

The connection between
sexual violence and the
armed conflict:

A call to prevent setbacks
in the Special Jurisdiction
for Peace



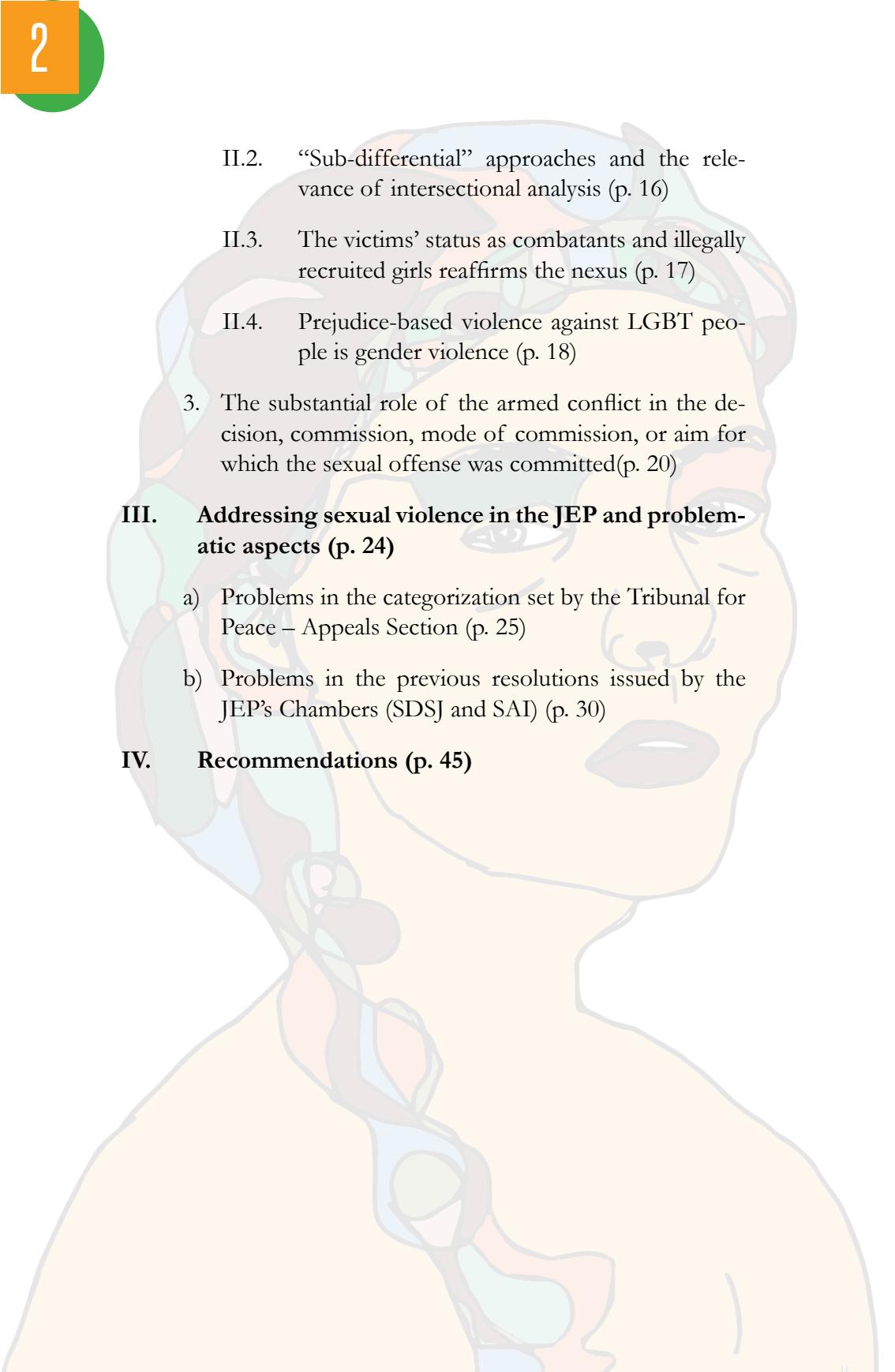
THE CONNECTION BETWEEN SEXUAL VIOLENCE AND THE ARMED CONFLICT: A CALL TO PREVENT SETBACKS IN THE SPECIAL JURISDICTION FOR PEACE¹

Alianza Cinco Claves

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Five Keys Alliance

I. Introduction: Why return to a settled debate?

In this document, the member organizations of the *Alianza Cinco Claves* (Five Keys Alliance –hereafter *5 Claves*) take up the concerns of the women’s and LGBT movement over recent years about the interpretations judicial bodies have made on the applicable criteria to establish the existence of a connection between sexual violence and armed conflict. Although this debate should be considered settled as the normative framework to establish this link is consolidated and binding, there have been judiciary interpretations that do not recognize them as such. Discrimination and the use of stereotypes and standards counter to victims of sexual violence continue to be present in the justice system.

The mobilization of women’s organizations that advocate to guarantee access to justice for victims of sexual violence influenced Constitutional Court Ruling 092 of 2008 and subsequent Ruling 009 of 2015. These judicial decisions reflected a crucial moment of public debate aimed at reaffirming the relationship between sexual violence and the armed conflict and warned of the implications if the nexus were to be denied. The organizations that make up the Mesa de Seguimiento al Auto 092 de 2008, Anexo Reservado, (Monitoring Roundtable for Ruling 092 of 2008, Classified Annex) warned in their fifth report (2013, p. 45) that “the restricted vision on when these [sexual

crimes] are related to the armed conflict” constitutes “one of the biggest problems contributing to impunity [in such cases].” This “restricted vision” refers to the persistence of “a simplistic view of the phenomenon’s complexity that does not take into consideration the classification of sexual violence as defined by the Constitutional Court in Ruling 092 or the information compiled by various international and national human rights organizations”(ibid.). These interpretations remain simplistic despite the parameters set forth by constitutional case-law to analyze these complex circumstances, especially that developed in Judgment C-781 of 2012 in which “a broad position was adopted” to interpret the expression “in the context of the armed conflict.” The Roundtable, in the same vein, drew attention to the need to take into account “the profile of the victim and the complexity of the acts of sexual violence in the context of the conflict, in light of the aforementioned broad interpretation” (ibid).

The climate of impunity referenced by the Roundtable meant, at that time, an almost total absence of convictions for the 183 cases in Ruling 092 of 2008’s classified annex, as well as a lack of investigative strategies aimed at overcoming this situation (ibid, p. 39-43). Subsequently, with the issuance of Ruling 009 of 2015, the Court prepared a new classified annex with 444 additional cases of sexual violence reported by women’s organizations to that tribunal (for a total of 627). Hence, the analysis of impunity carried out by the Monitoring Roundtable was extended to all those cases. The subsequent diagnosis made by the Roundtable found the persistence of “almost total impunity” (2016, p. 13 et seq.) for the incidents of sexual violence addressed by both classified annexes, and identified as influential practices: “archiving cases with widespread situations of sexual violence, a lack of investigation into cases with convictions for crimes other than sexual crimes, cases that the Attorney General’s Office reports as ‘lost,’ and cases closed due to preclusion or a resolution to desist on unreported grounds or in seeming defiance of the duty to investigate”(ibid, p. 33).

It is noteworthy that the monitoring carried out by the women's organizations on Ruling 092 of 2008 resulted in an identification of the need to focus advocacy towards achieving a more explicit Constitutional Court ruling on the nexus between sexual violence and armed conflict. The issuance of Ruling 009 of 2015, resulting from this process, was a milestone not only due to its specific focus on the situation and needs of women victims of sexual violence in the context of the armed conflict, but also because it reflected the factual patterns of this form of violence as was recognized in the previous ruling (092 of 2008). This led to the consecration a *presumption of constitutionality on the close and sufficient relationship between acts of sexual violence and the armed conflict*. To establish this relationship it is sufficient to verify two factual presumptions that are adapted to the general notion of the Colombian conflict in constitutional jurisprudence: "(i) the occurrence of sexual assault and (ii) the presence of armed actors—whatever their denomination or modus operandi—in the areas of the country in which these aggressions occur."

The Special Jurisdiction for Peace (JEP) is a new scenario where the relationship between sexual violence and armed conflict is revived, as an examination of material factors lies at the center of its jurisdiction. In regards to the interpretive role of the Justice Chambers, we observe that a false controversy may be opening up about when sexual violence conducts are connected to the armed conflict, which could actually be hiding the resistance of judicial operators to apply the already established minimum standards, or their lack of knowledge.

After a year and a half of the JEP's effective operation², at least 21 thematic reports on sexual violence have been submitted³

2. Since January 15, 2018, pursuant to JEP Presidency Resolution 001 of 2018.

3..According to the JEP press release published on its website on April 24, 2019, 19 reports on sexual violence had been presented up until April 2019. Subsequently, in June and August 2019, respectively, two other reports dedicated to this form of violence were presented to

that must be verified and processed by the Chamber of Acknowledgment of Truth, Responsibility, and Determination of Facts and Conducts (SRVRDHC), in accordance with the procedure established in Law 1922 of 2018. In some of the macro-cases that this Chamber opened for proceedings, sexual violence is part of the catalogue of victimizing incidents which, due to their magnitude and impact in specific territories, populations, or subjects, or due to of their connection with other forms of macro-victimization, led to a prioritization and clustering of these cases.⁴

Likewise, individuals who have been prosecuted or convicted in the ordinary courts for the commission of sexual crimes have begun to go before the JEP. This has led to pronouncements from the Chamber to Establish Legal Status (SDSJ) and the Chamber for Amnesty or Pardon (SAI) to accept or reject their applications, after examining the temporal, personal, and material areas of jurisdiction. With regard to the material jurisdiction, the analysis of the relationship between the acts of sexual violence and the armed conflict has been the central object of pronouncement. To support their analysis, in at least two cases, these chambers have requested expert concepts from the JEP Gender Commission, and, in two others, these have been used

the JEP. JEP communications consulted at: <https://www.jep.gov.co/Sala-de-Prensa/Paginas/La-organizaci%C3%B3n-Sisma-Mujer-entre-ga-dos-informes-de-violence-sexual-a-la-JEP.aspx> and <https://www.jep.gov.co/Sala-de-Prensa/Paginas/Red-Nacional-de-Mujeres-Defensoras-entreg%C3%B3-6-informes-al-Sistema-Integral-de-Verdad,-Justicia,-Reparaci%C3%B3n-y-No-Repetici%C3%B3n.aspx>

4. This is seen in the following macro-cases: Case No. 004 on the “Territorial situation of Urabá” (information provided by Ruling No. 040 of 2018); Case No. 007 on “Recruitment and use of girls and boys in the armed conflict” (provided by Ruling No. 029 of 2019); Case No. 006 on victimizing events against members of the Patriotic Union (provided by Ruling No. 027 of 2019) and Case No. 005 on the “Territorial situation of the region of Northern Cauca” (provided by Ruling No.078 of 2018).

indirectly (citing them as a reference).⁵

Despite the support of the specialized commission, there are problems in the reasoning of the first known resolutions (three issued by the SDSJ and one by the SAI) for cases with sexual crimes. These are resolutions No. 965, 972, and 973 of 2018 issued by the SDSJ, respectively, in the cases of participating party Juan Pablo Sierra Daza (retired second sergeant of the National Army), Geimy Alexander Jaimes Carreño (former member of the National Army), and Orlando Guerrero Ortega (regular soldier), all of whom requested special criminal treatment under Law 1820 of 2016. Of these resolutions, the first favored the participating party's requests and the other two denied the request. Beyond that, there is resolution SAI-LC-D-XBM-002-2019 of 2019 issued on the case of participating party Oscar Enrique De Lima Contreras, former member and deserter of the FARC-EP (Front 59), a beneficiary of conditional freedom.⁶

5. The first consultation presented to the Gender Commission by the SDSJ took place within the processing of Mr. Juan Pablo Sierra Daza's request (a retired army sergeant), file No. 2017120080101268E, in which Resolution No. 965 of 2018 was issued. It was requested through Resolution 528 of June 18, 2018 and the Gender Commission provided a concept by official letter on June 25, 2018, which is available at: https://www.jep.gov.co/Relatoria/Comisi%C3%B3n%20de%20G%C3%A9nero/Concepto%20de%2025%20de%20junio%20de%202018_Exp%202017-120080101268E.pdf. Subsequently, other offices in the same chamber used this concept to substantiate Resolutions No. 972 and 917 of 2018. More recently, the SAI (office of Magistrate Cecilia Balanta) did the same by requesting a concept from the same Commission to analyze a case involving a Wayuu teenager who was a victim of unlawful recruitment and violent sexual penetration, where the perpetrator (and participating party) was a former member of the 59th Front of the FARC-EP. The latter, dated March 6, 2019, is available at: <https://www.jep.gov.co/Relatoria/Comisi%C3%B3n%20de%20G%C3%A9nero/Concepto%2006%20of%20March%20of%202018%20Case%20Woman%20adolescent%20indigena.pdf>

6. Another resolution issued by the SAI (SAI-LC-XBM-046 of

In all of these cases, material jurisdiction is analyzed within the framework of the expressions *due to, in the context of, or in direct or indirect relationship with the armed conflict*, incorporated in transitory articles 5, 6, 21 and 23⁷, added by article 1 of Legislative Act 01 of 2017,⁸ in Law 1820 of 2016 (on amnesty, pardon, and special

February 25, 2019) also addresses acts of sexual violence (forced abortion and forced or compulsory contraception), in the case of Héctor Arboleda, alias the “Enfermero.” However, we will not go into the details of this case in present document as the study of material jurisdiction did not generate a controversy in that decision. In that case, material jurisdiction was not questioned nor was it grounds for analysis and the requirement was almost automatically considered to be fulfilled.

7. Transitory Article 23: “*Jurisdiction of the Special Jurisdiction for Peace*. The Special Jurisdiction for Peace will have jurisdiction over the crimes committed due to, in the context of, or in direct or indirect relationship with the armed conflict and without the intention of obtaining illicit personal enrichment or, when there is, without this being the determinant cause of the criminal behavior. For this purpose, the following criteria will be taken into account:

a) That the armed conflict was the direct or indirect cause of the commission of the punishable conduct, or
 b) That the existence of the armed conflict has influenced the author, participant, or abettor of the punishable conduct committed due to, in the context of, or in direct or indirect relationship with the conflict, in terms of:

- The individual's ability to commit [the conduct], that is, because of the armed conflict, the perpetrator has acquired greater skills that aided in the execution of the behavior.
- The decision to commit [the conduct], that is, the resolution or willingness of the individual to commit [the conduct].
- The manner in which [the conduct] was committed, that is to say that, as a result of the armed conflict, the perpetrator of the conduct was able to access the means for its consummation.
- The selection of an objective that was intended to be achieved through the commission of the crime.” (Underlining added to the original text).

8. Transitory Articles 5, 6, and 21 were declared constitutional by the Constitutional Court, through Judgment C-674 of 2017, finding that they have a thematic and teleological relationship with the content of the Final Peace Agreement (FPA). The declaration of constitutionality

criminal treatment) and in Law 1957 of 2019 (JEP Statutory Law on the Administration of Justice, Article 8). However, they have ceased to fully apply the already consolidated parameters in light of which these statutory elements must be interpreted as they provide a partial scope and expediency to the JEP Gender Commission's concepts and to specific excerpts from international jurisprudence, or because they assume that sexual violence is a private and collateral act, reproducing harmful gender stereotypes.

We must clarify that until these resolutions were issued, the JEP's Appeals Section of the Tribunal for Peace (TP-SA) had not ruled, in its capacity as the final instance, on the material jurisdiction in cases of sexual violence.⁹ It did so for the first time in Ruling 171 of May 8, 2019, in which it inaugurated the "presentation of an original precedent on the subject, which draws on the work of the SDSJ itself" (para. 31)—in the context of a case obviously outside the JEP's sphere of competence—to

also referred to Article 23, on which, the Constitutional Court additionally affirmed that "its relationship—both material and teleological—resides in the importance of specifying the parameters that will allow the JEP jurisdiction to be defined with respect to State agents [members of state forces], as an actor who fulfilled a specific role within the conflict and for whom the need to establish a differential, but also equitable, symmetrical, and balanced treatment is foreseen."

9. The Tribunal for Peace is the "final entity" and "maximum instance" of the JEP, as enshrined in transitory article 7 of Legislative Act 01 of 2017 (declared constitutional by Judgment C-674 of 2017 of the Constitutional Court). Article 59 of Law 1922 of 2018 expressly provides for the binding force of the "interpretative judgments" adopted by the Tribunal for Peace's Appeals Section at the request of the chambers, sections, or the Investigation and Prosecution Unit, "in order to ensure a unified interpretation of the law and guarantee legal certainty." However, we understand that the other decisions issued by that section, when resolving appeals against judgments and resolutions from the other chambers that define legal situations, become mandatory, that is, they constitute a judicial precedent (applied vertically for magistrates of a lower hierarchy and horizontally for the Tribunal magistrates).

refer to the nexus between sexual assault and armed conflict. To this effect, the ruling explained the means by which a connection between sexual violence and armed conflict can be recognized, considering sexual violence as “constitutive” or “circumstantial.” Although the aforementioned Ruling consists of a “[merely] initial development” of such categories (para. 10), their considerations are worrisome as they do not adhere to the criteria of international and national sources and, therefore, the impact on future decisions from judicial chambers is potentially negative and detrimental to the guarantee of access to justice for victims of sexual violence.

