

# A legal obligation under international law to guarantee access to abortion services in contexts of armed conflict? An analysis of the case of Colombia

**Juliana Laguna Trujillo**

Juliana Laguna Trujillo is a Colombian lawyer. She holds a master of advanced studies in transitional justice, human rights and the rule of law at the Geneva Academy of International Humanitarian Law and Human Rights.

## Abstract

*This article discusses the existence of an international obligation for the State of Colombia to guarantee access to abortion services for women and girls who are victims of conflict-related sexual violence in the context of the Colombian armed conflict. By examining international humanitarian law rules from an international human rights law lens, it sets out the interdependence between both frameworks from reproductive health and human rights perspectives. Furthermore, the article provides considerations on the recognition and redress of these violations in the transitional justice scenario in Colombia.*

**Keywords:** forced pregnancy, abortion, reproductive violence, reproductive rights, international humanitarian law, international human rights law, transitional justice, victims' rights, reparations.

: : : : : :

## Introduction

For more than half a century of armed conflict in Colombia, sexual and reproductive violence has been widespread among all armed actors, including guerrillas, paramilitary groups and governmental forces.<sup>1</sup> Although armed actors have used sexual and gender-based violence against the entire civilian population, the most affected and impacted demographic groups are women, girls and LGBTQ+ people.<sup>2</sup> One of the most understudied impacts of sexual violence in armed conflict, and a form of reproductive violence in themselves, are forced pregnancies and consequently forced motherhood resulting from the lack of access to sexual and reproductive health services, including abortion.<sup>3</sup> Furthermore, the individual and collective impacts on women and girls who do not have the option to terminate their pregnancies if they want to, and the children born as a result, have yet to be comprehensively studied.

Between 1958 and 2020, 15,229 cases of sexual violence in the Colombian armed conflict had been documented according to data from the Memory and Conflict Observatory.<sup>4</sup> Notably, between 1997 and 2005 – which corresponds to the time period of the expansion and consolidation of the political and territorial project of paramilitarism in the country<sup>5</sup> – 8,242 cases of sexual violence were reported, representing an increase in that specific form of violence from armed actors during this period.<sup>6</sup> The Victim's Unit – the governmental institution in charge of the national administrative reparations programme – has reported that more than 30,000 persons have registered in the Victim's Registry as victims of crimes against their physical and sexual integrity, which includes acts of rape,

- 1 Centro Nacional de Memoria Histórica, *La guerra inscrita en el cuerpo: Informe nacional de violencia sexual en el conflicto armado*, Bogotá, 2017.
- 2 *Ibid.*, p. 502; Campaña Violaciones y Otras Violencias: Saquen mi Cuerpo de la Guerra, *Encuesta de prevalencia de violencia sexual en contra de las mujeres en el contexto del conflicto armado Colombiano 2010–2015*, Bogotá, 2017.
- 3 Research on abortion and armed conflict in Colombia has mainly addressed three angles: (1) investigations focused on the relation between the weak presence of the State, the presence of armed actors and the consequent limited access to health services, which includes abortion services (see Médecins Sans Frontières, *Acceder a la salud es acceder a la vida: 977 voces*, Bogotá, 2010; Médecins Sans Frontières, *Aborto no seguro, mujeres en riesgo*, Bogotá, 2019); (2) investigations that have documented the barriers that hinder and, in some cases, prevent access to abortion services for women and girls in the country, and can disproportionately impact women and girls from conflict-affected areas (see Nina Chaparro, Annika Dalén, Diana Esther Guzmán and Margarita Martínez Osorio, *El ejercicio de la interrupción voluntaria del embarazo en el marco del conflicto armado*, Dejusticia, Bogotá, 2015; La Mesa por la Vida y la Salud de las Mujeres, *Barreras de acceso a la interrupción voluntaria del embarazo en Colombia*, Bogotá, 2017); and (3) emerging research, mainly from civil society organizations, on the forms of reproductive violence that have occurred in the context of the armed conflict in Colombia and their impacts on the victims (see Women's Link Worldwide, *Una violencia sin nombre: Violencia reproductiva en el conflicto armado Colombiano*, Bogotá, 2020; Center for Reproductive Rights, *Una radiografía sobre la violencia reproductiva*, Bogotá, 2020).
- 4 Observatorio de Memoria y Conflicto, “El conflicto armado en cifras: Violencia sexual”, available at: <http://micrositios.centrodememoriahistorica.gov.co/observatorio/portal-de-datos/el-conflicto-en-cifras/violencia-sexual/> (all internet references were accessed in November 2021).
- 5 Centro Nacional de Memoria Histórica, above note 1, p. 476.
- 6 Centro Nacional de Memoria Histórica, *Memoria histórica con víctimas de violencia sexual: Aproximación conceptual y metodológica*, Bogotá, 2018, p. 44.

forced pregnancy, forced abortion, sexual slavery and sexual abuse, among others.<sup>7</sup> Although unwanted pregnancies can be an outcome of rape, official records establish that by 2016 only 533 persons had been registered as children born as an outcome of conflict-related sexual violence.<sup>8</sup>

These numbers suggest that sexual violence and other forms of gender-based violence have been documented, prevalent practices in the context of the armed conflict in Colombia. While these figures might not represent the reality of the phenomenon due to underreporting issues (which will not be addressed in this paper), they reflect the fact that women and girls in the armed conflict in Colombia have been subject in a widespread manner to sexual and gender-based violence. Unwanted pregnancies have been one of the impacts and consequences for survivors.

Access to abortion services in Colombia was criminalized entirely until 2006. Then, a Constitutional Court ruling lifted the total ban on abortion under three circumstances: (1) when the continuation of the pregnancy poses a risk for the life or the health of the woman; (2) when the pregnancy is a result of sexual violence; and (3) when it is determined that there exists a foetal malformation that makes life outside the womb non-viable.<sup>9</sup> However, today, years after access to legal abortion services was made possible under these three limited circumstances, women and girls, especially those living in conflict-affected areas, continue to face multiple barriers preventing their access to this health service.<sup>10</sup>

Before 2006, women and girls who suffered sexual violence in the context of the armed conflict, and became pregnant as a result, did not have the right to access legal and safe abortion services if they so desired. What should have been the role of the State to protect and guarantee the rights of women in this context? How can the impacts of the lack of reproductive autonomy be addressed in a context where abortion services were completely criminalized? This article analyzes whether there was an international obligation under international humanitarian law (IHL) and international human rights law (IHRL) for the State of Colombia to ensure access to sexual and reproductive rights, including abortion services, for women and girls, in the context of the armed conflict before 2006. It argues that the State of Colombia, given the context of widespread conflict-related sexual violence, had, at least as a minimum, the duty to guarantee access to abortion services for women and girls affected by conflict-related rape. This analysis will allow the exploration of the opportunities for redress in Colombia under the Victims and Land Restitution Law and the transitional justice mechanisms created by the 2016 Peace Agreement for victims of forced pregnancy before 2006.

While this article focuses on Colombia, it contributes to broader conversations on the study of sexual and reproductive violence and reproductive

7 Unidad de Víctimas, *Atención y reparación para las mujeres víctimas de violencia sexual*, 24 May 2020, available at: <https://tinyurl.com/8fx4tkx9>.

8 Tatiana Sánchez Parra, “The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia”, *International Journal of Transitional Justice*, Vol. 12, No. 1, 2018, p. 46.

9 Colombian Constitutional Court, Judgment C-355-2006 (Jaime Araujo, Clara Inés Vargas).

10 N. Chaparro *et al.*, above note 3, p. 31.

health-care services in humanitarian and armed conflict contexts, by focusing on the obligation that States bear. Furthermore, the analysis links to larger debates in the field of transitional justice and reparations for victims of gender-based violence acts. Finally, the article contributes to discussions on the impacts of conflict-related sexual violence from a reproductive autonomy lens and the opportunities that transitional justice mechanisms offer for redress.

