment for crimes of a sexual nature is one of the components of a possible holistic approach covered in SCR 1820.[68] The formation and operation of the three courts were also intended to contribute to reconciliation and peace restoration and preservation. [69] – these issues are also important elements of SCR 1820[70]. By the resolution, the SC "stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation".[71]

Analyses of the degree to which the three courts have and still may contribute to achieving such goals through their work on sexual abuse, particularly the preservation and restoration of international peace and security, have been and will remain fraught with difficulty, but can nevertheless be useful. The same goes with other forms of transparency affecting the UN, directly or indirectly. These range from prosecutorial structures to the Truth and Reconciliation Commission of Sierra Leone to bring to justice the perpetrators of sexual abuse and other serious crimes in Timor Leste. Analyses of the work of such mechanisms, along with other sources, would also shed more light on the different facets of sexual violence against civilians in armed conflicts, including the connections between such violence and international peace and stability.

From the outset, there were expectations and hopes in many quarters that sexual harassment against civilians would be given due consideration by the three courts. The three courts themselves have at times compounded these needs and ambitions.Analyses of the degree of achievement and their inability to take due account of the problem could point to lessons for the successful implementation of SCR 1820.

[67] e.g. preambles of SCR 827; 955; SCR 1315 and SCSL-establishment agreement.
[68] eg SCR 1820 preamble, and operative par 4.
[69] eg preambles of SCR 827; 955; SCR 1315.
[70] eg SCR 1820 preamble, and operative pars 1, 4
[71] SCR 1820 operative par 4 (emphasis added).

In the ICTY, ICTR, and SCSL case-law, it is explained that superiors, including military commanders and civilian superiors such as political and local government officials, are persons who have the legal or factual power or authority, whether formalized, to either avoid the crimes of a subordinate or prosecute the subordinate after the crime has been committed[72].

In this example, the ICTY noticed the context and relevance of superior accountability, which has a long tradition and is part of universal customary law, meaning that this law is subject to all States and all parties to armed conflicts:

“. . .] criminal responsibility under [the superior-responsibility provision of the Statute] is based primarily on Article 86(2) of [Additional] Protocol I. [. . .] The preamble of Protocol I adds further that “the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments.” The purpose of superior responsibility, as evidenced in Articles 86(1) and 87 of Protocol I, is to ensure compliance with international humanitarian law. Furthermore, one of the purposes of establishing the International Tribunal, as reflected in Security Council Resolution 808, is to “put an end to widespread violations of international humanitarian law and to take effective measures to bring to justice the persons who are responsible for them”. And, more particularly, the purpose of superior responsibility in Article 7(3) [of the ICTY Statute] is to hold superiors “responsible for failure to prevent a crime or to deter the unlawful behavior of their subordinates. [. . .]” [73]

Of particular importance for the implementation of international humanitarian and criminal law in general, and the implementation of SCR 1820 is the following, as reflected in a provision of additional protocol I dealing with the duty of commanders[74]:

To avoid and eradicate infringements, the High Contracting Parties and the Parties to the dispute shall require commanders to ensure, in compliance with their degree of duty,

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[72] ICTY Statute art 7(3) reads: “The fact that any of the [ICTY crimes] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” ICTR Statute art 6(3) and SCSL Statute 6(3) are essentially the same.

[73] Blagojevic appeal judgment par 282 (emphasis added). See also Nahimana appeal judgment pars 485-486

[74] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

that the representatives of the armed forces under their command are informed of their responsibilities under the Conventions and this Protocol."[75]

Sexual violence against civilians or anybody else is prohibited under international humanitarian and criminal law, including the 1949 Geneva Conventions and their two 1977 supplementary protocols. By instructing their subordinates about the illegality and unacceptableness of any sexual harassment whatsoever, and by making clear by word and deed that any violation would be punished, superiors would lead to a decrease in sexual abuse.

As stressed by the ICTY:

"a superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed."[76]

The ICTY also noted that there might be cases where a superior needs to use force against subordinates behaving in breach of international humanitarian law, underlining the importance of the duty of superiors. A superior can have no choice but to use force to deter or punish subordinates from committing offenses[77].

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[75] Article 87(2). Additional protocol I arts 86-87 read in full: "Art 86. Failure to act. 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so. 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach. Art 87. Duty of commanders. 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol. 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol. 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

[76] Hadzihasanovic appeal judgment par 30 (emphasis added).

[77] Hadzihasanovic appeal judgment par 228 (the court added that this kind of use of force is legal under international humanitarian law insofar as it complies with the principles of proportionality and precaution).

Several ICTY, ICTR, and SCSL defendants were convicted on charges of superior and personal responsibility for sexual abuse committed against civilians by their subordinates, and the facts supported the charges. However, by statute, those convicted based on their responsibility may not, besides, be convicted based on superior responsibility for the same acts, although failure to prevent or prosecute subordinate offenses may be seen as an aggravating circumstance in the sense of convictions based on personal liability[78].

Of importance is the fact that the leaders of the accused or convicted people were also held under trial since they failed to take appropriate actions towards preventing or prosecuting sexual harassment or sexual crimes, as they should have done from their authority, as stated in international law[79].

Studying the history and case law of the two international ad hoc courts, for the former Yugoslavia and Rwanda, it is clear that their study of the issue of sexual violence has gained prominence in the international legal order. The international approach to sexual violence during armed conflict has moved dramatically beyond the norms that had embraced sexual violence as a violation of a man's property rights over a woman, with standards coming closer to respecting her. human dignity and the physical integrity of the victims themselves[80]. Equally important was the development of international elements of criminal law, through their case law, to define rape and sexual violence as genocide, crimes against humanity and war crimes. These developments were the first of their kind at the international level and opened the door to further substantive and procedural developments at the national level. It is noteworthy, however, that both the Statute of the International Court of Justice for the former Yugoslavia and the Statute of the International Court of Justice for Rwanda, the crime of sexual violence is absent.