Thus, the purpose of this document is to emphasize the State’s obligation of due diligence in the investigation, prosecution, and punishment of sexual violence, which dictates non-regression on the minimums previously acquired in the establishment of a connection between conducts of sexual violence and armed conflict. Specifically, we seek to criticize emerging discriminatory judicial practices in the JEP, since they impede access to justice and increase impunity by putting into question the relationship between sexual violence and the armed conflict, ignoring international standards and national constitutional presumptions.

For this purpose, we will follow the following structure:

In section II we systematize the normative framework that support the analysis of the connection between sexually violent behaviors and armed conflict. In section III, we criticize the judicial approach taken by the JEP in sexual violence cases, based on an analysis of the resolutions issued by the SDSJ, the SAI, and the Tribunal for Peace – Appeals Section (TP-SA) on the relationship between sexual violence and the armed conflict. Finally, in section IV, we recommend specific practices that the JEP should assume in the future to analyze material jurisdiction in cases involving sexual crimes.

II. Call to non-regression: the normative framework to establish the nexus between sexually violent conducts and armed conflict are consolidated and binding

In Colombia, there is consolidated case law on the necessary criteria to establish the relationship of a conduct with the armed conflict. Constitutional Court pronouncements¹⁰ have been accepted by the other permanent jurisdictions, with particular developments in addressing sexual violence. This area is adapted to the standards that, through the constitutional case law, are applicable in Colombia and systematize the adopted positions.

Within the framework of Public International Law, Common Article 3 and Article 1 of Additional Protocol II of the Geneva Conventions, are definitive, as they address non-international armed conflicts and have a conventional and customary character. The rules of IHL have been vastly developed in the field of International Criminal Law (ICL), specifically in the creation and operation of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The jurisprudence of this *ad hoc* court pioneered the definition of a consistent interpretation in light of IHL, and the special statute that gave rise to it (within the UN), to establish that the crimes were closely related to the conflict. Some of the ICTY decisions also dealt with acts of sexual violence—cases Kunarac, Kovac and Vukovic, Tadic, Blaskic, Mrksic and Furundzija. Subsequently, the International Criminal Tribunal for Rwanda (ICTR) reiterated the ICTY jurisprudence on this point, even in the case of Akayesu—also emblematic for addressing sexual crimes. Similarly, other tribunals or special

10. See judgments C-291 of 2007, C-914 of 2010, C-253A of 2012, C-781 of 2012, C-084 of 2016, C-080 of 2018.

temporary courts proceeded to prosecute crimes committed in armed conflicts in other countries' territories (Special Court for Sierra Leone).¹¹ Finally, the ICTY arguments have been accepted by the International Criminal Court (ICC), hence the interpretation which originated in the case of the former Yugoslavia has transcended into the field of universal criminal jurisdiction (Ntaganda case).¹²

In the field of International Human Rights Law (IHRL), the area of case law that originated in the PIL constitutes the reference framework drawn on by the Inter-American Court of Human Rights (I/A Court HR) to interpret human rights violations involving events that occurred in contexts of armed conflict. Thus, although it does not have jurisdiction to decide on State responsibility based on IHL and the jurisprudence of the international criminal courts, the IACHR has reaffirmed the relevance of calling up these sources as valid interpretation criteria given their *lex specialis*¹³ nature.

11. This court concluded its mandate on September 26, 2013, when the Appeals Chamber definitively ruled on the nine men convicted of the atrocities committed during the armed conflict in Sierra Leone. The defendants were prosecuted in four proceedings that correspond to the four cases tried by that Special Court: *Prosecutor vs. Charles Gbankay Taylor* (case known as “Charles Taylor”); *Prosecutor vs. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (“RUF” case); *Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* (case “AFRC”); and *Prosecutor vs. Moinina Fofana and Allieu Kondewa* (“CDF” case). Crimes involving sexual violence (mainly rape and sexual slavery) were also tried in all of these cases. Case details and decisions can be found in the publication “*Bearing the Greatest Responsibility: Select Jurisprudence of the Special Court for Sierra Leone*” available at: http://www.rscsl.org/Documents/RSCSL_Jurisprudence.pdf .

12. See ICC, VI First-instance Chamber, ICC-01 / 04-02 / 06, *Prosecutor vs. Bosco Ntaganda*, judgment of July 8, 2019. Available at: https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF .

13. GIRALDO, Marcela, Criterios de la Corte Interamericana sobre la interpretación de los Derechos Humanos a la luz del Derecho Internacional Humanitario, Collection Inter-American Human Rights

This jurisprudence establishes the relationship between crimes and conflict through the existence of two elements:¹⁴ a non-international armed conflict and a nexus between the conflict and the alleged crimes (that the armed conflict has impinged on or influenced the commission of the conducts). The second element is developed by analyzing the conditions of a (i) temporal, (ii) spatial or geographical, and (iii) material or causal nature. In turn, the central content of the material element is the “close and sufficient relationship with the development of the conflict,” which is demonstrated by indicative sub-criteria (not exhaustive or concurrent).¹⁵

In the national context there are crimes that fall within the scope of IHL (Book II, Title II, Law 599 of 2000 –Criminal Code) and the IHRL framework that help identify, acknowledge, and redress victims of fundamental rights violations and criminal behaviors that occurred in the course of the internal armed conflict (Law 418 of 1997¹⁶ and Law 1448 of 2011 –Victims Law). Here, certain expressions have been used to define its realm of application: the Criminal Code uses “*in the event (con ocasión)* and *in the development*

System, CNDH: Mexico City, 2016, p. 29-31. Available at: <http://appweb.cndh.org.mx/biblioteca/archivos/pdfs/fas-CSIDH-Criteria-IACHR.pdf>

14. We refer to the publication “Genocide, War Crimes, and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia” organized by Human Rights Watch and Universidad Iberoamericana (2010). Available at: https://www.hrw.org/sites/default/files/reports/ICTYweb_0.pdf

15. In the section referring to the material or causal element we will expand on these indicative sub-criteria.

16. “By which instruments are established for the search for coexistence, the effectiveness of justice and other provisions are dictated.” Law 418 of 1997 was modified and extended by Laws 548 of 1999, 782 of 2002, 1106 of 2006, 1421 of 2010, 1738 of 2014, and 1941 of 2018.

(*en desarrollo*) of the armed conflict,” Law 418 of 1997 uses “*in the context (en el marco)* of the armed conflict,” and the Victims Law uses “*in the event*” (*con ocasión*) and “*in the context (en el marco)* of the internal armed conflict.” The scope of such terms has been established in constitutional judgments based on the rules of IHL and IHRL that are included in the constitutional body of law (Common Article 3, Article 1 of Additional Protocol II to the Geneva Conventions and International Covenants).¹⁷ The case law constructed by the Constitutional Court in this regard is summarized in Judgments C-291 of 2007, C-914 of 2010, C-253A of 2012, C-781 of 2012, and C-084 of 2016.

Under the FPA, the provisions that organize and regulate the JEP use similar terms: conducts committed “*as a result of, in the event of, or in a direct or indirect relationship* with the armed conflict”¹⁸ and “regarding acts committed *in the context* of and *during* [the armed conflict].”¹⁹ The Constitutional Court, in Judgment C-080 of 2018²⁰ emphasized that the phrases connector – which indicates the scenarios in which the JEP has prevailing jurisdiction over the material factor– is the disjunctive conjunction “or.” This means that the facts committed in any of these cases (“in the event of, as a result of, or in direct or indirect relationship with the armed conflict”) must be understood as subject to the jurisdiction of the Special Tribunal. Additionally, it is understood that the IHL and IHRL sources integrated in the constitutional body of law

17. On the integration of IHL norms into the constitutional body of law, see Judgment C-291 of 2007, MP Manuel José Cepeda Espinosa and IHRL C 781 of 2012.

18. Thus, in: Article 8 of Law 1957 of 2019 (Statutory Law on Administration of Justice in the JEP - LEJEP); Transitory Articles 5, 6, 21, and 23 added by Article 1 of Legislative Act 01 of 2017, and Articles 2 and 3 of Law 1820 of 2016 (on amnesty, pardon, and special criminal treatments).

19. Article 2 of the LEJEP.

20. Automatic control of constitutionality of the Senate statutory bill Number 08 of 2017, House of Representatives bill Number 016 of 2017, “Statutory Law on the Administration of Justice in the Special Jurisdiction for Peace.” Section 4.1.3.

are the foundation for an analysis of material jurisdiction to be applied by the JEP (temporal, spatial, and material criteria for the application of IHL and IHRL).²¹

It should be remembered that, in cases of sexual violence, the Constitutional Court established the constitutional presumption of a close and sufficient relationship based on the *pro persona* principle and the obligation of due diligence as established in Ruling 009 of 2015. Judgment C-781 of 2012 had already incorporated a reference to Ruling 092 of 2008 into its analysis, as it is a milestone in the constitutional body of case law on women, gender violence, and armed conflict. Ruling 009 of 2015 lends continuity and specificity to that area and, therefore, there is no question as to its usefulness and obligatory nature for the judiciary.

Judgments SP15512-2014 of November 12, 2014 and SP15901-2014 of November 20 of the same year –both rulings from the Criminal Chamber of the Supreme Court of Justice (SP-CSJ) in reference to cases of sexual violence included in the classified annex of Ruling 092 of 2008– address the connection between sexual violence and the Colombian internal armed conflict as a central legal issue.

Below, we will review the content of the criteria contemplated in the sources referenced above to understand the relationship of the armed conflict in the commission of conducts of sexual violence: we will lay out temporal and geographical criteria and then we will focus on the material criteria, for which we will address international jurisprudence.²² The constitutional presumption enshrined by Ruling 009 of 2015, which refers to the heart of the referenced material criterion (“close and sufficient relationship”), we will underscore the suppositions of

21. See Judgment C-080 of 2018, automatic review of constitutionality of the draft statutory bill 08 of 2017 of the Senate and House of Representatives 016 of 2017 (JEP Statutory Law).

22. We will argue this point in the introduction of the corresponding section.

said presumption in the second section. We will not address the existence of the internal armed conflict since there is no current disagreement on this point. Indeed, the fact that a conflict—meeting the characteristics of an *internal armed conflict*—occurred in Colombia, is a premise that is beyond discussion in national legislation and jurisprudence.²³

A. Temporal and spatial conditions

In terms of *temporality*, “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until there is a general conclusion that peace has been achieved; or in the case of internal conflicts, when a peaceful settlement is achieved.”²⁴ On the *geographical* connection, the ICTY has said that “it is not necessary that the fighting occurred in the area where the crimes occurred.”²⁵ As stated in

23. It is worth mentioning that, in order to establish the existence of the internal armed conflict, Common Article 3 and Article I of Additional Protocol II of the Geneva Conventions apply. In light of these precepts, the idea is to exclude from the category of *internal armed conflict* the cases of “mere civil disturbances, sporadic revolts, or isolated terrorist acts” without losing sight of the “volatile nature of current conflicts.” For this purpose, international jurisprudence (ICTY and ICTR, in particular) has defined the following basic parameters: (i) the prolonged nature of armed violence, (ii) the intensity of the conflict, and (iii) the level of organization of the parties. The Constitutional Court addressed on the existence of the armed conflict in Judgment C-291 of 2007, section D, point 1.1, reiterated in Judgments C-080 of 2018 and C-084 of 2016. On the distinction between internal disturbances or internal tensions, the Constitutional Court also cites the Inter-American Commission on Human Rights (“La Tablada” case - Report No. 55/97, Case No. 11.137 - Juan Carlos Abella vs. Argentina, November 18, 1997).

24. The original Spanish language document uses the Constitutional Court translation of an excerpt of the ICTY Appeals Chamber decision from October 2, 1995, Case of the Prosecutor v. Dusko Tadic, No. IT-94-1-AR72.

25. Human Rights Watch (HRW), “Genocide, War Crimes, and Crimes

the Brdjanin case, “when linking crimes to armed conflict, it is not necessary to establish that combat activities occurred in the area where the crimes are alleged to have occurred.”²⁶ This same meaning was established in the Blaskic case.²⁷

Combining both criteria, “crimes may be temporally and geographically remote from actual fighting,” since “international humanitarian law applies in the whole territory, whether or not actual combat takes places there.”²⁸ In the case against Kunarac, Kovac, and Vokovic, it was determined that: there is no necessary correlation between the area where the fighting is actually taking place and the geographical scope of the laws of war. The laws of war are applied throughout the territory of the belligerent States [...] [T]he requirement that the acts of the accused be closely related to the armed conflict would not be denied if the crimes were temporally and geographically remote from where fighting effectively occurred.²⁹ Even IHL has

Against Humanity”, *op. cit.*, p. 21.

26. ICTY, First Instance Court, September 1, 2004, para. 123 (HRW, *op. Cit.*). Repeated position in the Tadic cases (Chamber of Appeals, October 2, 1995, para. 70) and Simic, Tadic and Zaric (First Instance Court, October 17, 2003, para. 105).

27. ICTY, First Instance Court, March 3, 2000, para. 69 (HRW, *op. Cit.*): “This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment.”

28. The two citations of this paragraph: Human Rights Watch (HRW), “Genocide, War Crimes, and Crimes Against Humanity”, *op. cit.*, p. 71.

29. ICTY, Appeals Chamber, June 12, 2002, para. 57 (HRW, *op. Cit.*). Position initiated in the Tadic case and repeated in the Halilovic case (First Instance Court, November 16, 2005, para. 26): “The Appeals Chamber in the *Tadic* case held that until a general conclusion of peace or a peaceful settlement is reached, international humanitarian law continues to apply, ‘in the whole territory of the warring States, or in the case of internal conflicts, in the whole territory under the control of a party, *whether or not actual combat takes place there*’”(emphasis in the original HRW document). Also, in the case of Limaj et al. (First Instance Court, November 30, 2005, para. 84).

reiterated that “[e]ven if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed... international humanitarian law applies.”³⁰ The Constitutional Court, in Judgment C-291 of 2007, adopts the precedent established in the international arena and reaffirms that IHL is applicable not only “in the places where armed fighting or hostilities take place.” Therefore, it emphasizes that “when it comes to incidents or situations that take place where the fighting does not directly take place, for the application of IHL” it is enough to verify that “the alleged crimes were closely related to the hostilities that took place in other parts of the territories controlled by the parties to the conflict.”³¹ This is a reference on the material criteria to verify the close and sufficient relationship with the armed conflict in those cases.

This line is also taken by the SP-CSJ for its application in specific cases, stating that criteria of immediacy or concomitance with hostilities or combat cannot be imposed and that there is also no rigid measure of spatial or temporal proximity. In Judgment SP15512-2014, reiterating a previous ruling from the Criminal Court,³² the ICTY line, and its reiteration by the ICTR and the ICC,³³ are assumed to affirm that there is no need for a direct nexus between conduct and the armed conflict in the sense that it does not have to occur in the midst of the heat of combat [...] it is enough that there is a relationship of some proximity between the conduct and the hostilities occurring in any other place in the territory controlled by the disputing parties, in such a way that it can be affirmed that its commission or how it is

30. The Prosecutor v. Kordic and Cerkez, First Instance Court, February 26, 2001, para. 32. (HRW, *op. Cit.*).

31. The Constitutional Court quotes and translates from the ICTY, case of the Prosecutor v. Dragoljub Kunarac and others, judgment of the Court of Appeals of June 12, 2002.

32. CSJ-SP, August 31, 2011, Rad. 36125.

33. Specifically refers to the appellate judgments issued in the Kunarac (ICTY, para. 58), Rutaganda (TPIR, para. 570-572), and Lubanga (CPI, para. 287) cases.

carried out is influenced by the armed conflict's existence.

In the same judgment, Ruling SP15512-2014 of the CSJ, when examining the circumstances of the commission of conducts of violent sexual penetration and torture brought before the court via a cassation procedure, it found that a connection exists with the armed conflict, giving credit to evidence that demonstrated the presence of armed actors from different groups, in a broad temporal and spatial framework, attending to the dynamics of the conflict at the regional level (Catatumbo region), without the need to focus on the more local level or on the concomitance or immediacy between conducts and the development of hostilities or specific armed actions.

It should be noted that the concomitance or temporal and spatial proximity with attacks, hostilities, or combat is just one of the many modalities recognized by Ruling 092 of 2008 in the Constitutional Court's non-exhaustive list of factual scenarios for sexual violence.³⁴ The ruling also refers to the temporal and spatial connection between armed conflict, forced displacement, and sexual violence, when these take place at reception sites where women have had to be forcibly transferred.