## Some considerations on reproductive violence and forced pregnancy

In contexts of armed conflict, repression or war, women, girls and historically discriminated groups have long suffered violations linked to their reproductive capacity and bodily autonomy.<sup>11</sup> In Colombia, reproductive violence has been a widespread practice by which all armed groups have targeted women, girls and LGBTQ+ people. Violations have included forced contraception and forced abortions as a policy within the ranks of armed groups, forced pregnancies as a consequence of conflict-related sexual violence by armed groups, and lack of access to emergency contraception and safe abortion services for victims of rape by armed actors.<sup>12</sup>

Forced pregnancy as a form of gender-based violence and an international crime was a practice documented in the conflict in the former Yugoslavia and in the Rwandan Genocide. Even though forced pregnancy was not included in the list of crimes under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), these acts were explicitly mentioned in some rulings. The ICTY recognized the existence of rape camps that “were specifically devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often interned until it was too late for them to undergo an abortion”.<sup>13</sup> The ICTR acknowledged that the deliberate impregnation of a woman by a man of another group, with the

11 Examples include the eugenics policy during Nazi Germany, under which between 70,000 and 350,000 persons were forcibly sterilized (see Stephen B. Sætz Marian Van Court and Mark W. Henshaw, “Eugenics and the Third Reich”, *The Eugenics Bulletin*, Winter 1985, available at: [www.eugenics.net/papers/3rdreich.html](http://www.eugenics.net/papers/3rdreich.html); Dieneke De Vos, “Can the ICC Prosecute Forced Contraception?”, *European University Institute Blog*, 14 March 2016, available at: <https://me.eui.eu/dieneke-de-vos/blog/can-the-icc-prosecute-forced-contraception/>), and the practices of forced pregnancies and abortions against Yazidi women and girls in the context of the conflict with the so-called Islamic State (see *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups*, UN Doc. A/HRC/28/18, 27 March 2015, paras 37, 39, 41).

12 Centro Nacional de Memoria Histórica, above note 1; Center for Reproductive Rights, above note 3; Women’s Link Worldwide, above note 3; Human Rights Watch, “*Aprenderás a no llorar*”: *Niños combatientes en Colombia*, New York, 2003, available at: [www.hrw.org/reports/colombia\\_ninos.pdf](http://www.hrw.org/reports/colombia_ninos.pdf); Women’s Link Worldwide, “Las mujeres y niñas víctimas de violencia sexual en las filas de grupos armados ilegales deben ser consideradas víctimas del conflicto en Colombia y tienen derecho a la reparación”, press release, 12 December 2019, available at: <https://tinyurl.com/yb9mw4fr>.

13 ICTY. *The Prosecutor v. Karadzic and Mladic*, Case Nos IT-95-5-R61, IT-95-18-R61, Review of Indictment Pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence, 11 July 1996, para. 64.

intention of preventing births within her group, could amount to the crime of genocide.<sup>14</sup>

The Rome Statute of the International Criminal Court (ICC) was the first international instrument that expressly included forced pregnancy as a crime against humanity and as a war crime.<sup>15</sup> Considerations on the effectiveness of the definition included in the Rome Statute, as well as the developments foregrounded by the ICTY and the ICTR, go beyond the scope of this article. However, acknowledging that the development of the term has occurred primarily within international criminal law is important to understanding the limitations that such a definition might bring.

For the purposes of this paper, forced pregnancy will be understood under the category of reproductive violence as a distinct category from sexual violence that has been understudied by international law.<sup>16</sup> By referring to forced pregnancy as a form of reproductive violence, the harms are not narrowly limited to impacts on sexual autonomy, but also include the individual's freedom to determine their reproductive choices – that is, whether and in what circumstances to reproduce.<sup>17</sup> As such, forced pregnancy describes the violation of reproductive autonomy that occurs when a person is forced to continue a pregnancy by any means of coercion, or when abortion services are denied when pregnancy is followed by rape.<sup>18</sup>

## **An obligation for the State of Colombia to provide abortion services in the context of the armed conflict before 2006?**

This section will set the IHL and IHRL standards that provide the basis for arguing that in the context of the long-lasting armed conflict in Colombia, the State of Colombia had an obligation to provide safe abortion services for victims of conflict-related sexual violence. Additionally, it will explore whether the existence of this obligation, derived from both IHL rules and IHRL developments at the international level, was applicable for the State of Colombia before the decriminalization of abortion

14 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 507.

15 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, (entered into force 1 July 2002) (Rome Statute), Arts (7)(1)(g), 8(2)(b)(xxii). Per the ICC *Elements of Crimes*, each permutation of the crime requires that “[t]he perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law” (pp. 9, 29). An analysis of whether this is an ideal formulation is beyond the scope of this article.

16 Rosemary Gray, “The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective”, *Journal of International Criminal Justice*, Vol. 15, No. 5, 2017.

17 Kristen Boon, “Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent”, *Columbia Human Rights Law Review*, Vol. 32, No. 3, 2001.

18 Rebecca Cook, Bernard M. Dickens and Laura E. Bliss, “International Developments in Abortion Law from 1988 to 1998”, *American Journal of Public Health*, Vol. 89, No. 4, 1999, pp. 580–581; International Federation for Human Rights, *Sexual and Gender-Based Violence: A Glossary from A to Z*, Paris, 2020, p. 79.

in 2006. The analysis will focus on two factors: the existence of the obligation before the Constitutional Court decriminalized abortion in 2006, and the persistence of an obligation to provide abortion services that is still unfulfilled by the State after the ruling of the Constitutional Court and the normative developments at the national and international level.

## Brief considerations on sources of international law

Article 38 of the Statute of the International Court of Justice (ICJ) is the authoritative referent regarding sources of international law.<sup>19</sup> Under this provision, treaties and customary international law are the principal sources of international law. However, resolutions from international bodies, principles of international law and unilateral acts by States are also legitimate but secondary sources of international law.<sup>20</sup>

The existence, today, of a corpus of international law regulating the treatment and rights of women in contexts of armed conflict is a reality that emanates from the proliferation of norms in recent years.<sup>21</sup> Still, the overlapping between legal frameworks can generate “uncertainty around who is bound by any given legal or normative instrument and the potential for self-serving selectivity by states and other parties to the conflict in their compliance with relevant norms and obligations”.<sup>22</sup>

IHL and IHRL, the regimes which will be discussed in this article, are composed of normative and legal obligations that have different binding value for States at the international level. IHL was the first framework to emerge within international law and finds its sources in both treaty and customary law; it is thus legally binding for all States party to the Geneva Conventions. The State of Colombia is a State party to the four Geneva Conventions since 1961, to Additional Protocol I (AP I) since 1993, and to Additional Protocol II (AP II) since 1995.

IHRL obligations derive from universal and regional treaties, treaty monitoring bodies and further treaties establishing enforcement procedures.<sup>23</sup> IHRL’s foundational source is the 1948 Universal Declaration of Human Rights, whose content was translated into treaty obligations with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In IHRL, the Convention to Eliminate all Forms of Discrimination Against Women (CEDAW) creates obligations for States regarding the treatment of women. There are currently ten

19 Jan Klebbbers, *International Law*, 2nd ed. Cambridge University Press, Cambridge, 2018, pp. 24–27; Hugh Thirlway, *The Sources of International Law*, Oxford University Press, Oxford, 2014, p. 2.

20 Samantha Besson, “Theorizing the Sources of International Law”, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 167.

21 Catherine O’Rourke, *Women’s Rights in Armed Conflict under International Law*, Cambridge University Press, Cambridge, 2020, p. 6.

22 *Ibid.*, p. 4.

23 *Ibid.*, p. 49.

human rights treaty monitoring bodies, which supervise the States Parties' compliance with their treaty obligations, settle disputes and provide interpretation on the scope, meaning and content of human rights obligations.<sup>24</sup>

The State of Colombia is a State party to the ICCPR,<sup>25</sup> the ICESCR,<sup>26</sup> the CEDAW,<sup>27</sup> the Optional Protocol to the CEDAW,<sup>28</sup> the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>29</sup> the Convention on the Rights of the Child,<sup>30</sup> the Inter-American Convention on Human Rights<sup>31</sup> and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).<sup>32</sup> For some of these treaties, the State is required to report periodically to the treaty monitoring bodies, and to the Human Rights Council regarding the Universal Periodic Review. Colombia has also accepted the jurisdiction of the Inter-American Court of Human Rights (IACtHR).