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[78] See eg Nahimana appeal judgment par 487: “The Appeals Chamber recalls that it is inappropriate to convict an accused for a specific count under both Article 6(1) and Article 6(3) of the Statute. When, for the same count and the same set of facts, the accused’s responsibility is pleaded pursuant to both Articles and the accused could be found liable under both provisions, the Trial Chamber should rather enter a conviction on the basis of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating circumstance.”

[79] Halilovic appeal judgment pars 63-64: “necessary” measures are the measures appropriate for superiors to discharge their obligations (showing that they genuinely tried to prevent or punish) and “reasonable” measures are those reasonably falling within the material powers of the superiors.

[80] Koening K. Alexa, Lincoln Ryan, Groth Lauren, The Jurisprudence of Sexual Violence - Sexual Violence & Accountability Project Working Paper Series, Human Rights Center, University of California, Barkley, May 2011, p. 14

Eventually, however, the findings of these two courts paved the way for the prosecution of rape and sexual violence by the International Criminal Court.[81]

The right to fair access to the legal process is guaranteed by females as a way of redressing discrimination, including gender-based abuse. The exercise and further safeguarding of these rights include an overview of the substantive and procedural dimensions of IHL requirements and international criminal law enforcement, prosecution, and adjudication. Sexual abuse, especially rape, serves as a beachhead and a yardstick to analyze and distinguish the real capacity of the female community to exercise its access to justice during or in the immediate aftermath of war or national emergencies. The hard law advances of specialized international courts and tribunals still need the required sex-based offenses and their accompanying forms of liability to be enforced vigilantly, even-handed down Due diligence, on the part of judges to resistance any sexist interpretations of the laws, elements, procedural rules, and the evidence, remains critical to the endeavor of constructing a non-discriminatory international justice system. Gains must be constantly safeguarded, questioned, and then further developed, especially at the ICC. Regional human rights courts and appropriate national fora must also ensure that females retain comprehensive, dynamic protection and full enjoyment of human rights. Equality, security, dignity, self-worth, and the fundamental freedom to be free of gender discrimination, in particular gender-based violence, under IHL and international criminal law are central to the human rights of females.

[81] Ibid.

3 Legal Argument-Analysis of Helena's Case

As attorney Juliana Laguna of Women Link Word Wide confirms, reproductive violence is a prevalent phenomenon in conflict situations that has historically been invisible as there are very few relevant judicial decisions globally.[82] Therefore it can be easily understood how important is the ruling regarding the case of Helena of the Constitutional Court of Colombia. This specific case constitutes an international benchmark in the recognition of violence of this type that women and girls have suffered within armed groups and the rights that must be guaranteed to them. [83]The Court had the chance to issue a landmark decision on violations of reproductive rights against women and girls within armed groups as serious human rights violations and war crimes; thus providing one of the first precedents in the world regarding that subject.[84]

Helena's case represents the violations of reproductive rights to which many women and girls were subjected within armed groups in the context of the Colombian armed conflict: sterilizations, abortions, forced pregnancies, and contraception. Those forms of violence have very few times been recognized by justice, both nationally and internationally, much less if committed in the ranks of armed groups.[85] Therefore it is considered important to analyze the legal arguments of the case of Helena that was brought before the Constitutional Court of Colombia.

Right after the application of the Peace Agreement between the Government and FARC, Helena intended to seek reparation for the victimizing acts she had suffered while she was a member of the guerilla group throught the UARIV as it is provided in

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82 Press Release 'Women and girls who were victims of sexual violence within illegal armed groups should be considered victims of the conflict in Colombia and therefore entitled to reparations'(12/12/20190 Women's Link Worldwide < https://www.womenslinkworldwide.org/en/news-and-publications/press-room/women-and-girls-who-were-victims-of-sexual-violence-within-illegal-armed-groups-should-be-considered-victims-of-the-conflict-in-colombia-and-therefore-entitled-to-reparations > accessed 29/11/2020

83 ibid

84 Press Release 'Women and girls who were victims of sexual violence within illegal armed groups should be considered victims of the conflict in Colombia and therefore entitled to reparations'(12/12/20190 Women's Link Worldwide < https://www.womenslinkworldwide.org/en/news-and-publications/press-room/women-and-girls-who-were-victims-of-sexual-violence-within-illegal-armed-groups-should-be-considered-victims-of-the-conflict-in-colombia-and-therefore-entitled-to-reparations > accessed 29/11/2020

85 Ibid

Law 1448/2011. RUV did not accecpt her application and as result Helena through her legal representatives filed a tutela action against the institutions that prevented her from receiving reparations for the damage she had suffered. The way through which Helena's legal representatives acted in order to guarantee her fundamental rights was submitting a tutela action against the Unit for the Victims Assistance and Reparation - UARIV -[86] and E.P.S.[87]