Another important precedent is Judgment SP-5333-2018 of the CSJ (Justice and Peace)³⁵ that focused on the history of the armed conflict in Chocó, identifying the presence of different armed groups in that territory and their practices in the region, without restricting the analysis to the temporal and spatial coincidence with the armed actions, even though they were not explicit in their norms or organizational policy. It concluded that, in reality, the armed actors' actions were not a counterinsurgency strategy (as apparently could be inferred from their statutes). Moreover,

34. Constitutional Court, Ruling 092 of 2008, Section III.1.1.2

35. That dealt with the human rights violations committed by the Chocó Pacific-Heroes Bloc and the southwestern front of the Self-Defense Forces, including charges of sexual violence that had not initially been included by the Justice and Peace Chamber of the Superior Tribunal of Medellín.

their activities were directed “as a form of dominance and power over the civilian population” (p. 60) that resulted in the mass displacement of black and indigenous communities and in various cases of individual displacement.

B. Material or causal conditions

In *material* terms, to establish the type of incidents in question, it must be verified that there is a *close and sufficient relationship with the development of the conflict*, as systematized by the Constitutional Court based on various ICTY pronouncements that use the expression “*closely related to the hostilities*.”³⁶ Likewise, within the framework of IHRL, the Court has established a general interpretation of the armed conflict as the expressions in the event of, in the context of, or in the framework of the armed conflict “have a broad meaning that obliges the judge to examine the circumstances in each specific case where there has been a serious violation of human rights or international humanitarian law, as well as the context of the social phenomenon, to determine whether there is a close and sufficient relationship with the internal armed conflict.”³⁷

The following guidelines have been developed internationally to determine the nature of this close nexus with the conflict:³⁸

□ **Crime shaped by or dependent upon the environment of conflict:** the close and sufficient relationship can be established “to the extent that the crime is shaped by or dependent upon the environment in which it was committed [in this case, the environment is the armed conflict]”³⁹ This adjectival use (*shaped by* or *dependent upon*) in the case known as the *Foca Municipality Case* (against Kunarac and others), was

36. Judgment C-291 of 2007, Section D, number 1.2.3.

37. Constitutional Court C-781 of 2012.

38. We use HRW’s systematization for reference (*op. Cit.*).

39. ICTY, case of the Prosecutor v. Blagojevic and Jokic, judgment of January 17, 2005 (translation into Spanish in the original *5 Claves* document realized by the Constitutional Court in Judgment C-291 of 2007).

highlighted to distinguish “a war crime from a purely domestic crime”⁴⁰

- **Acting in the context or under the guise of armed conflict:** in the same case against Kunarac it was considered sufficient to establish that “the perpetrator acted in furtherance of or under the guise of the armed conflict”⁴¹ (Stakic case: “[...] it would be sufficient to conclude that the perpetrator acted *in furtherance of or within the scope of the armed conflict*”).⁴²
- **It is not necessary to verify a strict causal relationship with the conflict but instead the role that it played in the commission of conduct:** it states that the armed conflict need not be the direct cause of the crime, but it should “have played a substantial role *in the ability of the perpetrator* to commit it, *in his decision* to commit it, *in the way* in which he committed it, or *the aim* for which it was committed”(emphasis added).⁴³

40. ICTY, case of the Prosecutor v. Dragoljub Kunarac et al., Judgment of the Chamber of Appeals of June 12, 2002, paragraph 58.

41. Excerpt taken and translated [for the original Spanish language document] by the Constitutional Court (C-291 of 2007).

42. The complete fragment cited by HRW (*op. Cit.*, p. 66) is: “[...] the Prosecution must [...] establish a link between the acts of the accused alleged to constitute a violation of the laws or customs of war and the armed conflict in question. As to the precise nature of this nexus, the Appeals Chamber has held that ‘it would be sufficient [...] that the crimes alleged were closely related to hostilities occurring in other parts of the territories controlled by the parties in conflict’”(ICTY, case against Stakic, First Instance Court, July 31, 2003, para. 569).

43. ICTY, case against Kunarac, Kovac and Vokovic, Chamber of Appeals, June 12, 2002, para. 58. The translation used by the Constitutional Court for Judgment C-291 of 2007 of that excerpt varies a bit: instead of “aptitude” it uses the word “capacity” and instead of “objective” it says “purpose.” This interpretation is repeated in cases against Halilovic (First Instance Court), November 16, 2005, paras. 29, 726 and Strugar (First Instance Court), January 31, 2005, para. 215. With regard to this jurisprudence that was constructed to provide content to the close and sufficient nexus, we at 5 *Claves* have presented the

- It is not necessary that the conduct had been planned or supported by some form of policy of the armed group. Thus stated in the Kunarac case and in the Halilovic case: “For the required nexus to exist, the crimes need not have to have been planned or supported by some form of policy.”⁴⁴
- A single act may constitute an IHL violation if the required nexus is established: as established in the Halilovic case: “there is no reason why a single, isolated act, could not constitute a violation of the laws and customs of war, when the required nexus has been established.”⁴⁵

In a complementary way, there are some indicative facts (among others⁴⁶) such as the *status of perpetrator*, the *victims’ status*, the final *aim* that the event seeks to promote, and *modal aspects* of the behavior contextualized with a focus on the *official duties* of the perpetrator. In the case against Kunarac and others, these factors were listed as follows:

In determining whether or not the act in question is sufficiently related to the armed conflict, the First Instance Court may take into consideration the following [...] facts: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign, and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.⁴⁷

relevance and applicability of the thesis of circumstantial or indirect nexus within the framework of the new Transitional Justice system in Colombia. See *5 Claves*, concept note from July 28, 2017 addressed to the Constitutional Court in file RPZ-003, with the framework of the constitutionality review of Legislative Act 01 of 2017.

44. ICTY, case against Halilovic, First Instance Court, November 16, 2005, para. 724.

45. Ibidem.

46. Indeed, the ICTY uses the Latin expression *inter alia*, indicating that it is not a comprehensive or exhaustive list.

47. ICTY, case against Kunarac, Kovac and Vokovic, Cham-

The “Analytical and Conceptual Framing of Conflict-related Sexual Violence” prepared in 2011 by the Steering Committee of the United Nations Campaign against Sexual Violence in Conflicts⁴⁸ offers a concise reading of these indicative facts:

Sexual violence need not, therefore, be explicitly orchestrated for military gain to be considered as relevant to the Security Council’s remit. The definition is broader and centers on a combination of who (the profile of victims and perpetrators), what (the elements of the offense), how (the method) and why (the motive)⁴⁹ (p. 2).

In the current context of the FPA, some of these guidelines are found in Legislative Act 01 of 2017.⁵⁰ In Transitory Article 23, paragraph b, the *influence, role, or function of the conflict in the commission of conduct* was incorporated and it descriptively defined the different factual presumptions:

Transitory Article 23: “Jurisdiction of the Special Jurisdiction for Peace. The Special Jurisdiction for Peace will have jurisdiction [...]. For

ber of Appeals, June 12, 2002, para. 59. This reference is invoked by SP-CSJ in Judgment SP15512-2014.

48. This analytical framework was developed (as explained by the campaign’s Steering Committee) with the aim of defining the scope of the concept of “sexual violence in conflicts” and to include standardized information in the reports that are prepared and presented to the Security Council and other global bodies, so that the data provided “are comparable between different situations on the ground and over time” and “more attention is provided to the nexus between sexual violence and the broader framework of conflicts and peacebuilding.”

49. We quote the summary note created by the campaign, available at: <http://www.stoprapenow.org/uploads/advocacyresources/1321456915.pdf>.

50. Although this provision is part of the chapter on “standards applicable to members of the public forces,” the Constitutional Court’s understanding in Judgment C-080 of 2018 is that this does not preclude that such criteria “can be extended to other actors,” since “they are inspired by international jurisprudence that developed these guidelines for all those responsible for events within the framework of the armed conflict.”

this purpose, the following criteria will be taken into account: [...] b) That the existence of the armed conflict has influenced the author, participant, or abettor of the punishable conduct committed on the grounds of, in the event of, or in direct or indirect relationship with the conflict, in terms of:

- His ability to commit it, that is, because of the armed conflict the perpetrator has acquired an increased ability that helped to execute the conduct.
- His decision to commit it, that is, the intent or willingness of the individual to commit it.
- The way in which it was committed, that is to say that, as a result of the armed conflict, the perpetrator of the conduct has had the opportunity to acquire the means that helped him carry it out.
- The selection of an objective that was intended to be achieved through the commission of the crime. (Underlining added to the original text).

In Judgment C-080 of 2018, the Constitutional Court stated that “one criterion cannot be given absolutely priority over the other to define the connection with the conflict.”⁵¹

In the three subsections that follow, we will delve into three thematic blocks, derived from the guidelines, that provide content

51. The Constitutional Court summarized these criteria in seven points: “[...] (i) the responsible party— whether civilian or combatant—; (ii) that the act constitutes a violation of international humanitarian law; (iii) that it occurred in the geographical area of the conflict; (iv) that the existence of the armed conflict would have influenced the responsible party’s ability to commit the conduct, or their decision to commit it, or how they commit it, or the aim of committing it; (v) that the armed conflict has given the responsible party the opportunity to commit the conduct; and (vi) that the objective of the responsible party was to obtain a military advantage over an adversary or, on the contrary, had a personal interest in obtaining illicit enrichment.”

on the (above listed) criterion of a material nature and that are relevant to examine the connection between sexual violence and armed conflict:

First (point 1), we will examine the constitutional presumption of a close and sufficient relationship (Ruling 009 of 2015), arguing that, at the national level, it is a special and binding normative framework that establishes the scope of a direct and sufficient nexus (the core of the material criteria to apply IHL) in addressing sexual violence.

Next (point 2), we will emphasize the victims' status. On the one hand, because we observe that, in some JEP decisions, the reinforced constitutional protection of women and girls has been lost as a fundamental element for assessment. References that reinforce harmful gender stereotypes and an interpretation of sexual violence as a private matter show that it is still necessary to remind judicial employees of the special protections for these individuals who are most often the victims of such events. On this point, we will also position a differential approach (with an intersectional perspective), the special situation of victims of sexual violence within the ranks of their own group (intra-ranks), and the consideration that prejudiced-based violence against LGBT people constitutes gender violence.

Finally (point 3), we will address the influence, role, or function of the conflict in the commission of crimes as a guideline explicitly incorporated in Legislative Act 01 of 2017 and because the problematic aspects found in the JEP decisions regarding sexual violence are related to interpretations that end up converging under this guideline. In addition, this thematic block will bring in guidelines other than those listed, due to their affinity, such as those related to aim, the conduct's methods, and the contexts from which they can arise. We will not go into the perpetrator's status as we consider it to be a matter more closely related to the JEP's personal jurisdiction. With regard to material jurisdiction, it must be concluded that once a perpetrator of a sexual

conduct is shown to have armed actor status, the presumption of a relationship with the armed conflict should be ascribed, in light of Constitutional Court Ruling 009 of 2015. It is worth remembering that the JEP's rules of jurisdiction also cover the possibility of studying the actions of civilian collaborators and State agents who are not members of the Public Forces.

1. Constitutional presumption of a close and sufficient relationship: special normative framework to apply the material criterion in cases of sexual violence

The existence of the armed conflict in Colombia produces gender-based risks⁵² that arise and materialize, affecting specific populations, mainly women, girls, and LGBT individuals. Thus, from the aforementioned Constitutional Court rulings we can conclude that: the conflict increases the risk of sexual violence and can cause forced displacement or can be magnified as a result of displacement; in this sense, it is recognized as an “alarming factual situation, that is openly detrimental to human rights as a whole, and to the most basic tenets of international humanitarian law that protect women as victims of the armed conflict.” Judgment C-781 of 2012 thus refers to sexual violence as follows: “A habitual, extended, systematic, and invisible practice in the context of the Colombian armed conflict.”

Ruling 009 of 2015 verified the continuity of certain factors that enhance the risk of sexual violence and that disproportionately exacerbate its impacts. In this case, the court organized these factors into two groups: those *of a contextual nature* and those *of a subjective nature*. The first includes two situations: (i) “the presence of armed actors in the territories” and their influence “on the individual, family, organizational, and community life of

52. That is, risks arising from positions of inequality and social disadvantage in which certain subjects are found based on what is culturally considered feminine or masculine, based on sexual differences and the opposed attributes assigned to individuals based on those differences.

women,” and (ii) an institutional absence or weakness in regards to the phenomena of sexual violence against women. The subjective factors are sub-differential approaches (age, ethnicity or race, disabling conditions, and diverse sexual orientations or gender identities).

Both factors form the foundation for the constitutional presumption of a close and sufficient relationship between acts of sexual violence and the armed conflict when verifying: “(i) the occurrence of sexual assault, and (ii) the presence of armed actors— regardless of their name or modus operandi— in the areas of the country where these aggressions occur.”⁵³ As the Constitutional Court explains, the presence of armed actors in the territories gives rise to the risk of sexual violence, “regardless of hostilities,” since it usually implies “a control or appropriation of the public and private realms of women’s lives.”⁵⁴

The territorial absence or weakness of State institutions to carry out concrete actions that prevent sexual violence, as well as care for and protect victims, has a nexus with the “capacity to influence and exercise the armed actor’s various forms of sexual violence,”⁵⁵ which are advanced in a scenario of state inaction. In other words, “the greater the difficulties and barriers to exercise basic freedoms and effectively enjoy economic, social, and cultural rights, the greater the propensity that female civilians become victims of sexual violence by the armed actors.”⁵⁶

The finding that sexual violence is configured as a real risk in the development of armed conflict merits State action aimed at preventing and confronting it, and [the finding] that there are objective factors that enhance its materialization leads us to reiterate what we, 5 Claves, have demonstrated to the SIVJNR in the past: the biased and superficial vision that aprioristically explains sexual violence as an isolated event or individual act, 53. Ruling 009 of 2015, section VII.1.

54. Ibid, section II, number 3.1.1.

55. Ibid, section 3.1.2.

56. Ibid.

carried out outside and separate from the context of war, must be overcome. To overcome this interpretation, it is necessary to take into account the intersection between the presence of armed actors in the territories and the context of precarious institutions.

The Constitutional Court recognizes the complex and multi-causal nature of the Colombian conflict. In Judgment C-781 of 2012, to determine the scope of the expression “in the event of the armed conflict,” it stated that:

“The concept of internal armed conflict [...] includes a complex phenomenon that is not limited to the occurrence of armed confrontations, the violent actions of a particular armed actor, the use of specific combat methods, or the occurrence of an event in a specific geographical space, instead the complexity of this phenomenon lies in its different manifestations and even in situations where the actions of armed actors are confused with those of common crime or with situations of widespread violence.”⁵⁷

Thus, in the case of doubts regarding the verification of material or causal criteria in a specific case, the presumption of a close and sufficient relationship between acts of sexual violence and the armed conflict constitutes a special and binding framework that cannot be ignored.

2. Status of the victim

There are four aspects related to the victim’s status that are crucial in assessing the nexus between sexual violence and armed

57. Judgment C-781 of 2012 (decision adopted by the Full Court of the Constitutional Court), paragraph 5.4.3, during the examination of the constitutionality of Article 3 (partial) of Law 1448 of 2011 regarding the “operational definition of victim.” This broad understanding to interpret the expression “due to” has been accepted by the Tribunal for Peace - Appeals Section of the JEP (TP-SA) (Ruling 019 of 2018, para. 11.1 et seq. And Ruling 171 of 2019, para. 12).

conflict: (i) women and girls as the main victims of this type of violence; (ii) the “sub-differential” approaches established by the Constitutional Court and an intersectional analysis; (iii) the intra-ranks scenario and the victim’s status as a combatant, an element that reaffirms the connection between the incidents and the armed conflict; and (iv) prejudice-based violence against LGBT people as a form of gender-based violence.

2.1 Women and girls: the main victims of sexual violence in armed conflict

In Ruling 092 of 2008, the Constitutional Court focused on and described in detail the armed conflict’s gendered facets and the extraordinary gendered risks that characterize the conflict’s disproportionate impact on the lives of women and girls. Sexual violence is recognized as a specific risk and a type of violence that mostly affects women and girls. Ruling 009 of 2015, updated the content of these risks in accordance with the specific conditions of vulnerability that diverse women face (we will refer to this in point 2.2.).

The CSJ-SP (Judgment SP15901-2014)⁵⁸ has fully embraced the perspective of reinforced protection for women from Ruling 092 of 2008 and considers as a basic foundation “the many situations of special vulnerability that women are exposed to in the framework of conflict, unlike any other victim [...] and, therefore, are not faced by men”(p. 29).