The development of international standards on the protection and fulfilment of women's rights, including sexual and reproductive rights, has been achieved mainly through soft-law instruments, including human rights treaty bodies' general commentaries, concluding observations and other expert pronouncements such as those of the Special Rapporteurs. As such, these standards are non-legally binding for States. However, they interpret and add detail to the rights and obligations contained in the respective human right treaties, increase the density of international practice of the interpretation of the treaties, and contribute to the emergence of customary international legal norms.<sup>33</sup>

Soft-law instruments remain a significant auxiliary source of normative value. They raise awareness about human rights issues and may influence the conduct of States while developing jurisprudence concerning the scope and content of international human rights obligations.<sup>34</sup> Moreover, soft-law developments by human rights bodies at the international level can have a considerable influence on national legal orders, which improves the practical implementation of rights.

Furthermore, Article 31 of the Vienna Convention on the Law of Treaties, which establishes the general rules of interpretation of treaties, offers guidance on soft law's value in the fulfilment of obligations emanating from treaties. As a

24 Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, Cambridge, 2012, p. 415.

25 The State of Colombia ratified this treaty on 29 October 1969.

26 The State of Colombia ratified this treaty on 29 October 1969.

27 The State of Colombia ratified this treaty on 19 January 1982.

28 The State of Colombia ratified the Optional Protocol on 23 January 2007.

29 The State of Colombia ratified this treaty on 8 December 1987.

30 The State of Colombia ratified this treaty on 28 January 1991.

31 The State of Colombia ratified this treaty on 28 May 1973.

32 The State of Colombia ratified this treaty on 10 March 1996.

33 Dinah Shelton, "Commentary and Conclusions", in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford, 2000, p. 451; Helen Keller and Leena Grover, "General Comments of the Human Rights Committee and Their Legitimacy", in H. Keller and G. Ulfstein (eds), above note 24, p. 129.

34 H. Keller and G. Ulfstein (eds), above note 24, p. 415.

minimum, good-faith interpretations of human rights treaties as required by Article 31 oblige States Parties to consider the commentaries carried out by human rights treaty bodies, as they are a product of an authoritative body established by the States Parties themselves to interpret the treaty and to monitor and promote compliance of it.<sup>35</sup>

Feminist scholars have criticized the fact that women have historically been excluded from spaces of international law-making due to a lack of representation in State leadership, and to structural discrimination.<sup>36</sup> A feminist critical perspective on international law identifies how many of the developments on women's rights at the international level were achieved through soft-law instruments; this has created a "compliance paradox",<sup>37</sup> meaning that even though the development and advancement of the recognition of women's rights – primarily through soft-law instruments – has been made in more inclusive spaces with broader participation from civil society organizations and women's groups, it has moved away from the formal process of international law-making,<sup>38</sup> thus generating a more robust soft-law standards system but without the hard-law nature that obliges States towards compliance.

### *The "constitutionality block" in Colombia and its relation to the sources of international law*

The Constitution of Colombia of 1991 includes explicit provisions that make direct reference to IHRL and IHL, which have been interpreted broadly by the Constitutional Court.<sup>39</sup> These provisions have been applied by the Constitutional Court as sufficient grounds for incorporating binding IHRL and IHL provisions in its legal decisions.<sup>40</sup> Additionally, the application of IHRL and IHL has been reinforced by the jurisprudential concept of the "constitutionality block". The Court has held that the constitutional judicial review of the situations under its scrutiny must be carried out not only in reference to the Constitution itself but also in relation to

those norms and principles that, without formally appearing in the articles of the constitutional text, are used as parameters of the control of constitutionality of the laws, since they have been normatively integrated into the Constitution, by various means and by mandate of the Constitution itself.<sup>41</sup>

35 H. Keller and L. Grover, above note 33, p. 129.

36 Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law", *American Journal of International Law*, Vol. 85, No. 4, 1991; C. O'Rourke, above note 21, p. 145.

37 C. O'Rourke, above note 21, p. 19.

38 *Ibid.*, p. 19; Hillary Charlesworth, "The Unbearable Lightness of Customary International Law", *American Society of International Law Proceedings*, Vol. 92, 1998, p. 44; Hillary Charlesworth and Christine Chinkin, *An Alien's Review of Women and Armed Conflict*, Regnet Working Paper No. 73, 2015.

39 See Colombian Political Constitution of 1991, Arts 9, 44, 93, 94, 214, available at: [www.constituteproject.org/constitution/Colombia\\_2015.pdf?lang=en](http://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en).

40 Manuel José Cepeda, "The Internationalization of Constitutional Law: A Note on the Colombian Case", *Verfassung und Recht in Übersee*, Vol. 41, No. 1, 2008, p. 62.

41 Colombian Constitutional Court, Judgments C-225-1995 (Alejandro Martínez), C-578-1995 (Eduardo Cifuentes), C-358-1997 (Eduardo Cifuentes), C-191-1998 (Eduardo Cifuentes).



Through the constitutionality block, the State's compliance with provisions of human rights treaties to which Colombia is a party is mandatory and cannot be limited in states of emergency.<sup>42</sup>

Regarding IHL norms, the Constitutional Court has held that

regardless of whether they are peremptory norms or not, all the provisions of IHL – both substantial and procedural, both conventional and customary in origin or as general principles of law – are binding upon the Colombian State as part of the constitutionality block. They too are, consequently, a parameter of necessary reference for the constitutional judge in carrying out their judicial review.<sup>43</sup>

The Constitutional Court has expressed that IHRL treaties which entered the constitutionality block were binding even when the Constitution of 1886 was in force.<sup>44</sup> In addition, the Court has recognized that the case law of international human rights bodies, which have the function of interpreting IHRL treaties, constitute a relevant interpretation criterion for establishing the meaning and scope of constitutional norms regarding fundamental rights.<sup>45</sup> In this sense, in its judicial review function, the Constitutional Court uses the relevant treaties that are part of the constitutionality block and the relevant interpretations that international human rights bodies have made concerning the scope of protection of certain human rights.<sup>46</sup>

The notion of the constitutionality block in Colombia is relevant for this article when discussing the relationship between sources of international law and the incorporation of international law into the domestic legal system. Indeed, at the domestic level, the State bears the burden of complying with international obligations that it has consented to be bound by.<sup>47</sup> Regarding Article 38 of the ICJ Statute, the Constitutional Court has stated that both international customary law and the general principles of law have the same position in normative hierarchy in the Colombian legal framework as international treaties, notwithstanding that customary international law can establish human rights and IHL rules. As such, they become part of the constitutionality block.<sup>48</sup>

42 Colombian Constitutional Court, Judgments C-582-1999 (Alejandro Martínez), C-225-1995; Rodrigo Uprimny Yepes, *El bloque de constitucionalidad en Colombia: Un análisis jurisprudencial y un ensayo de sistematización doctrinal*, Dejusticia, 12 December 2005, p. 16.

43 Colombian Constitutional Court, Judgment C-291-2007 (Manuel José Cepeda) (author's translation).

44 Colombian Constitutional Court, Judgment T-477-1995 (Alejandro Martínez).

45 Colombian Constitutional Court, Judgment C-010-2000 (Alejandro Martínez).

46 Judgments of the Constitutional Court where the recommendations of the human rights treaty monitoring committees have been used include Judgments T-597-1992 (Ciro Angarita), T-568-1999 (Carlos Gaviria), T-1104-2000 (Vladimiro Naranjo), T-568-2001 (Eduardo Montealegre), T-595-2002 (Manuel José Cepeda), T-512-2003 (Eduardo Montealegre), T-884-2003 (Jaime Córdoba), T-951-2003 (Álvaro Tafur), T-218-2004 (Eduardo Montealegre), T-221-2004 (Eduardo Montealegre), T-440-2004 (Jaime Córdoba), T-741-2004 (Manuel José Cepeda), T-826-2004 (Rodrigo Uprimny), T-827-2004 (Rodrigo Uprimny), T-851-2004 (Manuel José Cepeda), T-884-2004 (Humberto Sierra), T-907-2004 (Manuel José Cepeda), T-919-04 (Marco Gerardo Monroy), T-1096-2004 (Manuel José Cepeda) and C-507-2004 (Manuel José Cepeda).