UARIV is a Colombian institution created in January 2012, by Law 1448/2011, also known as the Victims and Land Restitution Law. This law establishes measures to assist and repair the damages the conflict brought along in people around the country. Enrollment in the RUV is a tool to guarantee the protection of the fundamental rights of the victims of the internal armed conflict, and in addition, it is essential to access the protection and guarantee mechanisms for care, assistance, and comprehensive reparation through administrative channels, enshrined in Law 1448 of 2011. This entity aims at approaching the State and the victims through efficient coordination and transforming actions looking to promote the effective participation of victims in their reparation process. Following this instruction, the UARIV coordinates the assistance and reparation measures given by the State, as well as the entities that are part of the National System for the Comprehensive Assistance and Reparation of Victims. The UARIV is a national entity with administrative and patrimonial independence, which belongs to the social inclusion and reconciliation sector, led by the Colombian department of Social Prosperity.[88] According to the Court's reasoning UARIV is the appropriate institution for the protection and guarantee of the fundamental rights that Helena seeks to ensure**.** Nonetheless, Helena's application for inclusion in the RUV was not accepted. And therefore, Helena submitted through her legal representatives[89] a tutela action against UARIV in order to seek reparation for the violation of fundamental rights with her non-inclusion to the UARIV. The attorneys of Helena invoked the protection of her fundamental rights to be fully recognized and her to be repaired as a victim of armed conflict, health, personal integrity, vital minimum, decent life, education, and housing. According to the jurisprudence of the Constitutional Court,

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86 la Unidad de Atención y Reparación Integral a las Víctimas – UARIV
87 Capital Salud
88 https://www.unidadvictimas.gov.co/en/la-unidad/victims-unit-review/28230
89 Legal support for the whole process was provided by Women Link Worldwide

[90] tutela action is the ideal mechanism to guarantee the effective enjoyment of fundamental rights of victims of internal arm conflicts. Especially in cases in which the protection of their rights depends on the inclusion in the RUV.

Subsequently, two were the main legal issues that the Constitutional Court of Colombia had to deal with. First it had to examine whether the UARIV violated the fundamental rights of Helena having denied her enrollment in the RUV, arguing that her statement was submitted outside the terms established in articles 2(3) and 155 of Law 1448 of 2011, without taking into consideration particular circumstances that could constitute force majeure, by not having pronounced on the merits regarding all the victimizing acts declared and by not having recognized Helena's quality of victim in the application of paragraph 2 of article 3 of Law 1448 of 2011. And secondly, it had to examine whether EPS violated the fundamental right to health of Helena -victim of sexual violence- by denying her comprehensive and immediate health care. In order to answer those legal questions, the Constitutional Court examined and developed its argument on a series of issues. Many factors have been studied by the Court but the ones that will be analyzed below are those related to the subject of the thesis. Therefore the approach will be focused on the international aspect of reproductive and sexual violence against women during arm-conflicts.

3.1 Amicus curiae interventions

The importance of this specific case can also be demonstrated by the significant amount of amicus curiae interventions the Court received from a series of Non-Governmental Organizations, Institutions, and Foundations. [91] In general terms, the common ideas exposed in the interventions will be briefly presented.

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90 Judgements T-119 of 2015, T-250 of 2015, T-446 of 2015, T-548 of 2015 and T-317 of 2015 Of Constitutional Courts

[91] The Court received received amicus curiae interventions from "Human Rights Watch", Christine Chinkin representing the University " London School of Economics and Politics Science", " Nobel Women's Initiative" , "Women's Initiative for Gender Justice", Colombian Commission of Jurists, Corporation for WomenFollow My Steps, Collective Corporation for Women Justice, Foundation for Women and the Future, Cedesocial Foundation, Legal Clinic of Public Interest and Human Rights of the Universidad Autónoma de Bucaramanga, Corporación Mujer Denuncia y Muévete, Public Actions Group of the Universidad del Rosario, Corporación Humanas, Red Nacional de Mujeres, Corporación Sisma Mujer, Colombia Diversa, La Mesa por la Vida y la Salud de las Mujeres, Profamilia, Coalition

It was pointed out how necessary is for the Constitutional Court to clarify the institutional responsibilities of UARIV in the case of scenarios, such as that of Helena, in which there is a gray area. In her case despite having suffered from acts of sexual violence that have affected her health, she still was not recognized as a victim nor could she effectively access programs designed to guarantee her rights like those provided by UARIV. It was insisted that the rights of women to reproductive autonomy, privacy, and equality, among other sexual and reproductive rights, must be protected at all times -both in peace and during arm conflicts. **It was clarified that forced abortion constitutes a serious violation of women's reproductive autonomy in any context.**[92] It was emphasized that the refusal to recognize Helena as a victim of sexual violence impedes her access to transformative reparations with a gender perspective. They pointed out that this situation not only increases the culture of impunity but also violates the rights of Helena and of other women to have access to comprehensive reparations, including specialized treatments regarding their physical and mental health. Additionally, it was highlighted how invisible has been historically the impact of armed conflict on women combatants and ex-combatants since the damages they suffered are often ignored by society. This invisibility lies in the lack of protection for women combatants and ex-combatants against sexual violence. Hence, it was affirmed that the recognition of the damage suffered by these women and their condition as victims of internal armed conflict by the Constitutional Court is extremely important. Particularly in Helena's case due to the recurrence and severity of contraception and forced abortion within armed groups, UARIV should not deny the victim status of sexual violence under Law 1448 of 2011. Her request for registration to UARIV should face her as a victim of sexual violence and examine her from a different perspective. Not recognizing the consequences that forced abortion and forced contraception generate in ex-combatant women leaves them in a vulnerable situation. It was indicated that among the various forms of victimization caused during an armed conflict, the objectification of the women's body can cause serious damages to their right to decide on their sexual and reproductive freedom.

Against the Linking of Children and Youth to the Armed Conflict in Colombia, Daniela Kravetz[25], Dalila Seoane[26], Helen Berents[27], Phoebe Donnelly[28], Megan MacKenzi e[29] and Jessika Mariana Barragán López[30].