In the same ruling, the CSJ said that: women combatants face all these risks more directly, but they are also experienced by combatants partners, wives, sisters, and mothers, as well as members of the women’s social, community, or political organizations or those of ethnic or racial minorities. All women who live in the influence areas of any of the armed actors are no stranger to these risks. In other words, it is not necessary to

58. We consider it pertinent to cite the statement here as it is a practical application of the considerations from Ruling 092 of 2008 for a specific case in the criminal jurisdiction.

directly link women with one of the actors in the conflict or their participation in the struggle to be [recognized] as a victim of the armed conflict, because the civilian population [...] is especially vulnerable to victimization (p. 30-31).

2.2 “Sub-differential” approaches and the relevance of an intersectional analysis

Ruling 009 of 2015 emphasized the “sub-differential” characteristics included as factors that increase vulnerability and the risk of sexual violence. Ethnic-racial affiliation, sexual orientation and gender identity and/or expression, age, disability, the role of social and political leadership, among others, make up these sub-differential approaches recognized by the Constitutional Court in Ruling 009 of 2015 as a foundation for women’s special constitutional protections in accordance with the differential factors of social vulnerability, discrimination, and exposure to risk, in relation to sexual violence. It is not simply a matter of classifying victims according to identity characteristics, but rather the aim is to generate analysis that questions how differential social markers operated and resulted in (multiple and intersecting) factors of discrimination, risk, and vulnerability. This also takes into account other contextual elements, how they shaped the selection of victims and the specific practices or types of victimization. In other words, the victims’ diversity and plurality is a factor that must be recognized to identify the particular nature of the victimization, its impacts, and the victims’ coping mechanisms.

Thus, the intersectional perspective is relevant as a “localized and contextualized approach”—following Mara Viveros (2016)—and should not be forgotten in the judicial approach to sexual violence associated with the conflict.

The memory work on the situation of Wayúu women and girls in Bahía Portete (CNRR-Grupo de Memoria Histórica, 2010) and the judicial analysis on the situation of black women in Chocó, subject of the ruling on the case of the Chocó Pacific-Heroes

Bloc and Southwestern Front of the Self-Defense Forces (SP-CSJ, 2018) are clear applications of how the intersections of race or ethnicity and gender are already being incorporated into the construction of a judicial and extrajudicial truth about sexual violence related to the armed conflict.

2.3 The victims' status as combatants and illegally recruited girls reaffirms the nexus⁵⁹

The Constitutional Court references international jurisprudence, cited by the SP-CSJ, in relation to the criterion of status as a *non-combatant* or outside of combat for those considered a victim. However, the current state of affairs exceeds the view that only non-combatants can be victims of sexual violence in association with armed conflict. This is the case of sexual violence against women and girls in the scenario or context of intra-rank life. Intra-ranks sexual violence has been recognized as part of the repertoire of violence exercised by armed actors in the context of the armed conflict. The connection with the armed conflict cannot be questioned due to the victims' status as *combatant* or *illegally recruited girls*. Similarly, the legal classification as a war crime or crime against humanity cannot be called into question for this reason, not only because the intra-ranks scenario is unequivocally connected to the development of the armed conflict, but because this status is not necessarily excluded from the scope of IHL protections, as international criminal jurisprudence has already recognized.

In the case of Bosco Ntaganda, the ICC (Appeals Chamber) adopted this position when it stated that IHL prohibits rape and other forms of sexual violence and indicated that, although most of the express prohibitions of rape and sexual slavery under IHL appear in contexts related to the protection of civilians and people outside of combat at the hands of a party to the conflict, these explicit protections do not exhaustively define or

59. Section prepared from contributions provided by Women's Link Worldwide organization.

limit the scope of protection against this conduct. Therefore, these behaviors are deemed to be prohibited at all times, both in peacetime and during armed conflicts, and against *all persons, regardless of their legal status*.⁶⁰

In the context of Justice and Peace, in the case of applicants Olimpo de Jesús Sánchez and others (ex members of the former Guevarista Revolutionary Army – ERG and the “Ernesto Che Guevara” Front of the National Liberation Army – ELN), it was acknowledged that women combatants are often victims of sexual violence and it was argued that victims of forced abortion, despite being militants of a faction, do not lose their right to freely and autonomously decide about their bodies and their lives in the areas of sexuality and reproduction. In this case, the ruling issued by the Superior Tribunal of Medellín (Justice and Peace Chamber),⁶¹ confirmed by the Supreme Court of Justice (Criminal Cassation Chamber),⁶² recognized that combatants are exposed to forms of gender and sexual violence within the organizations to which they are members, during the conflict, and admits the possibility that such conducts are war crimes.⁶³

60. ICC, Chamber of Appeals, *Prosecutor vs. Bosco Ntaganda* (situation of Democratic Republic of the Congo), decision of January 4, 2017, ICC-01 / 04-02 / 06, para. 50 et seq. Available at: https://www.icc-cpi.int/CourtRecords/CR2017_00011.PDF.

61. On December 16, 2015, MP María Consuelo Rincón Jaramillo. Available at: <https://www.fiscalia.gov.co/colombia/wp-content/uploads/2016/09/2015-12-16-Olimpo-de-Jesus-Sanchez-y-otros.pdf>. See a summary of this sentence at: <https://www.womenslinkworldwide.org/observatory/data-base/postulate-olimpo-de-jesus-sanchez-caro-y-otros>.

62. April 11, 2018, MP José Francisco Acuña Vizcaya, SP1249-2018, Rad. No. 47638. Available at: <https://www.fiscalia.gov.co/colombia/wp-content/uploads/2018-04-11-Olimpo-de-Jesus-Sanchez.pdf>.

63. In this regard, it is worth mentioning the February 25, 2019 Ruling from the Chamber of Amnesty and Pardon (SAI) of the JEP, internal file SAI-LC-XBM-046, in which the request was ruled upon for the provisional release of Héctor Arboleda Buitrago, alias “El Enfermero” (The Nurse), who, between 1998 and 2003, performed forced

The CNMH (2017, p. 160 et seq.) has analyzed the types of sexual violence used within the ranks of the different armed groups and proposed the following categories based on the cases documented for the production of the thematic report on sexual violence, *La guerra inscrita en el cuerpo (The War Inscribed in the Body)*.⁶⁴

(i) *disciplining*, which includes the homogenization of female and male bodies and the regulation of romantic life, sexuality, and the possibility of having a partner, among others. (ii) *tensions between the construction of disciplined and warring bodies and women's sexual and reproductive rights* that lead to a masculinization of women's bodies and opens the door to forms of sexual violence such as the forced renouncement of maternity (through forced abortion), the regulation of pregnancies, sexual activities and planning (through forced contraception). (iii) *The availability of bodies* that leads to the emergence of violence such as rape, sexual slavery, forced cohabitation and nudity. It is important to note that the different methods have varying manifestations depending on the armed group in question and an express prohibition of some of these behaviors in the organizational statutes does not prevent violence from being committed, tolerated and, even, promoted.

2.4 Prejudice-based violence against LGBT people is gender violence⁶⁵

There is consensus that sexual violence (whether or not it is related to the armed conflict) is directed at and mainly affects women and girls, based on the values of a patriarchal system.⁶⁶

abortions on members of illegal armed groups (FARC-EP, ELN, and ERG). In this decision, the relationship between such behaviors and the armed conflict was not questioned, however, the SAI departed from the legal assessment made by the Prosecutor's Office in a prior proceeding and adopted by the ordinary criminal justice system, which interpreted that the activities carried out by the accused could be classified as a crime against humanity or a war crime.

64. Report prepared in compliance with Law 1719 of 2014.

65. Section prepared with contributions from Colombia Diversa.

66. That is, the social organizational system that detracts value, belittles, subordinates, and excludes what is considered feminine and is

This should not justify an exclusion of sexual violence that is exercised *based on prejudice* against lesbian, gay, bisexual, and transgender people. On the contrary, it is essential to understand the mechanism through which gender-based violence operates in order to expand the definition to include violence against LGBT people due to their gender identity or sexual orientation.

As expert organizations have already advised the JEP, the sexual assault hitherto documented against LGBT people shows the close link between a binary conception of gender and the violence imposed on these victims. The assignment of roles and social obligations according to gender includes compulsory heterosexuality, the assignment of public or private work according to the gender determined at birth, and other physical, sexual, identity, and political characteristics imposed by the heterosexual intelligibility matrix. When these elements are part of a perpetrator's motivation to commit crimes against individuals perceived as LGBT, the stage is set for prejudice-based violence.⁶⁷

In the context of the armed conflict this type of violence operates when an armed actor takes advantage of the authority, trust, or violence granted by his warring role to exert order on available bodies: strong, masculine, athletic, and heterosexual men; delicate, domestic, modest, and heterosexual women. María

usually associated with women as it grants value and strengthens the position of power for what is considered masculine and is usually associated with men.

67. Press release dated March 29, 2019 on the delivery of reports of sexual violence against LGBT persons by Colombia Diversa and Caribe Afirmativo: <https://www.jep.gov.co/Sala-de-Prensa/Pages/Colombia-Diversa-y-Caribe-Afirmativo-delivered-reports-on-sexual-violence-to-JEP.aspx>. A central reference source on the subject is the report produced by the CNMH (2015) "Aniquilar la diferencia. Lesbianas, gays, bisexuales y transgeneristas en el marco del conflicto armado colombiano." Also see: BUENO-HANSEN, Pascha, "The Emerging LGBTI Rights Challenge to Transitional Justice in Latin America," in: International Journal of Transitional Justice, 2017, 0, p. 1-20.

Mercedes Gómez refers extensively to this and lays out two ways of treating bodies: through hierarchical violence and through exclusionary violence. The first aims to correct the world and heterosexualize (and “cisgenderize”) bodies. The second aims to completely eliminate the un-correctable from society, that which is absolutely indecipherable in the eyes of the perpetrator. This is why prejudice-based violence (“that which is exercised against bodies for being what they are” (Gómez, 2008)) is another derivative of gender-based violence: because it is trying to restore normality in the gender-sex-desire system.

This cannot be explained without looking at the social, political, economic, and cultural environment in which prejudice is developed and sustained and in which this type of violence operates. Being a “man” in Antioquia in the eyes of paramilitary groups is very different from being a “man” on the Pacific Coast of Nariño in the eyes of the FARC. Consequently, the violence need to “straighten out” masculinity will be different in both cases. Prejudice and correlative violence can refer to different social categories, among which sexual orientation and gender identity have been particularly invisible in transitional justice theory and practice.⁶⁸

In this context, that imposes hierarchies on the feminine and the masculine, many bodies (especially the bodies of LGBT people) have been considered by the armed actors as deviants that can be *corrected* or *sanitized* (CNMH, 2017, p. 131-157). This means that it is a type of violence that arises out of and is explained by *discriminatory contexts*. This is an essential finding to reveal the nexus between sexual violence and armed conflict. For this, it is necessary to highlight the importance of identifying (i) the perpetrator’s *prejudiced or discriminatory intent* by reviewing the contextual elements that provide a particular vision of the victims and (ii) the *discriminatory context*, as an element of proof

68. Other social categories that can lead to prejudice-based violence are: race (or racialization), ethnicity, class, disability status, and political ideology.

in itself, which involves addressing the social, cultural, political, and economic factors through which prejudice is developed and sustained against those who do not conform to the prevailing gender norms.

When evaluating prejudiced or discriminatory intent, it is necessary to bear in mind that violence can adopt symbolic or *instrumental* methods, which is equivalent to distinguishing the *prejudiced aim of victimization* and the *prejudiced selection of the victim*, respectively. This is relevant because it informs us that the *animosity or hostility* felt by the perpetrator towards a perceptible characteristic of the victim (element present in the first type) is not indispensable to show that it is a crime motivated by prejudice. The perpetrator may not feel animosity but will *allocate* characteristics to the victim that are sufficient to commit the aggression. The discriminatory context can be gleaned from the indicative facts in the materialization of some of these modalities.

All this makes sense when you unveil the serious impacts of discrimination in the context of the armed conflict, which are related to three aspects: (i) the object of the violent conduct exceeds individuality or the victim's affirmed identity since it involves an attack against the social group to which she belongs (or to which the perpetrator presumes she belongs); (ii) the attack communicates, as a strong symbolic message, the social rejection of individuals considered transgressors of the gender binary and heteronormative system; (iii) in the face of this type of violence, social and institutional impunity is installed as a rule (especially in the judicial arena) and harmful gender stereotypes are reaffirmed as a way to legitimize these models.⁶⁹

Thus, transitional justice is challenged on two levels. First, in identifying which negative images, on which bodies, and which identity traits were used to justify violence towards these

69. The IACHR has drawn attention to poor judicial investigations in cases of violence due to prejudice. See Report "Violence Against Lesbian, Gay, Bisexual, Trans, and Intersex Persons in the Americas." OAS/Ser.L/V/II.147 Rev. 1. Doc. 36, 2015, para. 44.

individuals. Second, once the characteristics of the violence and its strong cultural roots are recognized, in responding to the victims' demands for judicial clarification, thus promoting a judicial truth that supports the non-repetition of these conducts.

Finally, these reflections not only offer tools to establish the relationship between violence based on prejudice against LGBT persons and the armed conflict, but also in identifying the motivation that precedes cases of sexual violence against people with diverse sexual orientations and/or gender identities (real or perceived). It is possible to frame these behaviors in the concurrent legal characterization of *persecution as an international crime*, on which the criminal classification has already been vastly developed in the realm of international courts.⁷⁰

3. The substantial role of the armed conflict in the decision, commission, mode of commission, or aim for which the sexual offense was committed

On the question of discerning whether and how the armed conflict has influenced the decision-making, capacity, motivation, mode of commission, or objective pursued by the perpetrator when committing a crime, we highlight two areas of analysis that should necessarily be combined with a factual examination of the direct or indirect causal relationship suggested by the action to affect or influence. The application of Article 23 of Legislative Act 01 of 2017 should be considered in this case.

On the one hand, there is a *contextualization of sexual violence* in order 70. We highlight the following documents to which we refer: (i) United Nations Organization. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*. London, August 8, 1945. (ii) Statute for the ICTY (art. 5). (iii) ICTY, *Chamber of Judgment, Prosecutor v. Dusko Tadic, Opinion and Judgment*, No. IT-94-II, Tr. Ch. II, May 7, 1997, para. 697. (iv) ICTY, *Chamber of Appeals. Prosecutor v. Dusko Tadic, Opinion and Judgment*, No. IT-94-IA, July 15, 1999, para. 305. (v) Rome Statute of the International Criminal Court (art. 7.1.h).

to overcome approaches that reduce the complex phenomenon of sexual violence to a simplistic and *a priori* interpretation that always explain it as opportunistic (which is misinterpreted as linked only to the perpetrator's individual interest) or as the mere collateral damage of war (and, therefore, inevitable). In addition, there is also the *heterogeneity of sexual violence*, the observation of which is part of a broad process to collect factual (not only quantitative) data that, based on social science methodologies, is the foundation to understand and describe behaviors and the related phenomenon in their double character: social and legal.

To contextualize sexual violence, socio-political and political-military aspects are crucial to understand the factors that facilitate or favor the occurrence of such human rights violations. On the *sociopolitical dimension*, the *5 Claves* previously presented recommendations to the Truth Commission –CEV (see June 26, 2018 concept)⁷¹ stressing the importance of understanding sexual violence “as a form of discrimination, discipline, and domination” and as “an expression of patriarchal masculinity.” It is important to see that this “discipline is not only exercised on victimized women, but extends to other women, men, the community, and the victimizer himself, to the point that sexual violence is normalized and becomes a naturalized exercise of domination.” To analyze this dimension, it is necessary to document: (i) the objectives, which may be domination, regulation, silencing, obtaining information, punishment, dispossession, extermination, rewards, or uniting; (ii) the circumstances surrounding the sexual assault; (iii) the community's response; (iii) the reinforcement or revision of gender ideals and stereotypes about the feminine and the masculine in the community; and (iv) the State authorities' response or lack of response to women's complaints.

In the *political-military dimension* it is central to understand the *functionality* (intentional or not, planned or not) of sexual violence. Possible (non-exhaustive) elements for such an analysis, which

71. Pages 4 to 6.

5 *Claves* has disclosed, are: (i) *the factual patterns in the commission of sexual violence* documented and systematized by constitutional jurisprudence (and correlated interpretations thereof from the Supreme Court of Justice); (ii) *the significant advances and setbacks in territorial control* by armed actors; (iii) *the changes in time* that help to demonstrate *similar behavior patterns or the discontinuity of them* in order to generate a historical and anthropological understanding of the logic of war and the victimization of women (including trans women) and of men perceived as feminine by the perpetrators or feminized through sexual assault; (iv) *explicit aims of a military or political advantage*; (v) *impacts and new violations* of human rights (abandonment of land, property, and crops, displacement to other places, renouncement of a social or political struggle, renouncement of education or healthcare); (vi) *recurrence* of the use of sexual violence by armed groups against *women enrolled in armed groups declared as enemies*; (vii) *recurrence* of sexual violence by men from the armed group (especially those who are in the highest ranks of the military hierarchy) towards *women in their own group*.