47 Colombian Constitutional Court, Judgments T-568-1999 (Carlos Gaviria), C-067-2003 (Marco Gerardo Monroy).

48 Colombian Constitutional Court, Judgment C-1189-2000 (Carlos Gaviria).

## The existence of an obligation for the State of Colombia to provide abortion services in the context of the armed conflict under IHL and IHRL

The relationship between IHL and IHRL has been a matter of debate among practitioners and scholars.<sup>49</sup> Although IHL and IHRL share common principles around the protection of the human person, they are distinct legal frameworks. One of the main differences lies in the temporal scope of their application. While IHL applies only in times of armed conflict, IHRL applies at all times. Another fundamental distinction concerns the bearers of obligations. IHL must be complied with by the parties to the conflict, which may involve States but also non-State armed groups, while IHRL's primary addressee is the State.<sup>50</sup> However, and fundamentally, the ICJ,<sup>51</sup> statements from the International Committee of the Red Cross (ICRC)<sup>52</sup> and academic literature,<sup>53</sup> *inter alia*, support the view that human rights law and humanitarian law both apply in contexts of armed conflict.

Discussions today centre around how IHL and IHRL can apply coherently and comprehensively in situations of armed conflict.<sup>54</sup> Some literature considers the application of the *lex specialis* as a way of resolving the conflicts between IHL and IHRL,<sup>55</sup> while others advocate the concept of systemic integration.<sup>56</sup> Regarding

- 49 Noam Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 860, 2005; Françoise J. Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body", *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Émilie Max, *Implementing International Humanitarian Law through Human Rights Mechanisms: Opportunity or Utopia?*, Geneva Academy of International Humanitarian Law and Human Rights Working Paper Series, 2019; Robert Kolb, "Human Rights and Humanitarian Law", *Max Planck Encyclopedia of Public International Law*, March 2013.
- 50 N. Lubell, above note 49; F. J. Hampson, above note 49; É. Max, above note 49; R. Kolb, above note 49; Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross*, Vol. 90, No. 871, 2008.
- 51 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2014, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2015, para. 2016.
- 52 ICRC, "IHL and Human Rights Law", 29 October 2010, available at: [www.icrc.org/en/document/ihl-human-rights-law](http://www.icrc.org/en/document/ihl-human-rights-law).
- 53 Marco Sassòli and Laura M. Olson, "The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Françoise J. Hampson and Daragh Murray, "ESIL-International Human Rights Law Symposium: Operationalising the Relationship between the Law of the Armed Conflict and International Human Rights Law", *EJIL: Talk!*, 31 February 2016, available at: [www.ejiltalk.org/esil-international-human-rights-law-symposium-operationalising-the-relationship-between-the-law-of-armed-conflict-and-international-human-rights-law/](http://www.ejiltalk.org/esil-international-human-rights-law-symposium-operationalising-the-relationship-between-the-law-of-armed-conflict-and-international-human-rights-law/).
- 54 C. Droege, above note 50, p. 502; Andrew Clapham, "The Complex Relationship between the Geneva Conventions and International Human Rights Law", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 729.
- 55 Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 54; Daragh Murray *et al.*, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016, p. 83.
- 56 Vienna Convention on the Law of Treaties, 28 May 1969 (entered into force 27 January 1980), Art. 31(2) (c); C. Droege, above note 50, p. 521; Jean D'Aspremont and Elodie Tranchez, "The Quest for a Non-

the interactions of both frameworks in relation to women's rights in conflict, the adequate protection that IHL provides to women depends on its relationship with, and simultaneous application of, IHRL.<sup>57</sup> As the development of women's rights under international law since the 1990s progressed, there has been a renewed feminist engagement with IHL, which has focused mainly on identifying the interactions between IHL and IHRL.<sup>58</sup> In that context, the ICRC and its role in the interpretation and operational implementation of IHL has played a substantial part in incorporating a gender perspective into women's situations in conflict.<sup>59</sup>

For this article, a complementarity approach will be applied to analyze the rules of IHL in the light of IHRL standards, starting from the consideration that IHL may be interpreted in light of IHRL following Article 31.3.c of the Vienna Convention on the Law of Treaties, which indicates that in interpreting a norm, "any relevant rules of international law applicable in the relations between parties" may be considered.

### *IHL rules applicable in non-international armed conflict that lay down the protection of women's and girls' reproductive health*

The rules of IHL have been codified in the four Geneva Conventions and their Additional Protocols, which deal with the protection of victims of armed conflicts, and the Hague Peace Conferences of 1899 and 1907, which regulate the means and methods of warfare.<sup>60</sup> Article 3 common to the four Geneva Conventions is the provision that regulates the situation of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those rendered *hors de combat*<sup>61</sup> in cases of non-international armed conflict (NIAC). Furthermore, AP II and the evolution of customary international law have established more precise elements regarding the scope of application of common Article 3.<sup>62</sup>

Colombia has experienced one of the longest NIACs in modern times.<sup>63</sup> Regarding the treaty and customary international law emanating from IHL, the

Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2013, pp. 235–238; Vito Todeschini, "The Impact of International Humanitarian Law on the Principle of Systemic Integration", *Journal of Conflict & Security Law*, Vol. 23, No. 3, 2018.

57 C. O' Rourke, above note 21, p. 107; ICRC, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, Geneva, October 2001, p. 213.

58 C. O' Rourke, above note 21, pp. 40–41.

59 ICRC, above note 57; ICRC, *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document*, Geneva, 2004.

60 R. Kolb, above note 49.

61 A. Clapham, P. Gaeta and M. Sassòli (eds), above note 54, p. 28.

62 *Ibid.*, p. 393.

63 Geneva Academy of International Humanitarian Law and Human Rights, "Colombia: Still Engulfed in a Series of Non-International Armed Conflicts Despite the 2016 Peace Agreement", *RULAC*, 4 December 2018, available at: [www.geneva-academy.ch/news/detail/175-colombia-still-engulfed-in-a-series-of-non-international-armed-conflicts-despite-the-2016-peace-agreement](http://www.geneva-academy.ch/news/detail/175-colombia-still-engulfed-in-a-series-of-non-international-armed-conflicts-despite-the-2016-peace-agreement).

Constitutional Court of Colombia has established since its early jurisprudence that the norms and principles under this body of law are automatically incorporated into the Constitution, and as such have a binding force for all parties to the conflict.<sup>64</sup>

The persons under the scope of protection of common Article 3 are “persons taking no active part in the hostilities”, which are “first and foremost the civilian population”.<sup>65</sup> The scope of common Article 3 also includes “members of armed forces who have laid down their arms and those place *hors de combat*”. Moreover, the cornerstone of the protection granted to those under the scope of application of common Article 3 lies in the obligation of humane treatment as laid down in paragraph 1. As established in the ICRC Commentary to common Article 3,

the meaning of humane treatment is context-specific and has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as his or her age, social, cultural religious or political background and past experiences.<sup>66</sup>

The ICRC indicates that the differentiated ways in which women, men, girls and boys are affected by armed conflict must be assessed in order to understand the notion of humane treatment under common Article 3. Thus, “sensitivity to the individual’s inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment”.<sup>67</sup>

Furthermore, common Article 3 emphasizes that the obligation of humane treatment is absolute and has no exceptions. Even though the application of the obligation – which can include, for example, the provision of adequate health care – might differ depending on the person’s and the armed conflict’s specific situation, the treatment must never be less than humane.<sup>68</sup>

Common Article 3 introduces the prohibition against adverse distinction by stating that persons under its protection must be treated humanely in all circumstances “without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”.<sup>69</sup> The ICRC has stated that the listed grounds prohibiting distinctive treatment are not exhaustive but are illustrative. For example, adverse distinction founded in grounds such as “age,

64 Colombian Constitutional Court, Judgments C-574-1992 (Ciro Angarita), C-088-1993 (Ciro Angarita), C-225-1995.

65 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 521, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>.

66 *Ibid.*, para. 553.

67 *Ibid.*, para. 553.

68 *Ibid.*, para. 560.

