

ORDERS OF PREJUDICE:

SYSTEMATIC CRIMES
AGAINST LGBT PEOPLE
IN THE COLOMBIAN
ARMED CONFLICT



COLOMBIA DIVERSA

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COLOMBIA DIVERSA

Orders of Prejudice:
Systematic Crimes against LGBT People in the
Colombian Armed Conflict
© Colombia Diversa is a non-governmental organization that advocates for the rights of lesbian, gay, bisexual, and trans people (LGBT) in Colombia.

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ACKNOWLEDGMENTS

The book you are about to read is the culmination of two and a half years of work by Colombia Diversa's Peace and Armed Conflict team. Finding the right path toward justice for the LGBT victims of the armed conflict that we represent before the Special Jurisdiction for Peace was no easy task, and if we have succeeded, as we hope to show in this book, it is thanks to all of the people who have always stood beside us. Below, just a few acknowledgements:

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INTRODUCTION

The inverted pink triangle is a universal symbol of persecution against people with diverse sexual orientations and gender identities (SOGI). And though it has been reclaimed as an emblem of pride and protest against discrimination, we must not forget the context in which it arose: the expansion of Nazi concentration camps and the outbreak of a devastating and total war that engulfed the world for nearly a decade. A cruel system of torture and terror intent on exterminating anyone deemed inferior or different.

Several decades and periods of SOGI-based persecution had to pass before the question of whether this form of violence occurred during the Colombian armed conflict could arise. Our answer, contained in the pages of this book, is yes: in Colombia, most, if not all, of the armed groups involved in the conflict have used different repertoires of violence to subordinate or exclude lesbian, gay, bisexual, and trans (LGBT)¹ people from the territories under their control.

1 As Colombia Diversa has noted on multiple occasions, this acronym should not be understood a standard formula meant to encompass all people with non-hegemonic sexual orientations and gender identities, not only because many of those people do not identify with the acronym or one of its subpopulations, but also to avoid homogenizing the lived experiences of lesbian, gay, bisexual, and trans people. Despite these limitations, we continue to use the acronym (alongside other expressions like “people with diverse/non-hegemonic/non-normative sexual orientations and gender identities”) because of its strategic and political value to the LGBT rights movement in Colombia and abroad. Moreover, we believe that it is important to recognize that, despite the plurality and complexity of the various existing sexual orientations and gender identities, the people who are attacked due to their sexual or gender non-conformity are often perceived as lesbian, gay, bisexual, or trans. In any case, if we are speaking about a particular subpopulation or about individual or group of individuals who do not identify with the acronym, we will reference the group or identity by name. For more information, see: COLOMBIA DIVERSA. Cuando la guerra se va, la vida toma su lugar. Informe de Derechos Humanos de personas lesbianas, gays, bisexuales y trans. Bogotá: 2013-2014.

Now, the question that remains is how to address this harrowing and long-silenced history. Like the transitional justice mechanisms that preceded it,² Colombia's historic peace agreement with the former FARC-EP insurgency, Latin America's longest-lived and most powerful guerrilla group, opened up new opportunities for LGBT inclusion in the context of Colombia's ongoing political transition. By recognizing the armed conflict's unique and disproportionate impact on LGBT people, the 2016 peace deal has encouraged LGBT victims and organizations to demand truth, justice, reparations, and guarantees of non-recurrence from the newly minted transitional justice institutions.³ Despite these opportunities, however, accessing transitional justice institutions has been a trying endeavor, particularly in the realm of justice.

One of the primary reasons for this struggle is the patriarchal nature of the law, which is the foremost language of transitional justice and thus responsible for resolving LGBT victims' demands. As has been widely acknowledged in contemporary legal theory, especially feminist legal theory, the law suffers from a constitutive sexism.⁴ To quote Isabel Jaramillo, "the law, as a product of patriarchal societies and therefore reflect and protects

2 In Colombia, two transitional justice mechanisms preceded the 2016 peace agreement with the FARC-EP. The first is Law 975 of 2005, better known as the Justice and Peace Law, which provided for the (partial) demobilization of former Autodefensas Unidas de Colombia (AUC) paramilitaries, the country's largest and most powerful paramilitary group to date. We say partial because the Justice and Peace process failed to secure the full demobilization and disarmament of AUC combatants and to disrupt their criminal enterprises, enabling successor groups to quickly arise in their place. The second transitional justice mechanism that preceded the 2016 agreement was Law 1448 of 2011, better known as the Victims' Law, aimed at redressing victims of the armed conflict via land restitution and reparations. For more information on the Justice and Peace process, see: CENTRO NACIONAL DE MEMORIA HISTÓRICA (CNMH). *Desmovilización y reintegración paramilitar. Panorama posacuerdos con las AUC*. Bogotá: CNMH, 2015; *Grupos armados posdesmovilización (2006-2015). Trayectorias, rupturas y continuidades*. Bogotá: CNMH, 2016.

3 The peace deal created the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition, giving rise to three new institutions: the Truth Commission, Special Jurisdiction for Peace, and the Unit for the Search of Persons Deemed Disappeared. The system also includes preexisting reparations programs and guarantees of non-recurrence.

4 FACIO, Alda. *Hacia otra teoría crítica del derecho*. In: Herrera, Gioconda. *Las fisuras del patriarcado, Reflexiones sobre Feminismo y Derechos*. Quito: FLACSO, Sede Ecuador, 2000, p. 15 – 44. Retrieved from: <http://www.flacso.org.ec/docs/safisuras.pdf>.

[male] values and serves their needs and interests”⁵. Through our work as an LGBT rights organization, we have been able to confirm this analysis: the justice system struggles to address the demands of women and LGBT people because their complex experiences of oppression and exclusion elude the laws and logics that govern it. Furthermore, its operators are immersed in the same discriminatory logics that normalize and perpetuate these experiences of oppression and exclusion and therefore end up applying the law on the basis of such prejudices.

The research presented below is located at the intersection of two questions that arise from these reflections. First, how do we settle the historical debts owed to lesbian, gay, bisexual, and trans victims of the armed conflict, particularly in the sphere of justice? Second, how do we accomplish this using the language of the law, which has so often served to deny the citizenship and human rights of women and LGBT people?

Historical Debts in the Recognition of LGBT Victims of the Armed Conflict

The Colombian armed conflict claimed the lives and dreams of millions of people. Though this war had a multiplicity of causes, discrimination has always been at the core of the violence. Over the course of half a century, the inability to resolve social, economic, political, and sexual differences by other than violent means has helped fuel a conflict that has yet to truly give way to peace.

The existence of this protracted and bloody conflict has marked the subjectivities of many subaltern populations,⁶ while reasserting and reinforcing

5 JARAMILLO, Isabel Cristina. La crítica feminista al derecho. In: West, Robin. Género y Teoría del Derecho. Bogotá: Siglo del Hombre Editores, Facultad de Derecho de la Universidad de Los Andes, Ediciones Uniandes e Instituto Pensar, 2000. Pg. 52. Quote translated from Spanish.

6 Albeit coined by the Italian Marxist intellectual Antonio Gramsci, the notion of the subaltern has been theorized primarily in the field of postcolonial studies by the Subaltern Studies Group, a group of South Asian scholars including Gayatri Spivak, Homi Babba, Ranajit Guha, and Partha Chatterjee, among others, who were interested in examining post-colonial and post-imperial societies, and other Middle Eastern scholars like Edward Said. As explained by Colombian historian Francisco A. Ortega, the subaltern voice is a perspective that calls on different disciplines, particularly the social sciences, to consider “the repertoire of possible actions available to social actors, particularly those who inhabit conditions of social subordination”. ORTEGA, Francisco A. Rehabilitar la cotidianidad. In: Ortega, Francisco A. (ed.) Veena Das: Sujetos del dolor, agentes de dignidad. Bogotá: Universidad Nacional de Colombia. Facultad de Ciencias Humanas, Instituto Pensar, 2008. Pg. 24.

the terms of their marginality. Much of the war has played out in peripheral regions,⁷ where war converges with long histories of exploitation, neglect, and structural poverty and oppression. The identities of the LGBT people who inhabit these geographies of terror⁸ have been forged in the crucible of war and are thus inextricably tied to its dynamics. A war in which LGBT people have been *putas, sapos, víctimas, victimarios, mandaderos, bochincheros*,⁹ and a litany of other labels that lay bare the complex relationships between gender, sexuality, and conflict. Though exploring these subjectivities is beyond the scope of this book, it is important to bear in mind that the war has taken a disproportionate toll on LGBT people who have been relegated to the margins of the margins.

Though not all LGBT survivors¹⁰ have been targeted due to their sexual orientation or gender identity, most, if not all, of the armed groups involved have weaponized social prejudices against them in order to further their war aims. By attacking LGBT people, or those perceived as such, they have flexed their power, tightened their grip over local communities, and even gained legitimacy among civilians. In this way, their presence has given rise to social orders founded on preexisting and now exacerbated gender norms that transform LGBT people into constant targets of violence.

Over the course of Colombian history, these forms of violence have been

7 ROBINSON, James A. La miseria en Colombia. In: Revista Desarrollo y Sociedad, Universidad de Los Andes, First Semester 2016, p. 9-90.

8 In contraposition to the notion of geographies to exist (*geografías para existir*), the notion of geographies of terror (*geografías del terror*) refers to spaces in which there is a “breakdown of daily routines, movements, encounters, and experiences, combined with the fraying of social fabric and of collective endeavors rooted in the territory” and in which fear is imposed and people’s lives truncated, producing “despair, distrust, unease, and isolation”. See: CNMH. Un carnaval de resistencia. Memorias del reinado trans del Río Tuluni. Bogotá: CNMH, 2018. Pg. 47.

9 In English: whores, informants, victims, perpetrators, couriers, and gossips.

10 As of April 1, 2019, the official victims’ registry reported 5.037 victimizations committed against LGBT people. The most common victimizations are as follows: forced displacement (3.105); threats (895); crimes against sexual integrity (393); homicides (302).

subjected to a “politics of not-knowing”¹¹, which have not only silenced the voices of its victims but also erased their bodies and experiences from historical accounts of armed violence in Colombia. In fact, although we all know, or at least intuit, that those who dared defy gender and sex norms were targeted throughout the war, we often do not incorporate their stories as part of its history. This is not accidental, but rather the product of a society that trivializes, justifies, and at times even openly embraces violence and discrimination against LGBT people. In other words, it is the product of social complicity.

The multiple transitional justice projects implemented in Colombia, which have historically failed to recognize the violence committed against LGBT people during the conflict, have both reflected and facilitated this process of erasure. In fact, as noted above, the political and technical grammar of transitional justice has tended to favor LGBT exclusion. This is because at the core of the transitional measures adopted by Colombia and other countries grappling with legacies of serious and systematic human rights abuses is a legal framework in which domestic and international law converge to facilitate the transition to peace or democracy. Due to the law’s constitutive sexism, this framework, which purports to be gender-neutral, often ends up defaulting to the struggles and interests of men. In the words of Rosemary Nagy, the global project of transitional justice can be legitimately accused of “producing subjects and truths that are blind to gender and social injustice”¹². When these projects *do* incorporate gender concerns, however, they tend to do so in a

11 Though originally developed by Carolyn Nordstrom, who argued that girls are invisible casualties of war subject to politics of not-knowing, this concept was subsequently applied to LGBT victims of the Colombian conflict by Colombian academic José Fernando Serrano Amaya. For more information, see: NORDSTROM, Carolyn. Visible Wars & Invisible Girls, Shadow Industries, and the Politics of Not-Knowing. In: International Feminist Journal of Politics, vol. 1, no. 1, 1999, p. 71-84; SERRANO AMAYA, José Fernando. ¿Qué le pueden decir las orientaciones sexuales y las identidades de género a la justicia transicional? In: La ilusión de la justicia transicional. Bogotá: Ediciones Uniandes, 2017. Pg. 183.

12 NAGY, Rosemary. Transitional Justice as Global Project: Critical Reflections. In: Third World Quarterly, vol. 29, no. 2, 2008, p. 275 – 289. Pg. 276.

reductive and exclusionary fashion. As explained by Pascha Bueno-Hansen, “violence against gender and sexual minorities remains largely unexamined in the practice and scholarship of transitional justice because of an adherence to a narrow construction of gender-based violence anchored in the normative male–female binary and its corresponding assumption of heterosexuality”¹³. In this sense, transitional justice schemes around the world have made scant effort to shed light on the ways in which dictatorships or armed groups have deployed specific forms of violence against women and especially LGBT people.

This book emerges, then, as an effort to help resolve a long-standing dilemma in which the feminist movement offers an exemplary model of struggle: On one hand, we have the feminist conviction that the law, especially criminal law, is a tool of control and oppression that has helped buttress the system of hierarchies that privileges masculinity over femininity. On the other hand, we have the humanist conviction that all of the products of human knowledge and rationality, including the law, must be reinvented as often as necessary in order for ideals like equality and justice for all human beings to prevail. Faced with this tension, our conviction is that, despite its legitimate critiques about the patriarchal, heteronormative, and cisnormative¹⁴ logics that underpin the legal system, feminism, as a product of human thought, is above all an analytical and political tool that advocates for the transformation of all spaces in which gender-based violence and exclusion are produced and reproduced. This necessarily includes legal field.

13 BUENO-HANSEN, Pascha. “The Emerging LGBTI Rights Challenge to Transitional Justice in Latin America.” In: *International Journal of Transitional Justice*, vol. 12, p. 126-145. Pg. 127.