However, it is important to understand that sexual violence, although widespread (as it has been committed by all the actors in the armed conflict and women are its main victims), cannot be analyzed correctly if you overlook its heterogeneity. For this, it is necessary to delve into the following elements: (i) *who* are the perpetrators; (ii) what *type of sexual violence* was committed and against whom; (iii) *characteristics of the victims* (age, ethnicity, race, sexual orientations, gender identity or expressions, socio-political role) with an intersectional approach, observing the *social markers of difference* and the contexts of *discrimination* that could increase the risk or influence the perpetrator's decision to commit violence against these victims (understanding the relationship between gender violence and discrimination and also considering, therefore, a scenario of violence based on prejudice against LGBT people); (iv) the *particularities* of the commission of sexual violence according to *territory* and *time*; (v) *the aim* of sexual violence and (vi) *contexts* in which sexual violence was

perpetrated (during attack, territorial control, deprivation of freedom, or intra-ranks).

We emphasize that when there is the presence of armed actors in a territory, no sexual violence can be automatically interpreted as opportunistic. To overcome this approach, it is essential to reflect why it was committed and the circumstances that made it possible, as we have previously stated.⁷² Similarly, the diversity of possible contexts in which sexual violence is perpetrated leads us to affirm the connection between conducts and armed conflict, which is not dependent on demonstrating that its execution has resulted from an explicit military policy or organizational objective nor its widespread nature or a verification of a pattern of macro-criminality.

According to the description of the 2011 “Analytical and Conceptual Framing of Conflict-related Sexual Violence,”⁷³ sexual violence commonly classified as a war tactic “refers to acts of sexual violence that are linked with military/political objectives and that serve (or intend to serve) a strategic aim related to the conflict.” However, in the same document it is recognized that the connection with these strategic objectives is generally not explicit, since “it will rarely be reflected in manifestly issued orders.” Thus, the link may be established only by inference from other indicator data, for example, as mentioned in the analytical framework, if it is identified that the armed group has a “functioning chain of command and is able to restrain other offenses (such as mutiny or desertion) while sexual violence is neither condemned nor punished by the military hierarchy,” which would demonstrate a practice of tolerance for sexual violence in the organization.

The development of doctrines and jurisprudence around the 72. 5 *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,” concept from June 26, 2018, p. 6.

73. Cited above.

contexts of attack and territorial control also illuminate the issue to discern how an armed conflict could have influenced the commission of a sexually violent conduct.

As conceived based on the study of international case law, conducts of sexual violence that take place in the *context of attack*, are those “from which the armed actor seeks to improve, sustain, or take advantage of the current military position” (Corporación Humanas, 2009, p. 23). Two details are relevant regarding the scope of this context of sexual violence: (i) an attack “is not limited to the conduct of hostilities,” as defined in the municipality of Foca case tried by the ICTY,⁷⁴ “it may also encompass situations of mistreatment of persons taking no active part in hostilities, such as, someone in detention.”

On the other hand, (ii) it may be a *simple* or a *systematic* attack. A simple attack is “one in which criminal action results in at least one victim of sexual violence” (Corporación Humanas, 2009, p. 23), and “is characterized as simple when the circumstances, or knowledge of them, do not make it possible to establish some type of pattern or a relationship to other incidents, other violence, or other actions” (ibid.). However, when executing the conduct, the perpetrator (armed actor) benefits, either because it reinforces his ability to dominate “the victim, the victim’s relatives, peers in the ranks, or the community” (ibid., P. 24), as he obtains some “advantage over his opponents or enemies” (ibid.) or because he manages to convey a strong warning message “about his ability to inflict harm” (ibid.). In contrast, a systematic attack accounts for a pattern or acts of violence carried out in an organized manner, that is the non-accidental repetition of similar criminal conduct on a regular basis as part of a policy (ICTY).⁷⁵ In order to establish the relationship between the violent act and the armed conflict, it is not necessary to prove the systematic nature of the attack, since a single incident can be directly related.

74. ICTY, case of the Prosecutor against Kunarac, decision of February 22, 2001, para. 416.

75. Ibid, para. 429.

With *territorial control* it is important to remember that a legal recognition of the authority is of minimal importance to determine effective control. Thus, it is sufficient for the people who live in the territory to have the perception that this armed group “is the one in charge” and that disobedience or approaching the enemy side or persons designated as opponents can motivate aggressions or even death, by virtue of the group’s ability “to exert violence through force, or the threat of force” (Corporación Humanas, 2009, p. 25).

In Judgment C-080 of 2018, citing the Supreme Court of Justice, the criterion of territorial control is referenced as an element that may be related “to sustained and concerted military operations” and be an indicator of the existence of an armed conflict.⁷⁶ However, it is clear that combat between the armed forces leading hostilities is just one possible manifestation of such operations, as these can materialize in various ways that include, for example, “patrolling and anything aimed at exercising control on certain sectors of the population or restricting its mobility, among others, since a presence can be precisely what asserts their territorial control.”⁷⁷

The context of territorial control, coupled with a context of attack, can help elucidate the nexus with the armed conflict and eventual lead to a classification as a crime against humanity for conducts that seemed fortuitous or isolated, given that the relationship with the politics of an organization appears more evident, given the fact that “an armed group has a territory under its control, indicating the use of a policy to achieve and, eventually, maintain this control” (ibid.). In addition, such contexts give rise to the existence of coercive environments that reinforce the defenselessness of victims of sexual violence and make irrelevant the demonstration of a lack of consent, as described by the International Criminal Tribunal for Rwanda (ICTR) in the

76. The judgment of January 27, 2010, Rad. 29753, of the Supreme Court of Justice, Criminal Cassation Chamber, p. 26.

77. Ibid.

case of Akayesu⁷⁸ and by the International Criminal Court.⁷⁹

Nationally, one precedent is the December 5, 2018⁸⁰ SP-CSJ ruling, that addressed human rights violations committed by the Chocó Pacific-Heroes Bloc and Southwestern Front of the Self-Defense Forces, including charges for sexual violence that had not initially been included by the Justice and Peace Chamber of the Superior Tribunal of Medellín. This point is referred to previously, in point II.B.1. The analysis of that judgment was not limited to the explicit organizational statutes, but went beyond to focus on the information that demonstrated how, in fact, the AUC exercised territorial control in that specific region. It thus concluded that human rights violations, which included sexual violence as a form of “submitting black women to white and mestizo men [of the armed group]” (p. 69-73), were related not to a counterinsurgent (military objective) policy but to a strategy (non-explicit and not referenced, but aimed at obtaining a military advantage) “of domination and control of the population, its territories, and its resources, in order to protect the interests of the economic sectors in the region”(p. 62).

In the same way, in Judgment SP15901-2014 of the SP-CSJ, the consideration of an environment of coercion or duress associated with the power derived from belonging to an armed group and the territorial control that it exercised in the region, as well as the dominant position that the group membership granted to the perpetrators, led the CSJ to agree with the plaintiff, verify the link with the armed conflict, and overturn the initial ruling, according to which “everything was related to family discord and the sick passion and lasciviousness of an individual”(p. 37). According to the SP-CSJ: the armed conflict and the defendants’ militancy in an irregular group generated a climate of coercion that was

78. TPIR. First Instance Chamber ICTR-96-4-T. The prosecutor v. Akayesu. Sentencing judgment of September 2, 1998.

79. CPI. First Instance Chamber ICC-01/05-01/08. The prosecutor v. Bemba Sentencing judgment of March 21, 2016.

80. Supreme Court of Justice, Criminal Cassation Chamber, SP5333-2018, Rad. 50236, MP Eugenio Fernández Carlier.

relevant when subjugating the victim, since it was known that membership guaranteed impunity, omission from the authorities, and silence from anyone who might intend to file a complaint regarding the conduct (p. 37).

III. Addressing sexual violence in the JEP and problematic aspects

The case law that the JEP has begun to establish in relation to sexual violence and its nexus with the armed conflict, shows that discriminatory conceptions and a resistance to apply regulatory standards continue to prevail in the administration of justice (now also in the transitional system), with serious repercussions in guaranteeing access to justice for victims of sexual violence, increasing the extensive chain of impunity that has taken root in Colombia and in the world for this type of crime.

The JEP jurisprudence, as we introduced at the beginning of this document, is currently composed of two sets of decisions:

On the one hand, the jurisprudence of the TP-SA, final instance of the JEP with a unifying role, which is still incipient on this matter as it has only made an initial pronouncement in Ruling 171 of May 8, 2019 to introduce its own doctrine about material jurisdiction in cases of sexual violence. Hence, it can be said that the court has yet to establish a clear line of case law, instead they have an interpretive outline leading to the proposal to categorize the factual presumptions for sexual violence that are admissible in the JEP's material jurisdiction. On the other hand, there is a set of decisions produced by the chambers in the development of their own functions or internal distribution at the JEP. Specifically, these are initial decisions, all of which were prior to the TP-SA pronouncement (three from the SDSJ and one from the SAI), addressing the study of material jurisdiction to reject

or admit the presentation of information from cases that involve sexual crimes.

Next, we present a critical analysis of both sets of decisions, starting with the problems that we have identified in the categorization set by the TP-SA, given its significance for future decisions from the TP itself and the JEP chambers, by virtue of the unifying role exercised by the Appeals Section.

A. Problems in the categorization set by the Tribunal for Peace – Appeals Section

The abstraction of factual scenarios regarding the occurrence of sexual violence to structure typologies or classification categories in accordance with the circumstances of the conduct's commission and according to the factors that can be used to establish that the armed conflict effectively influenced a crime's materialization is a visible effort in academia and jurisprudence.

The most relevant precedent in national jurisprudence is the relationship of factual patterns of sexual violence, introduced in Ruling 092 of 2008 and supplemented in Ruling 009 of 2015 of the Constitutional Court in a non-exhaustive list of nine scenarios.⁸¹

81. These patterns were collected and synthesized in Ruling 009 of 2015 as follows: “[...] (i) the commission of acts of sexual violence as a part of violent operations of a larger scope; (ii) actions executed individually by the members of all armed groups with various aims, such as: intimidating the population, retaliation and revenge, an advancement strategy and territorial control, obtaining information, or simple viciousness; (iii) sexual violence against women believed to have family or emotional relationships with a member or collaborator of one of the legal or illegal actors; (iv) the commission of various crimes of a sexual nature in the context of the forced recruitment of girls and women; (v) rape and sexual abuse by members of armed groups to obtain their own sexual pleasure or against women who refuse to have sex or refuse exploitation; (vi) acts of sexual violence, torture, sexual mutilation, forced public nudity, or sexual humiliation of civilian women who violate the *de facto* social codes of conduct imposed

A formulation, coming from the social sciences, that had been used by magistrates of the JEP justice chambers⁸² is that of Elisabeth Jean Wood (2016), who proposes three descriptive categories to abstract the modalities of sexual violence associated with armed conflict: *strategic* violence, *opportunistic* violence, and violence as a *practice*. For the author, all of these account for conducts that are related to the armed conflict, including the opportunistic modality. Her proposal is to introduce an intermediate category (violence as a *practice*) to overcome the dichotomous interpretation (strategy /opportunism) where not all assumptions resulting from recent investigations systematized by the author fit. Thus, between sexual violence that is directly and explicitly related to the strategic objectives of the armed organization and that which is committed for the individual reasons of a perpetrator who takes advantage of the conflict environment to commit the crime—without an obvious connection to organizational reasons—the author raises the need to characterize violence “that has not been ordered (not even implicitly) or institutionalized, but is tolerated for multiple reasons [by commanders]” (Wood, 2016, p. 19).

More recently, in Ruling 171 of 2019 the TP-SA opted for its own categorization, based on the interpretation of what it refers to as the “most authoritative doctrine in the field”—without detailing the references that make up that doctrinal framework:

by illegal armed groups; (vii) acts of sexual violence against women who are part of social, community, or political organizations or who are human rights leaders or promoters, or against women members of their families, as a form of retaliation, repression, or to silence them regarding the armed actor’s activities; forced prostitution and sexual slavery of civilian women perpetrated by members of illegal armed groups, mainly paramilitaries and guerrillas; and (ix) the coercion of sex workers from different parts of the country to perform sexual acts with members of the guerrilla or paramilitary groups.”

82. This in an opposition vote from Magistrate Mauricio García on Resolution 973 of 2018 (SDSJ) and in Resolution SAI-LC-D-XBM-002-2019 (Magistrate Xiomara Cecilia Balanta).

According to international jurisprudence, as has been gathered by the most authoritative doctrine on the matter and which the SA considers relevant to interpret the transitional mandate, sexual aggressions connected to the armed conflict may be *constitutive* or *circumstantial* with regard to the hostilities” (para. 10).

With these two categories, the SA seeks to describe and distinguish the events that can fall under the different degrees of connection established by the law to define the scope of the JEP’s material jurisdiction: in the event of, in the context of, and in direct or indirect relationship.

The *constitutive* sexual assaults, in accordance with the TP-SA formulation, relate to the clearest degrees of connection: “due to” and with a “direct or indirect relationship” and cover two sets of events: sexual violence executed as a (i) “weapon of war” and (ii) as “mechanism of social or territorial control.”

The *circumstantial* elements, meanwhile, in the TP-SA classification, refer to the presumptions that fit under the expression “in the event of” and that include those scenarios “that account for a kind of *opportunistic* or *habitual*” violence, where “the decisive factor is personal interest.”⁸³

To better visualize the TP-SA classification proposal, we have organized its statements in the following table:

83. In this way, the TP-SA does not necessarily follow Elisabeth Wood’s categories. Its objective is not to explicitly accept or depart from the theories offered by this author (which some magistrates of the courtrooms have mentioned in specific pronouncements). The main concern of the SA is to distinguish the diversity of possible events and frame them in the different degrees of connection established by the national normative sources (in the event of, due to, and in direct or indirect relationship).

TP-SA Categories/ normative presumptions	Decisive and non-decisive factors	Illustrative scenarios
<p>Constitutive sexual violence: “due to” and in “direct or indirect relationship”</p>	<p>Decisive:</p> <p>“[...] Sexual assault responds to a collective interest and is an expression of the conflict because it is perpetrated as an integral element of larger-scale operations or violent plans” (boldface added, para. 12; citation: Constitutional Court, Ruling 92 of 2008, Justification III.1.1.2 et seq.).</p> <p>Non-decisive:</p> <p>“[...] The concerted planning of the act is indicative of the intended effect on an armed confrontation, but punishable conduct can be committed without prior agreement or an express order from a superior. Sexual assaults have the virtual effect of bolstering the repertoire of offenses available to those who make up armed groups—whether State or illegal—and of being implemented without further deliberation to achieve the organizational aim”(boldface added; para. 12).</p> <p>“Likewise, it is not a requirement for sexual violence to unfold in the conduct of hostilities. [...] the Colombian conflict is a complex phenomenon that must be broadly defined. Consequently, it is possible that a specific criminal act, which occurred outside confrontations, is linked to the conflict.” (Boldface added; para. 12; citation: Constitutional Court, C-781 of 2012, considerations 5.2 and ss., And JEP, Ruling TP-SA 19 of 2018, considerations 11.3 and ss.).</p>	<p>As a weapon of war:</p> <p>“[...] used as a terror tactic within the framework of a military strategy of threat, intimidation, silencing, punishment, spatial domination, usurpation, indoctrination, humiliation, or coercion against the enemy, their relatives or anyone who, from the perspective of the perpetrator, is part of their support networks”(para. 12).</p> <p>As a mechanism of social or territorial control:</p> <p>“[...] sexual violence is also wrought against the civilian population that inhabits influential or disputed places, in circumstances in which social domination favors the plans for consolidation or expansion of the military apparatus.”</p>

<p>Circumstantial sexual violence: “in the event of ”</p>	<p>Decisive:</p> <p>“[...] It is personal interest, notwithstanding exceptional circumstances in which habitual violence is the product of group strategies and with a clear military connotation” (boldface added; para. 13).</p> <p>This personal interest does not materialize in a disjointed way from the context of the imbalances of power that the armed conflict causes or the conditions of structural inequality that it exacerbates. In the words of the SA-TP:</p> <p>“The dispute creates scenarios for the transgression of sexual freedom, integrity, and development due to the power that weapons and, in general, the coercive atmosphere and cultural reconfiguration centered on new masculinities confer on those who receive or use the destructive materials of war. The mere existence of a conflict enables human rights abuses because it accommodates marked imbalances of force among people. Likewise, this generates the risk of exacerbating conditions of structural inequality, favoring discrimination and violence against individuals in situations of defenselessness and vulnerability, but, especially, against girls and women, members of ethnic communities, low income and uneducated individuals, among others. The circumstantial sexual offenses occur precisely when one of the actors obtains personal benefit from this asymmetry of force in order to reduce the autonomy of others”. (Boldface added; para. 13; citation: Constitutional Court, Ruling 092 of 2008, foundation</p>	<p>Opportunistic violence:</p> <p>“When attacks occur sporadically, they are considered opportunistic. They are limited to particular situations, in which the perpetrator abuses the body of the other by virtue of his authority, or with the intimidation or coercion afforded him by being armed”(para. 13).</p> <p>Regular aggression:</p> <p>“[...] When the offenses are systematic and repeated, such as those perpetrated within a warring organization and to the detriment of kidnapped civilians or, even, of the group’s own members or collaborators—some recruited by force—the violence acquires a habitual connotation. It is clear that, in circumstances such as these, the crime responds to attitudes of exploitation, derived from widespread practices of abuse of authority, its tolerance, and impunity” (para. 13).</p> <p>The limits between regular (in the context of) and constitutive (indirect relationship):</p> <p>“[...] When habitual violence is oriented towards a collective goal, orchestrated by the group leaders, and with the objective of catering to the comfort or motivation of the troops, the relationship with the NIAC [non-international armed conflict] could be described as indirect, and not in the context of, as it is their intention to contribute to the general war effort.”</p>
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	<p>“[...] the existence of an armed conflict is a necessary but insufficient criterion for the emergence of circumstantial sexual violence referred to by the JEP material jurisdiction. It also requires a connection between the act and a military dispute, which can be evidenced in the verbal or corporal communication that the perpetrator maintains with the injured individual before, during, or after the crime, or through other equivalent elements. Only when the armed conflict and the offender's role within it has vested him with power and he uses the display or exercise of such force or this image to perform a sexual act under the threat of committing an additional act disrespecting the life, integrity, or welfare of the victim or their loved ones, can it be affirmed that there is circumstantial violence connected to the conflict. However, although the relationship of defenselessness can be accompanied by explicit coercive actions, this is not necessarily a requirement” (boldface added; para. 14. Citation: Elements of the Crimes of the Rome Statute of the International Criminal Court, Article 8.2, paragraph e), Section VI; ICTR, Trial Chamber, ICTR-96-4-T, The Prosecutor Vs. Akayesu, Sentencing judgment of September 2, 1998, para. 688; ICC, Trial Chamber, ICC-01 / 05-01 / 08, The Prosecutor vs. Bemba, sentencing judgment of March 21, 2016, Para. 104).</p>	
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The TP-SA emphasizes that “when examining whether an act of sexual violence is related to the conflict, the JEP must take into account that this kind of behavior can serve different purposes, and material jurisdiction can be founded, at least partially, in any of them”(ibid.). To support this statement, the ICTR (*Akayesu* case) jurisprudence and the possible aims of sexual violence mentioned there are called upon: “Similar to torture, rape is used for the intimidation, degradation, humiliation, discrimination, punishment, control, or destruction of a person.”

