

# THE OPENING OF A NATIONAL CASE ON SEXUAL AND REPRODUCTIVE VIOLENCE, AND VIOLENCE BASED ON THE VICTIM'S SEXUAL ORIENTATION AND GENDER IDENTITY

is a necessary and urgent measure for  
transitional justice with a gender perspective




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The opening of a national case on sexual and reproductive violence, and violence based on the victim’s sexual orientation and gender identity is a necessary and urgent measure for transitional justice with a gender perspective.<sup>1</sup>

The Alianza Cinco Claves (Five Keys Alliance) has proposed to the Special Jurisdiction for Peace (JEP in Spanish) that it open a macro-case on sexual violence, reproductive violence, and violence based on the victim’s sexual orientation and gender identity (SOGI)<sup>2</sup>. We have found that Colombia continues to face a scenario of historic impunity for these crimes and that the gender measures established in the Final Peace Agreement (FPA) and, in general, the guidelines for a gender perspective in the investigation and prosecution of these crimes have remained on paper instead of being translated into action.

A specialized macro-case on these types of violence would allow for the development and implementation of the gender approach in transitional justice and be a step to overcome the obstacles faced by the victims of these crimes to access justice. Also, Cinco Claves believes that these types of violence, due to their specific

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1 Document prepared by the organizations that make up the Alianza Cinco Claves: Women’s Link, Colombia Diversa, Corporación Humanas, Red Nacional de Mujeres, and Corporación Sisma Mujer. (see annex A)

2 Sexual orientation and gender identity (SOGI)-based violence will not be referred to as homophobic and transphobic violence. This paper employs the notion of “SOGI-based violence” as a specific form of “prejudice-based violence,” a concept coined by Colombian sociologist María Mercedes Gómez in response to the reductionist “hate crime.” This concept has been adopted by Colombian LGBT rights organizations like Colombia Diversa as their primary lens of analysis, in order to comprehend and truly prevent violent acts against LGBT people. By prejudice-based violence, we mean violence rooted in social prejudices, which targets a particular individual (or individuals) due to their real or perceived membership in a historically discriminated group or class, in this case sexual orientation and/or gender identity. Of course, prejudice-based violence, as referenced in this paper, is a form of gender-based violence. Yet, the choice to use the former is both political, insofar as it casts a light on the specificity of SOGI-based violence, and analytical, insofar as it brings to bear a series of analytical tools to better understand and explain SOGI-based violence in armed conflict. For more information on the concept, see: COLOMBIA DIVERSA. Orders of Prejudice. Systematic Crimes against LGBT People in the Colombian Conflict. Bogotá: 2020; COLOMBIA DIVERSA. ¿Quién nos va a contar? Informe para la Comisión de la Verdad sobre experiencias de personas lesbianas, gays, bisexuales y trans en el conflicto armado colombiano. Bogotá: 2020; GÓMEZ, María Mercedes. Prejudice-Based Violence. In: Gender and Sexuality in Latin America – Cases and Decisions. Heidelberg, New York, and London: Springer, 2013

characteristics, can be used to demonstrate what happened during the armed conflict, and that a unified investigation will allow for the objectives laid out in the Comprehensive System for Truth, Justice, Reparation, and Non-repetition and created in the FPA to be achieved. This document proposes the opening of a national case on conflict-related sexual violence,<sup>3</sup> reproductive violence, and other sexually motivated crimes as a necessary and urgent measure for transitional justice with a gender perspective. For this aim, we will lay out arguments below demonstrating the need for a national case.

Cinco Claves sustains that a national case is necessary and urgent because (i) it is an appropriate manner to implement the gender approach in transitional justice; (ii) sexual and reproductive violence and sexually motivated incidents have the sufficient capacity to explain what occurred in the context of the armed conflict; and (iii) the case would contribute to overcoming the existing obstacles to access justice and the consequent panorama of historical impunity regarding cases of sexual and reproductive violence and other sexually motivated crimes.

### **(i) A HISTORIC OPPORTUNITY TO IMPLEMENT A GENDER APPROACH IN TRANSITIONAL JUSTICE**

Internationally, there is a clear call to incorporate a gender perspective in transitional justice as a mechanism to guarantee the protection of rights for women, girls, and LGBT people who are victims of armed conflicts.<sup>4</sup> The general human rights framework used by different transitional justice models in the past is insufficient to achieve this aim. In fact, it has been recognized that “transitional justice mechanisms have failed and continue to fail women”<sup>5</sup> and also, of course, LGBT people as they are especially affected by specific forms of violence in armed conflicts. That is why it is necessary to develop a gender perspective in transitional justice in general, and particularly in Colombia to

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3 The definition of sexual violence used as a reference for this text is that of the United Nations Security Council, Report of the Secretary-General on conflict-related sexual violence, S/2017/249\*, 15 April 2017, para. 2.

4 The United Nations Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence has made a call to action on this issue in his report on the gender perspective in transitional justice. See: The gender perspective in transitional justice processes, A/75/174, 17 July 2020, <https://undocs.org/en/A/75/174>

5 Committee for the Elimination of Discrimination against Women, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 1 November 2013, para. 76.

advance in the implementation of the broader gender component that was foreseen in the mandate laid out by the FPA, and to specify how it is included in the transitional justice model created to guarantee, among other objectives, access to justice for the aforementioned victims.

Effectively guaranteeing a gender perspective in transitional justice requires, in addition to the measures foreseen in the corresponding legal framework, a rigorous application of women's human rights standards as recognized in distinct international mechanisms and instruments; the creation of a specialized institutional architecture on the subject or significant internal bodies; the allocation of the resources required to carry out the related functions; the development of investigative methodologies with a gender approach; the design of binding tools such as protocols, instructional materials, or internal operational guidelines on the subject; and the adoption of special procedural rules to advance proceedings and other activities, ensuring these are in line with the differential impacts of these crimes. Some of these elements have been formally included in Colombia's current transitional justice model but have not been effectively implemented.

Although the FPA has established specific gender measures in each chapter, this has not necessarily guaranteed the implementation of a gender perspective in transitional justice, concretely, in the Special Jurisdiction for Peace.<sup>6</sup> The FPA has different measures that incorporate a gender perspective,<sup>7</sup> and, in particular, the JEP's institutional design has concrete instruments regarding sexual violence<sup>8</sup> and guaranteeing LGBT people's rights.<sup>9</sup> This indicates that the perspective has several provisions for-

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6 Cinco Claves has also highlighted the gender perspective's shortcomings in other bodies of the transitional justice model, such as the Truth Commission, but this document will only address those related to the Special Jurisdiction for Peace.

7 See, among other provisions, the definition of the gender-based approach in the Final Peace Agreement, point 6. Implementation, verification and public endorsement. To see all of the FPA's gender measures: <https://www.sismamujer.org/wp-content/uploads/2018/06/2017-Equidad-Genero-Mujeres-Acuerdo-final-1-1.pdf>

8 The FPA includes, among other measures, the prohibition of amnesty and pardon for sexual violence (para. 40, point 5.1.2), the creation of a special investigation team for cases of sexual violence (para. 67, point 5.1.2), improvements in psychosocial care for victims of sexual violence (point 5.1.3.4.1), and the inclusion of affirmative measures to respond to the disproportionate impacts of sexual violence (point 6 principles).

9 The FPA includes, among other measures, guarantees for the rights to truth, justice, and reparation for LGBT people (point 5.2), a guarantee of equality and non-discrimination for LGBT people (point 6 principles), guarantees for an effective administration of justice for LGBT people (point 3.4.1), and a recognition of the grave consequences of human rights violations against women and LGBT people (point 5.1.2.1.7).

ming the basis for the Colombian model—in addition to various international mechanisms and standards which will be addressed below—and nevertheless, they are not being observed.

In this regard, an analysis of the initial rulings has shown the presence of gender stereotypes in argumentation, which is one element that reveals the lack of a gender perspective. This is the case in our analysis of the identified obstacles to adequately describe the relationship between incidents of sexual violence and the armed conflict.<sup>10</sup> Also, in relation to the JEP's first broad indictment in the kidnapping case, Cinco Claves has shown that a methodology with a gender perspective is lacking,<sup>11</sup> which reveals the aforementioned problem.

For that reason, the national case is an opportunity to develop and make effective a gender perspective in transitional justice. The mechanisms and institutions foreseen to protect survivors and victims of sexual violence are specialized tools, which are not being fulfilled by the JEP. However, in the framework of a national case, they would be available as strategies to coordinate gender measures and grant them efficacy. In that sense, there is a mandate to truly implement the anticipated measures that, unlike those applicable to other crimes, are specific to sexual and reproductive violence. There are also other specific measures to protect LGBT people.

For example, in relation to other human rights violations, the regulation of sexual violence in the Final Agreement has specific measures that were not included for other violations. Nevertheless, they have not seen effective fulfillment, and therefore justice operators owe the population resolute action so as to make the gender perspective a reality in the cases brought before the JEP. In the Colombian case, there is an (unfulfilled) regulatory framework that underpins differential protection for victims of sexual and reproductive violence and persecution against LGBT people. A national case is a strategy to bring about the development and effectiveness of a gender perspective in our transitional justice model.

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10 <https://www.sismamujer.org/wp-content/uploads/2019/07/Publicación-5-claves-final-a-una-pag-1.pdf>

11 <https://www.sismamujer.org/wp-content/uploads/2021/03/10-03-21-Pronunciamiento-5-Claves-sobre-Auto-del-001.pdf>

From our different areas, we have continuously called for a reevaluation of the institutions in the general transitional justice framework, as it is known in the human rights arena. Thus, in relation to the definitions of gravity, representation, selection and prioritization, command responsibility, sexual violence, systematic patterns, and armed conflict,<sup>12</sup> the need to incorporate interpretation criteria that respond to international human rights law for women and LGBT people has been indicated. With this, there is a need for a resignification of justice as a concept that has been constructed within a patriarchal system, that arises from the ordinary justice system and threatens to reproduce the same challenges that have been identified by these populations in the new transitional justice system represented by the JEP.

This is due to the fact that women, girls, and LGBT people have historically faced obstacles to access justice in the ordinary justice system, as it does not recognize and even rejects the specificities required to investigate, try, and punish the crimes perpetrated against them.<sup>13</sup> Thus, on the one hand, there is an impunity backlog that the ordinary justice system is handing over to the transitional justice system due to the historic obstacles to access justice, and on the other hand, there is a need to incorporate a gender perspective in transitional justice to overcome the ordinary justice system's practices and to adapt procedures to ensure that they are in line with the gender mandate of the Final Agreement and international arenas regarding the protection of victims of sexual and reproductive violence and SOGI-based crimes.