14 Since these concepts will be explored in detail in the coming pages, for the time being, suffice it to say that heteronormativity, also theorized as compulsory heterosexuality, refers to the idea that heterosexuality is assumed and thus enforced by society, while cisnormativity refers to the idea that being cisgender (i.e. having a gender identity that “matches” one’s assigned sex per society’s binary conception of gender-sex) is assumed and thus enforced by society. For more information, see BUTLER, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. London: Routledge, 1990; FOUCAULT, Michel. *The History of Sexuality: An Introduction*. Pantheon Books, 1978.; RICH, Adrienne. “Compulsory Heterosexuality and Lesbian Existence.” In: *Signs: Journal of Women in Culture and Society*, vol. 5, no. 4 (Summer, 1980), p. 631-660.

Therefore, the purpose of this research is to offer conceptual and methodological tools for activists, academics, and justice operators to understand the phenomenon of violence of prejudice against LGBT people in the armed conflict in a more comprehensive manner. In particular, our aim is to question the misconception that violence against LGBT people cannot be analyzed under the lens of the criminal investigation techniques at the heart of transitional justice, which are founded on international criminal law (ICL) and, to a lesser extent, on international human rights law, because it lacks the underlying organizational logic can evidence the systematic or patterned nature of the crimes.

On the contrary, we will show that all violence committed against LGBT people in the Colombian armed conflict was *always* organized and never arbitrary, even if the system that produces it is not readily apparent. In this regard, we will show that armed groups capitalize on preexisting scripts of gendered oppression, which are in turn rooted in the sex/gender/desire system,¹⁵ in order to target LGBT people and that it is these systems that imprint a clear organizational logic on the violence. These scripts speak through the language of prejudice; hence, the title of the book.

In order to achieve this goal, the first chapter of the book questions transitional justice and international criminal law's blindness to structural violence, proposing feminist (re)definitions of the concepts of systematicity and patterns of violence. Bearing in mind these redefinitions, the chapter then goes on to argue that the SOGI-based violence committed during the

15 Though we explore this concept in depth in the first chapter of the book, for now, it can be summarized as follows: Having emerged in the work of Gayle Rubin and Judith Butler, the concept of the sex/gender/desire system allows us to analyze the ways in which society produces and reproduces unequal power relations along gender lines. In general terms, it speaks to the ways in which physical and biological differences between men and women (or bodies gendered masculine and feminine) are reified and institutionalized, giving rise to a system in which women and people with diverse sexual orientations and gender identities are at a systemic disadvantage. For more information, see: Op. cit., BUTLER, *Gender Trouble...*; COLOMBIA DIVERSA. *Un parche que resiste: Recomendaciones para una reparación colectiva y transformadora de lesbianas, gays, bisexuales y trans*. 2018; RUBIN, Gayle. *The Traffic in Women: Notes on the "Political Economy" of Sex*. In: *Toward an Anthropology of Women*. New York and London: Monthly Review Press, 1975, p. 157-210.

Colombian armed conflict constitutes the international crime of persecution. Specifically, it demonstrates that this crime against humanity is the legal equivalent of the notion of prejudice-based violence,¹⁶ which was developed by Colombian sociologist María Mercedes Gómez and has been used by Colombia Diversa and other LGBT rights organizations to explain violence against LGBT people for over ten years. These reflections summarize the innovative legal strategy that Colombia Diversa has pursued before the Special Jurisdiction for Peace (JEP, by its Spanish acronym), the tribunal created to prosecute those responsible for the grave and representative crimes committed during 52 years of war.

The second chapter of the book provides the methodological tools to apply the conceptual framework laid out in the first chapter to the analysis of conflict-related violence against LGBT people in Colombia. In particular, it applies the framework to the cases that Colombia Diversa has documented and represented in two regions of Colombia: the southern region of the Tolima department, particularly the municipality of Chaparral, and the municipality of San Andrés de Tumaco, located in the Nariño department. After analyzing the systems of gendered oppression at work in each region and identifying the patterns of violence perpetrated against LGBT people by the FARC-EP guerrilla, the chapter ends with a joint legal analysis of the underlying criminal acts perpetrated in both regions that constitute persecution.

All in all, it is our hope that this book contributes to the ongoing discussion about how we can use tools like international criminal law to further the causes of historically marginalized groups, spurring serious consideration and dialogue about systematic crimes committed on the basis of gender. In particular, we want to join the efforts to engender and queer international criminal law for LGBT victims of widespread or systematic atrocities, which currently involve organizations and

16 GÓMEZ, María Mercedes. *Violencia por prejuicio*. In: MOTTA, C. y SÁEZ, M., editors. *La mirada de los jueces*. Tomo 2. *Sexualidades diversas en la jurisprudencia latinoamericana*. Bogotá: Siglo del Hombre Editores, American University College of Law, Centre of Reproductive Rights, 2008.

scholars from all over the world. These include, for example, CUNY-MADRE-OWFI, who petitioned the Office of the Prosecutor of the International Criminal Court to investigate gender-based persecution and torture against women and LGBT people at the hands of Daesh in Iraq and Syria;¹⁷ the Regional Foundation for Human Rights Consulting (INREDH, by its Spanish acronym) and the Gay and Transfeminine Front of Ecuador – Nueva Coccinelle, who are currently engaged in strategic litigation in order to bring about the prosecution of police authorities who persecuted LGBT people, especially trans women, in the 1980s and 1990s;¹⁸ and CUNY-CIJUS-MADRE-Outright Action International, who are advocating for a broad definition of gender in the new treaty on crimes against humanity.¹⁹ All of these initiatives are part of the broader project of reimagining justice and accountability through the feminist lens that Christine Bell and Catharine O’Rourke invited us to apply to the field of transitional justice as early as 2007.²⁰

This is why our most important message is the sex/gender/desire system consists of overlapping and interconnected orders that communicate through prejudice and that shape the logics of wars and dictatorships. To refuse to recognize that the scripts laid out by this system eliminate the need to meticulously plan and orchestrate atrocities is to continue to refuse the process of depatriarchalizing all aspects of life, including the sources of law applicable in contexts of political transition.

17 CUNY, MADRE & OWFI. Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes. 2017. Retrieved from: <https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq.pdf>.

18 BUENO-HANSEN, Pascha. Los gays y las personas trans en Ecuador exigen justicia y recuperan la memoria histórica. Open Democracy. Retrieved from: <https://www.opendemocracy.net/es/gais-travestis-en-ecuador-exigen-justicia-y-recuperan-la-memoria-hist%C3%B3rica/>.

19 MADRE, CIJUS, CUNY & OutRight Action International. The International Crimes Against Humanity Treaty. 2018. Retrieved from: https://outrightinternational.org/sites/default/files/CAH%20Toolkit_English_Nov%202018_v2019.pdf?ga=2.178768420.1828923433.1595116782-1521800984.1595116782.

20 , BELL, Christine & O’ROURKE, Catherine. “Does feminism need a theory on transitional justice?” In: *The International Journal of Transitional Justice*, vol. 1, 2007, p. 23-44, doi:10.1093/ijtj/ijm002.

ACRONYMS/ABBREVIATIONS

IACHR	◀▶	Inter-American Commission on Human Rights
I/A Court H.R.	◀▶	Inter-American Court of Human Rights
ICC	◀▶	International Criminal Court
ICL	◀▶	International criminal law
ICTR	◀▶	International Criminal Tribunal for Rwanda
ICTY	◀▶	International Criminal Tribunal for the former Yugoslavia
JEP	◀▶	Special Jurisdiction for Peace (Spanish acronym)
LGBT	◀▶	Lesbian, gay, bisexual, and trans
SIVJRNR	◀▶	Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (Spanish acronym)
SOGI	◀▶	Sexual orientation and gender identity
SRVR	◀▶	Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct (Spanish acronym)
UN	◀▶	United Nations

METHODOLOGY

This book synthesizes the debates and testimonies submitted by Colombia Diversa to the Special Jurisdiction for Peace through three reports, two on Tumaco and one on southern Tolima, over the course of 2019. In this sense, the conceptual, legal, and practical reflections included in these pages arose from a qualitative and sociolegal research process that was conceived in order to bridge the yawning gap between LGBT victims of the armed conflict and Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR, by its Spanish acronym) created by the 2016 peace deal. In any case, the book is not merely a summary of these reports, rather it distills the key elements of our arguments into tools that activists, justice operators, and scholars can use to replicate our legal strategy in seeking justice for LGBT victims of serious human rights violations in any jurisdiction or part of the world where international criminal law and international human rights law apply.

In order to craft the JEP reports that shaped this book, we implemented the following methodology starting in the second half of 2018: **(I)** we identified and interviewed relevant institutions, organizations, and social leaders present in each territory in order to enhance and deepen the social, political,

and cultural contextual analysis previously crafted via secondary sources; **(II)** we reached agreements with individual and community leaders, who helped put us in contact with LGBT victims in the region and determine the best strategies for communicating the objectives of the documentation process and for setting clear expectations vis-à-vis the SIVJRNR; **(III)** we carried out semi-structured and in-depth interviews with the victims who expressed interest in taking their stories to the SIVJRNR, especially the JEP, after clearing up any doubts or uncertainties and procuring informed consent; **(IV)** once the interviews were transcribed, we systematized the information using a predetermined category tree as well as categories that emerged throughout the coding process; **(V)** we used saturation points to draw conclusions regarding the contextual analysis and the victims' testimonies; **(VI)** we identified the dogmatic elements that we needed to question and redefine, developed hypotheses regarding the patterns and legal characterization of the violence in each region, and proceeded to write the report; **(VII)** we carried out individual validation sessions with each of the victims during which we reviewed the sections detailing their specific cases as well as the overarching arguments of the report and signed a second informed consent form authorizing Colombia Diversa to submit the report (either as written or with the adjustments victims suggested); **(VIII)** we then procured powers of attorney in order to request accreditation of each of the victims before the JEP; **(IX)** we requested the reservation of the information contained in the report, per the wishes of the victims, and initiated the litigation process.

Understanding this methodology is key for readers of this book for two reasons. First, it shows the sources of the information here contained and the research standards with which it was collected and produced. Second, it explains why much of the information in this publication, especially in the second chapter, must be presented anonymously and with sparse details, both with respect to the episodes of violence and to those responsible, since this is what the victims who entrusted us with their stories demanded and since the

cases are currently under review by the Special Jurisdiction for Peace.²¹

In any case, for anyone who may be interested in learning more about the violence committed against LGBT people in the Colombian armed conflict, we encourage you to read the report submitted by Colombia Diversa to the Truth Commission.²² Though it does not reveal the identities of the victims or discuss their cases in depth, it does provide more information about the repertoires and the variations of violence deployed against LGBT people both among and within particular armed groups, thus giving the reader a more complete picture of conflict-related violence against LGBT people in Colombia. Other relevant reports include Colombia Diversa's *Vivir bajo sospecha* (2017),²³ which examines guerrilla and paramilitary violence in Vistahermosa, Meta and San Onofre, Sucre, respectively, and *Un parche que resiste* (2018),²⁴ which recounts the experience of collective reparation of the Mesa LGBT de la Comuna 8 de Medellín. These documents are part of Colombia Diversa's long history of visibilizing prejudice-based violence against LGBT people in Colombia both within and beyond the armed conflict.²⁵

21 This is why the citations of victim interviews only reference Colombia Diversa, the type of interview, and the year in which it was conducted without mentioning the date, place, name of the victim or any other identifying detail that could reveal their identity.

22 COLOMBIA DIVERSA. ¿Quién nos va a contar? Informe para la Comisión para el Esclarecimiento de la Verdad. Bogotá: 2020. Forthcoming.

23 COLOMBIA DIVERSA. Vivir bajo sospecha. Estudios de caso: personas LGBT víctimas del conflicto armado en Vistahermosa y San Onofre. Bogotá: 2017.

24 Op. cit., COLOMBIA DIVERSA, Un parche que resiste...

25 Since its inception, Colombia Diversa has documented the violence to which LGBT people are subjected in the context of the armed conflict. Its 2004 and 2006 human rights reports, for example, included annexes documenting various episodes of conflict-related violence against people with diverse sexual orientations and gender identities. Furthermore, in 2011, in its report on the situation of human rights of LGBT people in Colombia between 2008-2009, it laid out a series of elements to consider when examining conflict-related violence against LGBT people, particularly in the case of forced displacement. In this publication, it stated that the main challenges to documenting cases of forced displacement of LGBT people were: (I) invisibility and underreporting; (II) institutional and organizational weakness in addressing cases of forced displacement; (III) difficulty understanding the causes and effects of the violence against LGBT people. See: COLOMBIA DIVERSA. Todos los deberes, pocos los derechos. Situación de derechos humanos de lesbianas, gay, bisexuales y transgeneristas en Colombia 2008-2009. Bogotá: 2011.

CHAPTER

I

*AN EMERGING ALLY: INTERNATIONAL CRIMINAL LAW AS
A TOOL OF JUSTICE FOR LGBT VICTIMS OF ATROCITIES*

COLOMBIA DIVERSA

“The sacrificial victim, as part of a dominated territory, is forced to hand over their body as a tribute to the cohesion and vitality of the group. The stain of her blood defines the murderers’ esoteric belonging to the group. In other words, more than a cause, impunity can be understood as a product, the result, of these crimes, and the crimes themselves as a means for producing and reproducing impunity: a blood pact sealed with the blood of the victims”.
Rita Laura Segato, La guerra contra las mujeres, 2016.

International crimes have a relatively simple structure. To prove the crime was committed, two elements are necessary: an objective element (*actus reus*) and a subjective element (*mens rea* or criminal intent). These elements are folded into a series of contextual and specific elements that vary according to the type of crime (i.e. crimes against humanity, genocide, war crime, crime of aggression). The structure of crimes against humanity, for instance, is as follows:

(I) Contextual elements: According to the Elements of Crimes, “the last two elements for each crime against humanity describe the context in which the conduct must take place”²⁶. Per Article 7(1) of the Rome Statute, these elements are:

- (a) An attack directed against any civilian population;
- (b) Committed in a widespread or systematic manner;
- (c) With knowledge of the attack.

²⁶ ICC. Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2, 2000.

