



**Workshop Report**

# **Strategic Litigation for Gender-Based Violence: Experiences in Latin America**



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# Strategic Litigation for Gender-Based Violence: Experiences in Latin America

Workshop Report



**ReLEG**

Red Latinoamericana  
de Litigio Estratégico  
en Género



**Grotius Centre  
for International  
Legal Studies**



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# 1. INTRODUCTION

On 21 and 22 October 2020, the Office of the United Nations High Commissioner for Human Rights (OHCHR), together with the American University Washington College of Law, through its War Crimes Research Office and its Academy on Human Rights and Humanitarian Law, and Leiden University, through its Grotius Centre for International Legal Studies, organized an **online workshop on strategic litigation for gender-based violence in Latin America**.<sup>1</sup>

This joint initiative builds on the work that the three co-organizing institutions carried out over the last few years, drawing on their respective mandates and approaches, to promote accountability and contribute to ending impunity for gender-based violence.<sup>2</sup> Most of the participants are also members of the **Latin American Network for Gender-based Strategic Litigation** (Red Latinoamericana de Litigio Estratégico en Materia de Género, ReLeG).<sup>3</sup> This Network, which includes litigators, academics, legal practitioners and activists, articulates and promotes strategic gender-based violence litigation initiatives, contributes to gender-sensitive and intersectional legal education, and helps to devise public policies and legislative reforms aimed at achieving gender equality and access to justice.

The workshop was attended by around 40 individuals with expertise in the strategic litigation of gender-based violence cases in different Latin American countries,<sup>4</sup> including lawyers, civil society representatives, public prosecutors, judges, and representatives of government agencies and transitional justice commissions. One of the sessions was also attended by diplomatic representatives, United Nations officials, and public and private donors. The live sessions on 21 and 22 October 2020 were preceded by participant interviews aimed at analysing certain litigation processes in greater detail.

This report summarizes the main points of discussion, and draws on the experiences, challenges, and good practices shared by the legal practitioners in attendance.<sup>5</sup> As such, this report is not intended to reflect an exhaustive analysis of the issues discussed.

Although the workshop focused broadly on strategic litigation processes for gender-based violence cases, many of the discussions revolved around cases of sexual violence committed against women within the context of armed conflicts, dictatorships, State terrorism, or other forms of mass political repression, drawing on the experience of those present. The cases in

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- 1 The views expressed in this report are those of the participants of the online workshop on strategic litigation for gender-based violence in Latin America alone and, as such, cannot be attributed to the OHCHR, the American University, or Leiden University.
  - 2 The OHCHR has previously organized two workshops on accountability for crimes of gender-based violence with a broader global scope: *Protection of victims of sexual violence: lessons learned workshop*, on 27 and 28 March 2018, and *Strategic sexual and gender-based violence litigation: lessons learned workshop*, on 19, 20 and 21 July 2019, both in Geneva, Switzerland. The Washington College of Law of American University organized a workshop on the prosecution of crimes of sexual violence occurring during conflict and mass repression in Latin America, which took place in March 2017 at the Bellagio Centre in Italy. This workshop led to the creation of the “Bellagio Network”, whose members have since supported criminal law cases brought before several national jurisdictions, including in Guatemala, Colombia, Peru, El Salvador, and Chile. They have also represented victims and/or acted as independent experts before the Inter-American Court of Human Rights and have supported awareness-raising campaigns to promote gender equality and end impunity for gender-based violence. The Grotius Centre for International Legal Studies of Leiden University regularly organizes lectures, conferences, workshops, and seminars on international criminal justice and international human rights law. It also conducts research on strategic litigation, gender-based crimes, and the role of national jurisdictions in applying international law at the domestic level.
  - 3 For more information, visit: <https://www.releg.red/>
  - 4 Argentina, Chile, Colombia, El Salvador, Guatemala, Mexico, Peru, and Venezuela.
  - 5 In line with the Chatham House Rule, the confidentiality of all sources has been respected and no comments have been attributed to any individual participant.

this report reflect these discussions.<sup>6</sup> As discussed below, strategic litigation initiatives by civil society organisations in the region increasingly cover a broad range of issues related to other forms of gender-based violence.

Most of the experiences shared during the workshop concern criminal proceedings at the domestic level, which is why the report focuses on certain criminal law issues. However, the participants noted that strategic litigation processes

may be brought before a variety of different bodies, such as national courts (e.g., civil, administrative, and constitutional courts), regional or international bodies (regional or international human rights courts and international criminal courts and tribunals); or quasi-judicial bodies (e.g., United Nations human rights treaty bodies, the Inter-American Commission, truth commissions and similar transitional justice bodies, and national human rights institutions).

## 2. WHAT IS STRATEGIC LITIGATION?

The participants at the workshop examined strategic litigation cases, defined as processes brought before judicial and quasi-judicial bodies that aim to have a lasting impact beyond that of repairing the harm suffered by the victims. There are three potential impacts that claimants can hope to achieve by bringing these cases to court:

- 1) **Individual impact on the victim,<sup>7</sup> the complainant, his or her family and/or relatives:** The focus here is on recognizing these individuals' dignity, and meeting their expectations and wishes during the litigation process. Litigation processes have an individual impact when the court grants reparation measures, such as compensatory damages, medical and/or psychological services, measures promoting access to education, recognition of the facts by State authorities or requests for pardon. For certain individuals, having the facts acknowledged in a judgment by a judicial body can help their process of healing, reconciliation, and empowerment.
- 2) **Social impact:** This relates to structural changes that arise as a result of litigation proceedings and that are conducive to preventing the recurrence of similar events in the future and act as a deterrent. Examples include changing narratives about historical events and reinforcing messages of zero tolerance towards gender-based violence and impunity.
- 3) **Institutional impact:** Strategic litigation initiatives are ultimately designed to reinforce a State's human rights obligations and strengthen the institutions responsible for protecting citizens. Examples include changing legislative and public policy, developing jurisprudence on reparations, and amending policies and internal procedures on victim protection (such as interim measures, victim support and assistance protocols, and investigation protocols for specific crimes).

<sup>6</sup> Several cases are mentioned throughout the report, some of which have been outlined in text boxes. A list of all the referenced cases has been included at the end of the report, with hyperlinks containing additional information.

<sup>7</sup> In this report, the term "victim" is used from the perspective of international human rights law, which refers to victims of human rights violations. However, the term also takes into account that individuals whose rights have been violated have a right to self-identification. Certain individuals may be more comfortable with terms such as "survivor" or "claimant", and the signatories to this report respect this choice.



There was a consensus at the workshop that **strategic litigation processes can benefit women who have been victims of gender-based violence and can trigger structural changes for all citizens.** These processes are a key tool for advancing equality for all, closing the inequality gap, and eradicating discrimination, impunity, and corruption.

The participants shared the view that litigation processes aimed at advancing gender equality have been pioneers in integrating an intersectional perspective. Many of the processes are noteworthy for bringing to light other forms of discrimination that frequently occur alongside gender-based discrimination, such as discrimination experienced by indigenous peoples or people of African descent.

### A victim-centred approach

The participants identified the victim-centred approach as one of the fundamental guiding principles of all litigation processes.<sup>8</sup> Nevertheless, their experience revealed that those involved in legal proceedings, especially criminal ones, tend to focus on establishing the guilt of the accused. Victims are therefore side-lined despite being formally recognized as rights-holders.

While there is consensus on the importance of this principle and the need for it to be respected by all persons and institutions involved in litigation processes, the participants noted that, in practice, there are significant gaps between its implementation by civil society organisations and by public institutions. They pointed out that Latin American civil society has played a pioneering role in giving practical meaning to this principle and raising awareness among public institutions so that they implement measures more appropriate to a victim-centred approach.

Among the **actions that lawyers and civil society organisations take to accompany victims** and that contribute to a victim-centred approach, participants identified the following:

- Respecting victims' notions of justice and letting them guide and set the agenda for the litigation process;
- Managing victims' expectations with respect to the potential outcome of the litigation process;
- Respecting each victim's personal processes and his or her choice on whether to become involved in legal proceedings;
- Informing victims of all procedural developments and providing them with knowledge and understanding of relevant legal or procedural issues;
- Informing victims of the risks of the litigation process, but also of the potential benefits that might result from their participation, even when the final outcome is not as expected;
- Simplifying legal concepts so that victims understand the meaning of legal terms;
- Communicating with victims in their own language and, if necessary, through interpreters;
- Integrating an intersectional approach, by drawing attention to the victims' gender and to other aspects of identity, including their age, ethnicity, and economic or social background; and
- Accompanying them through their process of emotional resilience and empowerment.

<sup>8</sup> This section compiles several of the practices identified during the workshop; it is not intended to be an exhaustive list of all requirements necessary to ensure the integration of a victim-centred approach. More information on the victim-centred approach, its definition, and practical implementation can be found in: Office of the High Commissioner for Human Rights, *Protection of victims of sexual violence: Lessons learned, Workshop Report*, 2019, available at <https://www.ohchr.org/Documents/Issues/Women/WRGS/ReportLessonsLearned.pdf>.



Among the various ramifications of the victim-centred approach beyond those already mentioned, two further aspects were analysed in detail during the workshop: the need to build trust in justice institutions and the importance of addressing the holistic needs of victims.

### Building trust in justice institutions

A factor influencing the trust that victims place in judicial institutions and other public agencies is the degree of exposure and interaction they have had with these institutions prior to initiating the litigation process. Therefore, **it is necessary to build victims' trust in justice institutions so that they feel part of the litigation process and can break their silence.**

The legal proceedings in the cases *Maya Achi* in Guatemala and *Manta and Vilca* in Peru marked the first time that any of the victims in these cases had interacted with a judicial institution. For some, their participation in the trial proceedings involved traveling to the capital of their respective countries for the first time in their lives. Although civil society organisations provided continuous support to these victims, the treatment they received from the judicial authorities,<sup>9</sup> during the initial stages, negatively impacted their trust in the authorities throughout the trial proceedings, and even had negative psychological consequences for certain victims.

Meanwhile, the dignified treatment that the victims of the *Sepur Zarco* case, in Guatemala, received from the judicial authorities during the trial, together with the support provided by civil society organisations, is an example of how victims' trust in the justice system can be achieved through a multidisciplinary approach, coalition work, and sustained support for the victims over time.

This approach allowed the victims to initiate and navigate the entire litigation process and empowered them to make specific reparations claims, culminating in a landmark ruling.<sup>10</sup>

### Addressing the holistic needs of victims

The participants agreed that it is necessary to provide immediate responses to the needs of victims, both to strengthen their trust in State institutions and to promote a broader sense of social justice, which entails meeting the needs of victims independently of the reparations granted in court rulings.