There are historic obstacles to justice that are “inherited” and must be transformed in the transitional justice system. For example, there are barriers to file

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12 In 2017, Cinco Claves requested that the Constitutional Court restudy concepts such as maximum responsible parties, among others, in the context of transitional justice. See: Concept of the Alianza Cinco Claves on Legislative Act 01 of 2017. File: RPZ-003, 28 July 2017.

13 According to the Secretary-General of the United Nations, in Colombia, “particular attention should be paid to groups that face additional barriers to justice, such as ethnic minorities, women in rural areas, children, lesbian, gay, bisexual, transgender, and intersex individuals and women abused within the ranks of armed groups.” Report of the Secretary-General, Conflict-related sexual violence, S/2015/203, 23 March 2015, para. 22.

complaints<sup>14</sup> with consequent underreporting; declaration proceedings are conducted in highly revictimizing scenarios. In contexts such as ours, frequently, these voices are not considered valid and truthful as women's or LGBT people's testimonies are granted limited credibility due to who they are. It is also not easy for probative value to be assigned to the evidence contributed by victims in cases where evidence is often assessed based on stereotypes. Additionally, they are required to present evidence considered to be "model" or "rated evidence" in cases that are assessed from a lens of masculinity, such as the presence of a witness, which, in the case of sexual violence, is not common. The same occurs in relation to the thresholds of gravity required in crimes against LGBT individuals, which are seen as having an "objective" level of gravity and do not recognize the identity of LGBT people and the parts of that identity, such as the elements that make up an individual's gender expression (for example, hair, nails, clothes, make up, and others) or behaviors considered "normal" (for example, in the cases of socially obligated heterosexual marriages for lesbian or bisexual women).

These characteristics, which describe the reality of women and LGBT people to "access" justice, are what have given rise to the development of international norms and standards on the necessary conditions to incorporate a gender perspective in justice, including transitional justice, as the latter has a special role in fulfilling human rights mandates given its objective, as well as the responsibility to adapt its procedures and institutions for a true implementation of the Final Peace Agreement's gender measures and other international mandates on the rights of the victims involved in the proposed case.

Thus, among other gender measures in transitional justice, the following were foreseen in these norms and standards: an assessment of the preexisting structural context for gender; training for judicial operators to overcome discriminatory stereotypes; the participation of victims in transitional justice proceedings;

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14 Catharine MacKinnon has indicated that women do not file complaints because "we not only think that the police won't believe us and that doctors will treat us in a degrading way, but also that when we go before the justice system, the incident will not be seen from our point of view." *Feminism Unmodified: Discourse on life and law*, Harvard University Press, 1987, p. 123. Also, the Secretary-General of the United Nations has highlighted the obstacles to report sexual violence in conflict owing to stigma, the fear of reprisal, social rejection, and a lack of confidence in the institutions. It was also noted that in the case of LGBT persons, harassment by armed actors is rarely reported. See reports of the Secretary-General to the United Nations Security Council, S/2019/280, 29 March 2019, para. 22 and S/2018/250 of 23 March 2018, para. 34, respectively.



the inclusion of a broad typology of gendered behaviors; confidential handling of victims' identity; an understanding of damages to gender expression or sexual orientation; differential risk analyses; the creation of specialized chambers, courts, or institutions;<sup>15</sup> the development of special programs for girls affected by the conflict; a broad approach to gender in transitional justice bodies; a rejection of amnesties for crimes such as sexual violence against women and girls; protection against discrimination; the identification of particular needs and priorities; provisions for specialized staff for proceedings; the addressing of all violations due to gender, including violations of sexual and reproductive rights; the guarantee of effective and timely resources; the creation of specialized procedures that prevent revictimization and stigmatization; differential investigations, support, and specialized representation for victims; and, in general, the harmonization of judicial processes with gender equality standards.<sup>16</sup>

An international mandate exists, as well as a set of express provisions in the JEP's internal regulations on the gender perspective for transitional justice. However, there are delays in the fulfillment of these provisions to benefit women and LGBT people. Four years after the constitutional reform that approved the JEP's creation and three years after the JEP began operating,<sup>17</sup> the entity has received 31 reports on sexual, reproductive, and SOGI- or prejudice-based violence. These reports were prepared and submitted by women's and LGBT organizations, but in most cases, due to a lack of prioritization, proceedings have not been initiated. The proposed national case is necessary to advance in clarifying these crimes that were perpetrated throughout the national territory and by different armed actors, some of whom are part of the JEP's specific jurisdiction.

The violence suffered by women and LGBT people occurred nationally under the premise that their bodies and lives did not have worth in of themselves, that their existence was subordinated to the aims of a war that instrumentali-

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15 See these elements in the Report of the United Nations Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, *The gender perspective in transitional justice processes*, A/75/174, 17 July 2020, para. 45, 52, 63, 79, 80, 97, 107, 108.

16 See these elements in Committee for the Elimination of Discrimination against Women, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, 1 November 2013, para. 52 to 81.

17 The JEP was opened to the public on 15 March 2018.

zed them; all this under a logic of discrimination and, particularly in the case of LGBT people, of persecution. This means that a regional lens or one tied to other criminal practices is an incomplete outlook on this phenomenon, on the instruments and aims of sexual violence, reproductive violence, and SOGI-based violence. Proceedings that see these types of violence as categories subjugated to other regional cases or macro-cases render them invisible amid investigation methods that have yet to incorporate a gender perspective and other conducts that continue to be considered more chargeable and important. For these types of conducts, an investigation based on the armed actor is not viable, as it places the party to the conflict at the center instead of the victims. Our experience shows that, for women and LGBT people, an incident including these types of violence is not more serious because it was perpetrated by one actor or another. This is another element that was “inherited” from the ordinary justice system, which has divided its proceedings and even investigation units according to the armed actor. This is a practice that must be overcome by the transitional justice system if it is to truly make effective its mandate of victim-centered processes.

Based on the reference point of international and local mandates for incorporating a gender perspective in transitional justice, as follows we justify why, in the framework of the prioritization policy, a national case is a necessary and urgent measure for a transitional justice system that observes these mandates. For sexual violence, reproductive violence, and violence against LGBT people, there is a set of provisions that lay out the legal foundation for prioritizing the proposed national case, which justifies the case and shows that the JEP currently owes surviving victims an effective response.

The different FPA mandates on the gender perspective propose affirmative measures “which respond to the disproportionate impact that the armed conflict has had on women, in particular sexual violence [and]... includes a differential treatment that recognizes the causes and disproportionate effects that the armed conflict has had on women.”<sup>18</sup> The constitutional adoption of a gender perspective also establishes that it be “applied in all of the System’s phases and procedures, in particular regarding women who have suffered from or parti-

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18 See Final Peace Agreement point 6.

icipated in the conflict”<sup>19</sup> as well as a special investigation team on sexual violence and the other aforementioned measures. Meanwhile, Law 1957 includes a specific catalogue of rights for victims of sexual violence (Art. 16) and a differential perspective that obliges the JEP to emphasize the needs of women and children due to the disproportionate and differential effects that they suffer in the armed conflict (Art. 18). Also, the centrality of victims in this law recognizes the increased gravity of human rights violations against women and other groups subject to special constitutional protections, such as LGBT people (Art. 13). Another provision orders the JEP to prioritize women victims of the armed conflict in the protection of victims’ rights (Art. 39).

The Constitutional Court’s review of regulations related to the peace process also recognized that the armed conflict accentuated forms of discrimination against women, girls, and LGBT people.<sup>20</sup> Thus, the transitional justice system must respond to this reality with proportional measures, such as the immediate opening of a national case. Recently, the Constitutional Court also recognized that victims of reproductive violence, specifically forced abortions and contraception, suffer high levels of silencing and reluctance to report these incidents committed in the context of the armed conflict.<sup>21</sup>

From our lens, we do not believe that the conducts encompassed in the proposed case are more serious than other human rights violations, nor are they less important. We seek to highlight the disproportionate impact of these incidents on women, girls, and LGBT people and the need to anticipate special or affirmative measures that contribute to clarifying what occurred during the armed conflict, in particular eradicating the silencing and normalization of these types of violence, prosecuting those responsible, and generating transformative reparation for victims. Thus, the case is an appropriate and differential response, which is also backed by legally binding mandates, as was previously indicated.

Internationally, there are important advances in prioritizing this issue, but the JEP must take into account the fact that these developments have been formu-

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19 See para. 1 of Transitory Article 1, Transitory Chapter of the Political Constitution.

20 Corte Constitucional, C-080 de 2018. M.P. Antonio Jose Lizarazo Ocampo.

21 Corte Constitucional, SU-599 del 2019. M.P. Cristina Pardo Schlesinger.

lated in the context of a retributive justice model and complementary jurisdictions<sup>22</sup> such as the International Criminal Court. Also, the prioritization was not created with a gender focus, which is why it must be developed more fully. The needed prioritization criteria must not create obstacles to prosecute sexual crimes, reproductive violence, and other SOGI-based crimes and the largest possible number of transgressions must be considered to favor the legitimacy of the prioritization measures.<sup>23</sup> In this context, the JEP must observe additional elements in its prioritization policy that respond to the restorative justice model adopted in Colombia; preferential jurisdiction for behaviors considered serious human rights violations that occur due to, in the context of, or in direct or indirect relation to the armed conflict; and the gender mandate established for our transitional justice model, as was indicated.

When monitoring the issue of sexual violence in connection to the armed conflict, the United Nations has called on Colombia to prioritize the investigation and prosecution of conflict-related sexual violence.<sup>24</sup> Also, the Technical Secretariat of the International Verification Component for the Final Peace Agreement included the gender perspective's implementation in its fifth report, in addition to Cinco Claves' request to open a national case, and indicated that the JEP faces the challenge of "a discussion about the opening of a macro-case that prioritizes GBV, in particular sexual and reproductive violence."<sup>25</sup> The Office of the High Commissioner for Human Rights in Colombia has also requested the opening of a national case in its last two annual reports.<sup>26</sup> The national case is an opportunity for the JEP, which has a constitutionally established jurisdiction to try these cases, making effective and implementing the FPA's gender perspective.

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22 The Alianza Cinco Claves presented its arguments on this matter when addressing the JEP's previous prioritization proposal. See: Observations on the Draft of the Guidelines for the Prioritization of Cases and Situations for the Chamber to Acknowledge the Truth, Responsibility, and Establishment of Facts and Conducts (SRVR in Spanish), 13 June 2018.