(II) Specific elements: Related to the specifics of each crime laid out in Article 7 of the Rome Statute. The specific elements of the crime of persecution are as follows:

- (a) Acts of persecution against any identifiable group or collectivity;
- (b) Committed on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
- (c) In connection with any crime within the jurisdiction of the International Criminal Court (ICC) (war crimes and crimes against humanity).

Mirroring the structure of international crimes, this chapter is divided into two sections. The first focuses on the contextual elements that characterize crimes against humanity, specifically on the notion of systematicity, while the second focuses on the specific elements of the crime of persecution.

In the first section, we privilege the notion of systematicity over the study of the other contextual elements for four reasons. First, existing evidence indicates that SOGI-based persecution during the Colombian conflict was not widespread (i.e. directed against a numerically significant proportion of the population), making it essential to focus on systematicity. The crime of persecution is founded on the idea that some people or groups of people are persecuted due to the prejudiced views of the perpetrators. These views do not exist in a vacuum, rather they are rooted in systems of oppression that sustain power disparities across political, racial, national, ethnic, cultural, religious, and gender lines (i.e. all of the prohibited grounds of persecution listed in the Rome Statute, which arise from the state obligation to uphold the right to equality and nondiscrimination under international human rights law). In this sense, persecuted groups are always minorities in terms of their access to societal power, but not necessarily statistical minorities. Regardless of whether the group is a statistical minority, persecution may be widespread

in some contexts. However, current statistics *suggest* that this has not been the case for SOGI-based persecution in Colombia. We emphasize ‘suggests’ because the high rates of underreporting and other issues associated with verifying the sexual orientation or gender identity of the victims and motives of the perpetrators²⁷ obscure the true proportions of the phenomenon. As of May 31, 2020, the official victims’ registry reported 3,974 LGBT victims of the armed conflict, a relatively small (from a purely statistical standpoint) proportion of the 9,014,766 victims reported in total.

The second reason for focusing on systematicity relates to the laws and procedures governing the Special Jurisdiction for Peace, which have consistently privileged this requirement in demarcating the JEP’s jurisdiction. In early 2017, for example, the Colombian Congress passed Legislative Act 01, which temporarily amends the Constitution in order to incorporate the transitional justice arrangements created by the 2016 peace deal. This law circumscribed the JEP’s jurisdiction to *systematic* acts of violence committed by the former FARC-EP guerrilla or state security forces that constitute grave human rights violations, infractions of international humanitarian law (IHL), or international crimes. It also established that the Jurisdiction cannot “presume the widespread or systematic nature of the punishable conducts under investigation, nor that the act was committed as part of a plan or policy or as part of the large-scale commission of such crimes”²⁸.

This logic was reproduced in the JEP’s Statutory Law (Law 1957 of 2019), which was approved by Congress in late 2017 but signed into law in July 2019. Following the maxim of transitional justice that societies in transition cannot possibly prosecute all of the crimes committed in their violent past, the peace agreement stipulated that subsequent laws must establish the criteria for prioritizing and selecting cases for investigation within the JEP. The goal of these criteria would be to enable the prosecution of conducts that reflected

27 For more information on Colombia Diversa’s critiques of the official victims’ registry, see: Op. cit., COLOMBIA DIVERSA, *Un parche que resiste...*

28 CONGRESS OF THE REPUBLIC OF COLOMBIA. Constitution of Colombia, Legislative Act 01 of 2017. Chapter III, transitory article 12, par. 5. Quote translated from Spanish.

the broader patterns of violence perpetrated throughout the war. This is precisely what article 19 of the JEP’s Statutory Law sets out to do. Under this article, the JEP’s selection criteria were specified as: the gravity of acts, the representativeness of the acts, the differential characteristics of the victims, the representativeness of the perpetrators, and the availability of probative material. Notably, the notion of gravity was defined as concerning “the degree of infringement of individual and collective fundamental rights; the mode of commission of the acts of violence and their *systematicity*,” thus articulating a link between these two concepts.

In a similar fashion, in June 2018, the JEP’s Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct (“Panel for Acknowledgement of Truth” or SRVR, by its Spanish acronym) issued a document entitled Criteria and Methodology for the Prioritization of Cases and Situations. Here, it reiterated the link between the notions of gravity and systematicity as well as the JEP’s mandate to “identify and analyze plans and policies, elements of systematicity, and patterns of macrocriminality”²⁹. It also referenced the notion of “system crimes,” echoing former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Pablo de Greiff’s call for prosecutorial prioritization strategies (like the JEP’s selection criteria) given that “the case-by-case approach renders it difficult to establish links between the different cases, identify patterns of violations and ascertain chains of command, all of which are essential precisely wherever violations are not isolated occurrences but the result of *systems of crime*”³⁰ (emphasis added).

In response to these selection criteria, the Constitutional Court issued

29 SPECIAL JURISDICTION FOR PEACE (JEP). Criterios y metodología de priorización de casos y situaciones en la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas. 28 June 2018. Pg. 4. Quote translated from Spanish.

30 UNITED NATIONS. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 2014. Res. AG/HRC/27/56, General Assembly, Human Rights Council. Mentioned in: Op. cit., JEP, Criterios y metodología de priorización de casos y situaciones en la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas...

ruling C-080 of 2018, which adopted two conflicting interpretations of systematicity, a contradiction inherited from international criminal law that stems from an outdated reading of ICC precedent. On one hand, the judgment defines systematicity as “an element for the definition of crimes against humanity when attacks against the civilian population occur, among other elements, in the context of a policy or plan,” effectively binding the concept to the existence of a policy or plan. As precedent for this definition, it cites the International Criminal Tribunal for Rwanda’s (ICTR) trial judgment in *Akayesu* (1998), which, as we will see below, describes systematicity in similar terms. On the other hand, the ruling echoes the Committee against Torture’s (CAT) definition of systematicity, stating that torture is “practiced systematically when it is apparent that torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question”³¹. This second definition, in sharp contrast with the first, focuses on the non-random nature of the violence, without requiring the existence of a plan or policy.

Clearly, as demonstrated by aforementioned laws and decisions, the transitional justice scheme adopted by Colombia centers the notion of systematicity as fundamental to determining which crimes should and should not be investigated and prosecuted in order to establish the judicial truth regarding the violence committed during the armed conflict. Within this scheme, the concept takes on two roles: on one hand, it acts as a legal constraint on the Jurisdiction’s power to decide which crimes to investigate in depth and, on the other, it serves as a tool of transitional and criminal justice policy to limit which cases can be admitted into the Jurisdiction.

The third argument in favor of focusing on systematicity concerns the tendency of international criminal courts to blur the distinction between this notion and that of “attack directed against a civilian population”. In the Elements of Crimes, “attack directed against a civilian population” is

31 COLOMBIAN CONSTITUTIONAL COURT. Judgment C-080 of 2018, Justice writing for the Court: Antonio José Lizarazo.

understood to mean “a course of conduct involving the multiple commission of acts [...] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”³². Yet, as noted in relevant legal doctrine, international criminal court rulings often take this definition a step further, conceptualizing the attack as occurring in order to pursue or further a state or organizational policy and *in a non-random fashion*,³³ which, as we will see, is the defining element of systematicity. The fact that the courts tend to collapse these two notions makes discussing these elements separately unnecessary, since they end up having little practical difference, especially as it pertains to proving the existence of a policy, as will be explained below.

Ultimately, due to the non-widespread nature of SOGI-based persecution in Colombia, the notion’s privileged position in the JEP, and the importance of the non-random character of crimes to international criminal tribunals, the concept of systematicity becomes central to ensuring access to justice for LGBT victims of the Colombian armed conflict. However, as we will show in the first section, prevailing definitions of systematicity lack gender perspective and constitute one of the foremost barriers to justice for groups that have been historically silenced and rendered invisible in judicial debates on past atrocities, such as women and LGBT people. Though the systematic nature of the cases of violence submitted to the Special Jurisdiction for Peace should be readily apparent, allowing them to meet the gravity threshold in accordance with ICC standards, it ends up stopping them in their tracks.

In the second section, centered on the international crime of persecution, we lay the conceptual groundwork to show that **(I)** persecution is the legal equivalent of prejudice-based violence, a sociological concept that has been used to study violence against LGBT people in Colombia for over a decade; and that **(II)** even a restrictive interpretation of gender in the Rome Statute

32 Op. cit., ICC, Elements of Crimes..., Article 7(3).

33 CASE MATRIX NETWORK. Crímenes de lesa humanidad. Directrices de Derecho Penal Internacional, International Criminal Law Toolkit. Accessed June 20, 2020 at: <https://www.legal-tools.org/doc/66bb47/pdf/>.

must recognize sexual orientation and gender identity as protected classes.

A. Deconstructing the notion of systematicity as a contextual element of the crime of persecution

The notion of systematicity is the central analytical category for the study of large-scale criminality.³⁴ Yet, the field of criminal law is not alone in theorizing this concept. Quite the contrary, various branches of law, especially international human rights law, have attempted to develop a definition of systematicity capable of explaining phenomena such as the commission of grave human rights violations against a large number of individuals without premeditation. This section does not purport to exhaustively trace the diverse theoretical and legal discussions surrounding this concept, though it will delve deeply into its evolution in the field of international criminal law, with some references to other fields. Rather, its goal is to put the ICC's most recent definition of systematicity into dialogue with feminist theory in order to expose its limitations and propose a more gender-sensitive definition in its place, one that captures the violence committed against LGBT people in the Colombian conflict.

The proposed definition challenges the widespread assumption that systematicity depends on the existence of a plan or policy. Generally speaking, it posits that when **(I)** an attack directed against a civilian population **(II)** occurs in contexts marked by systems of oppression like the sex/gender/desire system and **(III)** in connection with an armed conflict that reinforces said system, proving the existence of a plan or policy becomes unnecessary. Rather, contextual evidence regarding the pervasiveness of the system is enough to reveal the organized, rational, and non-arbitrary nature of the crimes, which is systematicity's true purpose. In Colombia Diversa's view, this interpretation of systematicity applies to not only to violences perpetrated against LGBT

³⁴ Also referred to in this text as macro-criminality. Both reference the organization of large-scale criminal activity.

people but also against other groups or individuals who are subject to various forms of discrimination and exclusion that similarly challenge dominant conceptions of organized violence.

1. A brief history of the evolution of systematicity in international criminal law

Systematicity is an extralegal category. It was first conceptualized in the natural sciences and made its way into the social sciences before finally entering the realm of law. In doing so, it has helped legal theorists make sense of complex criminal enterprises whose meticulous organizational structure makes it impossible to consider them the product of chance.³⁵

In this sense, under current ICC precedent, the term ‘systematic’ is a contextual qualifier of an attack that “reflects the organised nature of the acts of violence and the improbability of their random occurrence” and “refers to the existence of ‘patterns of crimes’, evidenced by non-accidental repetition of similar criminal conduct on a regular basis”³⁶. When evaluating the systematic nature of an attack, the following (non-cumulative) criteria must be taken into account: **(I)** identical acts took place or similarities in criminal practices can be identified; **(II)** the same *modus operandi* was used; and **(III)** victims were treated in a similar manner across a wide geographic area.³⁷

International criminal judges, however, have not always espoused this definition of systematicity, instead reproducing the notion that systematic attacks must occur in pursuit or furtherance of formal or informal organizational policies. This now-superseded logic dates back to the concept’s origins in international law, when the unimaginable scale of the Holocaust sent shockwaves throughout the international community.

In a nutshell, the Nazi regime prompted a rethinking of the uses of violence

³⁵ German sociologist Niklas Luhman’s social systems theory is particularly relevant for studying criminal law dogma.

³⁶ INTERNATIONAL CRIMINAL COURT (ICC). Trial Chamber VI. Case No. ICC-01/04-02/06. Prosecutor v. Bosco Ntaganda, Trial Judgment, 8 July 2019, par. 692.

³⁷ Ibid, par. 693.

and gave rise to a new model of criminal responsibility. Broadly speaking, the resulting paradigm shift can be summarized as follows: In contemporary criminal law, the idea of criminal responsibility rests on two basic principles. The first is that only the individual who committed the criminal act (i.e. illegal behavior that causes harm or damage to someone or something) should be held liable. The second is that the individual in question may only be held responsible for their behavior, that is, objective, discernible, and, in this case, criminal acts, not for their individual characteristics. The shocking level of organization that characterized the Nazi apparatus of cruelty, which was also cloaked under a legal guise, challenged these two core principles. The inner workings of the Nazi regime revealed that there was a *system* of atrocities at work, one that could not be reduced to individual decisions or behaviors because it was predicated on a complex collective logic: a hierarchy, the division of labor, and specific decision-making mechanisms. The Nuremberg trials thus opened up new debates about the appropriate model of criminal responsibility for what the Nuremberg Charter³⁸ called war crimes, crimes against peace, and crimes against humanity. As Alejandra Azuero points out, the result was a new model that displaced the individual as the locus of criminal responsibility and focused on prosecuting the criminal *plan* or *design* in hopes of reaching the *planners* and *designers* rather than merely the executors of the crimes.³⁹ This is how the concept of systematicity, associated with notions of planning, premeditation, and organization/rationality, began to take force in international criminal law.

Still, it was not until the early 1990s, when the United Nations established two ad hoc criminal tribunals, that the notion of systematicity was first formalized and put into practice. The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) did not incorporate systematicity as a defining element of crimes against humanity, but the ICTY soon developed

38 The Nuremberg or London Charter created the International Military Tribunal for the prosecution and punishment of major war criminals of the European axis.

39 AZUERO QUIJANO, Alejandra. "Conviction by Design: Remaking Criminal Responsibility at the Nuremberg Trials." SJD Dissertation, Harvard Law School, 2017.

its own doctrine on the matter through case law. In contrast, article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) explicitly defined crimes against humanity as those committed “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”⁴⁰.