The TP-SA’s categorization is full of problematic aspects that negatively impact the rights of victims of sexual violence who look to access the JEP. Below, we state the problems identified in the TP-SA decision, as the final instance, which ultimately reflect the ostensible distance from the regulatory parameters outlined in section II of this document:

- This is a new categorization that ignores the set of international and national precedents regarding criteria for the application of IHL and IHRL on the nature and content of the close nexus with the conflict and on its application in relation to sexual violence. In sum, it ignores all legal constructs developed to date on sexual violence and armed conflict. The TP-SA seems to be more concerned with establishing, from a “doctrinal” position, its own classification to define the expressions “due to,” “in direct or indirect relationship,” and “in the event of,” without substantiating where the newly created categories arise from or how it deduces them from the normative framework and case law precedents to which their decisions should be subjected. As the categories created exceed the current normative framework, the TP-SA should be questioned on the legal implications of that classification in relation to satisfying the right to truth and justice for victims of sexual violence.
- The TP-SA ignores and omits any reference to Section 009 of 2015 of the Constitutional Court and the factual scenar-

ios documented there for sexual violence (to complement Section 092 of 2008). Even more serious is the fact that it does not acknowledge the applicability of the presumption of a close and sufficient relationship between sexual violence and armed conflict, although it is logical to infer that the indicative elements mentioned by the TP-SA to establish the so-called “circumstantial violence” are not obvious or easy to prove. In the same way, it disregards the objective and subjective contextual factors that underpin the presumption set forth in Ruling 009 of 2015, in addition to the evidentiary obstacles that victims face to access justice.

- It is also worrisome that the new categorization hides within “circumstantial” a mistaken understanding and misuse of the so-called “opportunistic violence,” opening a path to the prevalence of reductionist interpretations loaded with prejudices and stereotypes that consider sexual violence, as a rule, to be a private matter, as if it were a deviant behavior that is explained only by the sexual desire and deliberate conduct of the perpetrator. There is a latent risk that opportunistic sexual violence—correctly understood in light of the normative framework and case law precedents—will not be unacknowledged as having a close nexus with the armed conflict and will instead be automatically separated from the armed conflict. This *a priori* interpretation that violence was due only to an individual satisfaction of the perpetrator’s sexual desire would end up denying the direct relationship between sexual violence and the armed conflict and flatly decouple the context elements and influence of the armed conflict. On the contrary, for the Supreme Court of Justice, the perpetrator’s sexual pleasure is legally irrelevant when assessing the facts.⁸⁴ Likewise, internationally, a distinction has been made between personal motivation and intent, which in the case of sexual violence is discriminatory, the latter being

84. Supreme Court of Justice, Criminal Cassation Chamber, Judgment of July 30, 2014 Rad. 38668. See also Judgment of February 24, 2010. Rad 32872.

relevant only for trial purposes.⁸⁵ Therefore, focusing on the perpetrator's personal motivation or sexual desire to assess the facts is misguided.

- Thus, the categorization established under the seal of the “most authoritative doctrine” conceals prejudices and stereotypes that may result in an automatic exclusion of cases that do not meet these (restricted) criteria of sexual violence associated with the conflict.
- Abstraction in categories or classification typologies could be useful to group, describe, and understand the different presumptions on the commission of sexual violence in jurisdictional function and in academic theorization. However, the evaluation of each case should not begin with the general classification categories (deductive approach) but, on the contrary, with what the facts say in their heterogeneity and complexity, seeking to grasp and understand how sexual violence occurs in practice or, in other words, which practices of sexual violence are being deployed by specific actors and in what localized social contexts (inductive approach). This inductive approach is appropriate to fulfill the obligation of due diligence in the investigation and prosecution of sexual violence. The SP-CSJ ruling of December 5, 2018 is illustrative in that regard. Therefore, we conclude that the scheme formulated by the TP-SA, based on general categories—which exceeds the current normative framework—and imposing this reasoning on the JEP chambers, marks a disparity with the obligation of due diligence.

85. See Human Rights Watch, *Kunarac, Kovac and Vokovic*, (Appeals Chamber), June 12, 2002, para. 153, *Genocide, War Crimes and Crimes Against Humanity, A Topical Digest on the Case Law of the International Criminal Tribunal for the Former Yugoslavia*, Universidad Iberoamericana, 2010, p. 76. See also case *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 367, 369-370, *Genocide, War Crimes and Crimes Against Humanity, A Topical Digest on the Case Law of the International Criminal Tribunal for the Former Yugoslavia*, Universidad Iberoamericana, 2010, p. 310.

B. Problems in the previous resolutions issued by the JEP's Chambers (SDSJ and SAI)

Some rulings from JEP Chambers, although prior to TP-SA Ruling 171, reflect the trend referred to in the previous section: in some cases they categorically deny a relationship with the armed conflict, based on harmful gender stereotypes, and refrain from carrying out a judicious examination of the normative framework and the circumstances of the specific case that could substantiate that the armed conflict had an impact on the decision to commit the sexual offense, on the capacity or ability to commit it, on the mode of commission, or its intent. In others, although they accept a nexus to the armed conflict, the chamber opts for the least clear degree of connection, choosing not to undertake the recognition of a direct relationship (without sufficient argumentation).

Below, we will reference these, and other problematic aspects identified in the four known resolutions. To put these interpretations into the context of factual and procedural background, we have organized the basic information for each case in the following table:

Resolution / JEP Chamber / Participating party / Decision rationale	Procedural Background	Facts
<p>965 of 2018, SDSJ, Juan Pablo Sierra Daza (retired Second Sergeant of the National Army). Special criminal treatment was granted (based on Law 1820 of 2016). In addition, two guilty verdicts and a case with a valid arrest warrant from the ordinary criminal justice system were grouped together.</p>	<p>First conviction (288 months in prison without parole); judgment from November 17, 2015, Second Mixed Jurisdiction Court of Puerto Asis, Putumayo (file 86568-31-89-002-2015-00313-00, NI 21430), for the crime of homicide of a protected person.</p>	<p>Supporting facts of the first sentence:</p> <p>“On July 16, 2004 in the Cruce sector, coordinates 00 31 05LN - 77 03 15 LW, jurisdiction of the municipality of Orito, Putumayo, in development of Operation “Resplendor 9-1,” under the command of Second Sergeant Juan Pablo Sierra Daza, commander of the Croacia 4 platoon of the Colombian National</p>

	<p>Second conviction (280 months in prison): judgment from March 6, 2017, Criminal Court of the Circuit of Puerto Asís, Putumayo (file 86568-31-07-001-2005-00080-00, NI 15028), for the crimes of homicide, criminal conspiracy, and arbitrary detention.</p> <p>Pre-trial detention: criminal proceeding advanced by the Specialized HR and IHL Prosecutor's Office 70 in Santiago de Cali, Valle del Cauca (file 9094-70), for the alleged commission of the crimes of torture of protected persons, violent sexual penetration of a protected person, violent sexual conduct against a protected person, and illegal deprivation of freedom.</p>	<p>Army, during apparent combat Silvio Hernán Morales Argoty and Ecuadorian citizen NN Almlkar, who both resided in Los Llanos, were killed”(summary from the resolution).</p> <p>Supporting facts in the second sentence:</p> <p>“On October 25, 2004, in a settlement in the village of El Picudo, municipality of Puerto Caicedo, Putumayo, Mr. Juan Pablo Sierra Daza, Second Sergeant of the Colombian National Army, gathered the inhabitants to request support from the United Self-Defense Forces of Colombia. Later, in the company of paramilitaries, he removed the minor Juan Guillermo Gutiérrez Sánchez and Mrs. Rosalía Benavidez Franco from their home, whom he killed with a machete, dumping their remains into a well”(summary from the resolution).</p> <p>Supporting facts of the pre-trial detention measure:</p> <p>“On October 28, 2004 in the rural communities of Arizona and La Independencia, municipality of Puerto Caicedo, Putumayo, Second Sergeant Juan Pablo Sierra Daza, Commander of the Austria Platoon of the National Army, detained Nubia Esther González Sánchez, Elvira Marroquín, Gloria Nancy Sánchez Zuluaga, Flor Eccide Cortez, and Mr. Carlos Ortega, who were at the time traveling from their homes to Arizona and La Independencia to buy goods at market. He led them to a hotel, accusing the aforementioned individuals of belonging to or collaborating with the guerrillas and, under this pretext, they were illegally detained, threatened, and tortured, Gloria was subjected to</p>
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		<p>sexual acts, and Flor and Gloria to violent sexual penetration. They were then taken to the military base and finally released”(bold-face added; factual circumstances summarized in a SDSJ resolution based on its interpretation of the file sent by the Prosecutor’s Office and the files submitted to the JEP by the Ministry of Defense).</p>
<p>972 of 2018, SDSJ, Geimy Alexander Jaimes Carreño (former member of the National Army). Denied special criminal treatment (based on Law 1820 of 2016).</p>	<p>Plea bargain resulting from a preliminary agreement with the Prosecutor’s Office. Under that preliminary agreement, the legal classification studied in the indictment was modified. The defendant accepted his criminal responsibility as the author of the crime of aggravated sexual harassment, a different legal category than the one contemplated in the indictment when his arrest was legalized by a supervisory judge (control de garantías), corresponding to the crime of abusive sexual penetration of a child under fourteen years of age, and for which pre-trial detention was ordered.</p>	<p>Factual background considered by the ordinary criminal judge in the conviction:</p> <p>“[...] These proceedings were incurred due to the facts of sexual encounters in 2008 between Mr. GEIMY ALEXANDER JAIMES CARREÑO, thirty-one (31) years of age—at the time of the events—with the minor I.C.R.G. of twelve (12) years of age, which occurred in the context of turbulence within the minor’s family, causing her to run away from her home on several occasions, occasions during which she stayed in establishments paid for by the accused, and during which they had sexual relations. On the last occasion she was found on the premises of the Tolemaida Fort, a situation that caused Mr. Janner Riaño, father of the minor, to lodge a complaint.</p> <p>[...] With the aforementioned evidence, there is no doubt about the malicious actions of GEIMY ALEXANDER JAIMES CARREÑO in pressuring twelve-year-old I.C.R.G to have sexual relations with him. In this regard, and as a result of the negotiation between the defendant and the Prosecutor’s Office, the legal classification initially filed by the accusing body was changed to the crime of aggravated sexual harassment [...].</p>

		<p>[...] It is clear to the chambers that what was engendered here was a relationship over time and not an isolated act of sexual abuse. The Prosecutor's Office as the body responsible for the criminal prosecution reached this plea bargain in accordance with the guidelines set forth by the Supreme Court of Justice in recent pronouncements [...]” (Underlining and boldface added by the SDSJ; in the SDSJ resolution the summary of facts contained in the conviction is transcribed in this way, in addition to some assessments made by the ordinary criminal judge on the ruling).</p>
<p>973 of 2018, SDSJ, Orlando Guerrero Ortega (regular soldier). Denied special criminal treatment (based on Law 1820 of 2016).</p>	<p>Conviction (plea bargain, 102 months in prison) declared as the perpetrator of the crime of aggravated violent sexual penetration, by virtue of the defendant's acceptance of responsibility during the investigation process which motivated the plea bargain issued on November 23, 2016 by the Fourth Criminal Court of the Circuit of Cúcuta.</p>	<p>Facts that motivated the judgment in the ordinary criminal justice system: “In the early hours of September 2, 2005, some inhabitants of the rural community of Pueblitos, located in the municipality of Zulía (Norte de Santander), were surprised by three camouflaged men carrying firearms and sharp weapons, and with scarves over their faces, who entered their homes abruptly to steal their belongings and rape two women who were subsequently identified as Martha Yaneth Mora Luque and María Amparo Amaya Cárdenas.</p> <p>After conducting rigorous investigations, it was possible to determine that the three subjects were military, belonging to Engineers Battalion No. 5 “Francisco José de Caldas,” who at the time of the events were stationed in the “La Y de astilleros” sector of the aforementioned community, fulfilling “territorial control” missions.</p>

		<p>One individual involved was regular soldier Orlando Guerrero Ortega, recognized by Mrs. María Amparo Amaya Cárdenas as one of her aggressors.” (Boldface added; facts extracted by the SDSJ from the conviction).</p> <p>“[...] On the day of the events, we were gathered and my squadron, which was the second, was sent to the road that goes to Ocaña. We were there until about nine o’clock at night and then we returned to the point where we were staying. Soldiers IBÁÑEZ and JAIMES CAZICEDO proposed we leave that place. I had already consumed marijuana... after we left, they told me that we were going to get money. From there, we walked towards the point. I did not initially know what the point was, but once there, the events began to unfold. The first thing was to get the money, as they said, which is when the robberies that were reported occurred and the sexual penetration[...]”. (Boldface added; extract from the confession cited by the SDSJ).</p>
<p>SAI-LC-D-XBM-002-2019 of 2019, SAI, Oscar Enrique De Lima Contreras (former member and defector of the FARC-EP, Front 59). He was granted conditional freedom.</p>	<p>The participating party was being prosecuted for the crimes of violent sexual penetration of a protected person and illegal recruitment before the Criminal Court of the Specialized Circuit of Riohacha (crimes that motivated his capture after defecting from the FARC-EP) and was being held in the Medium and High Security Prison of Valledupar “La Tramacúa” (Cesar department).</p>	<p>“On March 12, 2015, the Prosecutor General’s Office interviewed MGU, during which the young woman said that “before March 20, 2014 she lived with her family on the ‘Soledad’ farm located in Barbacoas, jurisdiction of the municipality of Riohacha.” She added that, on that date, it was about 3:00 PM and she was bathing on the farm when suddenly four men arrived, one of whom grabbed her by the neck, not allowing her to scream. She was held at gunpoint, with her mouth covered, tied up with a chord, and led away on foot. She explained that at the time her brothers were calling for her and</p>