23 Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, Pablo de Greiff, A/HRC/27/56, 27 August 2014, para. 36, 43, and 57.

24 Security Council, Report of the Secretary-General, Conflict-related sexual violence, United Nations, S/2019/280, 29 March 2019, para. 44.

25 Technical Secretariat of the International Verification Component – CERAC/CINEP. Fifth verification report on the implementation of a gender perspective in the Final Peace Agreement. 21 April 2021.

26 Situation of human rights in Colombia. Annual Report of the United Nations High Commissioner for Human Rights, A/HRC/46/76, 17 March 2021, para. 41; A/HRC/43/3/Add.3, 8 May 2020, para. 32.

In line with the JEP’s prioritization criteria and methodology, the opening of a national case satisfies the proceeding’s required elements and, more so, is an urgent and necessary decision given the lack of proceedings on the reports already presented to the JEP on sexual, reproductive, and SOGI-based violence.

For the phase denoted “grouping and concentration” by the JEP, the amount of information provided by the organizations and entities on these types of conducts is considered to be sufficient for the proposed case. They offer the necessary input for the JEP to group and create the categories and provisional realm of conducts under its jurisdiction.<sup>27</sup> As of June 2020, 40% of the reports presented to the JEP included incidents of sexual violence and other types of gender-based violence.<sup>28</sup> This is a considerable number of cases which merit an urgent response.

Regarding the existing prioritization criteria, we believe that the requirements to open a national case have been met, although the JEP has not published in-depth information on the arguments used to open the other macro-cases. For example, the decision to prioritize JEP case 01 is said to be based on an analysis of the criteria, and then its prioritization was decided; however, the grounds used to justify moving from one step to the next are not available.<sup>29</sup> In fact, the title of this decision states that the kidnapping case is prioritized by virtue of the report sent from the Prosecutor General’s Office on the subject. In the case of sexual violence, this requirement is fully satisfied.<sup>30</sup>

In relation to the impact and availability criteria established by the JEP in its prioritization policy, it should be noted that the victim’s condition of vulnerability due to sex, gender identity, and sexual orientation is fulfilled in the propo-

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27 Chamber to Acknowledge the Truth, Responsibility, and Establishment of Facts and Conducts, Special Jurisdiction for Peace, Criteria and methodology to prioritize cases and situations, para. 27.

28 <https://www.sismamujer.org/wp-content/uploads/2019/07/COMUNICADO-1.pdf>

29 Chamber to Acknowledge the Truth, Responsibility, and Establishment of Facts and Conducts, Special Jurisdiction for Peace, RULING No.002 of 2018, 4 July 2018, para. 15.

30 According to Report VII of the Monitoring Roundtable on the Confidential Annexes for Ruling 092/08 and 09/15, in the second half of 2018, the Prosecutor General’s Office delivered the reports on sexual violence committed by the FARC and State Security Forces to the JEP. See <https://www.sismamujer.org/wp-content/uploads/2019/07/CAJAR-SISMA-SEPTIMO-WEB-14-10-2020.pdf> p. 26.

sed case as a majority of victims of sexual violence—around 85%<sup>31</sup>—are women and girls. Due to their gender and as victims of the armed conflict, they are subject to special constitutional protections. The situation is similar regarding reproductive violence, given that this type of violence produces specific damages that are prevalent in women due to their reproductive capacity, the unequal distribution of human reproduction responsibilities between men and women, and the disproportionate care burden that women take on in reproduction. Meanwhile, all the of the corresponding conducts against LGBT people are due to their gender identity or free exercise of their sexuality. This is violence that originates from a prejudice about what it means to be a Man or a Woman, which *always* presumes heterosexual behavior and a cisgender identity as the way to be within the patriarchal and binary social system (Man > Woman; heterosexual > homosexual). The set of violent conducts included in the proposed case result from historic patterns of discrimination, as has been recognized by international and national bodies.<sup>32</sup>

The differential impact of sexual violence and the representation of the alleged responsible parties, as a part of the subjective impact criteria, as well as the gravity, magnitude, and representativeness of the incident are included in the objective impact criteria established by the JEP, which will be addressed in further detail in the following section of the text. It can be preliminarily stated that these elements have been filtered by the Constitutional Court's specialized (and unique on a national level) jurisprudence regarding women victims of conflict-related sexual violence, which has established that “**the violence carried out in the context of Colombia's internal armed conflict, with its different manifestations, has a differential and exacerbated impact on women** (original emphasis).”<sup>33</sup>

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31 The periodic monitoring of the numbers on sexual violence show that these numbers are consistent over time. See: <https://www.sismamujer.org/wp-content/uploads/2019/07/25-05-2020-Bolet%C3%ADn-Sisma-Mujer-25-de-mayo-de-2020-.pdf>

32 The policy on sexual and gender-based crimes established by the Prosecutor of the International Criminal Court indicates that “[b]oth sexual and gender-based crimes may be motivated by underlying inequalities.” See <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes—june-2014.pdf> June 2014, para. 19. Also, the Constitutional Court in Ruling 09 of 2015 expressly recognized sexual violence as a form of discrimination against women: “It is observed with alarm that sexual violence persists as an expression of discrimination and gender-based violence, aggravated in an exacerbated manner within the context of the internal armed conflict and forced displacement due to the violence,” section II.1.

33 Constitutional Court, Ruling 092 of 2008, Section III.

On gravity, it should be noted that, according to the standards of the ICC’s Office of the Prosecutor, the assessment of “elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, the use of rape and other sexual and gender-based violence” should be included as selection and prioritization criteria.<sup>34</sup> For this reason, they are also criteria that have a sufficient basis regarding the type of violence laid out in the proposed case, as is described in greater detail in the following point. Additionally, the ICC’s Office of the Prosecutor stated that it will pay particular attention to crimes that have been traditionally under-prosecuted—specifically rape and other sexual and gender-based crimes—as part of the criteria used in the selection and prioritization policy for investigations.<sup>35</sup> These are elements that the JEP must not lose sight of in its prioritization decisions, within which it must also guarantee the victims’ participation.<sup>36</sup>

In conclusion, this section has laid out the viability of prioritizing the proposed national case as a necessary and urgent mechanism to truly implement a gender perspective in transitional justice, something that is being called for internationally and by civil society organizations. To date, this gender perspective is only included in the FPA theoretically, which is why its implementation is delayed in bodies such as the JEP, as a part of the transitional justice model adopted by the country.

#### **(ii) EXPLANATORY CAPACITY OF SEXUAL AND REPRODUCTIVE VIOLENCE AND OTHER PREJUDICE-BASED CONDUCTS**

Despite persistent challenges that lead to the invisibility and underreporting of conflict-related sexual, reproductive, and SOGI-based violence, what is undeniable is that as institutions and mechanisms to address these issues have been developed and specialized, both internationally and locally, the amount

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34 Office of the Prosecutor of the International Criminal Court, Policy paper on case selection and prioritisation, September 2016, para. 40. Available at [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)

35 Office of the Prosecutor of the International Criminal Court, Policy paper on case selection and prioritisation, September 2016, para. 46. Available at [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)

36 In accordance with the Final Peace Agreement, “Victims enjoy the rights to truth, justice, reparation, and guarantees of non-repetition. In order to guarantee these rights, they will participate in the SIVJNR in accordance with the implementing regulations of the judicial component and, among others, must be consulted regarding the conditions for prioritizing and selecting cases.” Point 5.1.2, #20. Point that was ratified by Constitutional Court Ruling C-080 of 2018.

of information and analysis on its scope has grown. The investigation of these conducts has a broad qualitative and quantitative explanatory capacity regarding what occurred in the context of the armed conflict and the differential impacts, and therefore, it has keys to transform the conditions that gave rise to the existing violence and discrimination against women, girls, and LGBT people. This violence has been perpetrated by all armed actors, throughout most of the national territory and on a large scale, based on patterns of criminal conduct within the framework of a military strategy and in a context of structural discrimination. Understanding this violence in the context of war helps to generate the conditions to eradicate its root causes.

As was laid out by Colombia Diversa in *¿Quién nos va a contar?* (Who Will Count Us?), violence resulting from a prejudice against LGBT people arose out of armed actors' contempt for victims' sexual orientation or gender identity. This was translated into a generalized victimization where these individuals experienced persecution as a crime against humanity by means of conducts that attacked their sexual autonomy—such as personal injury, forced displacement, threats, homicide, enforced disappearance, among others. Nevertheless, the violence was not executed in the same way in all places, but instead—closely—responded to the specific dynamics of the war being waged in a specific area. This means that it was not violence that occurred in parallel to the armed conflict but was instead woven into the numerous tactics used to advance military operations.

Peacebuilding must allow for the war to be understood from the voices and realities of women and LGBT people; otherwise, the interpretation of what happened comes from a masculine, heterosexual, cisgender, and often war-mongering perspective, which has consequences for the construction and reproduction of discriminatory socio-cultural ideas. The opening of a national case could allow for the violence against LGBT people to be understood, revealing the socio-cultural views at the root of that violence and the ties between communities and armed actors that allowed the violence to be perpetrated. The case could contribute to changing the ideas that the State and society have had about LGBT people, in addition to creating understanding and therefore laying down a foundation to eradicate violence on the level of the different underlying systems of oppression.



To justify opening the case, this section will lay out the explanatory capacity of the conducts that are part of the proposed national case, using as a reference the prioritization criteria established by the JEP starting in 2018 and some basic characteristics of these conducts, which show that even though these are not the only types of victimization experienced by women, girls, and LGBT people, they are a set of incidents that have useful tools for the implementation of judicial practices that are in line with international law on women's human rights and have the capacity to open a path to access justice for other types of gender-based violence.

In relation to the *characterization of the population* covered by the national case, even though there is a growing rejection by societies and States of the ongoing situation of violence and discrimination faced by women, girls, and LGBT people, historically this has not been a quick or simple process. Despite this, there are currently several mechanisms that integrate international law on women's human rights, as well as protection instruments for girls and LGBT people. These are initial elements to consider in the opening of a case given their binding nature for the Colombian State and increased level of implementation over time in relation to the issues in the proposed case. There are treaties, conventions, entities, or organisms that, little by little, have developed specialized standards on the protection of rights with two main focuses: violence and discrimination. This has been necessary due to the preexistence of structural conditions on domination that, for generations, have subjugated women, girls, and LGBT people to different forms of exclusion and subordination.<sup>37</sup> The Yogyakarta Principles, the least heterosexist interpretation of the FPA's gender perspective, and the Rome Statute's prohibitions regarding gender-based discrimination are only some of the guarantees that protect LGBT victims of the armed conflict.