In any case, in conformity with the debates that took place during Nuremberg, both the ICTY and ICTR’s case law define systematicity as requiring the existence of a plan or policy.⁴¹ Article 5 of the ICTY’s Statute indicates that the prohibited acts that could amount to crimes against humanity must be directed against any civilian population. In its doctrine on systematicity, the ICTY established that this requirement does not mean that the acts must be directed against the entire population of a specific state in order for them to constitute crimes against humanity. Rather, it speaks to the collective nature of the crimes and serves to exclude isolated or random acts that may constitute war crimes or crimes under national criminal law but do not qualify as crimes against humanity. Per this reasoning, in *Prosecutor v. Dusko Tadic* (1997), the ICTY’s Trial Chamber interpreted “population” to mean that “the acts must occur on a widespread or systematic basis, that there must be some form of a *governmental, organizational or group policy* to commit these acts and that the perpetrator must know of the context within which his actions are taken”⁴² (emphasis added). In other words, for an attack to qualify as systematic, there must be evidence of a policy that gives rise to human rights violations against the civilian population.

Shortly thereafter, in *Prosecutor v. Blaskic* (2000), the ICTY disaggregated systematicity into four elements: **(I)** the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad

40 UNITED NATIONS SECURITY COUNCIL (UNSC). Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006). 8 November 1994. Article 3.

41 Though the terms plan and policy are often used interchangeably in international criminal law, based on their usages, it can be inferred that plans typically entail a lesser degree of formalization than policies.

42 INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY). Trial Chamber II. Case No. IT-94-I-T, *Prosecutor v. Dusko Tadic*, Opinion and Judgment, 7 May 1997, par. 644.

sense of the word, that is, to destroy, persecute or weaken a community; **(II)** the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; **(III)** the preparation and use of significant public or private resources, whether military or other; **(IV)** the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.⁴³ It also clarified that the aforementioned plan need not be “declared expressly or even stated clearly and precisely,” rather it can be surmised from the occurrence of a series of events: **(I)** the general historical circumstances and the overall political background against which the criminal acts are set; **(II)** the establishment and implementation of autonomous political structures at any level of authority in a given territory; **(III)** the general content of a political program, as it appears in the writings and speeches of its authors; **(IV)** media propaganda; **(V)** the establishment and implementation of autonomous military structures; **(VI)** the mobilization of armed forces; **(VII)** temporally and geographically repeated and coordinated military offensives; **(VIII)** links between the military hierarchy and the political structure and its political program; **(IX)** alterations to the “ethnic” composition of populations; **(X)** discriminatory measures, whether administrative or other (banking restrictions, laissez-passer,...); and **(XI)** the scale of the acts of violence perpetrated – in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.⁴⁴ These rules were reiterated in subsequent ICTY rulings, which also placed special emphasis on the relationship between systematicity and “the organised nature of the acts of violence and the improbability of their random occurrence” while noting that “patterns of crimes—that is the non-

43 ICTY. Trial Chamber. Case No. IT-95-14-T. Prosecutor v. Blaskic. Judgment, 3 March 2000, par. 203.

44 Ibid, par. 204.

accidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence”⁴⁵.

The ICTR likewise addressed the meaning of the concepts *widespread* and *systematic* on various occasions. In *Prosecutor v. Akayesu* (1998), it described a systematic attack as “thoroughly organised and following a regular pattern on the basis of a common *policy* involving substantial public or private resources,” noting that while there is “no requirement that this policy must be adopted formally as the policy of a state,” there must “be some kind of preconceived plan or policy”⁴⁶ (emphasis added). In subsequent judgments, the Court reiterated this definition of systematicity, stressing the idea that systematic attacks are perpetrated by virtue of a predetermined plan or policy.⁴⁷

In the late 1990s, the adoption of the Rome Statute of the ICC finally crystallized the notion of systematicity as a definitional requirement of crimes against humanity. Since then, the ICC has consolidated its own doctrine on the matter. While this doctrine draws on its predecessors’ rulings, as we will show below, it also departs from their interpretations in significant ways.

In the decision on the confirmation of charges in *Prosecutor v. Katanga & Ngudjolo*, the ICC’s Pre-Trial Chamber asserted that the “adjective ‘systematic’ refers to the organised nature of the acts of violence and the improbability of their random occurrence”⁴⁸ and excludes random or isolated acts of violence, echoing the ICTY’s precedent on the matter. The ICC further recalled the two prevailing interpretations of systematicity as “an organized plan in furtherance of a common policy, which follows a regular pattern and

45 ICTY. Trial Chamber. Case No. IT-96-23 and IT-96-23/1. *Prosecutor v. Kunarac et al.* Judgment, 22 February 2001, par. 429; Appeals Chamber. Case No. IT-95-14/2-A. *Prosecutor v. Kor Die and Cerkez.* Appeals Judgment, 17 December 2004, par. 94; Trial Chamber I. Case No. IT-02-60-T. *Prosecutor v. Blagojevic and Jokic.* Trial Judgment, 17 January 2005, par. 545; Trial Chamber. Case No. IT-05-87-T. *Prosecutor v. Milutinovic et al.* Trial Judgment, 26 February 2009, par. 150.

46 INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR). Trial Chamber I. Case No. ICTR-96-4-T. *Prosecutor v. Jean-Paul Akayesu.* Trial Judgment, 2 September 1998, par. 580.

47 See: ICTR. Trial Chamber II. Case No. ICTR-95-1-T. *Prosecutor v. Kayishema & Ruzindana.* Trial Judgment, 21 May 1999, par. 123; Trial Chamber I. Case No. ICTR-96-3-T. *Prosecutor v. Rutaganda.* Judgment and Sentence, 6 December 1999, par. 69.

48 ICC. Pre-Trial Chamber I. Case No. ICC-01/04-01/07-717. *Prosecutor v. Katanga & Ngudjolo.* Confirmation of Charges, 30 September 2008, par. 394.

results in a continuous commission of acts” or “patterns of crimes” such that the crimes constitute a ‘non-accidental repetition of similar criminal conduct on a regular basis’⁴⁹. Once the trial concluded, the Trial Chamber reiterated the link between systematicity and the “organised nature of the acts of violence,” but it also introduced an analytical distinction between the notions of *policy* and *systematic*. Indicating that these concepts should not be seen as synonymous, it emphasized that it is the widespread or systematic nature of the attack, not the existence of a criminal policy, that sets crimes against humanity apart. In doing so, it affirmed that,

Any attack directed against a civilian population that may be considered “systematic” will in principle presuppose the existence of a State or organisational policy. [...] To establish a “policy,” it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community. Such analysis also entails inquiry as to whether a series of repeated actions seeking to produce always the same effects on a civilian population was undertaken with consideration – identical acts or similarities in criminal practices, continual repetition of a same *modus operandi*, similar treatment meted out to victims or consistency in such treatment across a wide geographic area⁵⁰.

The above interpretation clearly reveals ICC’s analytical shift: Though an attack directed against a civilian population may be driven by a specific policy (formal or informal), this is not the core concern when it comes to proving crimes against humanity. Rather, the heart of the matter is being able to identify the repetition of certain acts, the similarities between certain criminal practices, and their multiplicity and relative frequency in a particular geographic area, while considering the context in which these acts and practices play out, especially

49 Ibid, par. 397.

50 ICC. Trial Chamber II. Case No. ICC-01/04-01/07. Prosecutor v. Germain Katanga. Trial Judgment, 7 March 2014, par. 1111 & 1113.

(but not only) the relationship between victims, perpetrators, and the territory in question. In sum, according to current ICC's case law, it is the pattern of crimes that denotes the existence of a systematic attack.

With respect to the notion of 'policy' referenced in the definition of "attack directed against any civilian population" in article 7(2)(a), it is worth noting the ICC's most recent ruling stipulates that, "a policy may consist of a pre-established plan or design, but it may also crystallize and develop only as actions are undertaken by the perpetrators"⁵¹. In other words, in the eyes of the ICC, the plans or policies aimed at attacking the civilian population may or may not actually be planned. The latter scenario refers to the emergence of a practice. Furthermore, the Court also indicates that the existence of a policy may be surmised from a number of non-cumulative factors, such as: **(I)** the fact that the attack was planned or directed; **(II)** the existence of a recurrent pattern of violence, for example, repeated actions occurring according to a same sequence; **(III)** the use of public or private resources to favor the policy; **(IV)** the involvement of the state or organizational forces in the commission of crimes; **(V)** statements, instructions, or documentation attributable to the state or organization condoning or encouraging the commission of crimes; **(VI)** an underlying motivation; and **(VII)** the existence of preparations or collective mobilization orchestrated and coordinated by that state or organization.⁵²

Two preliminary conclusions arise from this discussion. First, though the notion of systematicity as predicated on the existence of a policy reigned in international criminal law for many years, ICC case law has recently decoupled these two concepts. As such, instead of privileging evidence of a policy as the key element for ascertaining systematicity, it privileges the identification of patterns of crimes. In this sense, rather than revealing a particular plan or policy, the prosecution of large-scale criminality per the logic of the premeditation and organization/rationality of criminal acts

51 ICC. Trial Chamber VI. Case No. ICC-01/04-02/06. Prosecutor v. Bosco Ntaganda. Trial Judgment, 8 July 2019, par. 674.

52 Ibid.

should seek to identify a series of *non-cumulative* factual elements that speak to the context in which they arise and convey their non-arbitrary nature. These elements may include but are not limited to: **(I)** the repetition of a certain conduct in a particular time and place; **(II)** the similarities between the crimes committed (when there are several incidents to be considered); and **(III)** the characteristics of the victims. In any case, the *context* in which the crimes were committed, which may emerge as a practice without prior planning, remains the crucial element both for evidencing the attack and analyzing systematicity.

Second, this definition of systematicity still hinges on the premeditation and organization of the criminal acts, which, as will be explained in the second part of this section, we see reflected in prevailing definitions of *pattern*. In this sense, while this analytical shift may prove more favorable to victims and their demands for justice because it emphasizes the interconnectedness of the human rights violations committed instead of the existence of a plan or policy that will surely be denied by its architects, it continues to pose its own set of challenges. In particular, the fact that the notion of pattern stresses elements like frequency and temporal proximity means that it overlooks the existence of criminal conducts that may lack prior planning and even temporal or geographic proximity but that are still deliberate and selective. These kinds of conducts do not need to be planned, organized, or rationalized because, as feminist scholarship on conflict-related sexual violence has shown time and time again,⁵³ they are buttressed by systems of oppression that precede but are exacerbated by war. In other words, the logics that sustain these preexisting systems of oppression likewise inform the violence committed by armed groups, giving perpetrators a socially prescribed script on which to act.

Bearing in mind these two conclusions, the second part of this section draws on feminist scholarship in order to propose a more capacious and gender-sensitive definition of systematicity, one that reflects the logic underlying the violence committed against LGBT people during contemporary armed conflicts.

⁵³ See, for example, CNMH. La guerra inscrita en el cuerpo. Informe nacional de violencia sexual en el conflicto armado. Bogotá: CNMH, 2018. Pg. 224.

2. Engendering Systematicity: Contributions to the Complex Debate between Feminism and International Criminal Law

Feminist movements and intellectual projects have marshaled important critiques concerning the theory and practice of law. Many of these critiques endeavor to reveal the ways in which the legal field⁵⁴ promotes and reproduces structural inequalities along the axes of gender and sexuality. Like many other disciplines, this field was conceived from a male perspective and therefore favors the sexualization of human activity, ultimately reinforcing the hierarchies that privilege the masculine over the feminine.⁵⁵ We draw on these critiques to unpack the concept of systematicity outlined in the previous section and posit a more gender-sensitive definition.

In order to better understand this critique, however, it is important to walk through some of the leading feminist commentary on criminal law, international law, and, of course, international criminal law. Speaking to the first, for several decades now, criminal law and criminal justice have been at the core of feminist legal challenges. As noted by Stephen Schulhofer, “criminal law is, from top to bottom, preoccupied with male concerns and male perspectives”⁵⁶. Not only are the policies and precedents often conceived in male-dominated spaces like legislatures, presidential cabinets, councils of ministers, and other high-level decision-making bodies, but the conception of crime itself (as a social construct) is also gendered male. The emphasis on attributes typically associated with masculine behavior such as the use of

54 For the purposes of this book, we use Mauricio García Villegas’ definition of the term “legal field” (in the original Spanish, *campo jurídico*). Following Pierre Bourdieu, Villegas defines the law as “a social field in which participants dispute the correct, authorized, and legitimate interpretation of legal texts. These participants [...] compete over the appropriation of the symbolic power implicit in these texts. In this way, the law becomes the quintessential form of symbolic power and of symbolic violence. The law’s symbolic power stems from its right to define its own meaning”. GARCÍA VILLEGAS, Mauricio. *La eficacia simbólica del derecho. Sociología política del campo jurídico en América Latina*. 2nd ed. Bogotá: IEPRI, Debate, 2016. Pg. 51. Quote translated from Spanish.

55 OLSEN, Frances. *The Sex of Law*. In: *The Politics of Law*. New York: Pantheon, 1990, p. 452- 467.

56 SCHULHOFER, Stephen J. “Feminist Challenge in Criminal Law.” In: *University of Pennsylvania Law Review*, vol. 143, no. 6, June 1995, p. 2151-2208. Pg. 2151.

force or violence and the proclivity to defy the established order have made criminal law into a “system of rules conceived and enforced by men, for men, and against men”⁵⁷.