	<p>the four men threw her on the ground so that her brothers would not see her, that they continued walking and arrived at a farm belonging to a man named Victorito and there they asked for food. She was always kept hidden and was attended to at that time by alias Pablo and alias Jaime.</p> <p>The adolescent MGU testified that the other two men responded to the names of alias Germán and alias Henry. She said that “come nighttime, alias Germán gave her a Coca Cola to drink. She began to feel bad, sleepy, and fell asleep. The next day alias Germán told her that he had raped her to make her his woman, to which she said no, that he disgusted her, that she was a virgin, that she had never been with a man.”</p> <p>“According to the prosecution’s accusations, these events took place on March 20, 2014, when Oscar Enrique De Lima Contreras, known as alias Germán, from the 59th Front of the FARC, took, in the company of another man, 17-year-old MGU, who belongs to the Wayúu ethnic group. It is alleged that MGU was taken with the intention of having her join the subversive organization’s ranks, which is why she was handed over to alias Silfredo who, at that time, was second in command of that front. Similarly, the field report noted that during the transfer from her home to the FARC-EP camp, MGU was sexually assaulted by Oscar Enrique De Lima Contreras. Likewise, it was stated that, years before, on August 2, 2010, the participating party had recruited one of MGU’s brothers, named JGU”(boldface added; summary of facts made by Judge Xiomara Cecilia Balanta Moreno</p>
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		<p>after analyzing the procedural issues appearing in the voluminous files sent by the Prosecutor's Office, in particular, the prosecution's brief, based predominantly on a field investigation report from the Judicial Police, and the statements considered most relevant: that of the adolescent victim—aged 17 at the time of the events, belonging to the Wayúu ethnic group, Juruaipa Ranchería community, and designated in the resolution with the acronym "MGU," to protect her identity; that of her father—who confesses to have been a FARC-EP collaborator when his daughter was recruited and sexually violated; and that of her mother—recognized as an indirect victim during the criminal proceeding.</p>
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An interpretation of the motivational section of the referenced resolutions allows us to observe that:

- **The Gender Commission's technical support is only partial and operates as a preconception of how to rule on the case under study:** in all resolutions, the Chambers of Justice cite the concept issued by the JEP Gender Commission as a way to endorse the conclusion of connection or non-connection to the armed conflict that resulted from studying each specific case. However, it is notable that none of the resolutions use the whole concept or highlight the specific sources used by the Gender Commission to support its opinion. Instead, according to the emphasis chosen for the particularities of a case, a portion of the concept is used, based on the element that is considered most functional to the adopted position.
- **References are not contextualized, and international jurisprudence is cited when convenient:** all four resolutions refer to the international jurisprudence of *ad hoc* crim-

inal courts (especially the ICTY and the ICTR). However, it is noteworthy that the quotes used are fragments, regardless of the local context of the armed conflicts that gave rise to the criminal prosecution. Particularly, in Resolution No. 973, the aforementioned extracts from jurisprudence appear to have been selected based on convenience, taken out of the original context and applied as if they were an abstract and universal norm. We noticed that this occurred in the use of the category of “purely domestic crime” as opposed to “war crime” as extracted from the ICTR.⁸⁶ This automatic reference, without taking into account local realities, neglects relevant debates, such as the one proposed by Chile Eboe-Osuji (2012, p. 261 et seq.) on the applicability of the circumstantial or indirect theory regarding a nexus with conflict.⁸⁷

- **Only two resolutions have a comprehensive review of the applicable normative framework to establish the relationship with the armed conflict:** of the four resolutions, only No. 965 (SDSJ) and SAI-LC-D-XBM-002-2019 (which affirm the existence of a connection to conflict) present an argumentative structure that explicitly and concretely examines each and every one of the applicable normative criteria (based on Transitory Article 23, international jurisprudence, constitutional jurisprudence, and concepts from the Gender Commission). No. 965 (SDSJ) follows this reasoning: it analyzes (i) the context in which the events occurred (for which it analyzes the objective elements in relation to the temporal, spatial, and material characteristics of the armed conflict in the department of Putumayo—the setting of the incidents); (ii) the status of the crime’s perpetrator; (iii) the victim’s status, and (iv) the author’s motive for committing the crimes (where it argues how the criteria of Transitory Article 23,

86. Rutaganda Case, May 26, 2003 decision.

87. Circumstantial theory that does not necessarily equate to the category of circumstantial violence created by the TP-SA in Ruling 171 of 2019.

paragraph b—influence of the conflict on decision-making, capacity or ability, mode of commission and/or choice of target are evaluated in that specific case).

- Resolution SAI-LC-D-XBM-002-2019, meanwhile, begins with a generic presentation of the normative elements it considers central, in light of the interpretation provided by some international courts. Thus, it emphasizes the criterion of the influence of conflict in the decision to commit the conduct, the capacity or ability to commit it, the mode of commission and/or the choice of target, enhancing the text with a general presentation of the phenomenon of illegal recruitment of children and adolescents and sexual violence in the Colombian armed conflict, which is reinforced by the data from by a new concept presented by the Gender Commission⁸⁸ and citing constitutional jurisprudence.⁸⁹ Based on the additional concept from the Gender Commission, it highlights the concept of “coercive environments” developed by the ICC. Thereafter, without analyzing the context of the armed conflict at the scene of the events, it refers to the concepts of *strategic* and *opportunistic* sexual violence and sexual violence *as a practice*—which is presented in the dissenting opinion of Judge Mauricio García from the SDSJ.⁹⁰ Finally, with the support of evidentiary material from the file sent by the Prosecutor’s Office, it analyzes, one by one, the normative elements for the specific case, and concludes that there is a connection between the conducts and the armed conflict, considering that the sexual violence that occurred

88. Issued on March 6, 2019 and available at: <https://www.jep.gov.co/Relatoria/Comisi%C3%B3n%20de%20G%C3%A9nero/Concepto%2006%20de%20marzo%20de%202018%20Caso%20Women%20adolescente%20indigena.pdf>.

89. Even though on sexual violence it only refers to Ruling 092 of 2008 without mention of Ruling 009 of 2015.

90. The dissenting opinion of Judge Mauricio García to Resolution 973 of 2018 (SDSJ) which cites the conceptual framework proposed by author Elisabeth J. Wood.

fits, at the least, in the category of opportunistic violence.

- Resolutions No. 972 and 973 of 2018 of the SDSJ contrast the prior resolutions as they deny the existence of a connection to the armed conflict, without explaining the elements of its reasoning. No. 972 goes directly from the normative expressions *due to, in the context of, or in direct or indirect relationship to the armed conflict* to a categorical denial of the connection in that specific case, without presenting arguments to rule out the different normative criteria that define the decision. This denial is based merely on a quote from the prior assessments previously presented by the ordinary criminal judge in the ruling derived from his plea bargain.
- Resolution No. 973 only considers the temporal criteria for the existence of the armed conflict, without reference to the geographical and material aspects that could also be assessed. The “territorial control” that the author exercised as a member of the public forces is mentioned, but argumentation is lacking for the decision to not give any weight to that objective fact. Furthermore, it directly skips over the denial of the influence of the conflict, using the category of “domestic crime” (as opposed to the category of international crime), raised under the assumption that the crime’s motive was reduced to “personal satisfaction.” These elements all adhere to a description of the facts provided by the participating party in his confession before the ordinary criminal justice system (version from which the respective plea bargain was derived).
- **Only two resolutions follow the Constitutional Court’s broad interpretation to determine the scope of the expression “in the context of the armed conflict” and none refer to the constitutional presumption established in Ruling 009 of 2015 of the same court:** Resolutions No. 965 (SDSJ) and SAI-LC-D-XBM-002-2019 take on the broad interpretation developed by constitutional

jurisprudence (in which judgments C-253A and C-781 of 2012 are milestones), while omitting any consideration of this criterion in the other two decisions. However, none of the resolutions mention the constitutional presumption of a close and sufficient relationship with the conflict established in Ruling 009 of 2015. Only resolution SAI-LC-D-XBM-002-2019 uses Ruling 092 of 2008 as a reference.

It should be noted that in Resolution No. 965, along the same lines as the Constitutional Court, the SDSJ states that the armed conflict is not a direct cause of the action, but that it took place in *the context of the conflict*. However, to rule out the direct link, it considered that the criminal conduct did not show a strategic objective directly related to the hostilities, such as “weakening the opposing armed structure” or “obtaining military advantage” and argued that the absence of causality does not preclude in considering that the behaviors displayed do fit the broad concept reflected in the expression “in the context of the armed conflict.” In this vein, it affirmed that an *indirect relationship* can be established with other “macro objectives,” such as “the enemy’s retreat, dissuading victims from having any kind of relationship with the guerrillas, controlling the victims and population, or when this fails, generating forced displacement in order to ensure territorial control.” However, the concept of military advantage and strategic objective are addressed ambiguously through the introduction of the expression “macro objectives,” without justifying why the examples given could not be framed in the idea of a strategic end or military advantage, within the international and national case law and doctrinal frameworks, in order to establish a direct causal relationship to the conflict.

Since a broad interpretation of the Colombian armed conflict, as defined by the Constitutional Court, is absent from Resolutions No. 972 and 973, the context is not

analyzed as evidence, nor are the previously mentioned criteria used to assess the connection between the incidents and the armed conflict.

This omission is worrisome, since it renders invisible the phenomenon of sexual violence, as well as its specific characteristics in certain regions of the country, where there have been many prior efforts to document sexual violence as a generalized practice associated with armed conflict. These exercises were realized by civil society, the judicial arena in connection to Law 975 of 2005, and other official bodies, such as the CNMH, to cite a few relevant sources. This concern arises from Resolution 973, where the SDSJ –when analyzing conducts of sexual violence that took place in the municipality of Zulia– ignored (without argumentation) the sexual violence already widely documented in the Catatumbo region, Norte de Santander (Corporación Humanas, 2015; Superior Tribunal of Bogotá, Justice and Peace Chamber, 2014; Supreme Court of Justice, 2015; CNMH, 2017).

Only Resolution No. 965 includes the context as a specific component in its argumentative structure, using the available and relevant evidence in order to contextualize and understand how the armed conflict developed at the scene, in order to highlight sexual violence in the context of territorial control.

Having reviewed the judicial records of the participating party, the SDSJ observes that his different conducts (including sexual violence) can be classified within the dynamics of the armed conflict in the department of Putumayo, “where actors such as the FARC-EP guerrillas, the United Self-Defense Forces of Colombia, and regular State forces disputed territorial control” and concludes that, in that context, “the participating party held a regular and irregular military position [...] that allowed

him to acquire an advantage to commit the abuse for which he was convicted and is currently being prosecuted.” In relation to the status of the participating party, the chamber considered the fact that he was a member of the public forces “to be decisive in the materialization of his crimes, since the legitimate use of force as a representative of the State generated an advantageous position over his victims, allowing him to submit and subject them to his aggressions.” The SDSJ made a cross-referenced interpretation of both factors—the context and the perpetrator’s status—in order to affirm that it was on this basis that the participating party acquired his ability to “take advantage of the language of the conflict,” stigmatize his victims as collaborators or members of the guerrilla, and “reduce the will,” of “[the women] he killed or sexually abused.”

Although Resolution SAI-LC-D-XBM-002-2019 does not devote a specific section to contextual analysis, it intertwines contextual elements throughout its argumentation, pulling elements from the interpretation of Ruling 092 of 2008 and data provided by the JEP expert commissions (Gender and Ethnic). The relevance given to the *discriminatory context* that leads to the risk of sexual violence for women in the Wayúu communities of La Guajira is worth highlighting (taken from the concept issued by the Ethnic Commission).⁹¹

□ **The silence on contextual elements in some resolutions goes against the standard of due diligence:** this omission is concerning if we remember that the context is, in and of itself, a means of evidence, and its collection and comprehensive assessment are part of fulfilling due diligence during an investigation. As derived from international and national standards, the contextual analysis of human rights

91. Not available on the JEP website by the date of this document’s preparation.

violations, and of sexual violence, specifically, is mandatory in the methodological approach of a criminal investigation, both to understand the nexus between the conducts and the armed conflict, as well as to determine its classification (to qualify it as an international crime, for example) and to define the applicability of a specific model to attribute criminal responsibility.

Contextual analysis helps establish the characteristics and vulnerabilities of the victims; the discriminatory factors that act to produce and feed the violence in a specific territory; the risk factors and the State's (enforceable) knowledge regarding these; the State prevention and protection measures taken; the practices, repertoires, and patterns of violence of an armed organization in a given location; the (non- explicit) motivations of the perpetrators; the interrelationship of how violence is exercised with social, political, cultural, and economic dynamics; and the connections between the conducts of sexual violence and other types of violence within the framework of the armed conflict.⁹²

This contextual analysis would simultaneously comply with the international standard of due diligence and the corollary right of victims to ensure that the context be fully assessed for the events that occurred, and that this be realized without prejudice against them.⁹³

92. On the purpose of contextual analysis, see: Sisma Mujer, "Lineamientos de política criminal para la protección del derecho humano de las mujeres a una vida libre de violencia sexual," Bogotá, 2013, p. 25; Flacso, "Violaciones, derechos humanos y contexto: herramientas propuestas para documentar e investigar," Mexico City, 2017, available at: <https://www.flacso.edu.mx/sites/default/files/violaciones-ddhh-y-contexto-her-Tools-proposed-to-document-investigar.pdf>; Office of the Prosecutor General of the Nation, "Protocolo de investigación de violencia sexual," adopted by Resolution 1774 of June 14, 2016, para. 56 to 62.

93. Law already enshrined in Colombian legislation (Law 1719 of

This construction of context(s) constitutes a means of proof that can be satisfied with a wide range of kinds of evidence.⁹⁴ However, a documentation of the context does not conclude in the phase of studying case law, but extends throughout the process based on the specific methodological approach. At no time is the State (in this case the JEP) exempt from evidentiary due diligence when prosecuting conducts of sexual violence. Due to the fact that the punishable behaviors can be documented through different sources makes it necessary to have an evidentiary standard that does not translate into a disproportionate (and discriminatory) burden for victims.⁹⁵

As the *Alianza 5 Claves*, several women's platforms and the Constitutional Court have argued that victims of sexual violence face greater evidentiary limitations and obstacles.⁹⁶ This has led to the establishment of evidentiary standards that prioritize a respect for victim's dignity and the removal of harmful gender stereotypes, during both the investigation and the prosecution of sexual violence (in general and in particular in contexts of armed conflict). The creation of a gender entity for

2014, Art. 13, No. 8).

94. To understand this procedural implication and its direct relationship to due diligence in the investigation, from the inter-American system, we refer to the Inter-American Court cases of Campo Algodonero and Rosendo Cantú. In Colombian legislation, moreover, its mandatory incorporation into the methodological approach of a criminal investigation was recognized in Law 1719 of 2014, Art. 14.

95. Examples of sources of information would be: in certain cases, the request for legal benefits or the express request that an individual appear before the Jurisdiction (obligatorily or voluntarily, depending on his status) and, in others, the reports submitted by human rights organizations and victims.

96. Ruling 009 of 2015 sums up those obstacles. See also the periodic reports by the Monitoring Roundtable on Ruling 092 of 2008 – classified annex.

the investigation of sexual violence within the JEP is an advancement that the *5 Claves* applauds, as it responds to concerns about the effective implementation of measures to overcome the aforementioned obstacles. These measures must conform to the applicable special standards on the subject (such as irreversible minimums).

However, on the examination of jurisdiction, it is clear that it would be an incommensurate standard—and harmful to victims of sexual violence—to demand an exhaustive demonstration of the elements necessary to verify the connection between the incidents and the armed conflict. This burden is also unnecessary in the context of the State’s broadly documented obligation of due diligence in contexts of armed conflict and sexual violence. Additionally, given that in the field of International Human Rights Law and International Criminal Law, victim testimony and circumstantial evidence are central (CORPORACIÓN HUMANAS, 2009, p. 103 et seq.), it is consistent to state that, during the examination of jurisdiction, the connection to the armed conflict cannot be ruled out until the victims’ participation has been guaranteed by hearing their testimony—with full respect for their dignity and guarantees of non-revictimization (Sisma Mujer, 2013, p. 120 et seq.).

□ **In some cases, opportunism is mistakenly used, based on harmful gender stereotypes that presuppose that sexual violence is always a private, individual, and a merely incidental or collateral event:** in Resolutions No. 972 and 973, the assessment of facts holds a preconception that sexual violence is a private act, limited to the individual sphere (of desire/sexual impulse or personal satisfaction) of the perpetrator or as an event that takes place only incidentally or collaterally, to the point of considering it, *a priori*,

separate from the sphere of armed conflict.

It is worrisome that legal arguments are founded on harmful gender stereotypes, obscuring the final impacts generated by the commission of a sexual crimes, which can be observed through the circumstantial and contextual elements. For example, in Resolution No. 972, the SDSJ adhered to and accepted as true the statement made by the ordinary criminal judge in that conviction, resulting from the plea bargain, and which ruled out sexual abuse and considered that there had been a “romantic relationship” which spontaneously arose between a teenage girl of under fourteen and a soldier, amid consensual “sexual encounters” in the periods when the victim fled her “turbulent” home. This position fuels social and institutional impunity by referring to armed actors’ “emotional involvement” or “crushes” with girls and adolescents in militarized contexts and, at the same time, trivializes the abuse of power and utilization of the condition of vulnerability of the teenage girls.