92 Emphasis added.

Also, it was explained that forced abortion has been widely recognized as a form of sexual violence by civil society and by United Nations organs. It was argued that international law categorically prohibits sexual violence, including forced abortion, for many years. Among others, it was added that United Nations, through its various organs and agencies, has frequently pointed out the prohibition of sexual violence in its various forms, including forced abortion, which adversely influences the physical and mental health of women. Thus, sexual violence has been prohibited under international law, both against civilians (in times of peace or conflict) and against combatants. It has even been prohibited in scenarios in which the perpetrator and the victim belong to the same group or rank within an armed group. In sum, the prohibition against sexual violence does not depend on the quality of the victim; in other words, such protection is not subsumed by the status or age of the victim.

Additionally, and of great importance was the underlining of the fact that sexual or gender-based violence as different international organizations and courts have recognized, constitutes a form of torture. Taking into account that the prohibition of torture has the character of a jus cogens norm, sexual and gender-based violence should not be tolerated by the States and should be investigated and punished with due diligence. For this, it is necessary for the State of Colombia not only to create or implement programs but to make existing ones effective otherwise, it leaves people like Helena unprotected. Therefore, women's rights to reproductive autonomy, among other sexual and reproductive rights, must be protected both in times of war and in post-conflict environments.

Following the decision, the Constitutional Court in its reasoning made specific reference to a report of the National Center for Historical Memory published in 2007 with the title "The War Inscribed in the Body. National Report on Sexual Violence in the Armed Conflict". [93] Their special reference was made to the serious consequences derived from sexual violence against women and the re-victimization to which they are subjected. . Among the consequences mentioned in the report are the following: i) serious physical health problems related to a) indelible body scars; b) sexual and reproductive health problems: 'low pain' and sexually transmitted infections; c)

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[93] The report of the Center for Historical Memory, published in 2007, is available at http://www.centrodememoriahistorica.gov.co/descargas/informes-accesibles/guerra-inscrita-en-el-cuerpo_accesible.pdf "La guerra inscrita en el cuerpo"

pregnancies due to rape and coerced maternity wards, d) physical affectations in pregnant women and, ii) perverse emotional consequences, which affect the capacity for action, the will of the victim, as it is an exercise in full control of the victimizer on the victim (...) which generates that the corporal and emotional affectations survive in many cases after years, deepened by the few possibilities that women have or have not had to elaborate their mourning, resignify losses or access the systems of Justice. Among these consequences are identified: b) the depth of silence and loneliness[94] and c) guilt and institutional revictimization.

Based on the above, the Constitutional Court concluded that the approach that can be generated to victims of sexual violence at institutions may lead to a greater impact on their rights since it could cause an increase in the feeling of lack of protection, guilt, and stigmatization. **Consequently, efforts should be made to lessen these feelings by allowing effective access to justice, holding perpetrators accountable, and sending an institutional and social message of absolute intolerance to sexual violence**.

Consequently, the Court with a reference to its previous jurisprudence[95] recognized that there are still obstacles in the country that re-victimize and prevent women, victims of sexual violence, from declaring or denouncing facts before the competent authorities, such as: “i) Justified fear (…) of being the object of new attacks against their life and integrity, or against those of their relatives, in case of declaring or reporting the facts to the competent authorities; ii) Lack of knowledge (...) of the mechanisms to declare or file complaints and request protection iv) Absence or weakness of the State in some areas of the country where sexual violence against women prevails in the context of the armed conflict and forced displacement due to violence; v) Presence and action of armed actors as a barrier to the declaration or reporting of cases of sexual violence against women and, iii) Persistence of cultural factors such as shame, isolation or stigmatization, which affect the low declaration or denunciation of acts of sexual violence by women vi) general difficulties faced by women in exercising their economic, social, and cultural rights, or in satisfying the minimum vital.[96]

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[94] The report “La guerra inscrita en el cuerpo” clarified that “some women have experienced deep feelings of abandonment, loneliness and helplessness, both at the time of the acts of sexual violence and later, especially when they keep silent or hide what happened due to fear that the aggressors will again harm them or their families.

[95] Colombia’s Constitutional Court, Judgement T-211 of 2019, M.P. Cristina Pardo Schlesinger

[96] Colombia’s Constitutional Court, Judgement T-211 of 2019, M.P. Cristina Pardo Schlesinger

The jurisprudence has evidenced that, apart from the obstacles referred to in the preceding paragraph, there are also other problems within the process of care for women survivors of victimizing acts of reproductive/sexual violence, which make it impossible to declare or report their situation in time; among which are "the deficiency of the care systems" and "the lack of training of public officials" regarding the application of the gender approach.[97]

The Court continued its ruling with a reference to the "First Survey of Prevalence of Sexual Violence", carried out by the House of Women and promoted by Oxfam in 2010.[98] In this survey, it was found out that sexual violence is one of the victimizing acts that generate the highest level of silence and reluctance to report by the victims. Of the recurring reasons for not doing so, are those of fear of reprisals and the presence of armed groups. [99] Now, regarding the inexistence or precariousness of the State regarding the prevention of sexual violence against women perpetrated by armed actors, in Order 009 of 2015, issued by the Special Chamber for Follow-up to Judgment T-025 of 2004, the Constitutional Court specified that:

"State control agencies and civil society organizations have shown that sexual violence against children and adolescents continues to be one of the most recurring illegal practices in the context of forced recruitment, especially against children and adolescents who belong to indigenous peoples. In its management report 2008-2009, the Office of the Attorney General of the Nation pointed out that the majority of minors in the war are girls, who are subjected to humiliating jobs, sexual slavery, compelled to be sentimental partners of the commanders, and forced to abort on many occasions. Studies have established that among the functions assigned to girls and adolescents within the ranks, are: (i) the development of intelligence activities and infiltration of the 'enemy', (ii) the maintenance of communications, (iii) the preparation of food, (iv) the storage and transportation of weapons, explosives and chemicals for the processing