Furthermore, the criminal justice system and the legal interests it protects have also drawn criticism for their expansive logic (in some instances promoted by certain sectors of the feminist movement), particularly when it comes to sexual offenses. Not only does this expansive logic advance a paternalistic view of women and children’s sexuality, but it also neglects the complex harms that result from these and other potentially sexually motivated crimes, which tend to disappear in the identification of the interests that warrant protection under criminal law.⁵⁸ For example, since laws criminalizing sexual offenses are often centered on safeguarding the sexual integrity of women and children, they tend to ignore the harms that sexual violence causes to one’s sexual autonomy. This critique views criminal law as a means to an end, a tool of last resort in the prevention and protection of women and other vulnerable populations against gender-based violence. As such, it calls for a minimalist application of criminal law that harmonizes protected interests with the complexities of sexually motivated crimes, which go beyond the so-called sexual integrity of the victim.⁵⁹

Together, these critiques point the way toward a broader truth about the field of criminal law: In the sexualized hierarchies of criminal law, people with gender-subordinated experiences, especially women, exist only as victims, *not* as autonomous and agentive beings, particularly when it comes to domestic or sexual violence. Though this is, in part, the product of patriarchal and moralistic legislation and punitive criminal justice approaches, it is also the product of feminist advocacy, which has actively promoted the adoption of laws that recognize women as victims

57 Ibid, pg. 2154.

58 ABADÍA, Marcela. *Feminismos y sistema penal. Retos contemporáneos para una legitimación del sistema penal*. Bogotá: Universidad de los Andes, Facultad de Derecho, Ediciones Uniandes, 2018. Pg. 191.

59 Ibid.

and especially as victims of sexual violence.⁶⁰ We will explore this in relation to international criminal law in the coming paragraphs.

Like domestic criminal law, international law has also been the object of sustained feminist scrutiny. As a set of rules and arrangements designed primarily to govern the interactions between sovereign states, international law reflects the gender biases of the broader international system on both an organizational and normative level. To quote Hilary Charlesworth, Christine Chinkin, and Shelley Wright, “States are patriarchal structures not only because they exclude women from elite positions and decision-making roles, but also because they are based on the concentration of power in, and control by, an elite and the domestic legitimation of a monopoly over the use of force to maintain that control”⁶¹. This means that masculine values regarding domination and the use of force prevail over discourses of providing care and addressing inequalities. As a result, international law emerges as “a thoroughly gendered system”; both the structures of international lawmaking and the content of its rules privilege men while marginalizing the interests of women and other gender-subordinated groups, when they consider them at all.⁶² This helps explain why the first treaty on violence and discrimination against women (the Convention on the Elimination of all Forms of Discrimination Against Women – CEDAW) was not adopted until 1979 and why a global agenda on gender equality and women’s rights was not formally established in the United Nations until the 1990s.

Naturally, feminist critiques of criminal law and of international law have also informed their assessments of international criminal law, which evinces similar patterns of exclusion. Women’s experiences in contexts of large-scale violence like armed conflicts and dictatorships were largely ignored

60 HALLEY, Janet. “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law.” In: *Michigan Journal on International Law*, vol. 30, no. 1, 2008, p. 1-123.

61 CHARLESWORTH, Hilary, CHINKIN, Christine & WRIGHT, Shelley. “Feminist Approaches to International Law.” In: *The American Journal of International Law*, Vol. 85, No. 4, 1991, p. 613-645. Pg. 622.

62 *Ibid*, pg. 615.

by international criminal law until the ICTY and the ICTR, which became the first to prosecute acts of sexual violence as international crimes. Still, it was the adoption of the Rome Statute in the late 1990s that truly marked a watershed moment in terms of women’s recognition as victims of large-scale violence. Due in large part to feminist mobilization around the creation of the ICC,⁶³ this Statute became the first international treaty to criminalize sexual and gender-based violence. In fact, it codified numerous forms of sexual violence as offenses that could amount to war crimes, genocide, and crimes against humanity and recognized gender a prohibited ground of persecution.

Though these advances have paved the way toward more gender-sensitive and survivor-centered models of international criminal justice, many of its patriarchal imperatives remain intact. First of all, the Statute’s paternalistic language casts women as victims who are completely devoid of agency and at the mercy of the voracious sexual appetites of male fighters.⁶⁴ Moreover, article 7(3) of the Statute, which defines gender as “the two sexes, male and female, within the context of society,” essentially equates the concepts of sex and gender and reproduces the discriminatory logics of compulsory hetero- and cisnormativity whereby the only acceptable configurations of sex/gender/desire are vagina/feminine/heterosexual and penis/masculine/heterosexual. We will return to this definition in the second section of the chapter. Finally, the absence of sexual orientation and gender identity as grounds for genocide or persecution represents an unacceptable silence that erases the atrocities committed against LGBT people in an effort to limit their prospects for justice under international criminal law.⁶⁵

63 DELPLA, Isabelle. “Women and international (criminal) law.” In: *Clio* [Online], vol. 39 (2014), Online since 10 April 2015. Accessed on 20 May 2020 at: <https://journals.openedition.org/cliowgh/546#quotation>; Op. cit., HALLEY, Rape at Rome...

64 Though not a central part of the debate addressed in this book, it is worth noting that feminist activists and academics have long questioned the representation of sexual violence as the spoils of war for those who wage it. In reality, sexual violence is part of a complex arsenal of war strategies that rely on diverse structures of power and domination (in this case human sexuality) in order to control or exterminate specific populations and territories. As such, sexual violence can be deployed with many ends, but it is always about power and never about the sexual satisfaction of individual fighters. See, for example, ALIANZA 5 CLAVES. *Conexidad entre la violencia sexual y el conflicto armado: un llamado al no retroceso en la Jurisdicción Especial para la Paz*. March 2020. Retrieved from: https://www.humanas.org.co/alfa/dat_particular/arch_contenidos/i_e_63809_q_Final_cinco_claves.pdf.

65 BARRERA MOORE, Charles. “Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population Under Article 7 of the Rome Statute of the International Criminal Court.” In: *Minnesota Law Review*, vol. 157, 2017, p. 1287-1330. <https://scholarship.law.umn.edu/mlr/157>.

In alignment with these critical examinations of international criminal law, this section uses the lens of feminist legal theory to interrogate the notions of systematicity and pattern of crimes, both of which have been at the heart of the global criminal justice project since the adoption of the Rome Statute in 1998.

Regarding the notion of **systematicity**, at the beginning of this chapter, we indicated that the implementation of a non-random criminal enterprise does not always require prior planning or the design of elaborate policies predicated on the division of labor within the structure or group that executes it. When conducts like those codified as international crimes occur in contexts of structural discrimination and exclusion of certain sectors of the population (like LGBT people), the logics that govern these systems of oppression substitute or rather preclude the need to devise specific plans or policies. In other words, where the ICC once decoupled the notions of systematicity and policy, we now intend to decouple the notions of systematicity and premeditation.

The logical starting point for such an endeavor is to interrogate the voluntarist and even contractual logic that equates non-arbitrary with premeditated. Specifically, the idea that in order to prove that a specific action or set of actions was not random, it must be shown that they were driven by a series of explicit agreements that shaped the design of criminal plans or policies. Feminist scholarship proves exceptionally useful in this regard because it has shown that sex and gender function as power relations that give rise to regimes, orders, or systems of oppression that work to sustain and reinforce those power relations. These regimes, orders, and systems are socially and culturally institutionalized, so they do not need to be enshrined in law.⁶⁶ As illustrated by Kate Millet in her seminal text *Sexual Politics* (1970), they exist in our philosophies, books, films, art, and other expressions of culture, and this is enough to bring them to life.⁶⁷

One of the most influential explanations of the architecture of these systems is Carole Pateman's *The Sexual Contract* (1988). Here, Pateman argues that social contract theory (i.e. the idea that modern states are founded on a social

66 MILLET, Kate. *Sexual Politics*. 5th Ed. New York: Columbia University Press, 2016 (1969). Pg. 24-25.

67 Ibid.

contract between those who govern and those who are governed) presupposes (and conceals) a preexisting sexual contract, which is institutionalized but neither explicit nor formalized. By organizing society on the basis of this social contract, modern nation-states essentially signed onto “men’s domination over women, and the right of men to enjoy equal sexual access to women”⁶⁸. This means that behind formal agreements like constitutions and bills of rights lurk other implicit patriarchal pacts that buttress women’s and other gender-subordinated subjects’ oppression. Put simply, “contract is the means through which modern patriarchy is constituted”⁶⁹.

The ideas that underlie these contracts have been dubbed *patriarchal ideology*. As explained by Alda Facio and Lorena Frías, *patriarchal ideology*⁷⁰ can be understood as “a set of beliefs that not only explain the relations and differences between men and women, but that also center one of the sexes as the default for humanity,” allocating rights and responsibilities as well as restrictions and rewards that end up being unequal for the sex/gender regarded as different from the mold.⁷¹ The rules of this system are produced and reproduced by diverse institutions like the family, the state, education, religions, science, and the law.⁷² In fact, sexed/gendered patterns of socialization are one of the primary vehicles of patriarchy. This is how it gains the tacit consent of both the oppressed and their oppressors and continues to perpetuate itself.⁷³

68 PATEMAN, Carole. *The Sexual Contract*. Oxford: Polity Press, 1988. Pg. 2.

69 Ibid.

70 It is worth noting that Facio and Frías define ideology as “a coherent system of beliefs that leads people to understand and view the world in a certain way, provides the basis on which to evaluate others’ behaviors and other social phenomena, and prescribes acceptable responses to that behavior.” FACIO, Alada & FRÍES, Lorena. “Feminismo, género y patriarcado.” In: *Academia. Revista sobre enseñanza del derecho de Buenos Aires*, vol. 3, no. 6, spring 2005, p. 259-294. Pg. 261. Quote translated from Spanish.

71 Ibid, pg. 261. Quote translated from Spanish.

72 Ibid, pg. 260.

73 Op. cit., MILLET, *Sexual Politics...*, pg. 26.

Three elements of patriarchal ideology are especially relevant to the discussion of systematicity in international criminal law: the use of force, compulsory heterosexuality, and the socially prescribed configurations of sex/gender/desire. In Colombia Diversa's view, these elements create *scripts* of patriarchal violence that are often revisited (and readily wielded) by armed groups seeking to impose their control over a specific territory, particularly since war tends to exacerbate sexualized gender difference.

To begin, as Millet points out, patriarchy is a totalizing ideology predicated on the use of force. Though it elicits the tacit consent of the oppressed, "control in a patriarchal society would be imperfect, even inoperable, unless it had the rule of force to rely upon, both in emergencies and as an ever-present instrument of intimidation"⁷⁴. Acts of physical violence are one of the key manifestations of the use of force and, in the patriarchal script, the foremost (even prescribed) form of physical violence used to maintain female subjugation is sexual or sexualized violence. The latter (sexualized) form refers to acts of power and control that may not involve physical attacks against the sexual integrity of their victims but that are expressed in a sexual manner. This is because "patriarchal societies typically link feelings of cruelty with sexuality, the latter often equated both with evil and with power"⁷⁵. Still, acts of physical (and often sexual) violence are not the only expression of force. Patriarchal societies have also tended to institutionalize the use of force through their legal systems, which often reinscribe the logic of male domination of women and other bodies perceived as weak and feminine, including people with diverse sexual orientations and gender identities.

The second core element of patriarchy that buttresses the subordination of feminized subjects is compulsory heterosexuality. According to Monique Wittig, heterosexuality is "a political regime, which rests on the submission

74 Ibid, pg. 43.

75 Ibid, pg. 44.

and appropriation of women”⁷⁶. This idea was reaffirmed by Adrienne Rich, who argued that rendering “lesbian existence” invisible was one way to enforce heterosexuality for women “as a means of assuring male right of physical, economical, and emotional access”⁷⁷. In addition to upholding male entitlement to women’s bodies, this regime has also medicalized and pathologized any and all non-reproductive expressions of sexuality, subjecting queer people to unspeakable cruelty.⁷⁸

Finally, patriarchal ideology needs a *system* that can ensure, via force or consent, the required alignment between one’s assigned sex, the gender roles considered appropriate for that sex, and the sexual desire allowed under the regime of compulsory heterosexuality. To describe this system, Gayle Rubin coined the term “sex/gender system,” to which Judith Butler added the notion of “desire.” For Rubin, the “sex/gender system,” which she views as “the locus of the oppression of women [and] sexual minorities,” is “the set of arrangements by which a society transforms biological sexuality into products of human activity, and in which these transformed sexual needs are satisfied”⁷⁹. As such, not only does patriarchal ideology rely on this system to conjure up differences between masculinity and femininity, but it also anchors those differences in biological sex, making the latter’s inferiority seem biologically intrinsic or natural. This, in turn, serves to justify the violence and discrimination committed against those who refuse to conform and maintain the status quo.⁸⁰ Complementing Rubin’s analysis, Butler links the concept of the sex/gender system with that of compulsory heterosexuality.

76 WITTIG, MONIQUE. *The Straight Mind*. In: *Out There: Marginalization and Contemporary Culture*. Cambridge and London: MIT Press, 1990, p. 51-57.

77 Op. cit., RICH, *Compulsory Heterosexuality and Lesbian Existence...*, pg. 647.

78 Op. cit., FOUCAULT, *The History of Sexuality...*

79 Op. cit., RUBIN, *The Traffic in Women...*, pg. 159.

80 Ibid.

In *Gender Trouble* (1990), she explains that modern societies tend to view sex (which she sees not as a biological fact but rather as a social construct), gender, and sexual orientation as inextricably linked and therefore dictate an arbitrary alignment between these characteristics. In other words, society expects people with genitals identified as penises (sex) to identify as men and ‘act masculine’ (gender) and to be sexually attracted to women (desire) and those with genitals identified as vaginas (sex) to identify as women and ‘act feminine’ (gender) and to be sexually attracted to men (desire).⁸¹

Together, the three elements of ideological patriarchy explained in this section suggest that the patterns of violence and exclusion that are rooted in the gender roles assigned on the basis of perceived sexual difference are far from isolated, spontaneous, or individual acts. On the contrary, the fact that feminist scholarship consistently turns to notions like *contracts*, *regimes*, *orders*, and *systems*, among others, to describe the ways in which society is organized along gender and sex lines clearly reveals that, regardless of the degree of legal formalization of gendered oppression, not only do our societies prescribe a specific set of rules for how ‘men’ and ‘women’ should behave but they also prescribe a specific set of punishments for those who break those rules. In this sense, the sex/gender/desire system, as a vehicle of patriarchal ideology, produces predetermined *scripts* of violence.