69 See also Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 2(1), which extends the prohibition against adverse distinction to the application of the Protocol as a whole. With respect to humane treatment “without any adverse distinction” of persons not or no longer taking a direct part in hostilities, see AP II, Art. 4(1).

state of health, level of education or family connections of a person protected under common Article 3 would therefore equally be prohibited”.<sup>70</sup> Article 2 of AP II states further prohibited grounds of adverse treatment.<sup>71</sup>

Common Article 3 does not prohibit non-adverse distinctions that are “justified by the substantively different situations and needs of persons protected under Common Article 3”.<sup>72</sup> Even though common Article 3 does not specify the possible grounds that justify differential treatment, the ICRC has indicated that a “person’s state of health, age or sex is traditionally recognised as justifying, and requiring, differential treatment”.<sup>73</sup> Furthermore, a non-adverse distinction can be justified in considerations regarding the social, cultural or political context in a society that establishes differentiated needs for men and women of different backgrounds and ages.<sup>74</sup>

The prohibited acts under common Article 3 are absolute and admit no exception.<sup>75</sup> Despite the lack of an explicit prohibition against sexual violence in the wording of common Article 3, the prohibition against rape under IHL is part of customary international law.<sup>76</sup> Moreover, the ICRC, drawing from other humanitarian rules<sup>77</sup> and the case law of international criminal tribunals,<sup>78</sup> understands that acts related to the reproductive functions of women and girls, such as forced pregnancy, forced sterilization and forced abortions, are included in the prohibition against sexual violence.<sup>79</sup>

From the above, we can see that the content and scope of the obligation of humane treatment and adverse distinction laid out in paragraph 1 of common Article 3 protects women who do not participate in hostilities from being subjected to inhumane treatment and from being discriminated against. One could contend that the prohibition against cruel treatment, torture and outrages upon personal dignity established in paragraphs 1(a) and 1(c) of common Article 3, connected to the obligation of humane treatment and non-discrimination, includes allowing access to comprehensive health services for women that have been subjected to conflict-related sexual violence, including reproductive health services. Furthermore, this obligation is complemented by the consideration by

70 ICRC Commentary on GC I, above note 65, para. 569.

71 AP II, Art. 3.

72 ICRC Commentary on GC I, above note 65, para. 575.

73 *Ibid.*, para. 577.

74 *Ibid.*, para. 578.

75 *Ibid.*, para. 582.

76 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 93, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

77 AP II, Art. (4)(2)(e); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 27; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 75(2)(b).

78 The Rome Statute, above note 15, Art. 8(2)(e)(vi), lists sexual slavery, forced pregnancy and enforced sterilization as war crimes.

79 ICRC Commentary on GC I, above note 65, para. 698.

human rights bodies that denying abortion services is a form of suffering that can amount to ill-treatment under IHRL, discussed subsequently.

With regard to paragraph 2 of common Article 3, which establishes a distinct obligation to care for the wounded and sick, it must be noted that the protection covers both members of armed forces and civilians.<sup>80</sup> To qualify as a wounded or sick person for the scope of protection of humanitarian law, a person must fulfil two conditions: they must need medical assistance or care, and they must refrain from any act of hostility.<sup>81</sup> With respect to the medical care that is owed to persons protected under common Article 3, the ICRC has recognized that “women, men, boys and girls of different ages and backgrounds can have different medical needs, be exposed to different risks hindering equal care, or face different social stigma connected to being wounded or sick”.<sup>82</sup> On the obligation to care for the wounded and the sick under common Article 3, it can be stated that victims of conflict-related sexual violence in a context of NIAC are owed medical care, which must also be accommodated to their needs, and this includes reproductive health services.

From the above considerations, it remains clear that while IHL does not explicitly refer to women’s and girls’ reproductive health, its core principles are based on the obligation to provide humane treatment to all persons under the scope of its protection. Furthermore, fulfilling this obligation includes refraining from any discriminatory treatment, ensuring the provision of medical treatment considering women’s specific needs, and completely prohibiting any cruel treatment and other acts against human dignity. Moreover, the ICRC has held that women’s individual situations must be considered when operationalizing such provisions.

### *IHRL standards that protect women’s and girls’ right to access reproductive health services, including abortion services, in armed conflicts*

Sexual and reproductive rights are not explicitly enunciated in most treaties.<sup>83</sup> However, the interpretations on the content and scope that human rights treaty monitoring bodies, international tribunals and national courts have made on the right to life, to health, to be free from cruel, inhumane treatment and torture, to privacy, and to non-discrimination, among others, have made clear that such treaties recognize and protect sexual and reproductive rights.<sup>84</sup>

80 *Ibid.*, para. 736.

81 *Ibid.*, para. 737.

82 *Ibid.*, para. 766.

83 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2nd Ordinary Session, 1 July 2003, Art. 14(2)(c), expresses that “States Parties shall take all appropriate measures to ... protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”.

84 Christina Zampas and Jaime M. Gher, “Abortion as a Human Right: International and Regional Standards”, *Human Rights Law Review*, Vol. 8, No. 2, 2008; Center for Reproductive Rights, *Ensuring*

Feminist advocacy for women’s human rights at the international level gained momentum in the 1990s, and significant developments regarding the recognition of sexual and reproductive rights advanced during this and subsequent decades.<sup>85</sup> Such developments have taken the form of general comments and recommendations from treaty monitoring bodies, and guidelines and recommendations from international human rights experts and civil society coalitions. However, these are considered soft law and can face resistance in their application by States. Nevertheless, they have been very relevant for advancing feminist agendas in relation to sexual and reproductive rights, and have been used by the Constitutional Court of Colombia as a relevant interpretation criterion for establishing the scope of fundamental rights protected by the Constitution.<sup>86</sup>

The International Conference on Population and Development (ICPD) has recognized that unsafe abortions are linked to maternal deaths or permanent injury to women.<sup>87</sup> Furthermore, States that subscribed to the 1995 Beijing Platform for Action—including Colombia—have committed to “reviewing laws containing punitive measures against women who have undergone illegal abortions”.<sup>88</sup> It was also in the declaration of the Beijing Platform that the situation of women in conflict was considered and forced pregnancy was included as a violation of the human rights of women.<sup>89</sup>

In 1992, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) issued its General Recommendation No. 19 on the issue of violence against women. In it, the CEDAW Committee underlined that gender-based violence impairs or nullifies women’s enjoyment of their human rights and fundamental freedoms, which include “the right to equal protection according to humanitarian norms in time of international or internal armed conflict”,<sup>90</sup> as well as the right to the highest attainable standard of physical and mental health.<sup>91</sup>

Moreover, the CEDAW Committee recognized that contexts of war and armed conflict often lead to increased sexual assaults on women, thus requiring specific protective and punitive measures.<sup>92</sup> Concerning Article 16 of the CEDAW, which obliges States to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, including the right to decide freely and responsibly on the number and

*Sexual and Reproductive Health and Rights of Women and Girls Affected by Conflict*, briefing paper, New York, 2017; Center for Reproductive Rights, *Reproductive Rights are Human Rights*, New York, 2009.

85 R. Cook, B. M. Dickens and L. E. Bliss, above note 18.

86 Colombian Constitutional Court, Judgments C-574–1992 (Ciro Angarita), C-088–1993 (Ciro Angarita).

87 ICPD, *Programme of Action of the International Conference on Population and Development*, UN Doc. A/CONF.171/13/Rev.1, 5–13 September 1994, paras 8, 19.

88 *Ibid.*, para. 106(k).

89 *Ibid.*, para. 135, 142(c).

90 CEDAW Committee, General Recommendation No. 19, “Violence Against Women”, 11th Session, 1992, para. 7(c).

91 *Ibid.*, para. 7(c)(g).