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[97] Colombia's Constitutional Court, Judgement T-211 of 2019, M.P. Cristina Pardo Schlesinger
[98] Nota informativa de Oxfam 'La violencia sexual en Colombia Primera Encuesta de Prevalencia' (2010) < https://oxfamilibrary.openrepository.com/bitstream/handle/10546/118168/bn-sexual-violence-in-colombia-091210-es.pdf?sequence=1&isAllowed=y>
[99] Nota informativa de Oxfam 'La violencia sexual en Colombia Primera Encuesta de Prevalencia' (2010) < https://oxfamilibrary.openrepository.com/bitstream/handle/10546/118168/bn-sexual-violence-in-colombia-091210-es.pdf?sequence=1&isAllowed=y >

of narcotics, (v) servitude and sexual exploitation, among others. Where particularly servitude and sexual violence, include repertoires such as touching, unwanted sexual activity, sex trafficking, sexual extortion, among others.

Additionally, the Court considered it is necessary to cite previous judgment C-080 of 2018, in which it held that:

The Rome Statute of the International Criminal Court considers sexual violence, including that committed against minors, as a war crime. [100] *The Penal Code defines various forms of sexual violence in the context of the armed conflict. In title II on Crimes against persons and property protected by International Humanitarian Law typifies violent carnal access, violent sexual acts, forced sterilization, forced pregnancy, forced nudity, forced abortion, forced prostitution, forced slavery, and trafficking people for the purpose of sexual exploitation*[101]*. All these crimes have special or aggravating factors when they are committed in a protected person under fourteen years of age.*[102]

In accordance with this absolute prohibition of sexual violence, especially that committed against children and adolescents, transitory article 7 of Legislative Act 01 of 2017 provided that the Investigation and Accusation Unit of the Special Jurisdiction for Peace 'will have a team of special investigation for cases of sexual violence '.

Due to the gravity of the situation of girls and boys in the context of armed conflicts, the United Nations Security Council issued Resolution 1612 of 2005. Under this instrument, the Security Council annually monitors, through country reports, the situation regarding events that affect children in contexts of armed conflict. Sexual violence against minors was incorporated in the annual reports provided for in Resolution 1612, pursuant to Resolution 1539 of the same Security Council.

This body has also developed a series of instruments to end sexual violence in the context of armed conflicts through Resolutions 1820 of 2008, 1888 of 2009, 1960 of 2010 and 2106 of 2013, mainly. The Secretary-General of the United Nations has formulated a broad definition of sexual violence in armed conflict, in the following terms: 'The expression' conflict-related sexual violence 'is used to refer to sexual

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[100] Rome Statute of the International Criminal Court
[101] articles 138 to 141B of the Penal Code of Colombia
[102] art. 140 of the Penal Code of Colombia

violence that occurs during conflict, or in a post-conflict situation, which has a direct or indirect causal relationship with the conflict itself. Such a link may be demonstrated by the perpetrator's status as a belligerent party; the proliferation and use of small arms and light weapons; the breakdown of law and order; the militarization of sites of daily activity such as fuel and water collection; cross-border consequences such as displacement, trafficking or economic disruption; the (sometimes deliberate) spread of HIV; and the targeting of ethnic, sectarian or other minorities or of populations in contested territory affording an economic, military or political advantage, including in violation of a ceasefire agreement.[103]

For its part, the Constitutional Court has also verified the occurrence of sexual violence in the internal armed conflict, including that committed against girls, boys and adolescents. When observing that the situation of women, youth, girls and older adults displaced by the armed conflict constitutes one of the most critical manifestations of the unconstitutional state of affairs declared in Judgment T-025 of 2004, by means of Order 092 of 2008, the Court warned about the gender-based risks to which women, youth, girls and older adults in displacement are exposed, among which he identified the risk of sexual violence, as an alarming factual situation faced by women victims of the conflict armed. In this Order, the Court identified in particular nine (9) factual patterns, which account for how these sexual crimes against women, girls and adolescents have been perpetrated by all the actors in the conflict in the usual way: '[..:] extended and systematic [...] '.

The Court with this reference to its previous Judgement underlines the fact that according to International Criminal Law and more specifically according to Rome Statute sexual violence is considered a war crime. And it highlights the fact that according to Colombia's Penal Code forced abortion constitutes a form of sexual violence. At this point, it is very interesting to understand how national and international legal obligations lead the road for the Court to continue with its reasoning with Helena's case. Also, this interplay between national and international obligations is of extreme importance especially when the national legislator has taken a step forward that could open the road for legislators at the international level too.