Several participants expressed the view that the right of victims to obtain reparations should not be dependent on a finding of guilt against an accused, but that these two processes can, and should, occur in parallel.

Without seeking to relieve the State of its own obligations, various civil society organisations offer extensive support to the victims they represent. These organisations provide various services, including medical and psychological assistance and economic empowerment services, to respond to victims' diverse needs. They often provide support during the litigation process and then call on State authorities to offer these services once a judicial order for reparation measures has been issued. Certain participants shared that, going forward, civil society organisations could be more vocal in calling for States to take up this responsibility in addressing the needs of victims before, during and after litigation processes.

<sup>9</sup> See below Gender stereotypes, p. 11

<sup>10</sup> For more information about the integration of a victim-centred approach in the *Sepur Zarco* case, see e.g., *Protection of victims of sexual violence*, above fn. 8, pp. 10, 20.





## 3. STRATEGIC LITIGATION DEVELOPMENTS

The participants in the workshop reflected on the origins and developments of strategic gender-based violence litigation and identified certain topical issues. Several of them stressed that the need to develop **strategic gender-based violence litigation initiatives arose as a response to the high levels of gender-based violence**, particularly against women, occurring in the Latin America region, as well as to the fact that the specific impacts of serious human rights violations on women had gone unnoticed for decades. Some of the elements that contribute to this include:

- Gender stereotypes and gender roles traditionally attributed to women, which have led to their limited participation in public and political life and to the denial, invisibilisation, relativisation, and minimization of their experiences;
- Decades of violence and repression followed by high levels of impunity, alongside persistently high levels of discrimination and violence against women, which have not created an enabling environment for women to raise their voices, share their experiences and demand respect for their rights; and
- Legal instruments that, in most cases, were predominantly drafted by men and failed to include women's perspectives, and judicial institutions that continue to be influenced by such instruments today.

Faced with this situation, and starting in the 1990s, feminist movements began to pay increasing attention to the serious human rights violations suffered by women, and to use the law as a tool to highlight and repair these violations.

Participants noted that the fact that women's rights are now part of the international human rights protection agenda is a remarkable achievement of the past few decades, and was critical to overcome the notion that gender-based violence is an issue

that only concerns the private sphere and national legal frameworks. **Law, traditionally used as a tool to repress and control women, has ultimately begun to serve as a catalyst for the realization of women's rights.**

They stressed that, going forward, strategic litigation should continue to make progress in addressing the structural causes of discrimination and gender-based violence. This perspective helps to contextualize cases that have been litigated and frame them within a *continuum* of violence, herein exposing **the close link between the high levels of impunity for crimes committed decades ago and the high levels of gender-based violence experienced in the region today.**

It was noted that when institutions tolerate or promote impunity for crimes of gender-based violence committed decades ago, they send the message that such forms of violence are accepted. Several participants noted that, in their work, they are required to dispel the widespread belief that periods of relative political stability lead to an end in gender-based violence, and that they must be constantly alert to new manifestations of this violence. Recognizing that recent cases of gender-based violence highlight pre-existing inequalities, the participants insisted that cases involving past crimes must not be forgotten, and that the narratives about which behaviours are socially acceptable must be changed.

A particular example of the *continuum* of violence against women highlighted during the workshop was the **Lote Ocho** case in Guatemala. Although the violence against Guatemalan women during the country's internal armed conflict (1960-1996) began to receive attention several years ago, impunity continues to be the norm in most cases. The Lote Ocho case concerns land dispossession and sexual violence committed by security agents of a private company, with the complicity of State agents, against indigenous women in 2007, years after the signing of the peace agreement, and

during a period when the Guatemalan government was making efforts to consolidate democracy and position itself as a State respectful of human rights. This case illustrates that when the structural causes of discrimination and violence against women are not addressed in a timely manner, they re-emerge, albeit in different forms.

Strategic litigation has helped to produce early progress in eradicating impunity for gender-based violence in cases of armed conflicts, dictatorships, mass repression, and other situations of political instability. However, **other modern-day expressions of gender-based violence warrant further attention and are likely to increasingly become the subject of litigation.** Without attempting to be exhaustive, the following is a list of topical issues identified during the workshop:

- Cases linked to migration, trafficking, and enforced disappearance, including cases of sexual violence, enforced disappearances and femicides/feminicides of migrant women;
- Cases linked to organized crime and drug

trafficking, including sexual violence, torture, enforced disappearances, and femicides/feminicides;

- Cases related to the rights of indigenous communities, access to land, and the responsibility of private actors for serious human rights violations, especially in relation to extractive industries;
- Cases of gender-based violence during protests and security operations;
- Cases of reproductive violence; and
- Cases of gender-based violence against LGBTI persons (lesbian, gay, bisexual, transgender and intersex).

As detailed in the following sections, there was a shared sense that, despite advances, many obstacles remain. Strategic litigation is expected to remain a key tool in the coming years in the struggle to bridge the gaps that exist between entitlements offered by the law and their realization.

## 4. A COLLECTIVE EFFORT

One of the key factors for success identified during the workshop is the involvement of multiple stakeholders during litigation processes.<sup>11</sup> **Victims have played a fundamental role in initiating litigation processes and in articulating what justice and truth mean to them.** It is also important to recognize and encourage the various contributions of justice actors (understood as litigators, judges, and prosecutors), academic institutions, experts from other disciplines, the international community, and donors.

In particular, the participants stressed the indispensable contributions of feminist movements and their influence on strategic litigation processes. It was noted that **when operating in spaces where**

**there is a deeply-rooted patriarchal ideology, such as in justice systems, feminist movements play a crucial role as catalysts for structural change.**

By using strategic litigation as a tool to advance these structural changes, the feminist cause helps to achieve a fairer society, close the inequality gap, and eradicate discrimination, impunity, and corruption. It was also emphasized that feminist movements have played a fundamental role in exposing the different forms of violence against women, especially in cases of mass repression and armed conflict, and their associated impunity.

The participants emphasized that feminisms are expressed in multiple ways. In recent years,

<sup>11</sup> More information on the roles played by different actors in litigation processes can be found at *Office of the High Commissioner for Human Rights, Strategic Litigation for Sexual and Gender-Based Violence: Lessons learned, Workshop Report, 2019*, available at: <https://www.ohchr.org/Documents/Issues/Women/WRGS/OHCHR-StrategicLitigationforSV-workshopreport-web.pdf>



movements such as #MeToo and Ni Una Menos (Not One Less) have demonstrated that the feminist cause is intergenerational and can take on a variety of forms and messages. These movements have resulted in a tidal wave of collective support for victims of gender-based violence, signalling increasing social condemnation of these practices and encouraging more victims to seek justice. It has also resulted in increased social scrutiny of the responses of State institutions to these cases.

Some of the synergies identified between different actors during the workshop include:

- **Collaboration between public prosecution services, civil society actors, and litigators.** When these actors coordinate and develop compatible case theories, it becomes more likely for such theories to be successful at trial. Respect for their respective mandates should not prevent these different parties from collaborating with each other in the litigation of the same case. For instance, if prosecutors are inexperienced in investigating international crimes, civil society lawyers can play a key role

in sensitizing them on the differences between these crimes and ordinary offences.

- **Standard practices for public prosecution services.** The participants mentioned that, to standardize good practices within a country or across a region, prosecutors must develop and implement guidelines and protocols to inform their investigations into cases of gender-based violence. However, operating procedures are not always sufficient to transform entrenched institutional practices. It is just as important to have the political will to make these changes work in practice, the necessary resources to implement them, and the activities to raise awareness about such instruments. A good practice is to create mechanisms to monitor the implementation of any guidelines and protocols. Beyond the binding nature of such instruments and the consequences that their non-implementation may entail, the effective impact of these instruments depends on justice actors' knowledge and understanding of their significance.

## ARGENTINA: OPERATING GUIDELINES FOR PUBLIC PROSECUTION SERVICES

In 2012, the Public Prosecutor's unit for coordination and follow-up in cases involving human rights violations during the period of State terrorism, issued a document entitled "Considerations on the prosecution of sexual abuse committed in the context of State terrorism",<sup>12</sup> dealing with various aspects relating to the investigation and prosecution of this type of conduct. In Resolution PGN 557/2012, the Attorney General stipulated the mandatory nature of these guidelines for prosecutors across Argentina.

The document identifies a series of legal obstacles that arose due to the deficient judicial treatment of crimes of sexual violence committed in the context of State terrorism during the dictatorship. It clarifies criteria relating to the interpretation of the rules on criminal prosecution of these offences and offers various guidelines for addressing these offences and handling the victims.

- **A growing number of independent expert opinions.** Independent specialists from different disciplines are increasingly offering their opinions to courts in the context of litigation proceedings. These opinions include medico-legal, psychological, sociological, historical and anthropological expertise. Academic institutions and independent legal experts also participate in litigation processes through *amicus curiae*, and present legal arguments to the court for its consideration, often relating to international human rights law, international criminal law, or international humanitarian law.

12 Available at: <https://www.fiscales.gob.ar/wp-content/uploads/2012/11/Informe.pdf>

- **Training new generations of legal practitioners.** Academic institutions have an important role to play in training new legal professionals. There is a need to introduce and/or strengthen gender training in academic curricula, especially in law faculties.
- **Designing holistic and sustainable financing strategies.** Civil society organisations representatives emphasized the importance of providing sustained support, both to victims and to the organisations that support them, during and after the litigation process. Participants shared the need to raise awareness among donors supporting strategic litigation processes. Some of the efforts made by different civil society organisations involved in strategic litigation have been aimed at:
  - Increasing **overall support for civil society organisations**, rather than providing funding for specific projects or cases. This will allow them to further strengthen their technical and institutional capacities, give them greater freedom to support victims in a sustained manner, and enable them to develop their litigation agenda independently of the donor(s);
  - Raising awareness of the fact that **legal processes can be lengthy**;
  - Raising awareness of the fact that litigation processes do not end when the final verdict is issued, and that the **need for support extends to the judgment implementation phase**;
  - Creating an understanding **that the expenses associated with a litigation process are not limited to legal fees**, but include other equally necessary costs such as travel for victims, witnesses and/or experts, the implementation of security measures for victims and witnesses, fees for independent experts, translation and interpretation costs, and the provision of psychosocial services to victims;
  - Creating an understanding of the fact that, even if the organisation receiving funds takes the correct actions, **the outcome of a litigation process can never be guaranteed**; and
  - Showing that strategic litigation has a **social impact that goes well beyond the individual cases brought to court**, in order to respond to possible concerns about the proportionality between the funds invested and the results obtained.