92 *Ibid.*, para. 16.

spacing of their children, the Committee held that practices such as compulsory sterilization or abortion could adversely affect women's physical and mental health while infringing on their right to decide on the number and spacing of their children.<sup>93</sup> Furthermore, in this General Recommendation, the CEDAW Committee urged States Parties to "ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control".<sup>94</sup>

The Special Rapporteur on Violence against Women, Its Causes and Consequences, in her first report from 1999 on the policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women, held that violence against women could occur within the context of a State's reproductive policy:

Direct State action violative of women's reproductive rights can be found, for example, in criminal sanctions against contraception, voluntary sterilisation and abortion. ... Within the context of reproductive health policy, State policies contribute to violence against women, manifested in forced abortions, forced sterilisation and contraception, coerced pregnancy and unsafe abortions.<sup>95</sup>

Moreover, the Special Rapporteur pointed out the varying and harmful impacts of sexual violence, specifically rape, in contexts of armed conflict.<sup>96</sup> Thus, she acknowledged that the consequences for women impregnated by rape who cannot access abortion services on legal grounds include physical and emotional trauma.<sup>97</sup>

The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health presented a report in 2003 which recognized that "reproductive health is an integral element of the right to health".<sup>98</sup> He held in another report that "[r]ape and other forms of sexual violence, including forced pregnancy, non-consensual contraceptive methods ..., female genital mutilation/cutting ..., and forced marriage all represent serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health".<sup>99</sup>

Additionally, in the 1990s, the CEDAW Committee and the Human Rights Committee issued concluding observations for Colombia, which identified that the prevalence of unsafe and illegal abortions was among the health problems requiring special attention from the State due to its relationship to maternal

93 *Ibid.*, para. 22.

94 *Ibid.*, para. 24(m).

95 Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UN Doc. E/CN.4/1999/68/Add.4, 21 January 1999, paras 44, 45.

96 *Ibid.*, paras 19, 20.

97 *Ibid.*, para. 21.

98 Paul Hunt, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur*, UN Doc. E/CN.4/2003/58, 13 February 2003, para. 50.

99 Paul Hunt, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur*, UN Doc. E/CN.4./2004/49, 16 February 2004, para. 25.



mortality rates.<sup>100</sup> The CEDAW Committee raised concern regarding the lack of exceptions for accessing abortion services in Colombia – even when the woman’s life is in danger or to safeguard her physical or mental health, or in cases where the woman has been raped – and held that “legal provisions on abortion constitute a violation of the rights of women to health and life and of article 12 of the [CEDAW]”.<sup>101</sup>

Thus, the Human Rights Committee expressed its concern in relation to the fulfilment of Article 6 of the ICCPR by the State of Colombia, given that

the existence of legislation criminalising all abortions under the law can lead to situations in which women are obliged to undergo high-risk clandestine abortions. [The Human Rights Committee] is especially concerned that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures.<sup>102</sup>

At the regional level, the Inter-American Commission on Human Rights (IACHR) referred to Colombia’s human rights situation in 1999. It recognized that abortion constituted “a very serious problem for Colombian women, not only from the point of view of the right to health but also of their rights as women, including the right to personal integrity and the right to privacy”.<sup>103</sup>

Moreover, in the years that followed the ICPD and the Beijing Declaration, human rights monitoring bodies and courts recognized that access to abortion services is linked to the enjoyment of a wide range of fundamental rights. By 2005, human rights bodies had indicated that at a minimum, States must ensure that abortion is legal and accessible when a woman’s life or health is at risk, in cases of rape and incest, and in cases of foetal anomalies, and States should take measures to ensure that women are not forced to seek unsafe abortion procedures.<sup>104</sup> Today, this minimum standard has been progressively recognized by different human rights monitoring bodies<sup>105</sup> and regional human rights

100 CEDAW Committee, *Revised Combined Second and Third Period Reports of States Parties: Colombia*, UN Doc. CEDAW/C/COL/2-3 Rev.1, 21 September 1993, para. 49; Human Rights Committee, *Concluding Observations by the Human Rights Committee: Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997, para. 24.

101 CEDAW Committee, *Report of the Committee on the Elimination of Discrimination Against Women*, UN Doc. A/54/38/Rev.1, 7–25 June 1999, para. 393.

102 Human Rights Committee, *Concluding Observations: Colombia*, UN Doc. CCPR/CO/80/COL, 26 May 2004, para. 13.

103 IACHR, *Tercer informe sobre la situación de los derechos humanos. Capítulo XII: Los derechos de la mujer*, OEA/Ser.L/V/II.102, 26 February 1999, para. 49.

104 Human Rights Committee, *K. L. v. Perú*, UN Doc. CCPR/C/85/D/1153/2003, 22 November 2005; Committee on the Rights of the Child, *Concluding Observations: Chad*, UN Doc. CRC/C/15/Add.107, 24 August 1999, para. 30; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Doc. E/C.12/1/Add.105, 1 December 2004, para. 53; IACHR, *White and Potter v. U.S.A (Baby Boy)*, Case No. 2141, 1981, paras 25–33.

105 See, for example, CEDAW Committee, *L. C. v. Perú*, UN Doc. CEDAW/C/50/D/22/2009, 25 November 2011, para 12(b); CEDAW Committee, *Concluding Observations: Bahrain*, UN Doc. CEDAW/C/BHR/CO/3, 10 March 2014, para. 42(b); Human Rights Committee, *Concluding Observations: Ireland*, UN

tribunals along with the obligation to provide post-abortion care to women independently of the legal status of abortion.<sup>106</sup>

The previous paragraphs illustrate the developments within the IHRL framework that took place starting from the 1990s regarding the need for States to ensure that women and girls who are victims of sexual violence have, at a minimum, access to abortion services as a measure to protect their rights. These developments are key when analyzed in relation to the fulfilment of the international obligations for the State of Colombia because they show that despite the advancement towards the recognition of reproductive autonomy for women and girls from a human rights perspective, the State still maintained a restrictive framework that criminalized abortion under all circumstances up until 2006. Thus, at the international level, the question may arise as to whether the State of Colombia could be held liable for not fulfilling its obligations related to the protection of the rights protected by the CEDAW and ICCPR—at the least—by forcing women and girls who are victims of conflict-related sexual violence to seek unsafe and illegal abortion procedures. However, it must be recognized that it is debatable whether the level of protection at the international level for victims of forced pregnancy whose victimization occurred before the development of the above-mentioned standards remains the same as for victims who suffered victimization after that.

### **The right to access a voluntary termination of pregnancy after ruling C-355 of 2006: The persisting barriers for victims of conflict-related sexual violence**

In 2006, the Constitutional Court, through its Judgment C-355, declared that a total abortion ban was unconstitutional when women terminate their pregnancies if their lives are at risk, the pregnancy is the result of sexual violence, or the product of the pregnancy would not be able to survive after being born.

The Court determined that a complete abortion ban was in direct violation of dispositions contained in different international human rights treaties that protect the right to life and the right to health of women, including, but not

Doc. CCPR/C/IRL/CO/4, 19 August 2014, para. 9; Human Rights Committee, *Concluding Observations: Sierra Leone*, UN Doc. CCPR/C/SLE/CO/1, 17 April 2014, para. 14; Human Rights Committee, *Concluding Observations: Guatemala*, UN Doc. CCPR/C/GTM/CO/3, 19 April 2012, para. 20; Committee Against Torture (CAT), *Concluding Observations: Paraguay*, UN Doc. CAT/C/PRY/CO/4-6, 14 December 2011, para. 22; Committee on the Rights of the Child, *Concluding Observations: Chile*, UN Doc. CRC/C/CHL/CO/3, 23 April 2007, para. 56; Committee on the Rights of the Child, *Concluding Observations: Costa Rica*, UN Doc. CRC/C/CRI/CO/4, 3 August 2011, para. 64(c); Committee on Economic, Social and Cultural Rights, *Concluding Observations: Dominican Republic*, UN Doc. E/C.12/DOM/CO/3, 26 November 2010.

106 Committee on Economic, Social and Cultural Rights, “General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health”, UN Doc. E/C.12/GC/22, 2 May 2016, para. 5; CAT, *Paraguay*, above note 105, para. 22; Office of the High Commissioner for Human Rights, *Practices in Adopting a Human Rights-Based Approach to Eliminate Preventable Maternal Mortality and Human Rights*, UN Doc. A/HRC/18/27, 8 July 2011, para. 29.

limited to, Article 6 of the ICCPR, Article 12.1 of the CEDAW and Article 12 of the ICESCR. The Court held that “the interpretation that different international human rights bodies have made in respect of the provisions contained in different international treaties . . . , in the sense that these provisions, which are part of the constitutionality block, bind the State to adopt measures that protect the right to life and the right to health” is relevant when analyzing the State’s international obligations.<sup>107</sup>

In this landmark decision, the Court acknowledged that “the criminalization of abortion also violated the right to equality of women in relation to men, in cases in which they are victims of sexual violence and as a result of it, remain in a state of pregnancy”. Moreover, the Court recognized that, for example, women affected by forced displacement in the context of the armed conflict faced a higher risk of being victims of sexual violence by armed actors or other persons, and therefore of being disproportionately affected by the criminalization of abortion.