[103] Judgement C-080/18

The Court continued its reasoning with another reference to a previous Judgement:

Subsequently, through Order 009 of 2015[104]*, this Court confirmed that sexual violence continues to be a gender risk for women in the context of the internal armed conflict and that forced displacement by violence persists as an expression of discrimination and violence against women. gender living in the territory. It noted the persistence of cases of sexual violence perpetrated by armed actors, including acts of physical and psychological torture, some with the subsequent murder of the victim, acts of ferocity and sexual barbarism; Rape, abuse and individual sexual harassment by armed actors, through kidnappings, retentions or abusive meddling for long periods of time, practices of forced reproductive planning, enslavement, exploitation and forced sexual prostitution, forced pregnancies and abortions, as well as contagion of sexually transmitted diseases. Likewise, the Court was informed of possible affectations of gender with sexual connotations against women, girls and adolescents, mainly indigenous, around mining exploitation in some areas of the country. Several women's organizations have documented cases of prostitution, serious effects on sexual and reproductive health, the transmission of sexually transmitted diseases such as HIV-AIDS, unwanted pregnancies in girls and adolescents, spontaneous or voluntary abortions without the required clinical conditions, harassment and sexual harassment.*

Thus, in order to provide elements of constitutional interpretation to the judicial and administrative authorities that must decide whether or not a case of sexual violence is related to the internal armed conflict, and that when proceeding to carry out the corresponding assessments of the case, If the most protective or guaranteeing interpretation of the victim's rights is chosen in case of doubt, the Court established a presumption of a close and sufficient relationship between the internal armed conflict, forced displacement due to violence and acts of sexual violence committed against women. For this presumption to be configured, it is enough that they present two objective elements: (i) the occurrence of a sexual assault, and (ii) the presence of armed actors - whatever their denomination - in the areas of the country in which they occur these attacks "[105]

[104] Corte Constitucional Judgement T-009 of 2015
[105] Corte Constitucional, Judgement T-299 of 2018

3.2 Parameters of International Law related to the human rights of women and sexual and gender violence perpetrated against women

At this part, the Court begins its reasoning with a reference to a case from the International Criminal Court, the case of the Prosecutor v. Thomas Lubanga Dyilo. [106] In the aforementioned case, Thomas Lubanga Dyilo was found guilty of war crime related to the recruitment and enlistment of children under 15 years of age and their use as participants in hostilities carried out within the framework of the Republic's internal armed conflict of the Congo. On that occasion, the ICC was clear in disapproving this type of practice and it was clarified that: "In accordance with the Optional Protocol to the United Nations Convention on the Rights of the Child, the participation in armed conflicts of children under 18 is prohibited. The Statute of the International Criminal Court also classifies as a war crime the recruitment and use of children under the age of 15 in armed conflicts.'

Specifically, in the inter-American system, the Declaration and the American Convention on Human Rights recognize that every child has the right to special protection, care and help without any discrimination, and to the consequent measures that their condition as a boy or girl requires, both on the part of his family as well as society and the State.[107]

Additionally, the Court clarified that any type of violation of women's human rights, in the context of an internal armed conflict, must be considered a violation of the fundamental principles of International Humanitarian Law.[108] Indeed, these principles derive various obligations of all States towards victims of sexual violence during the armed conflict. In particular, the Security Council of the United Nations - UN - has emphasized these obligations in nine successive resolutions on " Women, Peace, and Security.[109]Furtheremore, the Court referred to the Geneva Convention that Colombia

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[106] Lubanga Case The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06

[107] Press release from the Inter-American Commission on Human Rights, dated March 29, 2012, available online: < https://www.oas.org/es/cidh/prensa/Comunicados/2012/031.asp.>

[108] 1995 World Conference on Women, Beijing - China

[109] The Resolutions on -'Women, Peace and Security

ratified on November 8, 1961. Article 3, common to all four Geneva Conventions establishes that: *In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular, the murder of all kinds, mutilation, cruel treatment, and torture; b) taking of hostages; c) outrages upon personal dignity, in particular, humiliating and degrading treatment(…)*[110]

In addition, the Court did not skip to mention Protocol II Additional to the 1949 Geneva Conventions, related to the protection of victims of non-international armed conflicts of 1977 ratified by Colombia on August 14, 1995. In its preamble, the aforementioned protocol highlights the need for the contracting states to guarantee better protection for the victims of such armed conflict.[111] "[165]. Additionally, in its article 4, it determines that "[*All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour* (…)*They shall in all circumstances be treated humanely, without any adverse distinction* (...) *Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: 1. (a) Violence to the life, health and physical or mental well-being of persons, (...) (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;*[112]

[110] Article 3 Geneva Convention
[111] Preamble of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
[112]Article 4 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Subsequently, the Court continued its ruling with a reference in articles 7 literal g, and 8 numeral 2, literal e, of the Rome Statute[113] of the ICC. There it is indicated that within crimes against humanity and war crimes must be included those related to "[v] violation, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or **any other form of sexual violence of comparable severity**'.[114][115]

Another obligation for the Colombian State to guarantee women and girls the right to be free from all kinds of violence stems from the Convention on the Elimination of All Forms of Discrimination Against Women[116], as it was interpreted through General Recommendation No. 19: Violence against women. Colombia ratified this convention on January 19 1982 and it was incorporated into the Colombian legal system through Law 51 of 1981. The Optional Protocol was introduced through Law 984 of 2005.[117] From General Recommendations No. 19, 28, 30, and 35 the following assumptions can be drawn: gender-based violence against women is that perpetrated by the mere fact of being such or that which affects women disproportionate way; (ii) violence against women and girls is a form of discrimination and a violation of their human rights; (iii) gender violence affects women throughout the entire cycle of their lives, both through actions and omissions that result in physical, sexual, psychological or economic damage or damage; and (iv) the existence of an internal armed conflict exacerbates the existence of gender inequalities, which generates an increase in the risk and vulnerability of women and girls in the face of situations of gender violence caused by both state actors and actors. non-state.

Another source of obligations that bind Colombia is the Convention of Belém Do Pará- the Inter-American Convention on Prevention, Punishment, and Eradication of Violence Against Women. Colombia ratified this convention on December 3, 1996. It was incorporated into the Colombian legal system through Law 248 of 1996. "[E] very woman has the right to a life free of violence, both in the public and private spheres"[118] and that "[t] he States Parties condemn all forms of violence against women and agree

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[113] Rome Statute of the International Criminal Court, article 7, literal e.