The level of satisfaction for women's, girls', and LGBT people's rights continues to be low in spite of diverse regulatory advances. The unemployment rate; gaps

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37 According to the United Nations Beijing Declaration and Platform for Action, "Violence against women is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement." 1995, para. 118. <https://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>

in wages, poverty,<sup>38</sup> and political participation;<sup>39</sup> and levels of violence, among other factors, lead to the description of these social groups as *vulnerable*. From childhood, LGBT children often experience expulsion from their homes, a deprivation of their closest social circles to protect them, and they face the need to abandon their studies to find work in order to survive. Once they are grown, LGBT people continue to be victims of numerous demonstrations of structural violence on all levels. Labor discrimination pushes them into informal and socially feminized work such as hair styling, cosmetology, sex work, and domestic service. These jobs do not enjoy State oversight that protects them or that allows for demands to be presented for dignified treatment from employers or clients, meaning that they are confronted by unrestricted social prejudices. Access to healthcare is full of constant obstacles due to bureaucratic prejudice—unconstitutional regulations—or personal prejudice in the form of civil servants who do not want to implement regulations that protect LGBT individuals. Additionally, their sexual and reproductive rights are constantly affected by a lack of general and reliable information about their sexual practices, the lack of training on their rights as parents, and the impossibility of freely accessing an abortion.

Regarding this vulnerable population, the *magnitude* of incidents reveals the critical level of conflict-related sexual, reproductive, and SOGI-based violence and intensifies and reproduces the discriminatory conditions faced by women, girls, and LGBT people (who suffered sexual and other types of violence amid a pattern of persecution against them). According to registries from the National Victims Unit (Unidad Nacional de Víctimas), there were 29,619 violations of sexual freedom and integrity in the context of the armed conflict; 91% of the incidents were against women.<sup>40</sup> The Unit also reported 5,632 victimizing acts against LGBT people in the context of the armed conflict.<sup>41</sup>

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38 In 2019, the participation rate in the labor market was 53% for women and 73% for men, women's unemployment rate was 6 points higher than that of men, women only earned 88 pesos for every 100 pesos that men earned, women allocated 7 hours each day to domestic and care work in comparison to 4 hours for men, and the femininity index of poor households was 118.

<https://www2.unwomen.org/-/media/field%20office%20colombia/documentos/publicaciones/2019/09/boletin%20estadistico%20onu%20mujeres%20-%20marzo%202020.pdf?la=es&vs=3252>

39 In Colombia, only 12% of elected mayors and 19% of Congressional representatives were women. <https://www.dane.gov.co/files/investigaciones/genero/publicaciones/mujeres-y-hombre-brechas-de-genero-colombia-informe.pdf>

40 <https://cifras.unidadvictimas.gov.co/Home/Dinamico>

41 Ibid.

According to the National Center for Historical Memory (CNMH–Centro Nacional de Memoria Histórica), there are 15,230 cases of sexual violence, of which 31% are attributed to the guerrillas, 33% to paramilitary groups, 1.6% to State agents, and 26% to an unknown perpetrator.<sup>42</sup> All of the armed actors have a responsibility in cases of sexual violence, and it is the authorities who are responsible for identifying the group to which the large percentage of unidentified perpetrators belong. This same source registers 15,791 victims, 90% of whom are women. However, it is not possible to identify the number of LGBT victims.

Violence against LGBT people has not been adequately tracked by the Colombian State, which is why Colombia Diversa has taken on the task of issuing a yearly report on human rights violations against LGBT people in Colombia. Although some registries count LGBT victims (such as the Unified Victims Registry or certain reports from the National Center for Historical Memory), none are complete or even close to being quantitatively representative of what this population suffered during the Colombian armed conflict. Just in its documentation of cases in southern Tolima and Tumaco, Colombia Diversa reported to the JEP 21 victims of persecution as a crime against humanity between 1985 and 2016. All these cases are characterized by having more than one victimizing incident, being motivated by a feeling of animosity against the victim's sexual orientation or gender identity, and being deeply tied to the context of the war. These are qualitative characteristics that allow for a deeper understanding of the violence faced by LGBT people in the conflict.

On reproductive violence, the Prosecutor General's Office calculated that on average there were around 1,000 cases of forced abortions within the FARC-EP each year.<sup>43</sup> On this issue, the Constitutional Court stated, "It is estimated that 40% of the FARC-EP's troops are women, who have faced a repertoire of violence because they are women, such as: forced contraception and forced abortions."<sup>44</sup> Nevertheless, this is an estimate as there were also cases of voluntary abortions and contraception within the FARC. A Human Rights Ombudsperson's Office investigation that

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42 <http://micrositios.centrodememoriahistorica.gov.co/observatorio/portal-de-datos/el-conflicto-en-cifras/#base-de-datos>

43 LAVERDE PALMA, Juan David. Así obligan a las mujeres a abortar en las FARC [online]. El Espectador. 29 January 2013. Available at: <https://www.elespectador.com/noticias/judicial/asi-obligan-mujeres-abortar-farc-articulo-401836>

44 Corte Constitucional. Ruling 009 of 27 January 2015.

looked at a group of 65 minors who had left the guerrilla found that all the girls had intrauterine devices (IUDs); some had been implanted against their will, without any information, and using the argument that it was an order.<sup>45</sup> Also, in the autopsies performed on 11 FARC-EP ex-combatants killed during Operation Berlin, which was led by the army in December 2000, 9 of the 11 girls whose bodies were found had IUDs.<sup>46</sup> These are characteristics that show, from a quantitative and qualitative perspective, the critical problems experienced by women and girls in relation to reproductive violence.

The Victims Unit has data on reproductive cases from 1985 forward, without any breaks, which is to say there have been attacks against women, girls, and LGBT people for an extended amount of time. The numbers also show a national phenomenon, that is to say, a prevalence throughout the territory.<sup>47</sup> In the face of this massive and ongoing phenomenon, it is difficult to understand the interpretation that is frequently heard from justice operators about “isolated incidents.” This surely responds to a stereotyped understanding of the reality, and in particular, what happens to women, where the prevailing idea of sexual violence is that it is an act committed by out-of-control men and without any relationship to war strategies. Those of us who, for years, have listened to the voices of girls, women, and LGBT people know and have seen a different reality. The prior gives more value to armed actors’ voices, which has been a central characteristic of the administration of justice in general—not just in this transitional justice system—from how the process is structured, for example, units created according to the type of armed actor, to the symbolic placement of members of armed groups and of victims in the proceedings.

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45 United Nations. Economic and Social Council. Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia. E/CN.4/2003/13, 24 February 2003. Para. 48. Available at: <https://reliefweb.int/report/colombia/report-human-rights-situation-colombia-ec4200313>

46 Human Rights Watch. You’ll Learn Not to Cry. 2000. P. 45. Available at: <https://www.hrw.org/reports/2003/colombia0903/colombia0903.pdf>

47 As a reference for this data, it is suggested to review Corporación Sisma Mujer, *La Luz que nos queda*, documentación de casos de violencia sexual en el conflicto armado (Our Remaining Light: Documentation of Cases of Sexual Violence in the Armed Conflict), 2017, p., 22. <https://www.sismamujer.org/wp-content/uploads/2019/07/La-luz-que-nos-queda.pdf>

Regarding the intention of these incidents, cases have been documented where the armed actors—based on their hierarchy—organize turns to rape a person or divide up the actions involved in an act of violence to guarantee impunity. However, when they are questioned before judicial authorities, no one, not commanders, fighters, or foot soldiers acknowledge these incidents, not even as something they have heard about or seen. Some have even made speeches claiming that the armed group has not only not committed sexual violence but that they defend women, LGBT people, and the population in general, and they boast of the formal punishments for those who perpetrate this kind of violence, although they never manage to recognize the responsible parties. Also, they use the fact that they are part of a sexist society as an excuse, that this explains the possible occurrence of sexual violence but without accepting the legal consequences of not recognizing protection treaties and enforcement mechanisms in response to these kinds of conducts. This has been demonstrated by our organizations in the documentation processes with women and in case litigation.

There are between 15,000 and 30,000 cases of sexual violence, more than 5,000 against LGBT people, and at least 1,000 yearly cases of some form of reproductive violence, which were committed in the context of the war. In many cases, these acts of violence are perpetrated by multiple aggressors, simultaneously, and against multiple victims, including girls. The levels of brutality or cruelty also show the gravity of these events and the symbolic scope that they can have, affecting not only the direct victims but also communities and territories and in general girls, women, and individuals with diverse gender identities and sexual orientations. For this reason, there are critical repercussions on individual and collective life projects and on psychological and physical levels, in particular the impacts on sexual and reproductive health, which to date have not been recognized as a consequence of these incidents, nor is specialized care offered.<sup>48</sup> Even in cases when the impacts on an ex-combatant's reproductive rights are recognized, as is seen in the example of forced abortion, accessing reparation measures has not been possible.<sup>49</sup>

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48 Ibid., p. 33 and 42.

49 El Espectador. 2021. "Exguerrillera forzada a abortar fue acreditada como víctima del conflicto armado". Available at: <https://www.elespectador.com/judicial/exguerrillera-forzada-a-abortar-fue-acreditada-como-victima-del-conflicto-armado-article/>

Meanwhile, the type of incidents proposed for the national case are also *representative* of the main forms of victimization that are perpetrated against women, girls, and LGBT people for gender-based motives. Sexual violence has been recognized as an expression of discrimination,<sup>50</sup> and thus the principal victims are women and girls, who are sexually assaulted because they are women. Increasing the visibility of sexual violence against women does not look to reduce the recognition or the level of seriousness granted to cases of violence against men but instead seeks to demonstrate the differential and symbolic impact produced by this violence against a concrete population group, its effects, and the relationship it has in maintaining the conditions of subordination and exclusion experienced by women, girls, and LGBT people. This is the main victimization that occurs against women and girls in the context of the armed conflict precisely because they are women and girls, that is to say, due to gender discrimination. That is why it is representative, because based on the investigation, it is possible to identify the motive or aim of committing these crimes<sup>51</sup> and, with that, establish a foundation to transform the practices that validate it and reproduce the subordinate roles that sustain it. The role of transitional justice is extremely relevant in changing social practices and contributing to the prevalence of women's rights.<sup>52</sup>

Hence, this violence has several aims tied to the interests of the conflict's parties. These are cases where the victim is "accused" of collaborating with the opposing armed group, is "punished" for opposing the recruitment of children, is "disciplined" or "silenced" for exercising a leadership role that affects the actor's interests in

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50 The Constitutional Court in Ruling 09 of 2015 expressly recognized sexual violence as a form of discrimination against women: "It is observed with alarm that sexual violence persists as an expression of discrimination and gender-based violence, aggravated in an exacerbated manner within the context of the internal armed conflict and forced displacement due to the violence," section II.1.