Therefore, just as criminal organizations can arise both within legal or illegal and armed or civilian institutions and devise specific strategies to steal, murder, disappear, and even wipe out an entire group of people, other criminal strategies, the ones that are rooted in the sex/gender/desire system, can be implemented without a single attempt at prior planning. In this scenario, the need for premeditation vanishes because, as explained above, the mechanisms for policing and punishing ‘deviant’ women and people with

81 Op. cit., BUTLER, *Gender Trouble*...

diverse sexual orientations and gender identities are embedded in the fabric of society and thereby permeate every single aspect of the socialization of combatants.

Clear evidence of this argument can be observed in the behavior of armed groups. It's no coincidence that committing acts of sexual and gender-based violence against civilians and enemy fighters without explicit orders to do so is a constant across state and non-state actors. This holds true for state armies built on the values of order and discipline and for non-state groups like the now demobilized FARC-EP guerilla that reach high levels of organization. In other words, it cannot be chalked up to a breakdown in military hierarchy or mere lack of discipline. Such violence occurs even when there are laws or organizational policies like in the FARC-EP, which formally banned rape,⁸² that forbid fighters from engaging in these kinds of behaviors. Once again, the internalization of male domination (a product of the sex/gender/desire system), combined with the dynamics of irregular warfare, especially the need to secure territorial control, render premeditation unnecessary. Elisabeth Wood alluded to this fact when she added 'rape as a practice of war' to her initial typology of conflict-related sexual violence, indicating that, irrespective of individual fighters' intentions, sexual violence can emerge as a practice "that is driven from below and tolerated from above"⁸³.

Though there is some evidence to suggest that the strict enforcement of internal mechanisms against sexual and gender-based violence can prevent such violence,⁸⁴ the better question might be why they are rarely enforced (if they exist) in the first place. In this regard, Rita Segato contends that the use

82 Article 3(k) of the FARC-EP's Disciplinary Regulations (Reglamento de Régimen Disciplinario) codifies rape (violación sexual) as a crime within the movement and Article 4(3) sets forth a disciplinary mechanism to punish such acts.

83 WOOD, Elisabeth. "Conflict-related sexual violence and the policy implications of recent research." In: *International Review of the Red Cross*, vol. 96, no. 894 (2014), p. 457–478; "Rape as a Practice of War: Toward a Typology of Political Violence." In: *Politics & Society*, 2018, p. 1-25. Pg. 2.

84 WOOD, Elisabeth. "Armed Groups and Sexual Violence: When is Wartime Rape Rare?" In: *Politics & Society*, 2009, p. 131-161.

of sexuality as a weapon of war is embedded in the DNA of contemporary wars. In these wars, state and non-state actors battle for territorial control, but contested areas are not merely land; they are made up of networks of bodies and communities that must be brought under armed control. In this context, groups often target “fragile bodies,” not “warrior bodies,” which embody through their own suffering, the expressiveness of the gruesome threat directed at the entire community: “a message of boundless capacity for cruelty and low thresholds of human sensitivity”⁸⁵. In particular, Segato hones in on sexual and gender-based violence, arguing that the non-state actors that crop up during these “new wars” tend to mirror the state and produce a “Second Reality” in areas where they operate, which ends up being, like the state, a crystallization of patriarchal pacts, with rape and femicide as its most violent manifestations:

Rape, all rape, is never an aberration committed by a single individual. It is a message of power and appropriation proclaimed in society. The purpose of this cruelty is not instrumental. The bodies that become vulnerable in this new war context are not being forced to preform a service, but rather there is a strategy directed at something much more fundamental, a *pedagogy of cruelty* around which the entire power structure revolves⁸⁶ (emphasis added).

In contexts of irregular warfare like the Colombian conflict, these *textbook* forms of violence end up becoming strategic, helping armed actors secure and maintain territorial control over specific areas and populations.⁸⁷

Ultimately, we must debunk the idea that the men who wage war meticulously plan and rationalize every crime they commit and reconceptualize

85 SEGATO, Rita Laura. *La guerra contra las mujeres*. Madrid: Traficantes de Sueños, 2016. Pg. 61. Quote translated from Spanish.

86 *Ibid*, pg. 79.

87 For more information, see: *Op. cit.*, COLOMBIA DIVERSA, ¿Quién nos va a contar?...

systematicity so that it better captures the gendered dynamics of armed conflict. This new conception must acknowledge that little or no premeditation is required to rape, murder, displace or humiliate people with non-normative sexual orientations and gender identities because doing so is not perceived as causing harm but as punishing the punishable. In fact, as we will show in the second chapter of this book, in the case of the Colombian armed conflict, such acts of prejudice-based violence against LGBT people are never arbitrary precisely because they stem from the logics of male domination that have been deepened and reinforced throughout the course of the war.

Though the patriarchal logic of international criminal law, as reflected in the current view of systematicity, would have us dismiss these realities, feminist scholarship invites us to see them for what they are. To paraphrase Celia Amorós, just as the patriarchy enables diverse forms of gender-based violence like femicide, sexual violence, sex trafficking, and violence against LGBT people, it also positions them as isolated, heterogeneous, and unconnected phenomena in order to guarantee impunity. The task of feminism then becomes to make the connections that patriarchy renders invisible.⁸⁸ This is what a gender-sensitive definition of systematicity can do. Now, the challenge for transitional justice and for international criminal law is to take up this vision and ensure access to justice for LGBT victims of the armed conflict.⁸⁹

Just as we used feminist theory to critique the logic of systematicity, we will now turn to the notion of **pattern (or pattern of crimes)**. As noted in the

88 AMORÓS, CELIA. "Dimensiones del poder en la teoría feminista." In: *Revista Internacional de Filosofía Política*, vol. 25, 2005, p. 11-34.

89 This dovetails the call for gender-sensitive models of transitional justice made by feminist activists and academics, who have argued that this male-dominated field has also tended to exclude women and their perspectives. See for example, Op. cit., BELL, & O'ROURKE, Does feminism need a theory on transitional justice?...

beginning of this section, current ICC case law stipulates that in order to prove the systematic nature of an attack, one must demonstrate the existence of a pattern of crimes. Like systematicity, this is an extralegal concept that has been defined and discussed in the legal field and in the social sciences. In general terms, it refers to the associations that can be established between a particular set of events based on their time, place, and mode of commission. In the context of criminal investigations, the concept of pattern of crimes has allowed law enforcement to identify recurring elements in criminal acts in order to reveal the *modus operandi* (repertoire of actions) that constitutes the pattern. In this way, it has served to illustrate the degree of organization and rationalization of the conducts under investigation.

Though we will not launch into an exhaustive literature review of the different definitions of pattern, it is important to review and critique those that have been at the forefront of recent debates about large-scale violence and international criminal law, particularly where the JEP is concerned. In the social sciences, Francisco Gutiérrez-Sanín and Elisabeth Wood have proposed one of the most influential definitions in this regard, which was specifically designed to study armed conflicts. Drawing on the use of pattern as a “distinctive style, model or form” and “a combination of qualities, acts, tendencies, etc., forming a consistent or characteristic arrangement,” the authors propose a definition based on four elements: First, the *repertoire* or forms of violence in which the organization regularly engages, whose legal equivalent is the type(s) of criminal offense(s). Second, the *target* of each element of the repertoire. Third, the *technique*, or manner in which the organization carries out the violence. Finally, the *frequency* with which the violence occurs (i.e. the number of attacks committed against the target group).⁹⁰

90 GUTIÉRREZ-SANÍN, Francisco & WOOD, Elisabeth. “What Should We Mean by “Pattern of Political Violence”? Repertoire, Targeting, Frequency, and Technique.” In: *Perspectives on Politics*; Cambridge, vol. 15, no. 1, 2017, p. 20-41. Pg. 24.

A number of relevant definitions of pattern can also be found in the legal field. These are not limited to the sphere of criminal law, however, as was the case for systematicity, but rather span various areas of human rights law. While some of these conceptualizations draw on Gutiérrez-Sanín and Wood's definition, others tend to (dangerously, as we will explain below) equate the notions of pattern, policy, and even systematicity.

The first legal definition to consider comes from the Office of the United Nations High Commissioner for Human Rights (OHCHR). In 2006, the OHCHR released a report aimed at bolstering efforts to reestablish the rule of law and the administration of justice in post-conflict countries. In this report, it defines a pattern as “a set of events that, by their frequency, location and nature, imply some degree of planning and centralized control”⁹¹. Evidently, while this definition features many of the elements explained above, it incorporates an additional requirement, namely the degree of planning and centralized control denoted by the violence.

Though the Inter-American Court of Human Rights has not established a specific definition of pattern, it has referenced the notion in a number of rulings, often in the company of systematicity (“systematic patterns”), in order to describe a variety of violences that recur across the region. These have included widespread forms of violence like enforced disappearances⁹² and extrajudicial executions,⁹³ violences associated with specific (state) policies

91 SEILS, Paul y WIERDA, Marieke. Rule-of-Law Tools for Post-Conflict States. Prosecution initiatives. Office of the United Nations High Commissioner for Human Rights, 2006. Retrieved from: www.ohchr.org/Documents/Publications/RuleoflawProsecution-sen.pdf.

92 See, among others: INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011, par. 74; Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009, par. 152, 206, 221, 333.

93 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Myrna Mack Chang v. Guatemala. Merits, Reparations, and Costs. Judgment of November 25, 2003, par. 139, 151, 152, 217.

and their subsequent lack of due diligence in conducting the investigations,⁹⁴ and human rights violations derived from exclusion and structural inequality⁹⁵. Though the Court had the opportunity to flesh out this definition in the case *Villamizar Durán vs. Colombia* (2018), it ultimately declined to do so. In this case, the Colombian state alleged that the petitioners' claims were inadmissible because the Inter-American Commission on Human Rights (IACHR) inappropriately grouped petitions during the merits stage. In their view, this was tantamount to recognizing that the extrajudicial executions under review were part of a pattern of violence perpetrated by the Colombian military in the 1990s, ultimately violating their right to defense. The Inter-American Court rejected this argument, ruling that it was not the grouping of cases that revealed the existence of a pattern but rather the context in which the cases occurred. In this way, it skirted the question of defining pattern, which, as we will show below, continues to be confused with systematicity.⁹⁶

On a domestic level, after witnessing the failure of the prosecutorial model adopted under the Justice and Peace Law,⁹⁷ in 2012, the Colombian Congress promulgated Law 1592 in order to reform the Justice and Peace framework. Whereas before it was focused on bringing 'macro-charges' against former Autodefensas Unidas de Colombia (AUC) commanders for an impossible

94 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the Rochela Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of May 11, 2007, par. 156, 170, 206.

95 ABRAMOVICH, Víctor. "De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el sistema interamericano de derechos humanos." In: SUR—Revista Internacional De Derechos Humanos, vol. 6, no. 11, dic. 2009, p. 7-39. Accessed on 20 June 2020 at: <https://www.corteidh.or.cr/tablas/r24902.pdf>.

96 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Villamizar Durán et al. v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2018. (Only in Spanish).

97 As noted in the introductory chapter, Law 975 of 2005, better known as the Justice and Peace Law, provided for the partial demobilization of former Autodefensas Unidas de Colombia (AUC) paramilitaries.

amount of abuses,⁹⁸ it would now focus on prosecuting system crimes⁹⁹ by incorporating prioritization strategies. In this sense, Article 13 of Law 1592 established that the prioritization criteria meant to “shed light on the *pattern of macrocriminality* in the actions of illegal armed groups and reveal their contexts, causes, and motives, focusing investigation efforts on those most responsible”¹⁰⁰ (emphasis added). Though these changes were intended to revamp a flawed system that had hardly brought about justice for victims of paramilitary violence, they created a dubious pattern-centered model that ended up sidestepping the notion of systematicity altogether.

Within the new law’s regulatory framework, inconsistent definitions of pattern arose. The same year it was passed, the Office of the Attorney General of Colombia (FGN, by its Spanish acronym) created a series of mechanisms that provided both for the implementation of the new Justice and Peace law and for the prosecution of other system crimes. To that end, it issued Directive 001 of 2012, which defines pattern as a

set of activities, logistical means of communication, or a criminal modus operandi developed in an area over a particular period of time from which conclusions can be drawn regarding the different levels of command and by certain individuals/entities’ control over the criminal organization. This will help establish the degree of criminal

98 HINESTROSA, Juan Pablo. “Contexto y patrones de macrocriminalidad en Colombia: Una forma de buscar el derecho a la justicia.” In: Justicia en las Américas, Blog de la Fundación por el Debido Proceso Legal, March 2018. Accessed on 20 June 2020 at: https://dplfblog.com/2018/03/22/contexto-y-patrones-de-macrocriminalidad-en-colombia-una-forma-de-buscar-el-derecho-a-la-justicia/#_ftnref16

99 According to the International Center for Transitional Justice (ICTJ), system crimes are “(...) “unimaginable atrocities that deeply shock the conscience of humanity.” In comparison to ordinary crimes, the impact of these atrocities transcends borders and, therefore, attack the common heritage of all peoples and undermine the fundamental interests of the international community. These crimes are an affront to human nature. This characterization underscores the gravity of crimes encompassed by the terms, which includes genocide, crimes against humanity, and war crimes, as well as other crimes”. MARTÍNEZ OSORIO, David. Manual for the Contextual Analysis of Criminal Investigations by the National Analysis and Context Division of the Attorney General’s Office. 26 August 2014. Pg. 9.