## 5. INSTITUTIONAL ISSUES

Strategic litigation initiatives ultimately aim to improve protection systems and make States respond more effectively to allegations of gender-based violence. For this reason, most processes, whether judicial or quasi-judicial, national, regional or international, while representing the individual interests of affected persons, emphasise the creation of enabling conditions for them to engage freely in these processes.

Although the contexts differ, most participants reported that a series of common issues facing justice institutions have presented challenges in strategic litigation initiatives.

This section describes some of the institutional issues relevant to all stages of the strategic criminal litigation process, from the investigation to the indictment phase, up until the implementation of reparations. Some of these obstacles include:

- A deeply rooted **patriarchal culture** in justice institutions and the absence of gender balance among justice officials;
- An increasing number of **conservative movements that reject or oppose** groups defending women's or LGBTI rights and the influence of their conservative views in justice institutions;



- The **lack of political will** to fight against impunity and the restrictions that justice actors face when confronted with these political obstacles;
- **Reluctance to collaborate with civil society organisations**, especially in cases where they lack the capacity to take legal action in judicial proceedings;
- The **resistance, lack of will and/or technical expertise of justice actors** to apply normative and evidentiary frameworks that include international standards and to adequately integrate a **gender perspective in their cases**;
- Justice institutions' failure to understand and respond to the **stigmatization** and permanent consequences suffered by victims and family members, as well as the risks of re-traumatization implicit in the litigation process;
- The **absence of a victim-centred approach**, especially during the collection of testimonial evidence, and, in particular, in relation to crimes of a sexual nature, where victims are often expected to share intimate details and provide detailed accounts of events;
- A failure to understand the **factors that have diminished victims' voices**, and that have led many victims to remain silent for years, even decades, before disclosing the abuse they suffered;
- **Gender stereotyping and gender discrimination** against victims and/or complainants during legal proceedings; and
- The limited understanding of justice actors of the **notion of gender mainstreaming** in institutions and its practical implications.

Since there were extensive discussions on the last two points, these points are examined in greater detail below.

## Gender stereotypes

One of the challenges that was repeatedly raised was the influence of gender stereotypes and discriminatory attitudes in legal proceedings.

**Litigation processes are influenced by preconceptions about the attributes and characteristics expected of victims of gender-based violence, as well as by the roles that men and women should play in society.**

The lack of gender sensitivity of justice actors risks re-victimizing victims and/or complainants, and can also prevent cases from reaching a satisfactory conclusion.

The participants noted that gender stereotypes often intersect with other stereotypes and/or forms of discrimination, for example, in the case of indigenous women, LGBTI women, or women with certain political affiliations, whether these be their own or those of their family members.

Stereotypes are expressed in various ways and at different stages of the proceedings, the most common being degrading comments made during oral hearings and defence strategies based on stereotyped reasoning. These defence strategies are aimed at undermining the credibility of the victims, bringing into question their motives for bringing a criminal complaint and even holding them responsible for the violence they suffered.

Where a case has been seriously hindered by biases or prejudices from the judges, the legal representatives of victims have at times filed motions to recuse or disqualify them. These initiatives, while necessary and often successful, ultimately lead to lengthening already extensive legal proceedings and accentuate the victims' distrust in the authorities. The cases **Manta and Vilca** in Peru and **Maya Achi** in Guatemala are examples of where the discriminatory and racist treatment of female indigenous complainants was challenged by the victims' legal representatives through motions to disqualify the judges.

## GUATEMALA: MAYA ACHI CASE



In 2011, 11 Maya Achi women filed complaints with the Guatemalan Public Prosecutor's Office for the rapes they suffered between 1981 and 1985 in the municipality of Rabinal. The rapes took place during a period when the army had control over the region, and these crimes followed a similar fact pattern. Over the following months, more victims joined the complaint until there were more than 30 female complainants. Those accused of the crimes were former members of the Civil Defence Patrols (Patrullas de Autodefensa Civil, PAC), six of whom were arrested in May 2018 and charged with crimes against the duties of humanity for the acts of sexual violence reported by the victims. A seventh suspect died in 2018. An additional suspect was arrested in January 2020; the case against him has proceeded separately.



In June 2019, the judge in charge of the case dismissed some of the charges against several defendants and ordered the provisional closure of the cases against the remaining accused. One of the main grounds that the judge mentioned in her oral decision was that there was no documentation showing that the defendants were PAC members at the time (their recruitment was informal and there was no documentation stating that they had been appointed to their positions). The victims' testimony on the facts was not considered to be sufficient proof.

The complainants objected to this reasoning on the basis that the victims' testimonies had been clear and had identified the perpetrators. **The decision was also contrary to international standards on the investigation of sexual and gender-based violence**, which include that it is not necessary to corroborate the testimony of the victims in such cases.

The complainants also felt that **the judge's conduct during the preliminary oral hearing brought to light deep-rooted structural racism and sexism in justice institutions**. Faced with gross irregularities and a hostile attitude from the judge, the aggrieved women began the process of having the judge removed from the case. They alleged that the judge:

- Failed to provide adequate conditions for them to be able to testify freely. Instead, she constantly interrupted the victims during their statements and treated them in a humiliating and intimidating manner;
- Showed no cultural sensitivity towards the victims, even though for most of them it was the first time they had travelled to the country's capital and interacted with agencies of the judicial system; and
- Did not intervene when the defence used words against the complainants that were discriminatory or contained sexist or racist stereotypes.

As a result, **many of the victims were re-traumatized and their trust in the justice process was undermined**.



The Appeals Chamber for High Risk Cases considered the appeal to be well-founded and ordered that the judge be removed from the case. However, the decision on closure and dismissal had already been issued. The complainants subsequently appealed the ruling. At the time of writing, the new pre-trial judge in the case had committed three of the accused to trial.





## Integration of a gender perspective

The workshop made evident the need to work to raise awareness and strengthen the capacity to integrate a gender perspective in justice institutions. This process should include an assessment of the

impact of any activity or situation on women and men in all sectors and at all levels, and an examination into the gender dimensions of human rights violations, taking into account the perspective of all individuals based on sex and gender.<sup>13</sup>

### PERU: MANTA AND VILCA CASE



Following a surge in attacks by the insurgent group Shining Path (Sendero Luminoso) in the Department of Huancavelica during the Peruvian armed conflict, the military established bases in the districts of Manta and Vilca in 1984. Against this backdrop, members of the armed forces committed human rights violations against the inhabitants of these communities, including the rape and sexual abuse of numerous women. In 2003, the Peruvian Truth and Reconciliation Commission found that the sexual violence against the women in these communities occurred consistently and repeatedly as part of a widespread pattern of violence against women during the conflict. In 2004, judicial proceedings were opened to investigate the rapes perpetrated by members of the army against women in these communities. In 2016, the case went to trial.



The preliminary investigation in the Manta and Vilca case began in 2004 and spanned five years, during which time it became clear that the Public Prosecutor's Office was facing difficulties investigating and piecing together sexual crimes that had occurred decades earlier. This Office eventually charged the acts of sexual violence as crimes against humanity, arguing that they had been committed in a context of widespread attacks perpetrated between 1984 and 1995, which included enforced disappearances and extrajudicial executions, in what was a highly militarized territory.



During the trial, the legal representatives of the victims argued that **gender stereotypes were influencing the conduct of the proceedings**. The court made inappropriate insinuations about the victims, and also allowed the lawyers of the defence to make humiliating comments. In 2018, the Supreme Court upheld a motion for disqualification filed against the judges, and stated that they lacked objectivity and neglected their duty to prevent the re-victimization of women who had been sexually assaulted. The Court ordered the judges to be removed from the case and for new judges to be appointed.

In 2019, a new trial began before a newly composed bench of the Higher National Criminal Chamber.

The participants emphasized that there are different strategies to effectively integrate a gender perspective in an institution. A gender mainstreaming approach entails taking into account the gender dimension in all processes and decisions of these bodies.

A specialized approach involves the creation of bodies (commissions, working groups, roundtables, among others) with a specific gender integration mandate and dedicated staff. Since both approaches carry risks and benefits, the participants felt that hybrid solutions could be the most effective.

13 Office of the United Nations High Commissioner for Human Rights, *Integrating a gender perspective into human rights investigations: guidance and practice*, 2019, available at: [https://www.ohchr.org/Documents/Publications/IntegratingGenderPerspective\\_EN.pdf](https://www.ohchr.org/Documents/Publications/IntegratingGenderPerspective_EN.pdf)



The work of the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) in Colombia provides an example of gender mainstreaming.<sup>14</sup> The Colombian Peace Agreement was pioneering in including an express reference to the inclusion of a gender perspective as a cross-cutting principle that should inform all programs and bodies with competence in relation to the Peace Agreement, including the justice institutions, as well as the executive and legislative branches of government. This led to the creation of the JEP Gender Commission, whose competences include:

- The integration of a gender perspective in external relations with victims;
- The integration of a gender perspective internally, including in staff regulations and

the organisational structure of the JEP. Several initiatives have been implemented, including the creation of a specialized sexual violence unit within the Investigation and Prosecution Unit; and

- The issuance of expert opinions in response to requests for assistance from JEP judges (advisory function).

Finally, it was widely recognized that additional tools and measures would be needed to ensure that a gender perspective is adequately integrated within the courts, and that monitoring mechanisms should be put in place. Participants underlined the important role that civil society can play in identifying gaps and in reporting cases that are not conducted in a gender-sensitive manner.

## 6. LEGAL ISSUES

Besides these institutional issues, which can only be overcome through changes to the culture of justice institutions, the workshop participants also shared a series of legal issues that they encounter on a regular basis. This section provides examples of these problems, as well as some of the solutions that have been found to overcome them. However, to be fully overcome, some situations require appropriate legal reforms or progressive legal interpretations. Several of the issues raised call for further analysis to find an appropriate solution. The legal issues raised affect the entire litigation process, from the case selection to the enforcement of court decisions.

### 6.1. CASE SELECTION

The discussions highlighted a tension among the right to an effective remedy for individuals that have suffered gender-based violence, the

obligations of States to investigate serious human rights violations and adequately prosecute and punish those responsible, and the need to effectively allocate the often-scarce resources of the institutions involved.

In light of the obligation of States to respond to serious human rights violations<sup>15</sup> and the need to adopt a victim-centred approach, civil society organisations and relevant State authorities must have sufficient resources to provide legal services to all victims seeking to initiate legal proceedings.