51 On this issue, see Cinco Claves, Recomendaciones para la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición sobre violencia sexual contra las mujeres en el marco del conflicto armado, 26 June 2018. Additionally, in the Brdjanin case of the Yugoslavia Criminal Tribunal, it was accepted that rape "is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control, or destruction of a person." See: <https://www.peacepalacelibrary.nl/ebooks/files/33052822X.pdf>

52 On the changes that transitional justice can produce through the trial of sexual violence, the Secretary-General of the UN said that "transitional justice can provide an opportunity to transform both inadequate laws and harmful social norms, by ensuring that the gravity of sexual violence is registered on the historical record and in the public memory." United Nations Security Council, Report of the Secretary-General on conflict-related sexual violence, S/2017/249, 15 April 2017, para. 11.

the territory, is “dominated” as a part of the territorial control strategy, or is “subjugated” as a part of the bodies that are under the armed group’s control, whether these are people who were kidnapped and/or enslaved. They are “regulated” to control the relations and behaviors by means of which people express their emotions and feelings and/or express their sexuality, “pressured” so that they abandon the territories that are of interest to the actors or so that they deliver information that signifies an advantage over the *enemy*, or “stigmatized” for not being aligned with the armed group’s ideals. The violence has also served as a way to compensate members of the armed group, which includes organizing or controlling the sale of sexual services, and for cohesion when they seek to discipline the bodies of combatants, regulate sexual relations, and control births.<sup>53</sup> These occurrences are modalities that respond to the dynamics of war, and a starting point to understand this dynamic is to recognize it as eminently patriarchal.

In cases of persecution against LGBT people, these crimes are committed with the idea of punishing, expelling, or instrumentalizing a person for the simple fact that they are not heterosexual or cisgender. This discrimination favored the armed actors’ interests because it reaffirmed their social control, won favor by using community values, and exhibited the lethality and cruelty of their force without running the risk of being punished or facing disapproval from society. All these incidents were at the service of the combatants’ political, economic, or armed interests, as they released their lethality against people whom they considered to be innocuous, without advocates, and, in any case, available. On many occasions, this violence occurred with the unpunished complicity of civil society, local authorities, and the armed actors’ leadership. LGBT people experienced relentless armed persecution during the armed conflict, and they were left to fend for themselves. Their stories have not been fully tracked, and it is not until now that they seek judgement before the JEP.

In the case of reproductive violence, reproductive control practices were used within the FARC-EP’s ranks, which demonstrates that it was not fortuitous or isolated. These conducts were imposed explicitly starting with the Eighth Na-

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53 Regarding the aims of sexual violence, see: Corporación Humanas, Guía para llevar casos de violencia sexual. Propuestas de argumentación para enjuiciar crímenes de violencia sexual cometidos en el marco del conflicto armado colombiano. 2009. At: [https://humanas.org.co/wp-content/uploads/2020/12/10.Guia\\_para\\_llevar\\_casos\\_de\\_violencia\\_sexual.pdf](https://humanas.org.co/wp-content/uploads/2020/12/10.Guia_para_llevar_casos_de_violencia_sexual.pdf)

tional Conference of Guerrillas in 1993 and implemented on all hierarchical levels under the oversight of the Secretariat, the FARC-EP's maximum leadership structure. This violence served the armed group's political and military objectives because the active participation of female combatants and illegally recruited girls was incompatible with pregnancy and maternity. Reproductive control was implemented by means of violence, coercion, or deceit, using pharmaceutical, surgical, and non-conventional methods, often in unsafe conditions that left the victims with serious aftereffects and even produced death. The mental health impacts on women and girls who had desired pregnancies are multiple, such as suicide risks, trauma, and depression. However, the practices related to reproductive control did not take place in a uniform way among all the actors in the armed conflict. Instead, it depended on the specific armed group and era of the armed conflict that is studied.<sup>54</sup>

There have been impacts on women and girls' reproductive rights in all contexts of armed conflict, wars, dictatorships, or scenarios of repression. In these contexts, both the State and legal and illegal armed actors have violated reproductive rights by action or omission, and they have even exerted forms of reproductive violence against women and girls that include forced contraception, sterilizations, and forced pregnancies and abortions.

Additionally, in relation to the *gravity* of the violence addressed by the proposed national case, for several years now, Colombia has been internationally required to adopt strategies that guarantee access to justice for surviving victims of sexual violence. Sexual violence in the conflict has been described as habitual, and the need to guarantee a victim's access to justice has been highlighted, as well as the repercussions of impunity in perpetuating violence against women.<sup>55</sup> Attention has also been called to the effects of the armed conflict on women in the country.<sup>56</sup>

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54 Centro Nacional de Memoria Histórica. La guerra inscrita en el cuerpo. Informe nacional de violencia sexual en el conflicto armado. 2017. P. 115. Available at:

<http://www.centrodememoriahistorica.gov.co/descargas/informes-accesibles/guerra-inscrita-en-elcuerpo%20accesible.pdf>

55 United Nations, Report from the Mission to Colombia of the Special Rapporteur on violence against women, E/CN.4/2002/83/Add.3 Mission to Colombia (1<sup>o</sup> to 7 November 2001), para. 42, 98, and 103.

56 United Nations, Report of the Committee on the Elimination of Discrimination against Women, A/54/38/Rev.1, 1999, para. 358. See also Organization of American States, THIRD REPORT ON THE SITUATION OF HUMAN RIGHTS IN COLOMBIA of the Inter-American Commission on Human Rights, 26 February 1999, para. 39.



As a result of the United Nations issuance of the Women, Peace, and Security resolutions, countries have been urged to fulfill their content. Concretely, an alert has been raised on the impact of conflict-related sexual violence against women and girls, including LBT women, and the need to guarantee mechanisms to access justice.<sup>57</sup> The gravity of the situation of conflict-related sexual violence against women and girls has been internationally recognized, showing the gravity and magnitude, but it also imposes a mandate for State authorities to guarantee access to justice for surviving victims, which is currently within the JEP's specific responsibilities based on the provisions of the Political Constitution.

Nationally, the Constitutional Court has warned specifically of the gravity of sexual violence against women and girls, declaring that “sexual violence against women is a habitual, widespread, systematic, and invisible practice in the context of the Colombian armed conflict” (original emphasis).<sup>58</sup> Additionally, the ongoing nature of the incidents and risks of sexual violence against women in the context of the armed conflict have been demonstrated, and it has been indicated that these “represent an alarming factual situation that gravely harms human rights and the fundamental principles of International Humanitarian Law.”<sup>59</sup>

As was previously indicated, incidents occur permanently, continuously, at the hands of all armed actors, and in a majority of the national territory. The ongoing occurrence of these incidents in the territories, the continuity over time, and the widespread use by the different armed actors are aspects that show the adoption of sexual violence as a sustained and deliberate practice in the war. The recurrent use of sexual violence in contexts of massacres is far from validating this violence as isolated or discretionary but instead shows that it is part of the “total war”<sup>60</sup> against the populations. Each social group is attacked in the

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57 United Nations Security Council, Resolution 1325 of 2000, para. 11; Resolution 1820 of 2008, para. 4; Resolution 1888 of 2008, para. 7; Resolution 1889 of 2009, para. 3; Resolution 2106 of 2013, para. 2; Resolution 2122 of 2013, para. 10; Resolution 2106 of 2013, para. 2. See also General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW Committee, 1 November 2013, para. 81 (points c) and g).

58 Constitutional Court, Ruling 092 of 2008, Section III.

59 Constitutional Court, Ruling 09 of 2015, Operative section, first order.

60 For Elisabeth Wood, “Probably more common are organizations where some form of sexual violence by combatants is a strategy authorized not by explicit orders but by ‘total war’ or other permissive rhetoric.” Conflict-Related Sexual Violence and the Policy Implications of Recent Research. In: Cambridge University Press, 2 March 2015.

most violent way, and in this the armed actors have identified sexual violence as a principal way to devastate women.

It is important to understand that sexual, reproductive, and SOGI-based violence has occurred in the context of the armed conflict in a deliberate, intentional, and therefore, not-isolated manner. Within the United Nations, it has been recognized that sexual violence can be used as a tactic of war or military strategy that exacerbates situations of armed conflict,<sup>61</sup> and as an instrument of persecution.<sup>62</sup> This pushes out the idea that it is a circumstantial or almost involuntary effect of the war.

In that sense, an important aspect of the functionality of sexual violence in war is commanders' deliberate decision to not punish or repress it, given the political and military cost that it would have on the armed group's objectives.<sup>63</sup> On the contrary, it is considered to be an "acceptable and effective military strategy: compensation, a right, and a way of increasing group cohesion."<sup>64</sup>

Based on these elements, it stands out that sexual, reproductive, and SOGI-based violence in the context of the armed conflict has been considered systematic. The context of its systematic nature alludes to the existence of a policy

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61 The United Nations Security Council Resolutions on Women, Peace, and Security state that when sexual violence is used as a tactic of war or as a part of a widespread or systematic attack, it exacerbates situations of conflict. Resolution 1820 of 2008, para. 1; Resolution 1888 of 2009, para. 1. It is also indicated that sexual violence can be a crime against humanity, war crime, or genocide. Resolution 2106 of 2013, para. 2.

62 In agreement with the Secretary-General of the United Nations, "Sexual violence has been employed by the armed and violent extremist groups named in the present report as a vehicle of persecution, directed in particular towards women and girls of reproductive age, as the perceived transmitters of cultural and ethnic identity, and the symbolic repositories of familial and national 'honour.' Those patterns of violence are embedded in the underlying structural conditions including inequality, discrimination on the basis of gender and the neglect of the rights of minority groups, often exacerbated by militarization." United Nations Security Council, Report of the Secretary-General on conflict-related sexual violence, S/2018/250, 23 March 2018, para. 13.