100 CONGRESS OF THE REPUBLIC OF COLOMBIA. Law 1592 of 2012. Article 13, which incorporates Article 16(a) into Ley 975 de 2005.

responsibility of a criminal organization’s members and is a fundamental part of understanding the context of criminal activity¹⁰¹.

Not long after, the President released Regulatory Decree 3011 of 2013 for similar purposes, defining pattern as

a set of criminal activities, practices, and modes of criminal conduct that are carried out in a repeated manner in a particular territory and period of time, from which one can deduce the essential elements of the policies and plans implemented by the illegal armed group responsible for those actions¹⁰².

These definitions present subtle yet critical discrepancies with regard to their prescribed method of reasoning. While the FGN’s Directive places strong emphasis on identifying patterns in order to *draw conclusions about a criminal organization’s command and control structure*, the Decree focuses on identifying patterns to *deduce organizational plans and policies*. In stark contrast to the latter, the former incorporates an inductive logic whereby the process of identifying and grouping events can reveal the non-arbitrary nature of the criminal acts.

As the Justice and Peace trials continued, the problems with this pattern-centric model became even more evident. Because of the aforementioned inconsistencies and the fact that international criminal law lacks a clear definition of pattern, Justice and Peace justices turned to international human rights law,¹⁰³ particularly Inter-American case law,¹⁰⁴ to interpret the

101 Op. cit., MARTÍNEZ OSORIO, Manual for the Contextual Analysis of Criminal Investigations by the National Analysis and Context Division of the Attorney General’s Office..., pg. 8.

102 PRESIDENCY OF THE REPUBLIC OF COLOMBIA. Decree 3011 of 2013. Article 16. Quote translated from Spanish.

103 Justice and Peace verdicts regularly cite the European Court of Human Right’s conceptualization of pattern, which states that “a practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches”. In: EUROPEAN COURT OF HUMAN RIGHTS. Ireland v. The United Kingdom, 5310/71. Judgment of December 13, 1977, par. 159.

104 For example, the Criminal Cassation Chamber of the Supreme Court of Justice has noted that “the Inter-American Court of Human Rights describes the pattern of macrocriminality as a series of systematic or generalized crimes, which violate human rights or international humanitarian law, as stated in the case Perozo et al. v. Venezuela, in which it indicated that patterns or systematicity entail the commission of illegal acts, associated with ‘systematic and widespread practices,’ ‘patterns,’ or ‘State policies’”. In: SUPREME COURT OF JUSTICE. SP5333-2018, Court File No. 50236. Justice writing for the Court: Eugenio Fernández Carlier. Pg. 58. Quote translated from Spanish.

concept. However, as explained above, not only does Inter-American case law lack a specific definition of pattern, but it also regularly equates pattern with systematicity. Naturally, the Justice and Peace rulings ended up reproducing the Inter-American Court's flawed logic. The Appeals Judgment in the case against former paramilitaries from the AUC's Pacific Bloc – Heroes of Chocó summarizes Justice and Peace case law's approach to the notion of pattern and thus illustrates this pitfall well.

In this ruling, the Supreme Court of Justice's Criminal Cassation Chamber notes that there is no existing definition of pattern and proceeds to recap the Trial Chamber's criteria for establishing patterns. In their view, a pattern of macrocriminality must be:

evaluated based on a comprehensive assessment of the facts, which includes the context, causes, motives, and true objectives of the illegal armed group, patterns of conduct, and structures and networks of participation and support, [and] therefore, it argued that the pattern must contain:

- a. Acts and conducts that constitute it.
- b. Policies and plans behind those actions, which motivated the actions and those responsible for formulating the plans and policies, both within and outside of the armed group.
- c. The objectives of these policies and plans.
- d. The systematic and generalized or, at least, widespread and/or repeated character of those actions.
- e. The elements and/or circumstances that are constant or similar in those crimes and in particular, the time, place, and common modes of commission and their relationship with the policies and objectives of the armed group.
- f. The condition or characteristics of the victims of the crimes and the reasons for their victimization, especially in the case of vulnerable groups, victims of gender-based violence, and collective subjects like labor unions or constitutionally protected subjects (black, raizal, palenquero, and indigenous communities)¹⁰⁵.

105 Ibid, pg. 17-18

In response to these elements, which clearly go beyond the identification of recurring conducts and overstep into the domain of systematicity, the Court maintains that the process of establishing patterns must be understood as “an essentially inductive method of constructing the truth because it ascertains the policies, plans, and modus operandi of the criminal organization”¹⁰⁶. This process requires the identification of three factors: **(I)** the criminal activities carried out by the group, along with those responsible for these acts; **(II)** the time and place in which these activities occurred; and **(III)** their objectives¹⁰⁷. The Court further concludes that patterns must be designed to “recognize the true scope of the harm caused, demonstrate the impacts on the population as well as its direct effects on the culture of communities, the social and economic control of the territories, [and] the structured and planned modus operandi, through which illegal armed groups achieved their goals and objectives,”¹⁰⁸ which seems to suggest that the identification of patterns is one of the overarching goals, rather than a conceptual tool, of transitional justice.

From Colombia Diversa’s perspective, there are two main issues with these definitions of pattern. First, as has been repeated on multiple occasions, many of them tend to confuse or equate the notions of pattern and systematicity as if they were interchangeable. This is problematic because, as previously stated, demonstrating the existence of a pattern is *one* way, though certainly not the *only* way, to prove the non-arbitrary nature of a particular set of acts (i.e. systematicity). Similarly, (mis)interpretations of Inter-American case law’s murky distinction between the two concepts have led to the erroneous conclusion that, for transitional justice, the process of identifying patterns is not merely a means to an end, but rather an end in and of itself. Once again, this loses sight of the fact that patterns are but one alternative for revealing the organized/rationalized nature of violence. Finally, muddling the distinction

106 Ibid, pg. 56.

107 Ibid, pg. 57.

108 Ibid, pg. 58.

between the two concepts (often in a circular fashion) makes it unnecessarily challenging to prosecute large-scale violence because it is unclear what needs to be proven and how.

Second, the emphasis on temporal and quantitative criteria (e.g. frequency) is also worrisome. Certainly, temporal proximity can be extremely useful for identifying similarities between certain crimes and discerning the personal mark or imprint of the perpetrator. However, if applied rigidly, these criteria may end up dismissing the violence perpetrated against LGBT during armed conflicts. In the second chapter of this book, where we explore the dynamics of conflict-related violence against LGBT people in two regions of Colombia, we will show that, even though these forms of violence do not occur as frequently as others might, they are all deployed as part of the same prejudice-based strategy of domination. In fact, rather than disrupt the pattern, the temporal distance between these acts speaks to their effectiveness: the violence is so cruel and so loaded with meaning that it does not need to occur very often to push LGBT people back into the closet, to break up LGBT organizations, and even to displace entire LGBT communities, among others.

With these objections in mind, we emphasize three points that are essential for examining acts of violence committed in contexts of structural discrimination: **(I)** identifying patterns is NOT an end but rather a means for proving the existence of systematic attacks; **(II)** understanding the context surrounding the acts of violence is crucial because only contextual analysis can shed light on how gender and sexuality operate in a particular social order; and **(III)** it is also crucial to center the perpetrators' motives and the impacts of the violence on victims, as suggested by the Supreme Court of Justice's aforementioned ruling. On this last point, the main issue at stake is that acts of

violence may seem unconnected because of their repertoire or frequency are actually connected by prejudice, a fact that can be observed in the perpetrators' clear and objective expressions of this prejudice, including as insults, bodily marks, and other forms of humiliation.

In sum, drawing on Wood and Gutiérrez-Sanín's definition of patterns of violence, we define patterns of prejudice-based violence against people with diverse sexual orientations and gender identities in the armed conflict as entailing a series of criminal acts (repertoire) carried out in a similar manner (technique) by a particular armed group in a wide geographic area over a particular period of time. These acts target a specific sector of the population (target) and stem from (i.e. are prescribed and legitimated by) a particular set of moral and cultural imperatives entrenched in our society, meaning that they do not need to be planned beforehand. We call this latter element motivation and introduce it to Wood and Gutiérrez-Sanín's paradigm. This definition can be summarized as: the repeated use of violence rooted in a preexisting system of oppression directed against a civilian population in the context of an armed conflict.

Having unpacked and reinterpreted the notions of systematicity and pattern through a feminist lens, we will now examine the international crime of persecution. This is the legal characterization that Colombia Diversa proposed to the Special Jurisdiction for Peace for the prosecution of prejudice-based violence in the Colombian conflict. Before proceeding, it is also worth recalling that the second chapter of this book will apply our proposed framework to the violence committed against LGBT people in southern Tolima and in the municipality of Tumaco, two regions in which Colombia Diversa currently represents victims of the armed conflict before the JEP.

B. Systematic Violence against LGBT People in the Colombian Armed Conflict as SOGI-Based Persecution

As with the notions of pattern and systematicity, the JEP's prosecutorial model, which draws on international criminal law as one of its foremost sources of law,¹⁰⁹ made it necessary to draw on gender-sensitive analytical categories in order to guide legal discussions about how to characterize conflict-related violence against LGBT people. The concept of *prejudice-based violence*, developed by Colombian sociologist María Mercedes Gómez, has been particularly useful in this regard. For the past 10 years, Colombian activists and academics have used this concept as the lens to study and make sense of SOGI-motivated violence both within and beyond the armed conflict. Though not originally conceived to explain the dynamics of war, it successfully captures how and why armed groups target LGBT people, or those perceived as such, in conflict settings, as we will demonstrate in Chapter 2.¹¹⁰ For this reason, this notion has informed Colombia Diversa's view that the violence perpetrated against LGBT people in the armed conflict rises to the level of a

109 Given that Colombia ratified the Rome Statute in 2002, JEP standards were developed in accordance with ICC standards. In fact, Point 5.1.2, section II, numeral 40 of the 2016 peace agreement and article 6 of Legislative Act 01 of 2017 incorporate international criminal law (ICL), international humanitarian law (IHL), and international human rights law as sources of law for the Special Jurisdiction for Peace. As such, the JEP can bring charges for conducts criminalized not only under national penal legislation but also for grave breaches of IHL or grave human rights violations, including war crimes, genocide, and crimes against humanity, as stipulated in the Rome Statute. This prosecutorial model has made it essential to open up interdisciplinary dialogues between international criminal law and the social sciences. Social science fields like political science, sociology, and gender studies have been able to study armed conflict in a more comprehensive manner than ICL. Freed of certain legal constraints, such as the question of assigning criminal responsibility, these fields have developed an in-depth understanding of how war operates, the people that it affects, as well as the social, cultural, political, and economic dynamics at play throughout this duration and posited extralegal explanations for their observations. This intellectual production is vital for comprehending the logics of complex and seemingly invisible mechanisms like prejudice and the extent of the damage done by armed groups.

110 As suggested in the introductory chapter, Colombia Diversa has also used the lens of prejudice-based violence to study conflict-related violence committed against LGBT people in its annual human rights reports and conflict-specific reports. For more information, see: Op. cit., COLOMBIA DIVERSA, *Todos los deberes, pocos los derechos...; Vivir bajo sospecha...; Un parche que resiste...; ¿Quién nos va a contar?...*

crime against humanity, specifically the crime of persecution.

Bearing this in mind, this section puts into dialogue the notion of prejudice-based violence with the international crime of persecution, which we contend should be adopted as the legal characterization of conflict-related violence against LGBT people in Colombia. As we will see in the coming pages, examining this notion alongside the history of persecution leads to the inevitable conclusion that **persecution is the legal equivalent of prejudice-based violence**. The striking similarities between the two concepts and, of course, their ability to speak to the abuses committed against LGBT people in the war offer a compelling argument for why these atrocities constitute SOGI-based persecution. To that effect, the section will also argue that sexual orientation and gender identity are prohibited grounds for discrimination under the Rome Statute of the ICC. To accomplish these ends, we begin with a brief summary of the meaning and uses of prejudice-based violence in the Colombian armed conflict.

According to María Mercedes Gómez, prejudice can be defined as “the rationalization of a typically negative perception of those we regard as different or foreign”¹¹¹. By appealing to prejudices, individuals conjure up reasons to justify their negative reactions toward someone or something both to society and to themselves. Prejudice can also take the form of a false generalization ascribed to people with characteristics that we consider static or immutable.¹¹² This concept has been a staple of efforts to explain violence against LGBT people in Colombia because it offers a powerful analytical framework that goes beyond the individualistic and reductionist notion of ‘hate crime.’ Specifically, this framework draws attention to the context in which the violence occurs, stressing that, “there is no individual prejudice without social complicity”¹¹³,

111 Op. cit., GÓMEZ, *Violencia por prejuicio...*, pg. 99. Quote translated from Spanish.

112 Ibid.

113 GÓMEZ, María Mercedes. Prejudice-Based Violence. In: MOTTA, C. y SÁEZ, M., editors. *Gender and Sexuality in Latin America – Cases and Decisions*. Heidelberg, New York, and London: Springer, 2013, p. 279-323. Pg. 281.

and refocuses the locus of the aggression, situating it not in the identity of the victim but rather in the perpetrator's socially mediated value judgment about the victim's characteristics. A useful way to illustrate this point is to note that, under this paradigm, non-LGBT people who break with prevailing gender norms (for example, heterosexual men with feminine gender expressions) can also be the targets of SOGI-motivated violence (since the perpetrator associates them with LGBT people). In the context of the Colombian armed conflict, the concept of prejudice-based violence has helped elucidate the complex interactions between the political and moral aspirations of armed groups, the formation of sexed and gendered subjectivities in war-torn areas, and the symbolically and materially violent discourses and practices that operate in these regions.