However, both civil society organisations and public prosecution services operate with limited resources and must often make decisions to select and prioritize some cases over others. The difficulties posed by the need for prioritization is especially apparent where mass human rights

14 The Special Jurisdiction for Peace (JEP) is the justice component of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition, created by the Peace Agreement between the Government and the FARC-EP. The JEP is tasked with administering transitional justice and hearing offences committed before 1 December 2016 in the framework of the armed conflict. It was created to satisfy victims' right to justice, offer truth to the public, and contribute to the reparation of victims, with the aim of constructing a stable and lasting peace. As part of other transitional justice measures, Colombia adopted Law 975 of 2005, known as the Justice and Peace Law, which established, among other measures, special chambers to hear cases of crimes committed by illegal armed groups in the context of the armed conflict.

15 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, [A/RES/60/147](#), 2005.



violations have taken place. In these situations, the most common solution has been to develop prioritization criteria to inform decision-making and reduce, to the extent possible, the scope for individual discretion. **Case selection, whether by civil society organisations or public prosecution services, can create tensions, divide victim movements, and even re-traumatize victims whose cases are dropped.** For these reasons, new approaches need to be explored to reconcile these competing needs.

An additional challenge for case prioritization is to ensure that the criteria adopted adequately reflect the different manifestations of gender-based violence in a conflict. For example, in the JEP, due to the work of its Gender Commission, a gender perspective has been included in the prioritization criteria guidelines. Given that one of the factors determining prioritization is the amount of evidence supporting a case, the guidelines include a specific provision for sexual violence cases, which recognises the difficulties that prosecutors may face in obtaining evidence in these cases and which states that such difficulties should not pose an obstacle to victims' access to justice.

The participants identified several challenges relating to the need to adduce sufficient evidence to support charges and obtain a conviction.

**The laws and rules on evidence, as well as the evidence-gathering practices of the authorities in charge of the investigation (such as the police and prosecutors) and of judicial authorities often perpetuate the use of evidentiary methods that do not respect a gender-sensitive and victim-centred approach.** This reality leads civil society organisations to take an active role in the evidence-gathering phase, albeit within the limits of their respective mandates.

The participants shared the perception that judicial authorities often require a higher standard of proof for crimes of sexual violence than for other offences, without any procedural or legal basis. This practice makes evident the stereotypes and prejudices held by judicial authorities, and can lead to victims being subjected to detailed and thorough questioning that can be traumatizing if not carried out with the necessary safeguards. This type of questioning can bring into question the victim's credibility, such as in the **Chumbivilcas** case in Peru.

## 6.2. EVIDENCE-RELATED CHALLENGES

### PERU: CHUMBIVILCAS CASE



In April 1990, during the Peruvian internal armed conflict, a Peruvian army patrol called "Raya" entered Chumbivilcas province on an apparent search mission, during which they arrested around twenty individuals, executed or disappeared a number of villagers, and subjected several women to repeated sexual violence, including two women whose initials are AHA and ILA.



In its verdict on 28 June 2017, the trial chamber found the six defendants guilty of enforced disappearance, the infliction of serious injury resulting in death, and aggravated homicide against some twenty male victims. However, **the court acquitted the accused of the crimes of sexual violence perpetrated against the two women, both of whom had testified during the trial.**

The prosecution appealed the decision to acquit the defendants of the crime of aggravated rape against ILA and AHA. In the case of AHA, the prosecution argued that the rape was established by the victim's own testimony. Responding to the manner in which her evidence was assessed in the trial judgment, the prosecution argued that **"the fact that her husband had disappeared did not indicate that her account was based on resentment towards the soldiers or that she could have lied; the victim's testimony should be assessed based on the specific context of those areas affected by violence, where gender-based discrimination also plays a role; furthermore, the facts of the case constitute crimes against humanity"**.



On 2 May 2018, the Supreme Court of Justice of Peru overturned the trial judgment and ordered a retrial in relation to the charges of aggravated rape of AHA and ILA. **The Supreme Court ruled that the testimonies of the two women should be given due weight**, as “there is no doubt that the allegations are part of a pattern of violence, intimidation and death”. The Court also found **their testimonies to be consistent with the context of violence and the widespread and systematic attacks** against civilians established during the case in support of the convictions for other crimes. The Court found that the victims’ statements were clear and precise and that several witnesses had reported that there had been incidences of rapes against rural women. The Court therefore concluded that “there is no objective basis to doubt the reliability of the evidence against the accused, which is consistent and, most importantly, has remained unaltered”.

This ruling sets a **valuable precedent with regard to the assessment of the testimonies of victims and the attribution of responsibility for acts of sexual violence** in contexts of armed conflict.

An additional challenge is where State authorities are involved in committing the crimes; in many cases, the armed forces or defence ministries of that State will refuse to cooperate or provide internal information that could help bring the case forward.

The participants explored the benefits and drawbacks of the different means of evidence that are commonly used to prosecute cases of gender-based violence and, in particular, cases of sexual violence.

### Medical and forensic evidence

During the workshop, the participants highlighted that there is a general tendency on the part of justice actors to base their conclusions on forensic-medical evidence. However, in many cases, this form of evidence may not be appropriate or relevant for a variety of reasons:

- Medical reports **can document the physical aspects of crimes of a sexual nature** and, in some cases, may establish whether the crime was perpetrated by force. Yet such evidence fails to provide information on whether there was coercion or a lack of consent from the victim (in accordance with the applicable legal standards).<sup>16</sup>
- Where there has been a significant time lapse between the acts of sexual violence and the prosecution of the case, it is **factually impossible** to obtain medical evidence.

Yet several participants shared examples of instances where judicial authorities had requested forensic or medical reports to prove rapes that were committed decades earlier.

- **Medical personnel** in charge of performing physical examinations on the victims are not always aware of the applicable standards and the legal elements that need to be documented.
- Some **crimes leave no physical traces** on the victims’ bodies.

### Testimonial evidence

The participants welcomed the practice of being able to establish the guilt of the accused solely on the basis of testimonial evidence of victims and witnesses in criminal proceedings. This approach reduces the burden of proof on the victim.

Nevertheless, they also shared concerns that victims’ testimonial evidence may be relied upon as the main evidence in a case, since:

- There is a risk that such **testimonies may be lost** over time, either because victims’ memories deteriorate, their poor health prevents them from participating in legal proceedings, or they pass away;
- It places **undue pressure on victims** to engage in often lengthy and tedious judicial proceedings, where they will most likely be required to share

<sup>16</sup> The requirements for what is referred to here as a “lack of consent” vary according to the type of crime, the legal system, and the context in which the crime/s took place.



intimate facts and details and/or risk public exposure;

- It opens the door to **challenging the victim's credibility** as part of the accused's defence strategy; for example, when victims hesitate regarding the identity or affiliation of the perpetrators. This tactic is re-traumatizing, and may also affect the chances of obtaining a conviction; and
- It raises the **risk that cases may not be prosecuted** if victims decide not to go forward with the legal proceedings.

In some cases, legal representatives request that pre-recorded testimonies of the victims be taken during the preliminary investigation phase of proceedings (*prueba anticipada*). This is done to ensure the collection of those testimonies that may no longer be available at the time of the trial. Generally, a pre-trial hearing to collect such evidence is held when victims are believed to be at risk, either because of their advanced age, deteriorating mental capacity, expected change of residence, or risks to their personal safety. Pre-recorded testimonial evidence has been used in several cases in Guatemala, including the **Sepur Zarco** case, where pre-recorded video testimonies were introduced at trial in lieu of oral testimony. Similarly, in the **Maya Achi** case, many of the testimonies were pre-recorded during the preliminary investigation phase because of the advanced age of the victims and the risks to their health, and to avoid re-traumatizing them in later stages of the proceedings.

### Expert evidence

There is a growing tendency to use expert reports or expert witnesses<sup>17</sup> from different fields of knowledge as evidence in the litigation of gender-based violence cases.

Reports from experts have helped to provide insights from various disciplines, such as sociology, psychology, history, and anthropology, and have helped to bring a multidisciplinary approach to

litigation processes, incorporating perspectives that judicial operators are less accustomed to taking into consideration. Some examples of the roles that experts have played include:

- **Contextualizing pre-existing situations of discrimination and levels of violence against women**, thereby demonstrating the *continuum* of violence they have suffered. This has helped prevent gender-based violence from being viewed as isolated, private, or opportunistic acts, and has helped to establish the necessary connections between such acts and the broader context of violence in which they occurred. In some cases, contextualization has served to establish the specific intent required for certain crimes (such as the crime of genocide), or to charge certain conduct under specific criminal provisions;
- **Contextualizing existing power dynamics**, thereby contributing to the attribution of responsibility for the criminal conduct, be that individual criminal responsibility (in particular of high-ranking individuals and indirect perpetrators) or a State's international responsibility in international human rights law litigation;
- **Analysing the differential impact and effects** that the violence had in the short, medium and long term on individual victims and/or their families, as well as on entire communities, which has been key to quantifying and qualifying relevant reparation measures;
- **Proving contextual elements**, such as the widespread or systematic nature of an attack against a civil population, or the existence of an armed conflict, in cases of international crimes; and
- **Accounting for the challenges that victims face in testifying**, including psychological and physical difficulties, permanent damage or impairment to their sexual and reproductive health, sociological aspects, including gender roles ascribed to women and men, and the

17 The terminology and procedural particularities vary from one legal system to another.

culture of impunity that impact an individual's quest for justice.

In the **Sepur Zarco** case in Guatemala, the parties called around twenty experts. These included a gender anthropologist, who explained in detail how the sexual violence in question was intended to control the victims and punish them for their alleged collaboration with the guerrillas. In Argentina, in some cases such as the **Zárate-Campana** case, the prosecution used contextual evidence as a valuable tool in cases involving

crimes committed during the dictatorship. It was particularly instrumental in proving that the sexual violence in this case constituted a crime against humanity and in establishing the responsibility of indirect perpetrators. In Mexico, expert evidence has played a crucial role in cases of femicide/feminicide to document the history of violence against murdered women, the power dynamics, and the psychological factors that contribute to the subjugation of some victims. This has allowed some cases to be framed as the conclusion of a series of violent acts, rather than as isolated events.

### ARGENTINA: ZÁRATE-CAMPANA CASE



During the civil-military dictatorship in Argentina (1976 – 1983), the army and navy established detention centres in Zárate-Campana, where kidnapped persons were transferred, secretly detained, tortured, and subjected to different kinds of inhumane treatment. Many are still missing.