63 According to Elisabeth Wood, "Upper-level commanders may think effective prohibition too costly: it may require the disciplining or dismissal of otherwise effective subordinates; it may divert scarce resources to an issue seen as unimportant; it may lessen the respect of subordinates for their superiors (in a unit dominated by those who see nothing wrong in rape of civilians, the commander who would attempt to prohibit it may be seen as weak) and, thereby undermine vertical cohesion; or it may simply be too much trouble. Commanders may tolerate rape or sexual slavery as a form of 'compensation' to combatants (see below) if the cost of ending the practice are seen as too high." Conflict-Related Sexual Violence and the Policy Implications of Recent Research. In: Cambridge University Press, 2 March 2015, p. 37.

64 United Nations Security Council, Report of the Secretary-General on conflict-related sexual violence, S/2017/249\*, 15 April 2017, para. 11.

and pattern, and these definitions have been already addressed by the JEP in reference to international criminal law. The former is understood as the “set of plans or directives from the armed organization that are reflected in the identified patterns” and the latter “the non-accidental repetition of a similar criminal conduct in relation to the aim, execution method, and characteristics of the victims.” Also, according to the JEP, that policy can be express or tacit.<sup>65</sup>

This was previously indicated as a result of the Constitutional Court’s dictamen on the habitual, widespread, systematic, and invisible nature of sexual violence. Meanwhile, the Justice and Peace Court (Tribunal de Justicia y Paz) also established that: “Sexual violence is not an isolated incident or collateral effect, it is fundamentally a meditated act carried out in a systematic and widespread manner, as a control and domination method that fulfilled military objectives.”<sup>66</sup> Similar concepts have been put forth internationally. Thus, the Beijing Platform for Action accepted that “parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war.”<sup>67</sup> This is an aspect that has also been accepted by the ICC’s Office of the Prosecutor.<sup>68</sup>

The pattern of conflict-related sexual violence has not only had a multiplicity of impacts on victims but has also contributed to reproducing the conditions of violence and discrimination suffered by women, girls, and LGBT people in society. Sexual violence has been ordered, facilitated, encouraged, allowed, tolerated, instigated, authorized, or promoted by the armed actors; seen as a valid strategy for military advancement, territorial control, and/or the destruction of the “enemy,” among other objectives; and has strengthened the domination and subordination of the social groups most affected by its perpetration.

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65 Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los hechos y conductas, Ruling No. 019 of 2021, Case No. 1, para. 229 to 231.

66 Tribunal Superior de Bogotá—Sala de Justicia y Paz. Vencedores de Arauca Bloc. Case File Nº 110016000253200883612-01, 24 February 2015, M.P.: Uldi Teresa Jiménez, p. 315.

67 United Nations Beijing Declaration and Platform for Action 1995, para. 135.  
<https://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>

68 The policy paper on sexual and gender-based crimes of the International Criminal Court’s Office of the Prosecutor indicates that “the situations and cases before the Court have tended to show that rape and other sexual and gender-based crimes against both females and males are often widespread, and/or used systematically as a tool of war or repression.” See <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes—june-2014.pdf> June 2014, para. 75.

In the case of crimes motivated by the victim's gender identity or sexual orientation, the patterns in persecution are made up by different crimes committed against LGBT people depending on the nature and "traditional" use of violence in the territory, the era, and the armed group that was exercising control. The crime of persecution includes sexual violence, kidnapping, personal injury, enforced disappearance, homicide, threats, forced recruitment, and others. Even though they are different crimes, all were committed with the aim of inflicting harm on these people's sexual autonomy and, at the same time, obtaining some military advantage by doing so.

In *Orders of Prejudice*, Colombia Diversa explains how the social system has a prejudice against LGBT people, which is reproduced by armed actors in their dynamics, missions, and hierarchies. This means that explicit orders were not required from armed commanders, but rather the existence of a heteropatriarchal narrative laid out the instructions about what an armed actor can and *should* do when interacting with a LGBT person in a territory over which they seek control: take advantage of them, punish them, or expel them by any means necessary.

In the case of reproductive violence, forced contraception and forced abortion were generalized practices within the FARC-EP's ranks. They were not chance or isolated incidents, but were part of a deliberate and organized pattern of conduct that responded to the group's military goals, prohibiting women and girls from having children while in the armed group's ranks. In the words of the Constitutional Court, the violation of reproductive rights is a "gendered risk." Ruling 092 of 2008, which identified ten risks faced by women and girls in the armed conflict, found that girls and women who are forcibly recruited by illegal groups face the risk of experiencing repeated and systematic forced abortions and contraception. The Ministry of Defense's Humanitarian Response Group for Demobilized People (GAHD in Spanish) has indicated that women members of the FARC-EP were victims of multiple forced abortions, showing the frequency with which this crime was committed.<sup>69</sup> Also, the Justice and Peace Chamber of the Superior Court of Medellín has referred to forced abortions as a "systematic phenomenon" in the FARC-EP's José María Córdoba Bloc due to the reiterated use.<sup>70</sup>

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69 Fajardo, Luis Andrés and Vayoles, Rosar Yineth. *Violencia sexual como crimen internacional perpetrado por las Farc*. Ed. Planeta Colombia and Universidad Sergio Arboleda. 2015. P. 63. Available at: [https://www.usergioarboleda.edu.co/wp-content/uploads/2015/04/violencia\\_sexual\\_libro\\_completo.pdf](https://www.usergioarboleda.edu.co/wp-content/uploads/2015/04/violencia_sexual_libro_completo.pdf)

70 Colombia. Tribunal Superior de Medellín, Sala de Justicia y Paz. FARC. Hearing, formulation and acceptance of charges and comprehensive reparation. 8 August 2017. P. 49.

For the proposed national case, patterns can be identified from elements of the incidents that demonstrate the gravity and representative nature described here. Based on this explanation, it is also possible to identify the groups of cases presented to the JEP to date and how they operate, beyond the categories included in the charges for case 01.

Finally, in relation to the *information availability criterion* foreseen by the JEP to prioritize cases, it should be considered that the prioritization and selection instrument incorporates, for this specific subject, a criterion with a gender perspective, by which “the resulting specific difficulties regarding access and the collection of information must be considered.”<sup>71</sup> Hence, the challenges to investigate the incidents must be urgently addressed, implementing the necessary resources, as a measure to materialize the goal of clarifying what happened and guaranteeing victims’ rights to truth, justice, and reparation.

If the challenges to access information are not surpassed or if they are used to negate the prioritization of these crimes, the JEP will be contributing to the invisibility and normalization of sexual violence, reproductive violence, and violence against LGBT people in the armed conflict and times of peace. It will also send a message to active combatants, those appearing before the courts, and aggressors in general that impunity continues to be the Colombian justice system’s response.

### **(iii) CONTRIBUTION TO OVERCOMING THE OBSTACLES OF ACCESS TO JUSTICE AND CONSEQUENT HISTORIC IMPUNITY**

In a context of generalized impunity in societies such as Colombia, women, girls, and LGBT people face differential obstacles to access justice. The existence of violence and discriminatory stereotypes against them are a factor in the denial of justice.<sup>72</sup> Different international bodies have accepted that women and LGBT people who are victims of violence, including sexual violence, face obstacles to

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71 Chamber to Acknowledge the Truth, Responsibility, and Establishment of Facts and Conducts, Special Jurisdiction for Peace, Criteria and methodology to prioritize cases and situations, para. 41.

72 IACHR, CASE OF GUZMÁN ALBARRACÍN AND OTHERS V. ECUADOR, JUDGMENT OF 24 JUNE 2020 (Merits, Reparations, and Costs), case para. 189.

access justice *due to gender discrimination*.<sup>73</sup> Among those obstacles are gaps and irregularities in investigations, deficiencies in trials and punishments, a lack of protection, structural problems in the administration of justice, and difficulties to implement the existing laws and regulations, among others.<sup>74</sup>

For several years now, international bodies have recognized the persistence of differential obstacles for women and girls to access justice in Colombia in the context of a pattern of impunity.<sup>75</sup> A denial of access to justice is a historic issue that is not tied to the present context of peacebuilding, nor is it tied to a previous transitional justice model such as the one regulated by Law 975 of 2005, but instead there is a historic debt within the Colombian justice system that the JEP has inherited.

Meanwhile, Colombia Diversa has insisted that the patriarchal and heterosexist concepts of international criminal law (such as the crime of persecution) or legal elements brought in from other disciplines (such as the notion of “systematic”) prevent LGBT people from accessing transitional justice. This means that their complaints are not received by the administrators of the ordinary or transitional justice systems.

It instead speaks to overarching historic impunity associated with gender and rooted in socio-cultural practices that are established in the justice system, that is to say, in discriminatory stereotypes that negatively impact women’s, girls’, and LGBT people’s access to justice. Impunity due to discrimination must be

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73 The Inter-American Commission on Human Rights has found that “Violence and discrimination against women are still condoned in society in this hemisphere, as evidenced by the way in which officials in the administration of justice system respond to women victims of violence and treat their cases,” Report ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS, OEA/Ser.L/V/II. Doc. 68 of 20 January 2007, para. 147. It also indicated that “the uneven division of power between men and women will require a profound cultural transformation in every realm of Mesoamerican society. This uneven distribution of power directly impacts women’s access to the administration of justice, as the prevailing cultural norm is that men are superior to women,” Report ACCESS TO JUSTICE FOR WOMEN VICTIMS OF SEXUAL VIOLENCE IN MESOAMERICA, 9 December 2011, para. 166. The United Nations Committee on the Elimination of Discrimination Against Women also has indicated that “gender stereotypes and prejudice in the judicial system have broad consequences for the full enjoyment of women’s human rights. This can prevent access to justice in all areas of the law and can particularly affect women victims and survivors of the violence.” General Recommendation No. 33 on Women’s Access to Justice, para. 26.

74 In this vein, see IACHR op. cit. 2007, para. 21

75 See, in this sense, Inter-American Commission on Human Rights, FOLLOW UP REPORT–VIOLENCE AND DISCRIMINATION AGAINST WOMEN IN THE ARMED CONFLICT IN COLOMBIA, 2009, para. 80 and 87.

understood by the authorities that will see cases of violence against women, so as to identify the measures needed to revert the current situation.

For years, women’s organizations have also reported that “the application of concepts that are discriminatory against women in the judgements and decisions of justice administrators continue to be a determining factor for women’s cases to remain in impunity.”<sup>76</sup> This explanation has gained strength in different parts of civil society and women’s human rights entities,<sup>77</sup> as well as with some local judicial bodies. Impunity in cases of violence against women has been a factor of concern from international entities for decades, as it also reproduces the cycle of violence against women.<sup>78</sup> In the case of sexual violence in the context of the armed conflict, national judicial authorities have recognized that there is “a triple process of **official and unofficial invisibility, silence from the victims, and impunity for perpetrators.**”<sup>79</sup> In the 634 confidential annexes for sexual violence cases in Constitutional Court Rulings 092/08 and 09/15, the impunity rate has remained at 97%.<sup>80</sup>

LGBT people experience a similar situation as the impacts have only been officially recognized in three Justice and Peace cases,<sup>81</sup> and there has not been a satisfactory response from the ordinary jurisdiction regarding the conducts of persecution that have been established as a crime against humanity (Rome Statute, Article 7.1.h), which they suffered during the armed conflict.