[114] Colombia ratified the Rome Statute on August 5, 2002. It was incorporated into the Colombian legal system through Law 742 of 2005 and was declared constitutional through judgment C-578 of 2003.

[115] Emphasis added

[116] Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979

[117] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

[118] Article 3 of Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women - Convention of Belém do Pará

to adopt, by all appropriate means and without delay, policies aimed at preventing, punishing and eradicating such violence and carrying out the following: a. refrain from any action or practice of violence against women and ensure that the authorities, their officials, staff and agents, and institutions behave in accordance with this obligation; b. act with due diligence to prevent, investigate, and punish violence against women; c. include in its domestic legislation criminal, civil and administrative regulations, as well as those of another nature that is necessary to prevent, punish and eradicate violence against women and adopt the appropriate administrative measures that may be the case; (…) g. establish the judicial and administrative mechanisms necessary to ensure that women subjected to violence have effective access to compensation, reparation for damage, or other just and effective means of compensation.[119] In that same Convention, it was indicated that, when adopting the above measures, "the States Parties shall take into account especially the situation of vulnerability to violence that women may suffer due to, among others, their race or ethnic condition. , of migrant, refugee or displaced person. In the same sense, a woman who is subjected to violence will be considered when she is pregnant, disabled, underage, elderly, or in an unfavorable socioeconomic situation, or affected by situations of armed conflict or deprivation of her liberty.[120] These international obligations of the States were reiterated by the UN Security Council in Resolution 2467, adopted in April 2018, which had already been established in the eight previous resolutions on "Women, Peace, and Security".

However as the Court continues with its reasoning, it considers of great importance to make a specific reference to a case from the ICC. This decision marked a fundamental milestone in the development of IHL and the regulation of war crimes and is the Ntaganda case[121]. Despite the fact that the ICC had already ruled on the issue of sexual violence against child combatants within an armed group outside the law, this case was the first in which the ICC has had to examine the protection of combatants from illegal armed groups who have been victims of intra-row sexual violence, that is committed within the same group. So it can be affirmed that the decision ruled by the ICC constitutes a relevant development in the matter of regulation of sexual violence in non-

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[119] Article 7 of Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women - Convention of Belém do Pará

[120] Article 9 of Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women - Convention of Belém do Pará

[121] Ntaganda Case The Prosecutor v. Bosco Ntaganda ICC-01/04-02/06

international armed conflicts.[122] The ICC expanded the traditional concept of "protected person " in an armed conflict, extending protection to child soldiers who, as a general rule, are classified as combatants and, therefore, are not covered under traditional categories. of the Geneva Conventions. So, for the first time, it was maintained at the international level that war crimes **no longer seek to penalize only the behaviors committed by fighters of illegal groups against civilians, but also those committed within them[123],** penalizing themselves including serious crimes such as sexual violence. In the analysis carried out by said Court, in the first and second instance, it was affirmed that the literal b and e of numeral 2 of article 8 of the Rome Statute, which typifies the crimes of rape and sexual slavery, do not put as a condition, for the purposes of a person to be considered as a victim, not to be a direct participant in hostilities within the non-international armed conflict, as it is required in common Article 3 of the Geneva Convention. Thus, the ICC broadened the traditional concept of a "protected person" within an armed conflict, extending protection to child soldiers who, as a general rule, are classified as combatants and who, therefore, are not protected under the traditional categories of the Geneva Conventions. Thus, for the first time, it was argued at the international level that war crimes no longer seek to penalize only the conduct committed by combatants of groups outside the law against civilians, but also those committed within them, penalizing even serious crimes such as sexual violence.[124] Regarding all this, with respect to women combatants who are members of an armed group outside the law, General Recommendation No. 30 of the Committee of the Convention on the Elimination of All Forms of Discrimination against Women indicated that, regardless of the type of armed conflict, its duration and the actors involved, it has been evidenced that women and girls become systematically and deliberately a target of violence and sexual abuse. Indeed, it was noted that forcibly recruited women and girls are particularly vulnerable to being victims of sexual violence. For this reason, in the case of Bosco Ntaganda, it was emphasized that the obligation of protection at the head of the States subsists even though such crimes have

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[122] Fernández Carter Catalina 'Crimes of sexual violence committed within an armed group: the case of child soldiers in "The Prosecutor vs. Bosco Ntaganda " (2018) Anuario Iberoamericano Derecho Internacional Penal, 6, 82-109.
[123] Emphasis added
[124] Fernández Carter Catalina 'Crimes of sexual violence committed within an armed group: the case of child soldiers in "The Prosecutor vs. Bosco Ntaganda " (2018) Anuario Iberoamericano Derecho Internacional Penal, 6, 82-109.

occurred within an armed group against its members, in the framework of an armed conflict internal. Likewise, it pointed out that the group of female combatants is the most likely to be violated by sexual violence, both by State agents and by the armed groups themselves. This argument was also adopted by the UN Security Council, in Resolution 2106 of 2013 on "Women, Peace, and Security" in the sense of understanding that women are in a vulnerable situation not only during the armed conflict but also in the post-conflict stage.

Additionally for its part, the United Nations Population Fund (UNFPA) determined, through a report, that gender-based violence includes the violation of women's sexual and reproductive rights; which are related to the right to decide freely and responsibly about the number of children someone wants to have, the time to do so and access to information and the means to do so, as well as the right to make decisions concerning reproduction free from discrimination, coercion, and violence.[125]

In this same sense, the Convention on the Elimination of All Forms of Discrimination Against Women established, in its article 16, numeral 1, literal e, that pregnancies, the use of contraceptives, and forced abortions, within a context of non-international armed conflict, violates the right of women to decide freely and responsibly about the number of children they want to have and the time to do so. Besides, the UN Security Council, in Resolution 2467 of 2019, established that this type of victimizing acts should be considered as a form of gender violence, which can lead to torture or cruel, inhuman, and degrading treatment and that, also, constitutes an international crime.