The Public Prosecutor's Office called two contextual witnesses during the trial proceedings, a sociologist and an anthropologist, who played a crucial role in supporting the prosecution's case theory and in obtaining a conviction. Among other aspects, their testimonies served to:

- Sensitize the judges on the time it may take victims to come forward and speak about their experiences of sexual violence and the **reasons why victims may choose to remain silent** about these experiences;
- Contextualize the sexual violence perpetrated against men and women, and explain the differential impact of rape and sexual abuse on men due to gender stereotypes and norms related to being male in a patriarchal culture;
- Sensitize the judges to the underlying purpose behind sexual violence, that has to do with **the desire to humiliate and dominate the victims**, and not with a sexual desire or the libidinous aspect of the conduct, a perception still held in Argentinean society; and
- Establish the role of those who ran the detention centre as indirect perpetrators for crimes committed by forces under their command, by showing that in these centres there was an **implicit authorization from the hierarchical superiors** to the lower ranks to commit sexual violence and other abuses. The prisoners were left at the mercy of the subordinates, who operated in an atmosphere of complete tolerance and with guaranteed impunity.



In 2020, a Federal Court sentenced two senior officers from the army and the navy to 18 and 22 years in prison respectively, for crimes of unlawful deprivation of liberty and torture committed against 20 victims who were detained at the Zárate-Campana detention centre.

In addition to the innovative use of contextual evidence to document certain allegations, an interesting aspect of the judgement is that the responsibility of the defendants for sexual violence against disappeared women was established on the basis of the testimonies of witnesses.



## Contextualization as an evidence-enhancing tool

Contextualization can be a powerful tool to strengthen the evidence that is used to substantiate allegations. During the workshop, civil society organisations insisted on the importance of situating the crimes within the broader contexts in which they are committed, regardless of whether cases are litigated collectively or individually.

Contextualization can serve to:

- **Corroborate allegations;**
- **Identify additional victims** of the same acts or of the same perpetrators, particularly when these victims are deceased or missing;
- **Establish patterns**, and therefore reduce the pressure on the victim to testify. By adducing evidence on patterns, prosecutors can corroborate a victim's testimony with other testimonies on aspects such as geographical details, time, *modus operandi*, the role of the different perpetrators and participants and their command structures, or other elements, and thus provide judicial authorities with enough information to establish the victim's credibility and the veracity of his or her allegations; or
- **Prove the widespread or systematic nature of an attack** against a civilian population, in cases of crimes against humanity, or the existence of an armed conflict in cases of war crimes. This strategy has been used, for example, to document the systematic practices of torture, including sexual torture, and enforced disappearance in clandestine detention centres in Argentina.

To contextualize crimes, apart from the multi-disciplinary expert reports mentioned above, legal practitioners have relied on related cases, on the testimonies of other victims and witnesses who testified in prior cases, as well as on the reports of truth commissions or the reports of other mechanisms with a mandate to document mass human rights violations.

## 6.3. SELECTION OF CRIMINAL CHARGES

In strategic criminal litigation initiatives, several challenges make it difficult to legally characterise the facts and select the most appropriate criminal charge within the framework of the respective legal system. The selection of criminal charges is also limited by the rules applicable in criminal matters for joinder of offences, e.g., *lex specialis*, and the rules on cumulative or concurrent charging.

Various participants stressed how important it is for prosecutors and plaintiffs to jointly explore the different ways of characterising criminal conduct in order to accurately reflect the full scope of the harm inflicted on the victims.

Moreover, there is a need to find creative solutions to reconcile the fact that different legal systems may come into play in relation to a specific case, such as domestic criminal law, international criminal law and international human rights law, especially in contexts where the domestic legal system coexists with the international legal system without full harmonization. In these cases, complainants should choose which legal category best reflects the facts of the case and analyse how this characterisation affects their chances of success in the case. For example, in both Argentina and Colombia, cases of forced abortion have been prosecuted under the domestic criminal provision of “abortion without consent” and then labelled as an international crime by examining the surrounding context in which the crimes took place.

**Incorporating an international human rights law perspective in litigation strategies advances the notion that litigation processes should ultimately aim to hold both the individuals and the State accountable**, in circumstances where the authorities actively participated in the acts, or failed to provide access to justice and adequate reparations to victims.

There is sometimes some room for manoeuvre when selecting the criminal charges. In doing so, it is important to adopt a gender perspective to understand the causes underpinning the violence and the differentiated impacts on the victims, as in the *Diana Sacayán* case in Argentina.



## ARGENTINA: DIANA SACAYÁN CASE



Diana Sacayán, a trans woman and human rights defender, was murdered in Argentina in 2015, a few weeks after she succeeded in getting the Buenos Aires State legislature to adopt a law that included improvements in the right of access to work for transgender persons. Diana Sacayán was attacked with a knife, violently beaten, tied, gagged, and stabbed in the abdomen.



The prosecution deliberately chose to charge the crime as an aggravated homicide motivated by hatred for the victim's transvestite gender identity (commonly referred to as “transvesticide”) rather than as femicide. Although Diana Sacayán had been recognized as a woman in her identity documents, a broader interpretation of the notion of gender revealed that she was murdered not because she was a woman, but because she was a transvestite. The case was therefore contextualized as an instance of the discrimination suffered by LGBTI persons, characterised by high levels of cruelty. The prosecution considered the high degree of violence to be directly related to her gender identity since the victim was targeted and attacked due to her identity as a transvestite woman. This argument was based on the grounds that hate killings are particularly brutal. The prosecution requested the maximum sentence for the perpetrator of the crime.<sup>18</sup>



In 2018, the court sentenced the accused to life imprisonment for aggravated homicide motivated by gender-based hatred and by violence. The National Criminal Appeals Court later affirmed the conviction for the homicide of Sacayán, which was “aggravated by the fact that it was a crime of gender-based violence”, but it ruled out the aggravating circumstance of “hatred of gender identity” that had been considered by the trial court. The prosecution filed an extraordinary appeal before the National Supreme Court of Justice, which is still pending at the time of writing.

Discussions during the workshop highlighted some of the issues faced in the selection of criminal charges, which require the plaintiffs and/or prosecutors to assess the respective advantages and disadvantages of each charging strategy. Two of these issues are detailed below: the charging of sexual violence as an underlying act of torture, and the charging of reproductive violence as a distinct criminal offence.

### Sexual violence as a form of torture

The recognition of rape as a form of torture was hailed as an important development during the workshop, although the participants agreed that this legal classification can present obstacles in domestic litigation efforts.

On the one hand, this approach supports the argument that sexual violence is not only a problem affecting the victim's private sphere and falling within the exclusive remit of domestic criminal law. It also engages international law as the conduct can be considered a violation of human rights and/or an international crime. **It is therefore possible to rely on international standards during a trial, even before domestic courts**, for example, in relation to the non-applicability of the statutes of limitation or the enhanced due diligence obligations in investigating torture allegations.

However, subsuming sexual violence under torture charges may also present some challenges, as it might render less visible certain elements of sexual violence crimes, such as their sexual nature and their impact on the victims.

<sup>18</sup> For more information, see: Unidad Fiscal Especializada en Violencia contra las Mujeres, *Travesticidio de Amancay Diana Sacayán: documento de buenas prácticas de intervención fiscal*, 2020, available at: <https://www.fiscales.gob.ar/acciones-genero/travesticidio-de-amancay-diana-sacayan-documento-de-buenas-practicas-de-intervencion-fiscal-2020/>



Other obstacles derive from the definition of the crime of torture under domestic legal provisions which, contrary to international standards, could limit the investigation of sexual violence to those acts committed by public officials or with their acquiescence.

Finally, it is important to consider the sentences associated with each type of criminal offence in the applicable domestic legal system. For example, in Argentina, penalties for torture may be lower than penalties for rape.

## Reproductive violence

A growing number of civil society organisations in the region are working to advance women's sexual and reproductive rights. These rights include specific prohibitions on acts of reproductive violence, such as forced pregnancies, forced abortions, forced sterilizations, forced contraception or obstetric violence; as well as other rights such as the right to access safe and legal abortion, and access to quality sexual and reproductive health services.

**When dealing with cases of reproductive violence, civil society organisations face the issue of whether or not to characterise such acts as criminal offences distinct from crimes of sexual violence.**

Considering reproductive violence under sexual violence charges can be useful when such charges are recognised as international crimes. This approach allows legal practitioners to draw on the well-established normative and jurisprudential framework of international criminal law, and bring to light forms of violence that have received little attention to date and link them to the contexts of mass violence in which they occurred. For example, it allows **forced sterilizations in Peru** to be characterised as a crime against humanity.

However, this approach is not without risk and may even hinder the advancement of litigation into certain forms of reproductive violence. The main risk identified by participants was that certain forms of reproductive violence that cannot be considered forms of sexual violence will remain invisible and without sufficient legal protection. There is an equal risk of rendering the specific harms of reproductive violence invisible if these acts are characterised as other crimes, such as torture or inhuman and degrading treatment. One particularly relevant example comes from Argentina, where among those illegally detained during the dictatorship were pregnant women whose new-born babies were systematically abducted, such as in the **Campo de Mayo Military Hospital case**.<sup>19</sup> With the assistance of the Specialized Prosecutor's Unit for Violence against Women (Unidad Fiscal Especializada de Violencia Contra las Mujeres, UFEM), the prosecution argued during the trial that the fact that pregnant prisoners were taken to this hospital to give birth in inhumane conditions constituted a form of torture. The prosecution referred to various international standards on reproductive rights, such as the right to a dignified childbirth. The court convicted one of the defendants for torture, among other charges, but did not take the opportunity to develop the notion of reproductive violence.

In light of these challenges, civil society organisations are advocating for acts of reproductive violence to be charged as distinct crimes.

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19 The Campo de Mayo Military Hospital in Buenos Aires province operated a clandestine maternity ward where pregnant political prisoners who were about to give birth were admitted. After childbirth, many of them were extra-judicially executed and their babies were either illegally adopted or abandoned. According to the Judgment of 30 October 2018 of Oral Federal Criminal Court No. 3 of Buenos Aires, "a 'secret maternity ward' was set up in Campo de Mayo Military Hospital, functioning as a clandestine detention centre for pregnant prisoners, 'since they were still being detained, under the same illegal conditions and experiencing all kinds of torture and torment, especially psychological, knowing that worse than the fate that awaited them was that they would not be able to see their children again.'"

## COLOMBIA: HELENA CASE



Helena is a woman who lived with her family in a rural area of the Colombian countryside affected by the conflict. When she was 14 years old, she was unlawfully recruited by the FARC-EP. From the moment she joined the armed group, she was forced to take contraceptives. Later, as an adult, she became pregnant in a consensual relationship and was forced by her commanders to have an abortion in unsanitary conditions, which left her with permanent physical and psychological consequences. As a result, she escaped from the guerrilla group, while her family remained under constant threat from the group.