In the case of reproductive violence, despite the gravity and depth of the impacts on women’s and girl’s reproductive rights—and the prevalence of these

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76 Mesa de Mujer y Conflicto Armado, VI informe sobre violencia socio política contra mujeres, jóvenes y niñas en Colombia, 2006, p. 48, available at: [https://www.coljuristas.org/documentos/libros\\_e\\_informes/vi\\_informe\\_mesa\\_mujer\\_y\\_conflicto.pdf](https://www.coljuristas.org/documentos/libros_e_informes/vi_informe_mesa_mujer_y_conflicto.pdf)

77 See Report from the Mission to Colombia of the Special Rapporteur on violence against women, E/CN.4/2002/83/Add.3 11 March 2002, para. 16.

78 See Report from the Mission to Colombia of the Special Rapporteur on violence against women, E/CN.4/2002/83/Add.3 11 March 2002, para. 16.

79 Constitutional Court, Ruling 092 of 2008, Section III.1.1.6.

80 VII informe de la Mesa de Seguimiento a los Anexos reservados de los Autos 092/08 y 09/15, p. 17 <https://www.sismamujer.org/wp-content/uploads/2019/07/CAJAR-SISMA-SEPTIMO-WEB-14-10-2020.pdf>

81 See the rulings from the Justice and Peace Chamber of the Superior Court of the Judicial District of Bogotá against alias “Botalón” (2015), against alias “Juancho Prada” (2020), and against Ramón Isaza (2021).

conducts in different armed conflicts around the world—access to justice, truth, and reparation has been extremely limited, particularly if the victim was a member of an armed group. In Colombia, there are only four convictions for conflict-related crimes that violate women’s and girls’ reproductive autonomy,<sup>82</sup> and just one recognizes the practice of reproductive violence in an armed group.<sup>83</sup> None of the cases analyze the incidents committed by the FARC-EP, regardless of national CNMH reports and other investigations that demonstrate reproductive control practices inside the ranks of the FARC-EP, among other armed groups such as the Guevarista Revolutionary Army (ERG in Spanish), the National Liberation Army (ELN in Spanish), and the United Self-defense Forces of Colombia (AUC in Spanish).<sup>84</sup> It is important to highlight that only 18% of women victims of sexual violence by the guerrillas have reported the incident, which is why impunity for these crimes is approximately 98%.<sup>85</sup>

Thus, for access to justice in cases of sexual violence, reproductive violence, and SOGI-based crimes, the victims face different obstacles, and the JEP must anticipate mechanisms to overcome them. Below, we will lay out just a few related to case registration and the scope of the concepts as a way to exemplify and

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82 In Colombia, there are only four convictions for crimes against reproductive autonomy, and only one that demonstrates this practice inside the ranks of an armed group. On this matter, see: Tribunal Superior de Medellín. Sala de Justicia y Paz. Ejército Revolucionario Guevarista. “Caso Olimpo de Jesús Sánchez Caro y Otros”. Rad. No. 110016000253200883621. 16 December 2015.; Colombia. Tribunal Superior de Bogotá. Sala de Justicia y Paz. Postulado Salvatore Mancuso Gómez y otros. Rad. No. 11 001 22 52 000 2014 00027. 20 November 2014.; Colombia. Tribunal Superior de Barranquilla. Sala de Justicia y Paz. Postulado Hernán Giraldo Serna y otros. Rad. No. 08-001-22-52-002-2013-80003; El Tiempo. Conviction of 40 years in prison for alias “El Enfermero” [online]. El Tiempo. Available at: <https://www.eltiempo.com/justicia/delitos/condena-de-40-anos-de-prision-para-alias-el-enfermero-493514>.

83 El Tiempo. Conviction of 40 years in prison for alias “El Enfermero” [online]. El Tiempo. Available at: <https://www.eltiempo.com/justicia/delitos/condena-de-40-anos-de-prision-para-alias-el-enfermero-493514>.

84 Women’s Link Worldwide (2019). “VIOLACIONES A DERECHOS REPRODUCTIVOS DE MUJERES Y NIÑAS AL INTERIOR DE LAS FILAS DE LAS FARC-EP: UNA DEUDA DE LA JUSTICIA”. See: <https://www.womenslinkworldwide.org/informate/sala-de-prensa/women-s-link-worldwide-presenta-ante-la-jurisdccion-especial-para-la-paz-el-primer-informe-que-documenta-violaciones-a-derechos-reproductivos-de-mujeres-y-ninas-dentro-de-las-filas-de-las-farc> Also see: Human Rights Watch (2004). “You Will Learn Not to Cry” Child combatants in Colombia; Amnesty International (2004). Colombia: Cuerpos marcados, crímenes silenciados; CNMH. (2013). La niñez en el conflicto armado y los contextos de violencia: Reclutamiento y utilización por grupos armados ilegales y procesos de restablecimiento de sus derechos (2010-2012). In: CNMH (2013). Desafíos para la reintegración. Enfoques de género, edad y etnia. p. 271-324; and (2017). La guerra inscrita en el cuerpo: informe nacional sobre violencia sexual en el conflicto armado.

85 EL ESPECTADOR. 82% de las mujeres agredidas sexualmente en Colombia no denuncia los hechos [online]. El Espectador. 20 March 2014. Available at: <https://www.elespectador.com/noticias/nacional/82-de-mujeres-agredidas-sexualmente-colombia-nodenunci-articulo-481979>



show the scale of action required by transitional justice with a gender perspective as an opportunity to overcome the barriers that victims have historically experienced in these cases.

In relation to registry obstacles, it must be noted that a variable does not exist to fully identify these cases judicially and, consequently, establish how many cases of sexual, reproductive, and SOGI-based violence exist. For that reason, it corresponds to the JEP to adopt measures that establish the universe of victims and specify which cases fall under its jurisdiction. If the JEP limits itself to those documented in reports from the Prosecutor's Office, it will inherit the ordinary justice's information gaps and hence the risk of impunity remains. The entity only records cases manually according to criteria (groups of cases, criminal categories), which does not guarantee a complete registry.

There is another difficulty in the cases identified by the Prosecutor's Office: a significant percentage of cases have not yet identified the responsible armed actor. For example, in the aforementioned confidential annexes, 45% of the cases have yet to define, as a minimum, the alleged responsible party to determine whether or not the case is within the JEP's jurisdiction.<sup>86</sup> In these cases, over a decade has gone by since the Court's initial decision and six years since the second decision. However, an effective strategy has yet to be adopted to establish the alleged responsible party. The JEP must also anticipate a mechanism to address this issue, allowing for advances in identifying cases under its jurisdiction.

The registry also has serious failures related to cases of state security forces because there are specific obstacles in the process to register, report, and in general access justice in these cases. Cinco Claves has indicated that "there are serious difficulties for the victims of this armed actor to access justice since reporting a legal actor implies questioning the authorities and for civil society to confront the state power."<sup>87</sup> Additionally, there are procedures that refuse to register victims. The JEP then faces an even greater challenge to identify and clarify these cases when it cannot rely on information from the ordinary

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86 VII informe de la Mesa de Seguimiento a los Anexos reservados de los Autos 092/08 y 09/15 p. 28 <https://www.sismamujer.org/wp-content/uploads/2019/07/CAJAR-SISMA-SEPTIMO-WEB-14-10-2020.pdf>

87 See Concept of the Alianza Cinco Claves on Legislative Act 01 of 2017. File: RPZ-003, 28 July 2017.

justice system or administrative authorities. The national case could contribute to overcoming this kind of barrier since measures focused on identifying cases in which state security forces are the perpetrator of the three types of violence addressed in this document have not yet been adopted.

Additionally, on the obstacles related to these concepts, it must be noted that there are three concepts where the gender perspective in transitional justice is a determining factor to guarantee victims' access to justice. The first is related to the *centrality of victims*, given that from our perspective, the JEP's current procedure follows guidelines inherited from the ordinary justice system, which grant more importance to the aggressors' voices and not to those of the victims, from basic procedural aspects to a symbolic level. Being treated with reverence, modifying concepts to avoid discomfort, and even the multiple restrictions that we faced at the beginning of the declarations to be recognized as the victims' representatives are all examples of the weakness in the principle of the victims' centrality and that of the gender perspective. On these subjects, Cinco Claves has written a specific analysis document, which was previously delivered.<sup>88</sup>

The second concept is that of the *full truth*, which in the context of this transitional justice process is a factor defined by cross-compliance. The negation of sexual violence by those going before the JEP has not been accompanied by a strategy to guarantee the fulfillment of this constitutional provision. On this matter, our Alliance has already insisted that the JEP use this concept "as a condition to establish the level of the contribution to satisfy the victims' rights and, therefore, as a condition to access legal benefits, given that in the case of sexual violence it is impossible that combatants had no knowledge of this type of incident."<sup>89</sup> From our experience, we can say that these cases were collective or public as they have also been in other contexts of armed conflict.<sup>90</sup> The JEP has the obligation to strengthen the gender perspective in relation to cross-compliance.

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88 Cinco Claves, *Lecciones de litigio ante la JEP: qué ha pasado con la violencia sexual, la violencia reproductiva y otros crímenes motivados en la sexualidad de la víctima*, 2021.

89 See *Observations on the Draft of the Guidelines for the Prioritization of Cases and Situations for the Chamber to Acknowledge the Truth, Responsibility, and Establishment of Facts and Conducts (SRVR in Spanish)*, 13 June 2018.

90 In the case of Guatemala, it has been explained that sexual violence was also systematic and widespread, with the idea of wiping out the population, and it was included in the modus operandi for massacres, with "multiple collective and public rapes." See Amandine Fulchiron, *La violencia sexual como genocidio. Memoria de las mujeres mayas sobrevivientes de violación sexual durante el conflicto armado en Guatemala* in *Revista Mexicana de Ciencias Políticas y Sociales* Universidad Nacional Autónoma de México Nueva Época, Año LXI, No. 228 September-December 2016, pp. 391-422; pp. 396-397.