Since Judgment C-355, over twenty additional rulings from the Constitutional Court have been issued in relation to the fundamental right of voluntary termination of pregnancy.<sup>108</sup> At the international level, further standards related to the obligation for States to provide access to abortion services in contexts of armed conflict and humanitarian settings as a measure to ensure the enjoyment of rights have been established. The CEDAW Committee, in its General Recommendation on women and armed conflict, urged States Parties to “ensure that sexual and reproductive health care includes access to sexual and reproductive health and rights information; . . . safe abortion services; [and] post abortion care”.<sup>109</sup>

Moreover, the Committee Against Torture (CAT) and the Human Rights Committee have expressed that, under certain circumstances, denying access to abortion services is a form of physical or mental suffering that can amount to ill-treatment.<sup>110</sup> Moreover, the CAT has expressed that complete bans on abortion may constitute torture or ill-treatment.<sup>111</sup> These considerations are also linked to the obligation of humane treatment under IHL.

107 Colombian Constitutional Court, Judgment C-355-2006.

108 The Constitutional Court has continuously stated in its decisions (see Judgments T-636-2007, T-585-2010, T-841-2011, T-627-2012, C-754-2015, T-301-2016, T-697-2016, C-327-2016 and SU-096-2018) that the fundamental right to voluntary termination of pregnancy protects the autonomy and freedom of decision of women who, being in one of the three grounds for decriminalization provided for in ruling C-355, resolve to put an end to the human gestation process. The right to voluntary termination of pregnancy belongs to the category of reproductive rights, and as such, shares the orientation, foundation and mandatory content of those rights. At the same time, as it is a fundamental right, it commits all servants and organs of the State, public and private social security providers, and individuals to respect and fulfil it.

109 CEDAW Committee, “General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations”, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 51(c).

110 Human Rights Committee, *K. L. v. Peru*, above note 104; Human Rights Committee, *Sierra Leone*, above note 105, para. 17; Human Rights Committee, *L. M. R. v. Argentina*, UN Doc. CCPR/C/101/D/1608/2007, 28 April 2011; CAT, *Concluding Observations: Poland*, UN Doc. CAT/C/POL/CO/5-6, 23 December 2013, para. 23.

111 CAT, *Paraguay*, above note 105, para. 22; CAT, *Concluding Observations: El Salvador*, UN Doc. CAT/C/SLV/CO/2, 9 December 2009, para. 22; CAT, *Concluding Observations: Nicaragua*, UN Doc. CAT/C/NIC/CO/1, 10 June 2009, para. 16.

At the regional level, a relevant international development on the right to life in the context of sexual and reproductive rights is the IACtHR ruling on the case of *Artavia Murillo et al. v. Costa Rica*. In this case, the IACtHR—the authorized interpretive body for the American Convention on Human Rights—specified the scope of the wording “conception” and “in general” of Article 4.1 of the American Convention that protects the right to life, as well as the term “human being” in Article 1.2 of the Convention. The Court stated that

it is possible to conclude from the words “in general” that the protection of the right to life in accordance with said provision is not absolute, but is gradual and incremental according to its development because it does not constitute an absolute and unconditional duty, but rather implies understanding the origin of exceptions to the general rule.<sup>112</sup>

The recommendations, general comments and interpretations made by international human rights bodies, as well as international judicial decisions (which the Constitutional Court has held are relevant for the interpretation of the rights granted by the Constitution), have evolved since 2006 towards a more robust protection of the rights of women to life, health, privacy and autonomy, which include guaranteeing access to abortion services.<sup>113</sup> Despite jurisprudential and normative progress at the national and international level, however, women still face multiple barriers when accessing abortion services in Colombia. The situation is particularly challenging for women living in conflict-affected areas or under the control of armed actors.<sup>114</sup> Research in Colombia has shown that the conflict in that country not only reinforces structural barriers to accessing reproductive health services—e.g., the lack of information on contraceptive methods and sexual and reproductive rights, the reinforcement of gender roles that restrict women’s bodily autonomy, and the lack of availability of reproductive health services in rural areas—but also places women’s bodies at the centre of action of armed actors.<sup>115</sup> In such circumstances, the exercise of reproductive autonomy for women, which includes accessing abortion services, is dependent on the will and limitations imposed by armed actors.<sup>116</sup>

The Constitutional Court has recognized that barriers to abortion services disproportionately affect women victims of conflict-related sexual violence and forced displacement. As some of the reasons for this, the Court identified

the absence of health providers in remote areas where the violations occur, the enormous risk involved in requesting a legal abortion in areas that are still territorially and socially controlled by perpetrators and members of non-State armed groups, ignorance by public officials of the legal possibility of

112 IACHR, *Artavia Murillo et al. v. Costa Rica* (“*In Vitro Fertilization*”), Judgment, 28 November 2012, para. 264.

113 Colombian Constitutional Court, Judgment SU-096-2018 (José Fernando Reyes).

114 N. Chaparro *et al.*, above note 3.

115 *Ibid.*, p. 44.

116 *Ibid.*, p. 44.

voluntary termination of pregnancy, or appeal to conscientious objection by health providers to deny the service.<sup>117</sup>

Despite the extensive development of national and international standards that protect the right of women to access reproductive health services, including abortion, women still face barriers in Colombia. This is especially difficult, and has been recognized by the Constitutional Court as such, for women victims of conflict-related sexual violence. Moreover, even though the State has had a reinforced obligation to provide such services, the persistence of barriers to accessing this service raises questions as to the State's degree of compliance with this obligation.

### **The impacts of denying access to abortion services in the context of the armed conflict: Reflections on the transitional justice scheme in Colombia**

The previous sections have provided evidence of the developments in both IHL and IHRL that protect women's reproductive rights in contexts of armed conflict, with a specific focus on the case of Colombia. Such standards were key in the landmark ruling by the Constitutional Court that decriminalized abortion in 2006. Furthermore, the Constitutional Court has played a pivotal role in recognizing the systematicity of gender-based violence and discrimination against women and girls in the context of the armed conflict through its rulings,<sup>118</sup> as well as reiterating that victims of such crimes have the right to access justice, truth, reparations and guarantees of non-recurrence.<sup>119</sup>

In relation to the right to reparation, the Victims and Land Restitution Law (Law 1448/2011, Victims Law) was a milestone in recognizing this right for victims of the armed conflict in Colombia. The Victims Law created a series of institutions and mechanisms for granting access to comprehensive reparation measures for victims of the armed conflict and recognized as victims all persons that had suffered harm due to serious infringements of IHL or IHRL that occurred after 1 January 1985.<sup>120</sup> As such, the Victims Law's reparation system allows the

117 Colombian Constitutional Court, Decision A-009-2015 (Luis Ernesto Vargas).

118 Colombian Constitutional Court, Decisions A-092-2008 (Manuel José Cepeda), A-009-2015.

119 Colombian Constitutional Court, Judgments SU-599-2019 (Cristina Pardo), T-083-2017 (Alejandro Linares), C-588-2019 (José Fernando Reyes), T-211-2019 (Cristina Pardo), T-004-2020 (Diana Fajardo), SU-648-2017 (Cristina Pardo).