After the signing of the Peace Accords between the Colombian government and the FARC-EP guerrillas, Helena requested administrative reparations from the Colombian State as a victim of the conflict. However, the unit in charge of administrative reparations rejected this request on the grounds that she had left the FARC as an adult, citing the Victims and Land Restitution Law (Law 1448), which establishes that former members of armed groups cannot be considered victims of the conflict, “except in the case of former child soldiers who were demobilized as minors”. Helena appealed this decision and initiated an application for protection (*amparo*) that reached the Constitutional Court. In a landmark ruling in December 2019, the Constitutional Court affirmed that her exclusion from the reparations scheme constituted a violation of her human rights, recognising that the protection afforded by international humanitarian law to combatants who suffered sexual and reproductive violence extends to acts committed by members of the same side.

This case highlights how facts can be legally characterised differently over time. **The forced contraception and forced abortion suffered by Helena were initially considered a form of sexual violence. As the case progressed, her legal representatives argued that the harms suffered by Helena were a specific form of reproductive violence, to emphasise the violations to her reproductive autonomy.** This strategy resulted in the Constitutional Court’s recognition that international humanitarian law prohibits reproductive violence.



Proceedings to enforce the implementation of the Court’s ruling are now underway. The legal representatives included the case in a report they submitted to the JEP, recommending the prioritization of investigations into incidents of reproductive violence during the armed conflict and the recognition of violations of reproductive autonomy suffered by women and girls.

## PERU: FORCED STERILIZATIONS CASE



In the 1990s, almost 350,000 women and 25,000 men were forcibly sterilized in a programme led by the government of the former president Alberto Fujimori to reduce the birth rate. The programme mainly targeted indigenous and poor rural communities of the country. Many of the victims suffered serious injuries resulting in death, while others survived with severe physical and psychological consequences. The women were sterilized without ensuring their free, prior, and informed consent in their mother tongue, and through deception, threats, abduction, and humiliation; the sterilizations were conducted in unsanitary conditions and without informing the women that they were irreversible.



On 10 October 2013, during the Friendly Settlement in the Case of *Mestanza Chávez vs. Peru* before the Inter-American Commission on Human Rights, **the Peruvian State acknowledged that the forced sterilizations had violated human rights** and undertook to conduct an exhaustive investigation into the events and apply legal sanctions against any person, including public officials or civil servants, civilians, and military, found to have participated in these acts, be it as indirect perpetrators or intellectual authors, as physical perpetrators, or in another capacity.



After several attempts by the plaintiffs to obtain the implementation of the State's pledges, domestic judicial proceedings have now gained new momentum. On 1 March 2021, the Public Prosecutor began presenting evidence in a case against the former president Alberto Fujimori, his former health ministers, and other high-ranking officials, who are accused as co-perpetrators of the crimes of forced sterilization against thousands of indigenous women. Victim support organisations are demanding a prompt and impartial trial that is free of discrimination and prevents re-victimization.

### The legal characterisation of conduct as an international crime

Many of the cases examined during the workshop were perpetrated in a context of armed conflict, dictatorship, political repression, or other situations of instability, allowing them to be characterised as international crimes (war crimes, crimes against humanity, or genocide).

While it is true that most States in the region have incorporated **the normative framework of international criminal law into their domestic legislation**, with varying degrees of adjustment depending on the context, **this has not always led to the strengthening of the technical capacities of justice actors to prosecute such categories of crimes.**

Some of the solutions that participants shared to address this challenge include:

- Referring to **international case law standards in legal pleadings**, which may often be unfamiliar to national judges, to clarify issues of interpretation; for example, to clarify that proving the widespread or systematic nature of an attack is a contextual element of crimes against humanity, but that it is not necessary to prove that every form of violence was carried out in a widespread or systematic manner;
- Using **patterns** as a tool of analysis or evidence of allegations that reveal the widespread or systematic nature of the attack;

- Adopting an **intersectional approach** when constructing patterns and giving visibility to factors such as the age and socio-economic conditions of victims, their place of origin and/or their ethnic minority background; and
- Introducing evidence to **establish the nexus between the armed conflict and the acts of gender-based violence**. In particular, including details that demonstrate how the armed conflict played a substantial part in the perpetrator's ability to commit the crime; their decision to commit it; the manner in which it was committed; or the purpose for which it was committed.

### 6.4. STRATEGIES FOR THE ATTRIBUTION OF RESPONSIBILITY

Another issue faced by legal practitioners in strategic litigation before criminal courts is the question of how to hold the accused criminally liable. Some of the challenges that practitioners face relate to the narrow interpretations by the courts of the different modes of liability applicable to crimes of sexual violence, since the courts at times incorrectly apply higher standards of proof for sexual violence than for other categories of crimes:

- For example, in certain contexts, because of deeply entrenched gender stereotypes, justice actors continue to regard crimes of sexual violence as **crimes that can only be attributed to physical perpetrators**. Under this interpretation,

only the person who physically carried out the criminal conduct (e.g., penetration) can be held liable, and all other forms of responsibility are excluded, such as co-perpetration and indirect perpetration. This interpretation lacks any legal basis in the definitions of the modes of liability, and is based on the stereotype that sexual violence is committed by the perpetrator for a sexual motive.

This reasoning is at odds with other types of crimes, such as torture or homicide, where there is no debate as to the applicability of other modes of liability. The participants agreed that it was important to underline that liability can be attached to crimes of sexual violence just as it is attached to other types of crime.

To correct these erroneous perceptions, the Public Prosecutor's Office of Argentina issued operating guidelines<sup>20</sup> that include the recognition that crimes of sexual violence should not be considered crimes that can only be attributed to physical perpetrators. This recognition marked an important step towards the prosecution of acts of sexual violence by individuals who performed different roles in the repressive structures during the dictatorship. For example, it led to the recognition that senior members of the regime, as well as others who contributed to running clandestine detention centres where victims were subjected to sexual violence, could be co-perpetrators or indicted perpetrators. In this way, irrespective of whether the victim can identify the physical perpetrator, other individuals who were not physically present at the scene of the sexual violence crime can be held liable for their role in the crimes.

- Another issue is whether the authorities have the competence to **prosecute sexual offences *ex officio***, or whether the victim is required to bring a complaint before the acts can be subject to prosecution.

During the workshop, the participants mentioned that while most legal systems allow victims to file criminal complaints for sexual offences, a more favourable outcome may be obtained in certain

situations where prosecution services initiate criminal proceedings *ex officio* even in the absence of a complaint from the victim. The participants pointed out that when these offences constitute international crimes, States have a greater interest in prosecuting them, and, where massive human rights violations have occurred, the authorities should not require a complaint from a victim when the victim has died or disappeared. In such cases, the testimonies of other victims and/or witnesses should be sufficient to establish the crimes, as was considered in the **Zárate-Campana** case in Argentina.

On the other hand, some participants also emphasized that, since crimes of sexual violence are traumatic in nature, the victim's willingness to participate in legal proceedings plays a fundamental role and, as such, these cases should require the filing of a complaint by the victim before proceeding.

- Another issue is **whether the accused will admit responsibility** for the crimes during political transitions. The participants stressed that previous experiences in the region have shown that, in general, individuals will admit responsibility for other types of crimes, such as homicides or organizing massacres, more readily than for crimes of a sexual nature.

In Colombia, the JEP encourages the admission of responsibility, offering accused persons the possibility to participate in restorative justice procedures, with commuted or reduced sentences for those who, in the opinion of the Chamber of Recognition, recognize their responsibility in an honest manner, recount the truth and are willing to offer reparations to the victims. If they do not admit responsibility, the case will be subject to a trial, similar to ordinary court proceedings. Despite the incentive offered for accepting responsibility, there is a risk that cases of sexual violence will end up in court, requiring a higher threshold of evidence. As previous experiences of transitional justice in Colombia have shown, the JEP must adopt a strategy that makes sexual violence visible from the outset in its cases, and

<sup>20</sup> See above 4. A collective effort, p. 8.



must seek alternatives that do not rely as heavily on confessions from the accused.

Despite the challenges described above, the participants noted that considerable progress had been made in the application of forms of responsibility to these crimes and in expanding definitions. Two important developments have been the attribution of responsibility to senior-level leaders and to private actors.

### Attributing responsibility to senior leadership

An important development in the Latin American region is that, in an increasing number of cases, it has been possible to attribute responsibility for gender-based crimes to senior officials, indirect perpetrators and hierarchical superiors.

With regard to the attribution of responsibility to high-ranking defendants, several criminal jurisdictions have convicted the commanders of law enforcement institutions and the leaders of non-State armed groups. High-ranking superiors have been held accountable as perpetrators for their role in, for example, unleashing campaigns of violence that led to the commission of gender-based crimes, using organized structures of power to carry out these crimes, and creating the conditions of vulnerability and impunity that facilitated their perpetration. In this way, **national jurisdictions have moved away from the notion that a hierarchical superior's criminal liability can only be established for crimes that he or she has expressly ordered.**

In the **Zárate-Campana case**, although the physical perpetrators of the sexual violence were never identified, two senior commanders were convicted as indirect co-perpetrators on the basis that they granted lower ranking individuals wide discretion to commit acts of violence against prisoners. This meant leaving the victims at their mercy, in an atmosphere of tolerance, secrecy and guaranteed impunity for the perpetrators. Lower ranking individuals could therefore “select” the type and severity of violence they wished to inflict on their victims, even in the absence of express orders from their senior commanders. This decision confirms previous jurisprudence on the matter in Argentina.

### The liability of private actors

The participants identified as an emerging issue the attribution of responsibility to private actors for serious human rights violations, including for sexual violence. Recent decades have seen an increasing number of cases in which private sector actors have been involved in the commission of crimes. The problem is particularly acute in cases where mining companies claim access to lands traditionally occupied by indigenous peoples and local communities.

In these cases, **in addition to the criminal responsibility of the perpetrators of the crimes and the responsibility of the State for human rights violations, it is possible to initiate legal proceedings to claim the civil liability of the companies involved.** These cases often involve a wide range of national and international actors and open the possibility of the extra-territorial application of the law in the home countries of such companies.

This type of litigation brings with it the need for civil society organisations to consider adding new branches of law in their work and expanding their collaboration networks to include litigators from other jurisdictions. It also entails the need to coordinate and harmonize the different judicial processes, facilitating the exchange of documentation between jurisdictions, especially where related proceedings are taking place in parallel.