The third concept is the *connection between sexual violence and the armed conflict*. On this point, our Alliance had previously written a text<sup>91</sup> to explain the issue and emphasize the need “to overcome stereotyped and reductionist ideas that tend to classify sexual violence as incidents that are private, incidental, and unconnected to the context of the conflict.”<sup>92</sup> The national case can also contribute to the adoption of a concept that is aligned with international standards for the protection of victims of sexual violence.

The previous are some examples of the obstacles to access justice that a national case, such as the proposed case, could help to overcome through a transitional justice methodology with a gender perspective. In the context of the JEP’s actions, it is also necessary to remember that there is an internal request, handed down by the Special Tribunal for Peace (Tribunal Especial para la Paz), to open a national case. During the accreditation proceedings, in which the request was initially denied, over a year ago the Tribunal requested that the Acknowledgement Chamber open the case, but the decision has not yet been fulfilled.<sup>93</sup>

More generally, both ordinary and transitional justice must take into account the historic discrimination faced by women, girls, and LGBT people to access the respective procedures, and they must consequently adopt measures to overcome the obstacles to access justice. Among the measures recommended by the different entities that have made declarations on gender justice, and in particular sexual violence, are the following: consider all the evidence and the context when investigating these incidents;<sup>94</sup> have personnel trained on the type of violence being investigated, preferably with an individual of the same sex as the victim;<sup>95</sup> and apply the Rome Statute’s rules of evidence and procedure, among others. However, in

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91 <https://www.sismamujer.org/wp-content/uploads/2019/07/Publicación-5-claves-final-a-una-pag-1.pdf>

92 Ibid. p. 82.

93 Appeals Chamber of the Special Tribunal for Peace. Ruling TP-SA 502 of 2020 of 4 March 2020 “ELEVATE to the Chamber to Acknowledge the Truth, Responsibility, and Establishment of Facts and Conducts (SRVR) a *judicial motion* for the opening of a case on sexual violence during the non-international armed conflict in Colombia.” See Alianza Cinco Claves’ official statement: <https://www.sismamujer.org/2020/07/17/comunicado-de-la-alianza-cinco-claves-sobre-la-mocion-judicial-de-la-sala-de-apelaciones-del-tribunal-para-la-paz-de-la-jep-sobre-apertura-de-un-caso-nacional-de-violencia-sexual/>

94 See, in this sense, Inter-American Commission on Human Rights, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser.L/V/II. 20 January 2007 op cit 2007, para. 51

95 Ibid., para. 52

particular, there has been a call to incorporate a gender perspective in the analysis of facts and evidence during the judicial investigation.

Again, a scenario of a historic denial of justice, of obstacles based on stereotypes, and general impunity regarding sexual violence is what the Special Jurisdiction for Peace has received. This requires a structural response that seeks—within the framework of a transitional justice model with a gender perspective—to transform the situation and guarantee access to justice for women, girls, and LGBT people.

This was the starting point for the Cinco Claves member organizations to propose at the Havana peace negotiations the need for specialized mechanisms to be included in the agreement as a way to confront the preexisting barriers to access justice.<sup>96</sup> This was the origin of measures such as the creation of a special group to investigate sexual violence in the JEP's Special Investigation Unit, proposed by Cinco Claves and established in Transitory Article 7, Transitory Title, of the Political Constitution. These are measures that must be a part of the structural response to the problems described here.

Opening a national case is a necessary and urgent measure that contributes to overcoming historic obstacles for women and LGBT people to access justice. It will require the creation of a methodology with a gender perspective that foments, independently (not interrelated), the investigation and trial of the conducts addressed in the national case and that allows for their appropriate characterization and assessment in the context of the armed conflict, not as isolated incidents, but as an exercise of power.<sup>97</sup> This methodology could also advance in the fulfillment of due diligence obligations, for example, in relation to challenges such as registry; and the adoption of measures that prevent reproducing gender stereotypes in judicial investigations, for example, in relation to the aforementioned concepts. Also, it must take into account the contexts, repertoires of violence, gender arrangements, and different expressions of violence in each historic moment.

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96 <https://www.sismamujer.org/wp-content/uploads/2018/06/2015-CincoClaves-AcuerdoVictimas20162003.pdf>

97 Rita Segatto has indicated that “Rape, all rape, is not an anomaly by a solitary subject, it is a message of power and appropriation pronounced in society.” *Las nuevas formas de la guerra y el cuerpo de las mujeres* 1a. edición Puebla: Pez en el árbol, 2014, p. 56. Also, for the author, “Sexual violence is how the men of war ‘teach’ women and girls due to their gender, as a power exercise over those they consider to be inferior, as a punishment.” *Las estructuras elementales de la violencia*. Universidad Nacional de Quilmes, 2003, p. 138.

The existence of obstacles to access justice is an accepted fact in relation to the conducts that are the focus of the proposed national case. Entities such as the IACHR have insisted on the need to guarantee *de jure* and *de facto* access to judicial bodies and resources to overcome the different obstacles in the investigation and trial of cases of violence against women.<sup>98</sup> The set of obstacles leads to a scenario of impunity that has also been noted by different entities in relation to sexual violence, reproductive violence, and SOGI-based crimes. Thus, it has been internationally indicated that “Impunity for sexual and gender-based crimes continues to prevail and there are barriers to women and lesbian, gay, bisexual, and transgender persons accessing justice, mainly owing to negligent and prejudiced attitudes of justice officials.”<sup>99</sup>

It has been accepted that there is a pattern of systematic impunity in cases of violence against women,<sup>100</sup> which is replicated for LGBT people. Impunity is understood as the lack of investigation, prosecution, and trial. As has been repeatedly described, this is an ongoing reality in Colombia as it is in many other countries. This is the situation that the JEP faces in relation to a majority of the conducts that are under its jurisdiction and, of course, sexual and reproductive violence and SOGI-based crimes are not the exception. Nevertheless, the investigation of this kind of incident, with the aim of overcoming historic obstacles and the consequent impunity, must opt to include a gender perspective, which means that it must have a strategy that is in accordance with the dimension and characteristics of impunity for the aforementioned types of violence.

In this scenario, it is hoped that the transitional justice system will be a doorway to access justice for surviving victims who have historically been denied justice. It is felt that the proposed national case could contribute to overcoming the obstacles to access justice by building a gender methodology for the investigation and prosecution of the crimes addressed in this case. We have already highlighted the different errors in how the JEP has addressed cases of sexual violence. An analysis of the initial decisions, which excluded some cases of sexual violence due to a restricted understanding of their connection to the armed conflict, and the comments laid out by Cinco Cla-

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98 See, in this sense, the IACHR report Access to Justice for Women Victims in the Americas, OEA/Ser.L/V/II. 20 January 2007.

99 The United Nations Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence. See The gender perspective in transitional justice processes, A/75/174 17, July 2020, para. 51. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/186/90/PDF/N2018690.pdf?OpenElement>

100 IACHR, op cit., 2007, para. 124.

ves on the treatment given to these cases in the kidnapping macro-case are, among others, clear elements showing the gaps that are arising within the JEP because there is no national case.

The national case can establish guidelines to address sexual, reproductive, and SOGI-based violence on aspects such as the type of conducts that are to be investigated; the scope of the concepts; the criteria related to the victims' identification, registry, and visibility; conditions for data processing and for the planning and implementation of the proceedings, not only regarding privacy but also the symbolic space that victims must hold; the comprehensive intervention model in accordance with human rights standards for a life free of violence; the characterization of impacts and definition of comprehensive reparation measures and mechanisms; the psycho-social approach for the cases; the participation mechanisms for surviving victims; and the requirements for their accompaniment and criteria to identify and assess evidence, as well as analyzing the facts and factors of responsibility. Illustrative elements seek to exemplify how a national case would contribute to the restoration of judicial practices to overcome challenges to report incidents, revictimizing actions, the failures to apply and interpret the pertinent regulations for the relevant incidents, the difficulties to assess evidence, the criteria for argumentation in decisions, and in general the omission of existing concepts for the investigation and trial of incidents such as conflict-related sexual, reproductive, and SOGI-based violence.

The opening of a national case must have investigative parameters or a methodology that contributes to overcoming the existing obstacles, based on judicial practices that adopt the operational and decision-making criteria of *impartiality and independence* in justice as well as concepts that require an assessment of the incidents without using discriminatory stereotypes.<sup>101</sup> Also, since it is just one case, the design and implementation of those parameters and methodologies should be applied in a concentrated way to a group of cases, which will allow for an adequate and timely assessment of its impact on overcoming the obstacles to access justice, and whether adjustments are necessary to maintain that objective. Without a doubt, this experience will lead to a transitional justice model that materializes the gender perspective and that advances to clarify sexual, reproductive, and SOGI-based violence, and will establish tools that can be used in other macro-cases that the JEP will see today and in the future to apply concrete affirmative measures.

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101 In this regard, see IACHR op. cit. 2007, para. 53.

# Conclusions

Cinco Claves requests that the JEP open a macro-case on sexual, reproductive, and SOGI-based violence against women, girls, and LGBT people as a necessary and urgent mechanism that would allow for the implementation of the gender perspective in transitional justice, with the capacity to explain what happened to those populations in the armed conflict and contribute to overcoming the obstacles to access justice and historic impunity faced by the victims in these kinds of cases.

International entities have recognized that transitional justice has failed to guarantee a gender perspective in the cases. The Final Peace Agreement has a broad catalogue of specific provisions on subjects related to the proposed case, which must be applied to implement the gender perspective in transitional justice. Also, internationally, there are diverse advances on these issues that sustain the relevance of a national case, and they offer specific standards to implement the indicated gender perspective, which additionally will lay the foundation for proceedings in similar cases.

The JEP's prioritization policy allows for a national case to be opened as the conducts addressed in this case have a broad explanatory capacity in relation to women's, girls', and LGBT people's vulnerability, given the magnitude due to the number of incidents, qualitative characteristics, ongoing nature, and territorial scope of the cases, and the representative nature of the incidents characterized by discrimination and diverse perpetration methods, as well as the gravity of conducts that, far from being isolated, are part of a military strategy. Additionally, the JEP must apply its prioritization policy, taking into account the restorative justice model (not retributive), and in accordance with the mandate of a gender perspective as anticipated in the Final Peace Agreement.

Impunity in the conducts covered by the proposed national case result from the historic obstacles to access justice and the persistence of gender stereotypes in the administration of justice. This is the reality that the JEP has been handed, an accumulation of failures in the administration of ordinary justice, which a case such as the one proposed could help to overcome.

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# Annex A