On the other hand, the Committee on Economic, Social and Cultural Rights expanded the scope of the right to health in General Observations No. 14 and 22, since in them it declared that it must include the possibility of enjoying a variety of establishments, services, goods and information and the obligation of the State to guarantee, to survivors of sexual violence in all types of situations, health care at a physical and mental level.[126]

Finally, reference should be made to Resolution 2467 of 2019 of the Security Council of the UN, where it was established that victims of sexual violence perpetrated by armed

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[125] United Nations Population Fund (UNFPA), "Report of the International Conference on Population and Development", October 18, 1994, /COMF.171/13, principle 8.

[126] UN Economic, Social and Cultural Council, General Comment No. 22

groups on the margin of the law in internal armed conflict, shall have access to "national relief programs and repair, as well as health care, psychosocial care, safe shelter, support livelihoods, and legal assistance"[127] and that the State should make an effort to "help eliminate the social and cultural stigma associated with this category of crimes and facilitate rehabilitation and reintegration efforts.[128]

After this analysis, the Court concluded its ruling. In sum, it would be contrary to Colombia's obligations that derive from international law: (i) to deny recognition of the status of victims of the internal armed conflict to women ex-combatants of an armed group outside the law, who have suffered sexual and gender-based violence; and (ii) consequently, prevent their access to comprehensive reparation programs, established in the national or domestic legal system to restore their fundamental rights, under the argument or justification of having belonged to a guerrilla group, regardless of whether they were forcibly recruited when they were minors, which could reflect a lack of will in the aforementioned affiliation. For that reason the Court ordered:

1. that the decision by UARIV not to include Helena in the Register of Victims be declared void;
2. that within 10 days of the date of its decision, UARIV admit Helena to the Register of Victims on the basis of her having suffered forced recruitment as a child, sexual violence (including forced use of contraceptives and forced abortion) and forced displacement;
3. that within 15 days of the date of its decision, UARIV reinstate the provision of psychosocial and medical assistance to Helena to address the emotional, mental health and physical effects of having suffered sexual violence;
4. that in the provision of integral reparations to Helena, UARIV take a gender-sensitive approach to ensure her fundamental rights; and
5. that the health services provide and guarantee access to Helena to immediate, comprehensive, gender-sensitive, specialized care for as long as necessary to address the physical and psychological consequences of the violations she suffered.

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[127] UN Security Council, Resolution 2467 of 2019, approved by the Security Council at its 8514th session, held on April 23, 2019.
[128] UN Security Council, Resolution 2467 of 2019, approved by the Security Council at its 8514th session, held on April 23, 2019.

The Court thus decided that the only way to guarantee Helena's fundamental rights and to find an adequate balance between Colombian law and Colombia's international obligations under international humanitarian law and international criminal law was a legal process known in Colombia as 'La figura de la excepción de inconstitutionalidad' (constitutional exception).[129] This way article 2(3) of Law 1448/2011 would be overruled in this specific case, in order for Helena's fundamental rights to be guaranteed. Thus by rendering Article 2(3) of Law 1448 inapplicable to this specific case the Court harmonized with Colombia's obligations that derive from international law, both humanitarian and criminal.

3.3 Conclusions

Colombia is a patriarchal society where high levels of sexual and gender-based violence have long existed.[130] During the 55 civil war, violations of reproductive rights were a common practice among FARC towards its women members as described at the beginning of this dissertation. However the aforementioned rights have long been recognized by a plethora of Conventions, Committees and UN bodies. From international law aspect state has the obligation to guarantee the protection of those rights.

With this case, Colombia's Constitutional Court had the chance to recognize reproductive violence as a form of harm committed against women and girls in times of conflict and hence to guarantee their rights to integral reparations. This judgment sets an important legal precedent in recognizing a form of gender-based violence that has remained invisible for very long.[131] The existence of reproductive violence is something that has long been judicially underestimated in terms of international law, especially in times of conflict. Yet it is very common and with devastating

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[129] Art.4 of Colombia's Constitution

[130] Christine Chinkin, 'Giving voice and visibility to victims of sexual violence has the potential to drive cultural change in Colombia'(2017) LSE Latin America and Caribbean blog < https://blogs.lse.ac.uk/latamcaribbean/2017/06/14/giving-voice-and-visibility-to-victims-of-sexual-violence-can-drive-cultural-change-in-colombia/ > accessed 20/11/2020

[131] Dienek Vos, 'COLOMBIA – Colombia's Constitutional Court issues landmark decision on victims of reproductive violence in conflict' (2020) IntLawGrrls <https://ilg2.org/2020/01/11/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/https:/ilg2.org / > accessed 26/10/2020

consequences for the victims. Amicus curiae briefs, that the Court received from experts regarding the case of Helena, highlighted that its effects include both physical and mental traumas that deeply affect victims long after the violence has occurred. The fact that reproductive violence, like forced abortion, is specifically criminalized in national jurisdictions like Colombia, may assist judges at the international level in accepting reproductive violence as a specific crime also at an international level. Helena's decision by the Colombian Constitutional Court recognizing that forced contraception and forced abortion constitute victimizing acts for women ex-combatants leads the road to a broader recognition of this gender-based violence. A form of violence that has long remained invisible in international law. This decision lets us believe that perhaps the time for a wider recognition has come.

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