Despite this, many participants agreed on the need to seek justice at the national level as a first step, because it is the natural step for victims and because it allows States to be held accountable for their obligations and offers the possibility to set precedents for the future. The possibility of litigating cases extraterritorially, in particular using universal jurisdiction, is an avenue available to civil society organisations who were present at the workshop, but not the first option they would resort to.

## GUATEMALA: LOTE OCHO CASE



Since 2005, there have been disputes over land ownership and access to land between the indigenous community of Lote Ocho and surrounding communities in Izabal, and the company Compañía Guatemalteca de Níquel (CGN). CGN operated in Guatemala as a subsidiary of the Canadian company Skye Resources Inc. which, in turn, was owned by the Canadian company HudBay Minerals Inc.

On several occasions, the CGN company tried to evict the communities from the land, and violent clashes ensued. In 2007, CGN requested the State authorities to forcibly evict the communities. The police, military, and CGN security personnel arrived in the communities to carry out the forced evictions, using excessive force against the community, mostly women and children, and burned down their houses. CGN employees also committed acts of sexual violence against at least 11 women, with the complicity of the police authorities.



Supported by their legal representatives, the victims launched various legal procedures to determine responsibility for these acts. In Guatemala, they brought criminal proceedings against the security personnel of CGN and against those responsible for aiding and abetting the crimes, as well as against the authorities who were present during the violent acts, on the basis of omission liability. In Canada, they initiated civil claim proceedings against HudBay Minerals Inc. for negligence regarding its subsidiary CGN, arguing that CGN had launched a campaign to generate fear among the inhabitants of Lote Ocho and surrounding communities with the intention of driving them off their land, which the company did not have the right to mine.

This litigation strategy aims to provide a holistic approach to the notion of justice, which views **both the criminal prosecution of perpetrators and the civil liability of the companies involved as integral to the victims' quest for justice**. This case may set an important precedent in the region, clarifying issues such as the non-application of the principle of *non bis in idem* in relation to proceedings concerning the same facts before different jurisdictions and the non-extinction of criminal responsibility in one jurisdiction by the initiation of civil proceedings in another jurisdiction.

This case highlights the *continuum of violence suffered by Guatemalan women*. The sexual violence was clearly intended to intimidate and force the women off the land. This type of violence was also a form of collective violence in that not only were the bodies of individual women violated, but also the collective territories of their communities. The case also highlights the persistence of patterns of discrimination against women and indigenous communities with the involvement of State authorities. These patterns are not confined to the years of armed conflict, as they are still present during periods of democracy and relative political stability.



The Ontario Superior Court of Justice in Canada ruled that the Canadian parent mining company could be held liable in Canada for the human rights abuses committed by its overseas subsidiary, including the rape of the 11 Maya q'eqchi' women. The proceedings are underway.<sup>21</sup>

21 The Canadian case relating to the allegations of sexual violence is *Margarita Caal et al vs. HudBay Minerals*. See also *Choc vs. HudBay Minerals Inc.* and *Chub vs. HudBay Minerals*. For more information, see: [Guatemalan women's human rights claims against Hudbay proceed in Canadian court - Business & Human Rights Resource Centre \(business-humanrights.org\)](https://business-humanrights.org/en/guatemala-women-human-rights-claims-against-hudbay-proceed-in-canadian-court).





## 6.5. ORDERING REPARATIONS

Reparations for victims are at the heart of any litigation process, both in domestic and international proceedings. The participants shared some of the challenges regarding reparation measures.

Given that it is impossible to restore the *status quo* after the violations have already taken place, the participants emphasized the need for **“transformative reparations” as a means to create favourable conditions for a better society**. They are the vehicle to placing victims in a position where they can enjoy their rights more effectively, compared to the position they were in before they suffered the violations. This has been an important step forward in recognising the need to address the structural causes that led to violence and discrimination, in order to redress the victims. However, the participants emphasized that:

- It is necessary to delve deeper into the factors that, in practice, can transform the lives of people affected by gender-based violence, to reflect on what would be the most appropriate standards to bring about this transformation, and to ascertain which aspects of transforming the lives of victims would ensure the non-repetition of the violence;
- There is a need to strike a balance between victim-centrality (for victims’ notions of justice to prevail), and the need to inform victims in a realistic manner about the possibilities available to them when applying for reparation measures. Civil society organisations are at times required to carry out **awareness-raising work beforehand so that victims see themselves as rights holders** and demand measures that have the potential to repair the harms they have suffered;
- Reparation measures should be determined on the basis of an **analysis into the particular context and the specific needs of the victims**, whether these are individual or collective needs. Reparation measures will therefore vary from case to case. These measures should not be carried over from other cases without the necessary adjustments; and

- Further attention needs to be paid to **document the harm caused and the impacts of human rights violations on victims from the outset of the investigative work on a case**, so that the victims’ demands for reparations are taken into account. It was pointed out that in the early stages of a criminal procedure, the focus of the investigating authorities or the prosecution is often on building their case theory, charging the conduct, and collecting evidence that might establish the responsibility of the perpetrators. In some jurisdictions, however, the impact of the crimes on the victims must be established at the time of the issuance of the indictment, and when this aspect is overlooked during the investigation, it can be relegated to the background during the proceedings.

The participants noted that reparation measures that order States to **provide core services that are already among their obligations**, such as building a hospital or a school, can be controversial. In these cases, the aim is not to replace the State in the exercise of its duties, but rather to address the structural causes that made the violence possible in the first place. By better realizing the rights to education and health within affected communities, and especially with respect to women, States can reduce poverty and racism and curb levels of violence.

**Guarantees of non-repetition** are an important component of reparation measures and form part of the notion of transformative reparations. Apart from redressing the harm to individual victims, litigation offers great potential to transform society by establishing an institutional truth with an intergenerational vision.



## GUATEMALA: SEPUR ZARCO CASE



In 1982, the Guatemalan army established an outpost for “rest and relaxation” of its personnel in the indigenous village of Sepur Zarco. At the time, Maya Q’eqchi’ leaders in the area had been trying to obtain legal rights to their lands. The men were considered insurgents, captured and disappeared. In the absence of the men, the army subjected the women to domestic slavery, rape and sexual slavery.



In 2011, 15 female survivors from Sepur Zarco, who are now respectfully referred to as the *abuelas* (grandmothers), took their case before Guatemala’s high-risk court. On 2 March 2016, the court convicted two former military members of crimes against the duties of humanity (rape, murder, and enslavement) and awarded 18 reparation measures to the survivors and their communities. This was the first time that a court in Guatemala had prosecuted a case of conflict-related sexual slavery using domestic and international criminal law.

Among the **reparation measures in the judgment** is a commitment by the court to reopen the land claim files, as well as orders to establish a health centre, improve the infrastructure of the primary school, open a new secondary school, and provide scholarships for women and children, all of which would lift them out of extreme poverty.

Among the factors that helped secure the “transformative reparations” in the judgment are the following:

- The fact that the victims were at the centre of the process meant that the Sepur Zarco *abuelas* could engage with institutions whose notion of justice was different from the one that prevailed among indigenous communities.
- The constant support that civil society organisations and the victims’ legal representatives offered them before, during and after the trial proceedings, which built a context of trust that allowed the victims to express their wishes regarding reparations.
- A multidisciplinary approach to the notion of reparations, which expanded the range of reparation requests to include less common claims. This approach was based on the idea that reparations should not return victims to the situation they were in before the events occurred, which was a situation marked by discrimination and violence.
- The support of each reparation claim with solid expert evidence documenting the different impacts of the violence on the victims and their communities.



The Sepur Zarco case produced a landmark judgment, a symbol of the tireless struggle of the survivors who seek to leave the past behind, and build a better future for their community. The challenge at this stage in implementing “transformative reparations” is to translate them into specific actions, while building the expertise and capacity of the competent authorities. **The creation of a “reparations monitoring committee” made up of various stakeholders is an important step forward.**



## 7. CONSOLIDATING PROGRESS

The participants stressed the importance of consolidating progress, bearing in mind that favourable decisions may not be final until they are upheld on appeal. Even once reparations are awarded in a court judgment, lengthy and complex proceedings may be needed before the awarded measures are enforced and the reparation measures are implemented.

### Appeals

Most of the cases studied during the workshop were appealed, either by litigators, the prosecution, or the defendant. At times, the appeal or review phase presents an opportunity to raise arguments that include international standards, which may be more difficult to raise at trial. On other occasions, however, depending on the context, there is a greater risk for political interference when the case is before a higher court.

In this sense, the **Maya Ixil Genocide** case in Guatemala against the former dictator Ríos Montt and a co-accused showed how a victim-friendly trial judgment can be overturned. Although a higher court overturned the judgment shortly after it was issued, the litigation process served the purpose of memorializing the victims and gave visibility to mass human rights violations against indigenous communities.

### The implementation of decisions and the enforcement of reparation measures

One of the main challenges expressed by civil society organisations representatives at the workshop concerned the implementation of court decisions. On the whole, participants found that there is an unsatisfactory level of the implementation of court-ordered reparation measures by the competent authorities.

Although procedures for implementing decisions vary depending on the context and on whether the cases are domestic (criminal, constitutional, or other) or international human rights cases, the challenges in achieving the enforcement of judgments are similar.

Despite constituting a State obligation, a **court order for reparations is often insufficient in itself for the competent authorities to assume their responsibility for its implementation**. The participants identified the need for political will as a key factor in ensuring the implementation of decisions. For this reason, both the victims and their legal representatives must take an active role in the implementation phase of a judgment.

Some of the strategies that have been explored by civil society actors include:

- Pushing for the creation of **compliance monitoring mechanisms** for reparation measures or for the enforcement of judgments.
- **Directly advocating** for dialogue spaces with public institutions, reminding them of their obligations and calling on them to comply with court rulings.
- **Raising awareness among different State actors** about the existence of reparation orders. Sometimes, litigators have launched coordination initiatives among different government agencies responsible for implementing reparations.
- **Coordinating among litigators working within the same jurisdiction** (e.g., different organisations litigating before the Inter-American system from the same country) to develop joint strategies and approaches. This coordination helps litigators to have a unified voice in their discussions with the State, to develop common understandings and strategies, and to have an overall picture of the State's compliance with court rulings.
- Strengthening **efforts to monitor** the implementation of decisions and provide ongoing **collective support** for cases at the enforcement stage.
- Coordinating with the State so that there is continuity and an **appropriate transition between the services frequently provided by**

civil society organisations to victims during the litigation process (e.g., psychological support) and the provision of such or similar services as part of the reparation measures implemented by the State.