In Resolution No. 965, this hypothesis of desire or personal satisfaction is mentioned to affirm that, despite the presence of a deliberate individual impulse (while failing to provide a founded argumentation or the proven facts to back this hypothesis), it was possible to conclude in favor of an *indirect* nexus with the armed conflict.⁹⁷

97. It stated verbatim: “The motives that the participating party had for carrying out his behaviors do not have a strategic and direct objective in relation to the armed conflict, such as weakening the military structure or another element to generate an advantage in the realm of the hostilities, nor are they outside of the desire for personal satisfaction which led to the act, as the Inspector General affirms in his statement; however, this is because the crimes were not committed due to the direct events of the armed conflict, but instead occurred in the context of it.”

In contrast, Resolution SAI-LC-D-XBM-002-2019 looked to distinguish between the concepts of sexual violence as *strategic* and *opportunistic* and as a *practice*. This is a theoretical exercise that demonstrates the effort to operate in accordance with the consolidated normative frameworks. Thus, when it refers to the possibility of an interest in personal satisfaction (which may or may not have a connotation of “sexual pleasure”⁹⁸), this is not done in a reductionist or stereotyped way, but rather in reference to a classification coined in Political Science on the various ways in which sexual violence associated with armed conflict can manifest itself, always taking care to present the contextual elements taken into account for the specific case (in particular, the coercive environment engendered by recruitment).

The chamber also requested a specific concept from the Gender Commission, given the intersectional factors of age, gender, and ethnicity present in this particular case. From this concept, the SAI cites:

Obtaining sexual pleasure is not the only aim of sexual violence committed by armed actors in the conflict, it is also a way of demonstrating power, dominance, and a clear manifestation of what constitutes an abuse of power, especially in contexts of coercion—such as the armed conflict—and warns that, according to the Gender Commission, “sexual violence in the armed conflict

98. Note that, in any case, there are positions of dissent in the social sciences about the desire for sexual pleasure as a motive for the perpetrator to commit rape. One position is that of Rita Laura Segato (2003), who argues that “it is more about the display of sexuality as a virile and violent capacity than the search for sexual pleasure,” that is, rape operates “as a demonstration of strength and virility to a community of *peers*, with the aim of guaranteeing or preserving a place among them by proving to them that one has sexual competence and physical strength” (p. 33). For the author, this element is not only visible in group rapes, but also in individual or lone rapes.

can have at least nine aims: to dominate, regulate, silence, obtain information, punish, expropriate, exterminate, reward, and create cohesion.”⁹⁹ Based on the above, the SAI (Office of Judge Balanta) concluded:

122. [...] It can be inferred that the context of the armed conflict made possible or created the opportunity for the commission of these conducts by the participating party. [...]

123. With regard to sexual assault, although this office does not have enough information to consider whether the type of sexual violence to which MGU was subjected was strategic or a practice, this office finds that the sexual violence allegedly suffered by the adolescent, MGU, fits, at least, into the category of **opportunistic violence**. [...]

124. Similarly, according to the information provided, on March 20, 2014, when MGU was forcibly taken as a FARC recruit, the participating party appears to have used the backing he enjoyed as a combatant from the aforementioned organization. [...] It was in this context of recruitment that, apparently, the participating individual took the opportunity to sexually assault MGU, while en route to the FARC-EP camp, from which she escaped three days later.

125. Thus, this chamber considers that the information contained in the file to show that the participating party, using his position as a combatant, an armed individual, with knowledge of the victim’s ethnic and family environment, and the defenseless situation of the victim while undergoing recruitment, he took advantage of this coercive context, made possible by the armed conflict, to rape MGU”(boldface in the original text).

99. These are the aims studied by Corporación Humanas (2009).

However, it is striking that a scarcely indirect nexus with the conflict was chosen, even though the chamber recognized that sexual violence in the context of the illegal recruitment of children and adolescents is a common practice deployed by members of armed organizations, which is internally tolerated and directly linked to the coercive context.

□ **Adoption of prima facie decisions based on stereotypes and prejudices:** although the JEP has been incorporating the understanding that the decisions made to admit or reject a request or case during the jurisdictional examination phase is an initial procedural filter where an analysis of the nexus to the armed conflict would only have a *prima facie* character, that is to say “at first glance,” with the evidentiary elements at hand—which at that stage are usually scarce—this also means that an assessment of the nexus or relationship to the conflict may subsequently change after contextual information, evidence, victims’ testimonies, adjudicated facts, and other contributions to the truth provided by the participating parties are collected. This understanding has already begun to be explicitly incorporated into some decisions from the JEP’s Chambers of Justice and the SA-TP.¹⁰⁰ In princi-

100. Some JEP Chambers of Justice and SA-TP decisions incorporate that understanding in the examination of the elements for material jurisdiction. See, for example: SRVRDHC Resolution No. 001 of October 25, 2018 (in Case 003, on “Deaths unlawfully presented as casualties in combat by State agents”—known as *false positives*) in which the chamber observed that “the material jurisdiction [...] to understand the conducts committed by a person is analyzed in depth when the facts are fully known,” and that the initial decision stage for a voluntary submission request corresponds to an “initial and preliminary moment in the case.” Therefore, the definition of the relationship of conducts with the armed conflict is first carried out “in a general and initial manner.” In the same decision, the SRVRDHC clarified that “any *prima facie* consideration on the relationship to the armed conflict must be presented without prejudice so that the chamber, when taking into account additional elements for comparison at a later stage of analysis,

ple, this is consistent with constitutional case law cited above that warns of the inadmissibility of an *a priori* exclusion, especially when there is doubt or a borderline situation. This is in accordance with the *pro persona* principle, which is mandatory in such cases and is materialized for sexual violence in the constitutional presumption of close and sufficient relationship to the armed conflict (Ruling 009 of 2015 of the Constitutional Court).

- Another consequence of the *prima facie* character is that the construction of patterns of violence, victimization, or macro-criminality are not a prerequisite to establish a nexus to the armed conflict during the initial phase to examine material jurisdiction for the admission of an application for processing or to receive information on the incidents, as the construction of these patterns (whatever name is deemed appropriate for them) is a process that integrates an inductive approach with contextual analysis incorporated into the research plan, which can only culminate in a substantive decision from the respective trial. Additionally, the frequency, repetition, systematicity, or generality of conducts are not essential to identify a connection to the conflict. In other words, it is not only repetitive or frequent conducts affecting multiple victims that can be related to the armed conflict.¹⁰¹

can evaluate this relationship in each specific case and can arrive at different conclusions.” On the other hand, the SA-TP, in Ruling TP-SA 19 of 2018 (case of third party David Char Navas, whose request for voluntary *non-comprehensive* submission was rejected), stated that the requests for submission before the JEP cannot lead to a “material jurisdiction set in stone,” causing the cases processed by this jurisdiction to lose “their dynamic and evolutionary nature.” The *prima facie* character for the examination of material jurisdiction was also invoked in SDSJ Resolution No. 965 of 2018 for a case involving acts of sexual violence.

101. We refer to the concept of simple attack cited previously.

However, in its judicial practice, the SDSJ is adopting *prima facie* decisions based on stereotyped and prejudiced interpretations against women, leading to a flat out dismissal of applications due to an alleged lack of nexus with the conflict—lack of jurisdiction in the material factors—as was the case in the aforementioned Resolutions No. 972 and 973 of 2018. In decisions where the connection to the conflict is admitted, the *prima facie* character of the resolution is argued to leave open the possibility of questioning the connection to the conflict at a later stage, with the latent risk of stereotypical views guiding that definition, as happened with Resolution No. 965, where an indirect relationship with the conflict was barely accepted and only with a *prima facie* character.

Decisions of a *prima facie* character that are actually based on prejudicial gender stereotypes should not arise in the initial phase when examining material jurisdiction. These stereotypes must be eliminated from practices and decisions at all stages of the process to surpass a purely procedural vision.

□ **The previous considerations of an ordinary criminal judge are decisive and prioritized in two of the resolutions:** in No. 972 and 973 the analysis of facts is limited to the prior assessments of the ordinary criminal judge or to the previous testimony of the participating party (via confession during the investigation or via a plea bargain). A new assessment of all the circumstances, in line with the aim of the JEP, was lacking. Resolution No. 972 analyzes the facts debated in the ordinary criminal case, which resulted from a conviction based on a plea bargain, that is to say, a judicial truth that resulted from a negotiation between the defendant and the Prosecutor's Office, opening the door to changes in the charges from an initial indictment for abusive sexual penetration against a minor under fourteen years of age to aggravated sexual harassment. This plea bargain led to a

conviction based on a discourse that was functional to the adapted charges. This means that elements of charges for abusive sexual penetration were used along with expressions that are more lax and favorable to the defendant, such as the one that qualifies the sexual encounters between the soldier and a child under fourteen years of age as a “relationship” or referring to the victim’s “family turbulence” to explain her running away from home and having sexual encounters with the soldier. For the JEP’s mandate, using the agreement with the ordinary justice system as the only input for a factual analysis is blatantly unsatisfactory. It is clear, then, that the judicial truth was established in a limited and restricted manner regarding motive, which should have provided the rationale for the conviction, but instead was derived from the plea bargain, was the only information taken into account by the SDSJ to analyze the nexus of the conduct with armed conflict.

A similar situation is observed in Resolution No. 973, which only took into account a description of the facts, as presented by the defendant when he chose to accept the charges and access the benefits of a plea bargain. In his version, the defendant (now a participating party) did not offer any details on the context of the armed conflict in the area where his battalion was located, nor on the tasks he was assigned or his use of officially allocated weapons, in his capacity as a soldier. He referred to the conduct of sexual violence as a barely incidental event, influenced only by the consumption of a psychoactive substance, without relation to the potential benefit of his status as a soldier. When adhering to the limited view of the facts provided by the above mentioned procedural figures (plea bargain and preliminary agreement), the SDSJ was far from comprehensively analyzing the elements of the ordinary criminal proceedings and did not address all of the evidence collected by the Prosecutor’s Office.

Only resolutions 965 and SAI-LC-D-XBM-002-2019 do not adhere, without further deliberation, to the previous decisions. Instead they assume a proactive stance to seek out the adequate evidence for that procedural stage, with a diligent interpretation of the evidence already collected and transferred by the ordinary courts (and not just from previous decisions), consulting secondary sources for additional useful and relevant information to expedite the context analysis.

There seems to be a contrast between resolutions that demand a high standard of proof (in the sense of being more exact, exhaustive, and/or diligent) and resolutions that hold as sufficient the standing judicial truth from prior ordinary judicial procedures, without first revising in an autonomous manner the body of evidence transferred from the ordinary system. It is noteworthy that the second category coincides with resolutions that deny the connection of conducts with the armed conflict.

Therefore, we caution that, on the issue of sexual violence, the JEP Chambers of Justice are not aligned with the standard of due diligence. An analysis of procedural components and the body of evidence in relation to the factual aspects discussed in the ordinary proceedings must respond to the truth-rendering aim of transitional justice. For this reason, the TP-SA pronouncements on the use of evidence presented in ordinary criminal proceedings against the participating parties is of utmost relevance. It leads to the establishment of a starting point, a fixed threshold, from which the participating parties' contribution to the truth will be assessed, with the expectation that the prior judicial truth will be surpassed and that a comprehensive and collective truth, with victim participation, can be achieved.¹⁰² This aim is of special significance for crimes and perpetrators that have seen

102. Ruling TP-SA 019 of 2018, Chapter VIII.

historical patterns of impunity and a dissatisfaction of the standards of truth, as is the case with sexual violence committed and tolerated by State agents.

- **Omission of victims' differential characteristics and an intersectional analysis in two of the resolutions:** in Resolutions No. 972 and 973, an analysis of the victims' status and the context of discrimination is omitted. In No. 973, the fact that the victim was a teenage girl under fourteen years of age did not lead to an assessment with a differential approach. This is profoundly different from the line of argumentation used in SAI-LC-D-XBM-002-2019 where the victim's direct characterization as a woman, adolescent, and indigenous person, using an intersectional analysis based on information proactively obtained from two JEP expert commissions (Gender and Ethnic). This lens had a visible role in the positive application of the normative framework.

I.V Recommendations

Based on a systematization of the consolidated normative framework to establish the relationship between conducts of sexual violence and the armed conflict and reflections using a critical interpretation of four resolutions already issued by the SDSJ and the SAI on this topic, we recommend that the JEP Chambers of Justice and Tribunal for Peace:

- a) Fully observe the set of previously consolidated normative and case law criteria to establish the connection between sexual violence and armed conflict, without allowing for setbacks, and without subjecting this issue (which in reality is a settled debate) to new false controversies that can only be justified through the application of dis-

criminary stereotypes. In that sense, both the Chambers and the Tribunal for Peace must move beyond an interpretation and use of the categories of opportunistic and circumstantial sexual violence as unrelated to the conflict. Furthermore, the latter should not be invoked as long as it implies a disproportionate and unnecessary burden of proof for the victims, given the existence of a presumption of a close and sufficient relationship between incidents of sexual violence and the conflict.

- b) Fully observe the parameters set out in Ruling 009 of 2015 regarding the integration of contextual and subjective factors to understand the factual scenarios of sexual violence and their nexus to the armed conflict. As developed in the Ruling, this framework can be used to discern the close and sufficient relationship between sexual violence and armed conflict, within a broad concept of armed conflict and the pro-person principle. In borderline or unclear situations, the Constitutional Court established a constitutional presumption on the existence of that connection. It is up to JEP authorities to integrate the premises contained in that constitutional presumption into their methodology and motivation.
- c) Adopt normative interpretative guidelines for the definition of sexual violence in the armed conflict that take into account the victim's status, the context in which the events occurred, and the discriminatory intent of the aggressions, instead of personal motivation as a legally irrelevant aspect.
- d) Avoid a generalized classification of the relationship between conducts of sexual violence and the armed conflict as indirect which, while a legally viable option, could be used disproportionately based on a stereotyped view of this type of event and could restrict criteria that would allow them to be included in the different scenarios fore-

seen by Legislative Act 01 of 2017. We also recommend overcoming stereotyped and reductionist views that tend to classify conducts of sexual violence as private, incidental, and disjointed from the conflict, based on harmful gender stereotypes. This implies removing any stereotyped and discriminatory interpretations of women from practices and decisions, in addition to bearing in mind that gender-based prejudices cannot support *prima facie* decisions to reject or not admit the nexus between conducts of sexual violence and armed conflict.

- e) Adapt JEP practices and decisions to the standards of due diligence. This implies considering that contextual elements are in themselves means of proof that must be collected and evaluated. Their assessment, in light of the pro-truth principle and the restorative approach of the new transitional justice body (JEP), must be proactive and not based on a previously constructed (and limited) judicial truth from ordinary criminal proceedings that have a restricted vision of armed conflict. It also implies that there cannot be an excessive or inappropriate burden of proof on victims or in each procedural stage. The obstacles historically faced by victims of sexual violence to access justice, in particular, in relation to evidence, must be considered.

- f) Understand that gender-based violence also includes the perpetration of sexual violence grounded in symbolic and instrumental prejudices against lesbian, gay, bisexual, and transgender people. The consolidated standards on due diligence to ensure the effective investigation, prosecution, and punishment of sexual violence must be fully incorporated in cases in which the conditions established by the Constitutional Court have been verified and constitute a close and sufficient relationship between

the crime and the armed conflict, and when these serious crimes have been committed against individuals with diverse sexual orientations and gender identities.

- g) Recognize that, like any act of gender-based violence, violence due to prejudice against LGBT persons occurs in a context of structural discrimination that not only facilitates the conduct, but also generates disproportionate impacts on the victims's lives and limits their opportunities to access justice. Hence, it is up to the JEP to respond to the call made in the agreement itself to overcome these historical forms of discrimination, using the context to establish the severity of persecutory sexual violence against people with diverse sexual orientations and gender identities.
- h) Take into account that the discriminatory context that is used to justify prejudice-based sexual violence against LGBT individuals and other subjects of special protection (due to age, ethnic-racial identity, different abilities, etc.), as well as the intra-ranks context where sexual violence can be committed against women combatants and illegally recruited girls. These are all components that cannot be overlooked if there is to be an understanding of the nexus between armed conflict and sexual violence, from a differential and intersectional perspective.
- i) Adapt JEP practices and decisions to international standards that protect women combatants and illegally recruited girls from practices of reproductive violence, as a form of sexual violence exercised within armed groups. These are conducts, which are understood to be sexual violence in the context of the armed conflict, are prohibited at all times and should protect everyone. These include conducts that violate reproductive rights such as forced pregnancy, abortion, sterilization, and contraception. Hence, the intra-ranks scenario must be consid-

ered as a context where women and girls are exposed to events that are classified as sexual violence. These are decisive elements to understand the nexus between armed conflict and sexual violence. Consequently, the JEP's different bodies and chambers must take into account the recent ICC decision which condemned Bosco Ntaganda—former leader of the Patriotic Forces for the Liberation of Congo (FPLC)—for the commission of crimes against humanity and war crimes, including conducts of rape and sexual slavery within the FPLC ranks, as well as the use of child soldiers, as it is the first international precedent that condemns acts of sexual violence within the ranks of an armed group that were committed by its own troops.

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Con el apoyo de:

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