120 National Congress of Colombia, Law 1448/2011, 10 June 2011, Art. 3. Victims, for the purposes of this law, are considered to be those persons who, individually or collectively, have suffered harm as a result of events occurring on or after 1 January 1985, as a consequence of infractions of IHL or grave and manifest violations of IHRL which occurred during the conflict. According to paragraph 2, members of organized illegal armed groups shall not be considered victims, except in cases in which children or adolescents have been demobilized from the organized illegal armed group when they were minors. It must be noted that despite the explicit exclusion to the reparation programme of the Victims Law for members of non-State actors who did not demobilize while being underaged included in paragraph 2, a decision from the Constitutional Court changed this. Through Judgment SU-599-2019, the Court

adoption of reparation measures for victims of forced pregnancies for acts of sexual violence that occurred in the 1980s. Furthermore, the Law also recognizes children born from conflict-related rape as direct victims of crimes of a sexual nature.<sup>121</sup>

While the Victims Law does not include reproductive violence as a category of victimization, it includes under “crimes against sexual liberty, integrity and formation” acts that constitute forms of reproductive violence, including forced pregnancy. Paradoxically, with the Victims Law, the Colombian State puts in place a remedy for women who suffered such forms of victimization at least from 1985, when the international developments on violations occurring to women in the conflict were not mainstream or fully developed. In light of this, one could argue that the State, when allowing access to reparation measures to victims of conflict-related sexual violence in the context of the armed conflict, is implicitly recognizing forced pregnancies—and other gendered victimizations—as harms that are under the scope of application of the Victims Law and are subject to the fulfilment of the right to reparation. This offers a window of opportunity for redress by fulfilling the right to reparation for women that carried unwanted pregnancies as a result of conflict-related sexual violence at a time (if the act occurred within the temporary scope of the Victims Law) when international and domestic legal frameworks did not offer legal protection.

In the context of the transitional justice system created by the 2016 Peace Agreement, fortunately the issue of reproductive violence has not remained in the margins.<sup>122</sup> The Truth Commission has been vocal about the importance of recognizing and investigating the modalities under which reproductive violence committed by all armed actors in the armed conflict operated.<sup>123</sup> The broad scope of the Truth Commission’s mandate makes it an ideal space for inquiry on the violations of reproductive rights that women endured in the armed conflict long before the situation of and violations committed against women in armed conflicts were even recognized at the international and national level.

On the other hand, as of 2021 the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) has initiated investigations into seven macro-cases relating to criminal phenomena that occurred in the armed conflict

recognized that combatant women who were subject to sexual and reproductive violence within the ranks of armed non-State actors have a right to reparation under Law 1448/2011.

121 Law 1448/2011, above note 120, Art. 181: “For the purposes of the present Title, children and adolescents conceived as a consequence of sexual violation during the internal armed conflict shall also be considered victims.”

122 Women’s Link Worldwide, above note 3; Center for Reproductive Rights, above note 3; Cinco Claves, “La Alianza Cinco Claves pide abrir un caso de violencia sexual, reproductiva y otros delitos motivados en la sexualidad de la víctima”, 24 February 2020, available at: [www.womenslinkworldwide.org/informate/sala-de-prensa/la-alianza-cinco-claves-pide-abrir-un-caso-de-violencia-sexual-reproductiva-y-otros-delitos-motivados-en-la-sexualidad-de-la-victima](http://www.womenslinkworldwide.org/informate/sala-de-prensa/la-alianza-cinco-claves-pide-abrir-un-caso-de-violencia-sexual-reproductiva-y-otros-delitos-motivados-en-la-sexualidad-de-la-victima).

123 Comisión de la Verdad, “La violencia reproductiva en el conflicto armado: Una verdad pendiente”, 15 December 2020, available at: <https://comisiondelaverdad.co/actualidad/noticias/violencia-reproductiva-en-el-conflicto-armado-una-verdad-pendiente>; Comisión de la Verdad, “Mi cuerpo dice la verdad”, available at: <https://comisiondelaverdad.co/encontro-por-la-verdad-mi-cuerpo-dice-la-verdad>; Comisión de la Verdad, “Espacio de escucha ‘Violencia reproductiva en el conflicto armado Colombiano: Una verdad pendiente’”, 17 September 2020, available at: <https://comisiondelaverdad.co/actualidad/historico-eventos/espacio-de-escucha-violencia-reproductiva-en-el-conflicto-armado-colombiano-una-verdad-pendiente>.

and have impacted victims' rights. However, no case has had an exclusive focus on sexual and gender-based violence.<sup>124</sup> Within the JEP, there is a window of opportunity when it determines the scope of proper sanctions<sup>125</sup> with a gender perspective that considers a restorative and transformative approach for victims of forced pregnancy and children born of conflict-related sexual violence. Such a perspective will enable the JEP to examine the structural inequalities that have hindered access to rights and services for women and girls, especially those living in conflict-affected areas who have suffered sexual and reproductive violence.

## Conclusions

This article has set out the key interdependencies between IHL and IHRL on reproductive health services while identifying key implications for the obligations that the State of Colombia must uphold. For this analysis, the fact that feminist engagement within international law frameworks has not been dominant in the latter's normative development is a relevant contextual factor. Moreover, while providing a critique of the lack of inclusion and diversity within the creation of international law was not the aim of this paper, such a perspective helps to provide an understanding of why the development of specific rules and standards that protect and make visible the situation of women did not arise until the end of the twentieth century, despite the historical and reiterative violations occurring in contexts of armed conflict, war and repression against women and girls.

The recognition of women's experiences in armed conflict and the protection of their rights have significantly evolved in international law. However, the establishment of standards regarding reproductive autonomy within contexts of armed conflict remains underdeveloped. This article has provided evidence to consider that, under treaty and customary rules of IHL related to humane treatment, the prohibition against adverse distinction, the obligation to protect and care for the wounded and sick, and the prohibition against ill-treatment and degrading treatment, read through an IHRL lens, one could contend that the State of Colombia had an obligation to provide reproductive health services, including abortion, for victims of sexual violence before abortion was decriminalized. However, the analysis provided has acknowledged that international protection can vary depending on the time in which the victimization took place. In this regard, through the Victims Law, the State of Colombia recognizes and provides a remedy for violations occurring in the context of the armed conflict at least since 1985, thus making an implicit recognition of victimization related to reproductive health and rights.

For Colombia, an additional matter of relevance for the implementation of international standards is the relevance of the constitutionality block within the domestic system. The value of the provisions that enter the constitutionality

124 C. Claves, above note 122.

125 National Congress of Colombia, Law 1957/2019, Art. 21(1).

block, as having the same worth as the Constitution, must be upheld by all State institutions. In this sense, the Constitutional Court has been consistent in determining that soft-law pronouncements and standards are relevant hermeneutic parameters for determining the scope of fundamental rights protected by international human rights treaties and the Constitution.

Furthermore, this article hopes to ignite a broader discussion on acknowledging the nuances of conflict-related sexual violence that considers the multiple and intertwined individual and collective harms for women and children born from sexual violence. It has sought to reflect on the limitations that international law and its different frameworks have when structural gender discrimination persists and reproductive labour is borne only by women – and thus, on how access to reproductive health and rights for all persons is crucial for the fulfilment of a life project that denaturalizes gender stereotypes and imposed social roles.

The present analysis offers an additional contribution to the study of reproductive rights within contexts of armed conflict but leaves the space open for further questions to be resolved. These questions mainly revolve around the implications of failing to comply with a duty born by the State to guarantee access to safe abortion services for women victims of conflict-related sexual violence. For women that did not have the option to terminate their pregnancies in a context of total prohibition, with the threat of facing criminal prosecution if they sought an abortion procedure, what do the harms and impacts look like? Sexual violence affects the enjoyment of rights related to sexual freedom and, as such, entail harms of this nature. What, then, are the harms that victims of forced pregnancies face? What are the impacts of being denied the opportunity to freely decide over one's life project and body because of a State-enforced policy that targets women specifically? What are the consequences for those children born of rape, and to what extent are these addressed by transitional justice mechanisms? All these questions go beyond the scope of this article but are of massive relevance in the post-conflict scenario in the context of ongoing armed confrontation that Colombia faces.

Confronting the historical lack of State presence, including precarious health services provision, in the rural and conflict-affected areas of the country is a debt still owed by the Colombian government. The provisions included in the 2016 Peace Agreement related to transitional justice measures offer the opportunity to include within the broader conversation of what happened to Colombians in the armed conflict the experiences of victims of forced pregnancy. Reproductive rights must be a central part of the peacebuilding stage, which is why it is important to tell the stories of all women that were subjected to rape in the armed conflict and were not given the option to terminate their pregnancies.