- Making use of **media outlets** to raise the visibility of the enforcement phase, whether to applaud efforts to enforce the reparations measures or denounce their non-implementation.
- Working with the justice administration, civil society, victims' groups, and academic institutions to foster a **process of mainstreaming of international standards** and a greater understanding of their practical application at the national level.
- Participating in **constitutional or legislative reform processes** to seek the inclusion of provisions that facilitate the incorporation of international judgments into domestic law.
- Promoting the adoption of concrete **reparation measures** to avoid situations where there is the appearance of compliance without real change. This approach also ensures that reparation measures respond to the specific needs of victims and redress the specific harms against

them, rather than being worded in general terms.

For all of these initiatives, it is important for the primary role of the victims to be respected. The integration of a gender perspective also calls for women to be encouraged to participate in these initiatives.

Some litigators who brought cases before the Inter-American Court system stressed that the analysis of the impact of these litigation processes cannot be reduced to whether the reparations were enforced. In their experience, **proceedings before international mechanisms can operate as catalysts to advance accountability processes at the national level.** This can be so even when these initiatives are technically not presented as measures to implement international judgments. In addition, before and after judgments are issued, there are processes taking place to establish social and institutional truths and to recognise the suffering of the victims. Finally, it should not be overlooked that **obtaining a favourable verdict may in itself represent a form of reparation for victims.** It is a recognition of the dignity of the individual and a realization of his or her right to the truth. The Inter-American Court has played an important role in offering this recognition to many victims whose stories had not been heard or believed by national authorities.

## EL SALVADOR: EL MOZOTE CASE



In December 1981, the Salvadoran army carried out an operation in the north of the Department of Morazán, in which a series of massacres took place. Between 1,000 and 2,000 military personnel were deployed to search for a suspected counter-insurgency training camp. Soldiers entered villages, burned houses and animals, separated women and children from the men and executed them, resulting in the murder of around 1,000 people, almost half of whom were children. The army justified its violent operations and systematic violations of human rights as part of its efforts to suppress the guerrillas.



After El Salvador passed the 1993 General Amnesty Law for the Consolidation of Peace, no investigation was conducted into these events and no one was brought to justice for these crimes. The case came before the Inter-American Court of Human Rights in March 2011. The Court issued a verdict **declaring the State of El Salvador responsible for the human rights violations perpetrated by the Salvadoran armed forces in El Mozote**, in 2012. The Court also indicated that the approved Amnesty Law may be an obstacle to investigating the facts of the massacre and punishing those responsible.



The case currently remains at the enforcement stage, and the Inter-American Court has issued several rulings relating to compliance monitoring, and has conducted an on-site monitoring visit. **While the State of El Salvador has partially complied with some of the measures issued in 2012, no one has yet been brought to justice for the serious crimes committed in El Mozote.**

Given the length of time that has passed since its initial ruling, the Court could now take the opportunity to introduce a gender perspective and an intersectional approach in the next steps of the process relating to supervision of compliance and execution of the remaining reparation measures.

## 8. CONCLUSIONS

Civil society organisations working to advance women's rights have increasingly adopted strategic litigation as an integral part of their institutional work. Other human rights groups are also increasingly bringing cases that integrate a gender perspective and an intersectional approach. The progress made in strategic litigation of cases involving sexual and gender-based violence, in particular those where women are victims, is noteworthy. However, this progress marks only the beginning of a movement that still has many hurdles to overcome.

Civil society has taken a lead in promoting gender integration in judicial proceedings involving gender-based violence. Over the years, these efforts have been reflected in reforms to the practices of justice systems. **Although there are notable differences between national contexts, and despite the persistence of a patriarchal ideology that perpetuates impunity in cases of gender-based violence in the region, on the whole, there have**

**been noticeable improvements in the protection systems that are in place to respond to these cases.**

The workshop revealed the diversity in the developments and challenges in strategic litigation in the Latin American region. In Argentina, for instance, crimes of sexual violence that were committed during the dictatorship have been prosecuted as stand-alone offences in at least 30 cases since 2010.<sup>22</sup> In Colombia, the international community has its eyes on the work of the JEP, which has already offered indications of its potential to set new standards for gender integration in transitional justice processes. Mexico and Chile are beginning to reap the fruits of years of litigation and social mobilization, although many obstacles remain. In Guatemala, the significant advances that have been made in landmark cases, such as Molina Theissen<sup>23</sup> and Sepur Zarco, stand in contrast with less satisfactory litigation processes, such as the Maya Ixil Genocide<sup>24</sup> or Maya Achi cases. In Peru, there has been limited

22 These cases concern approximately 13% of the verdicts handed down for crimes against humanity committed during the Argentinean dictatorship.

23 In September 1981, during the internal armed conflict in Guatemala, members of the army arrested Emma Guadalupe Molina Theissen and illegally held her at a military base for her political affiliations. During her detention, she was tortured and raped, until she managed to escape. After her escape, members of the army abducted her brother Marco Antonio, 14 years old, from the family's home. That was the last his family heard from him. In 2004, the Molina Theissen family brought the case before the Inter-American Court of Human Rights, which declared the Guatemalan State responsible for the enforced disappearance of Marco Antonio. Among others measures, it ordered the State to investigate and punish the perpetrators of the victim's disappearance, as well as those who ordered the crimes, and to compensate the family. In 2016, when the case was brought to trial in Guatemala, the Public Prosecutor's Office, acting upon request by Emma Guadalupe, filed charges against the defendants for the sexual violence she suffered in captivity, in addition to the charges for the enforced disappearance of her brother. In 2018, four of the five defendants—including two former senior army officers—were convicted of these offences.

24 The accused included the former *de facto* President General Efraín Ríos Montt, who was convicted of genocide and crimes against the duties of humanity in 2013, and his former chief of military intelligence, José Mauricio Rodríguez Sánchez. The verdict was, however, overturned by the Constitutional Court a few days later after the defence filed an application for protection (*amparo*). The case was later retried but Ríos Montt died in 2018 before the court could reach a verdict. Rodríguez Sánchez was acquitted at both the first trial in 2013 and the second trial in 2018, following a split decision.

progress in a context of widespread impunity; however, the latest developments in the Forced Sterilizations case remain a cause for hope. At the other end of the spectrum, Venezuela and El Salvador provide a less promising outlook and impunity remains the norm. The El Mozote case has been met with dismay over the failure of the State to comply with reparation measures ordered by the Inter-American Court of Human Rights.

Regardless of the many challenges that remain, gender-based violence is now becoming more visible and there is **growing social rejection of the various expressions of this violence**. As a result, victims increasingly see themselves as rights holders and are more frequently deciding to initiate legal proceedings to denounce the violence they have suffered.

**Coalition work** has been key to achieving these objectives. Civil society organisations, victims' groups, feminist movements, national and international judicial authorities, public prosecution services, academic institutions, the media, the international community, and donors have made significant contributions towards these advances. Noteworthy initiatives include ReLeG, which serves as a platform in the Latin American region for the exchange of experiences and mutual collaboration in the eradication of all forms of gender-based violence and discrimination, including discrimination based on sexual orientation and gender identity.

The participants emphasized that **victims' groups have played a key role** in criminal proceedings where the legal systems allow victims to actively participate (e.g., by allowing them to request evidentiary measures, file motions and introduce charges). Acting as civil parties, victims have contributed to achieving significant progress on the recognition of their substantive rights, as well as with regard to procedural aspects.

The workshop highlighted how civil society organisations, lawyers, and public prosecution services have found **creative solutions** to overcome some of the many challenges that they face. As mentioned in this report, some of these initiatives include:

- A growing number of cases in which the victims are women have been presented as taking place in a **continuum of discrimination and violence**, in order to highlight the structural causes that facilitate the violence and the need for transformative reparation measures.
- New practices and standards of **evidence-gathering** have been developed that incorporate a multidisciplinary perspective, reducing the need for evidence from victims and the reliance on medical or forensic evidence.
- In cases where **sexual violence crimes** have been **charged as international crimes**, they have been placed within the context of mass human rights violations in which they occurred, as such contextualization helps to corroborate the testimonies of the victims.
- Legal practitioners have gradually moved away from the notion that sexual violence crimes can only be attributed to the physical perpetrators. As a result, an increasing number of cases have shown that it is possible to **establish the criminal responsibility of other individuals** for their contributions to the crimes, including indirect perpetrators and the commanders of the physical perpetrators.
- Various legal proceedings have been initiated against judges for perpetuating or allowing misogynistic and racist attitudes during court proceedings. With the growing **scrutiny of the practices of judicial operators**, protection systems are progressively becoming stronger and safeguards for victims are improving.
- Victims have mobilized public support through the media, and international support through the **development of partnerships** with international donors and by bringing cases before the Inter-American and United Nations human rights systems. These initiatives have helped to compensate for the disparities between their own resources and those of the defendants, who at times have the support of public authorities (especially in contexts where there is no strong political will to fight impunity).



- Victims' lack of confidence in the institutional framework has been addressed through the design of **holistic support strategies**, which have responded to victims' legal, medical, psychosocial, economic and protection needs. These support strategies are maintained over time, including before, during and after the litigation proceedings.
- Civil society organisations have incorporated new forms of intervention aimed at **bridging the gap between applicable standards** (whether national legislation or policies, or international standards) **and the reality of victims**. These interventions include strengthening the capacities of the judiciary, creating spaces for conversation and dialogue between different stakeholders, involving an increasing number of actors, such as academic institutions, and raising awareness and visibility of the applicable standards.

These are only a sample of the various practices and strategies that the participants at the workshop have developed to combat the multiple obstacles they face. Strategic litigation has shown the potential for bringing about important structural and social changes, and for providing justice to individuals, communities and marginalized groups in society. Latin American civil society organisations and legal practitioners have a strong commitment to gender equality and an admirable capacity to develop innovative and creative legal arguments, strategies and techniques. Given past successes, and the advanced technical and legal expertise of civil society organisations and legal practitioners in the region, strategic litigation is expected to continue playing a fundamental role in advancing human rights and in the fight against impunity for gender-based violence.

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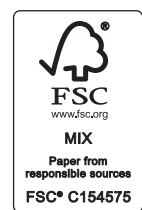
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Office of the United Nations High Commissioner  
for Human Rights (OHCHR)

Palais des Nations  
CH 1211 Geneva 10 – Switzerland  
Telephone: +41 22 917 90 00  
Email: [infodesk@ohchr.org](mailto:infodesk@ohchr.org)  
[www.ohchr.org](http://www.ohchr.org)