Victims of prejudice-based violence are chosen with at least one of two criteria in mind for at least one of two purposes or ends. The first selection criterion is instrumental: the perpetrator ascribes certain characteristics to the victim that make them seem "more vulnerable to their ends"¹¹⁴. In many of these cases, victims are selected because the perpetrator believes that targeting them will not provoke strong backlash from society. Armed groups have committed many acts of violence against LGBT people in this way. For example, in one of the cases submitted by Colombia Diversa to the JEP, the FARC-EP, acting on the stereotype of gay men as gossips, attempted to recruit a gay man in Tumaco, Nariño as an informant. When he denied the guerilla's 'request,' he was threatened and eventually forcibly displaced after they circulated a rumor that he had HIV/AIDS.

The second criterion for selection is symbolic, that is, the perpetrator targets the victim in order to send a broader message of exclusion or subordination. This is the most common form of prejudice-based violence against LGBT people. In this scenario, the perpetrator casts themselves

114 Op. cit. GÓMEZ, *Violencia por prejuicio...*, pg. 101. Quote translated from Spanish.

as a ‘representative’ of the normative or socially accepted identity and the victim as a ‘representative’ of the non-normative or socially deviant social group. In this sense, it serves both to constitute and reassert the status quo. Instances of so-called ‘corrective’ rape, whereby perpetrators attempt to use sexual violence to eliminate homosexual relations as a source of pleasure and thus purge the victim of what they consider an ‘aberrant’ sexuality, are an archetypical example.

In addition this selection process, Gómez explains that prejudice-based violence has two uses: one hierarchical and one exclusionary. The first seeks to reaffirm the victims’ inferiority, that is, to remind them of their subordinate place in society, and the second to eliminate them altogether. This latter scenario occurs when the perpetrator perceives the victim’s difference to be incompatible with the prevailing social order. While hierarchical uses tend to rely on instrumental violence, exclusionary ones invariably turn to symbolic violence, such as marking sexualized areas of the body or using exclusionary threats to make life unlivable in certain spaces.

LGBT people have been victims of both uses of prejudice-based violence in the Colombian armed conflict. When armed groups attempt to coerce them into doing their bidding (running errands, serving as informants, transporting materials, washing their clothes, cooking their food, and cutting their hair, to name only a few), they remind victims that not only do they have an obligation to comply because of their inferior status but also that, as the quintessential masculine source of authority, the armed group can compel their submission. On the flipside, when armed groups murder or cast out LGBT people who refuse to conform, they are engaging in exclusionary forms of prejudice-based violence.

As a final note, when studying prejudice-based violence, it is essential to keep two caveats in mind. First, as emphasized by Gómez, context is key. There is no specific set of violences that automatically indicates whether the victim

was targeted for instrumental or symbolic reasons or whether the violence was used in a hierarchal or exclusionary manner. Each instance of violence must be studied in context in order to make this determination. Second, the aforementioned distinctions (instrumental v. symbolic, hierarchical v. exclusionary) are ideal types, meaning that they may overlap in practice. Now, having explained the concept of prejudice-based violence, we turn to the international crime of persecution as the potential legal characterization for conflict-related violence against LGBT people.

1. Naming the unnamable while approaching the end of the world and the “end of history”: The evolution of the international crime of persecution during the second half of the 20th century

According to the latest ICC ruling, “the prohibition of persecution as laid down in Article 7(1)(h) of the [Rome] Statute is intended to protect the right of all individuals not to be discriminated against on the basis of political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law...Persecution therefore constitutes, in and of itself, one of the most serious crimes against humanity, as it amounts to the denial of fundamental rights of one or more persons by virtue of their belonging to a particular group or collectivity”¹¹⁵. In other words, though discrimination is often dismissed as a lesser offense in the Colombian context, international law recognizes it as so serious that it can rise to the level of a crime against humanity. In order to understand how this came to be, however, as well as its relationship to prejudice-based violence, it is important to review the origins and evolution of the international crime of persecution.

Like systematicity, the origins of the crime of persecution can be traced back to the post-World War II era, when the world was still reeling from the

115 Op. cit., ICC, Trial Chamber VI, Prosecutor v. Bosco Ntaganda, Trial Judgment..., par. 175.

devastation of total war and the carnage of the Holocaust. In the aftermath of this war, Article 6(c) of the Nuremberg Charter recognized two categories of crimes against humanity: **(I)** those related to inhumane acts, including but not limited to murder, extermination, enslavement, and deportation; and **(II)** persecution on political, racial, or religious grounds.¹¹⁶ This distinction was reproduced in whole in the Nuremberg Principles¹¹⁷ as well as in the Tribunal's subsequent rulings. Despite its codification, however, for the duration of the Nuremberg Trials, this crime remained a reality only on paper, since no one was charged or convicted of persecution.

It was not until the late 1990s, in the wake of the genocidal wars that wracked the former Yugoslavia and Rwanda, that the crime was actually put into practice. Both the ICTY and ICTR's founding statutes recognized persecution as a crime against humanity: the former on political, racial, or religious grounds and the latter on political, ethnic, racial, or political grounds.¹¹⁸ Both tribunals also went on to develop a solid jurisprudence on the matter, though the ICTY was undoubtedly at the forefront of these developments.

In May 1997, upon the conclusion of its first trial (*Prosecutor v. Dusko Tadic*), the ICTY became the first international tribunal to issue a conviction for the crime of persecution and expound upon its elements, which up until

116 UNITED NATIONS. Agreement for the Persecution and Punishment of the Major War Criminals of the European Axis. London, August 8, 1945.

117 See Principle VI of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal at: INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS. Yearbook of the International Law Commission, 1950. Vol. II. par. 97.

118 Article 5 of the ICTY Statute states that: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [...] (h) persecutions on political, racial and religious grounds". Article 3 of the ICTR states that: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any population on national, political, ethnic, racial or religious grounds: [...] (h) Persecutions on political, racial and religious grounds". See: UNSC. Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993. Article 5.

that point had been left undefined.¹¹⁹ In this judgment, the Trial Chamber defined persecution as the “violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right”¹²⁰ on one of the specified grounds. In doing so, it also established that persecution could be committed in three ways. First, it could encompass other crimes enumerated in Articles 2 and 3 of the Statute (i.e. war crimes). In this case, the Court could bring charges for both crimes.¹²¹ The second scenario concerned whether other acts which constituted crimes against humanity under Article 5 of the Statute could also constitute persecution. To answer this question, the Court had to resolve a predicament: While customary law indicated that discriminatory intent was only required for persecution, the reports submitted by the Secretary-General of the United Nations and by various members of the Security Council interpreted it as a requirement for other crimes against humanity as well. The Court settled this debate by incorporating discriminatory intent as an additional requirement for all other acts constituting crimes against humanity.¹²² From a practical standpoint, this decision meant that persecution lost its specificity vis-à-vis other crimes against humanity, since proving any other act enumerated in Article 5 of the Statute made it unnecessary to include it as a separate offense.¹²³ Finally, the Trial Chamber ruled that persecution could encompass other acts not enumerated elsewhere in the Statute, noting that, “persecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic

119 SWAAK-GOLDMAN, Olivia. “The international crime of Persecution in International Criminal Law.” In: *Leiden Journal of International Law* (1998), p. 145-154.

120 *Op. cit.*, ICTY, Trial Chamber II, Prosecutor v. Dusko Tadic, Opinion and Judgment..., par. 697.

121 *Ibid*, par. 700-701.

122 *Op. cit.*, SWAAK-GOLDMAN, The international crime of Persecution in International Criminal Law..., pg. 151-152; *Op. cit.*, ICTY, Trial Chamber dII, Prosecutor v. Dusko Tadic, Opinion and Judgment..., par. 652.

123 The Appeals Chamber later reopened this debate and walked back the Trial Chamber’s position incorporating discriminatory intent as an additional requirement for all crimes against humanity. It ruled that the Trial Chamber had been mistaken in its interpretation of the debate and that proving discriminatory intent was only required for the crime of persecution. See: ICTY. Appeals Chamber. Case No. IT-94-1-A, Prosecutor v. Dusko Tadic, Judgment, 15 July 1999, par. 305.

or fundamental right is present”¹²⁴. All things considered, the ICTY concluded that, “the crime of persecution encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights”¹²⁵.

After the *Tadic* verdict, both the ICTY and the ICTR developed robust case law on the crime of persecution, but the ICTY remained the standout. In fact, the ICTY’s interpretation of the elements and scope of persecution evolved in ways that clearly influenced its eventual inclusion in the Rome Statute. In this sense, it is worth recalling that the ICTY’s most recent definition of persecution is as follows:

[A]n act or omission which:

1. Discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. Was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)¹²⁶.

Nevertheless, despite the ICTY and ICTR’s efforts, the international crime of persecution remained relatively underdeveloped until the Rome Statute, which marked a watershed moment in its history.¹²⁷ According to Article 7(1)(h) of the Rome Statute, one of the crimes against humanity recognized under this international treaty is:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph

124 Op. cit., ICTY, Trial Chamber II, Prosecutor v. Dusko Tadic, Opinion and Judgment..., par. 707.

125 Ibid, par. 710.

126 LIÑÁN LAFUENTE, Alfredo. “La construcción del crimen de persecución en la jurisprudencia de los Tribunales Penales Internacionales Ad-Hoc.” In: Revista de Derecho Penal y Criminología, UNED, 3^o Época, no. 1, 2009, p. 103 – 145. Pg. 110. This definition was first set forth in the Trial Judgment in the case Prosecutor v. Milorad Krnojelac (2002) and reiterated in multiple rulings thereafter, including the Trial Judgment in the case Prosecutor v. Ratko Mladic (2017). See: ICTY, Trial Chamber II, Case No. IT-97-25-T, Prosecutor v. Milorad Krnojelac, Judgment, 15 March 2002, par. 431; Trial Chamber I, Case No. IT-09-92-T, Prosecutor v. Ratko Mladic, Trial Judgment, 22 November 2017, par. 3228.

127 Note that while we focus on the ways in which the Rome Statute marked a watershed moment for the evolution of the international crime of persecution, there are many reasons why it marked a watershed moment in world history and international law that are beyond the scope of this book.

3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court¹²⁸.

This article introduced several notable changes in the description of persecution. First, it expanded the list of prohibited grounds of persecution, adding nationality, culture, and gender to the preexisting political, racial, ethnic, and religion. The inclusion of ethnicity is a reflection of the ICTR's influence, since it was included in the ICTR's but not in the ICTY's Statute. It also made the list open-ended, such that other grounds that are universally recognized as impermissible can be incorporated through judicial interpretation. Second, in contrast with the ICTY standard, the article limited the scope of persecution to those crimes within the jurisdiction of the ICC. In other words, only acts enumerated in the Rome Statute (i.e. war crimes or other crimes against humanity) can constitute persecution.

The Rome Statute also assigned all crimes against humanity, including persecution, a series of specific elements.¹²⁹ According to the Elements of Crimes, the elements of persecution are as follows:

1. The perpetrator severely deprived, contrary to international law, one

128 ICC. Rome Statute of the International Criminal Court. Article 7(1)(h).

129 Due to the confluence of different legal perspectives during the Rome Conference, the structure of crimes against humanity emphasizes two elements: an objective element (*actus reus*) and a subjective element (*mens rea*). While the objective element accounts for the time, place, mode of commission, and passive subject of the crime, the subjective element reflects the intent and knowledge with which crime is committed. While certain objective and subjective elements are specific to certain crimes against humanity, as we will see below with persecution, others are common to all crimes against humanity. The objective element common to all crimes against humanity is the existence of a widespread or systematic attack directed against a civilian population (see article 7(1)). The subjective element common to all crimes against humanity is the commission of the underlying criminal acts with intent and knowledge of this widespread and systematic attack (see article 7(1)). Article 30 of the Rome Statute further elaborates that, "'knowledge' means awareness that a circumstance exists or consequence will occur in the ordinary course of events" and that intent can be construed in relation to the conduct (i.e. intent to engage in a specific action), in relation to the consequence (i.e. intent to bring about a particular outcome), or both. See: *Op. cit.*, ICC, Rome Statute of the ICC..., Article 7(1) & 30.

or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹³⁰

These provisions thus indicate that, under the Rome Statute, the crime of persecution can be summarized as: a series of acts that constitute war crimes or crimes against humanity which are committed as part of a widespread or systematic attack directed against civilian group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law. This motivation reveals the intent and knowledge with which the acts are committed.

Based on these elements, the crime of persecution can be said to consist of **two objective elements (actus reus)** and a **subjective element (mens rea)**. The first objective element stipulates that the conduct must be committed as part of a widespread or systematic attack directed against

¹³⁰ Op. cit., ICC, Elements of Crimes..., Article 7(1)(h).

a civilian population. As mentioned at the beginning of this chapter, this criterion is also a contextual element common to all crimes against humanity. The second objective element is specific to the crime of persecution and it concerns the deprivation of a person's (or group of persons') fundamental rights "due to their membership in or resemblance to a group or collectivity with some characteristic feature"¹³¹ in connection with any crime within the jurisdiction of the Court. This element reflects the specific consequences of the underlying prohibited act(s) (i.e. the serious infringement of fundamental rights produced by the commission of one or more conducts that constitute war crimes or other crimes against humanity). These conducts need not be committed against the group or collectivity in its entirety. In fact, as shown above, the first element of the crime indicates that they may be committed against *one or more* persons whose membership in a particular social sector or group is known to or assumed by the perpetrator.¹³² Finally, as previously mentioned, this element settled the debate regarding which acts constitute persecution, excluding those that not enumerated in the Rome Statute.

Conversely, the subjective element or *mens rea* of persecution refers to the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"¹³³. This element has two implications. The first concerns the rights whose severe infringement could constitute persecution. In this regard, the ICC's most recent jurisprudence points to "international human rights standards such as those laid down in the Universal Declaration of Human Rights (UDHR), the two UN Conventions on Human Rights, and other international instruments on human rights, as well as the rights reflected

131 LIÑÁN LAFUENTE, Alfredo. La tipificación del crimen de persecución en el Estatuto de Roma y su primera aplicación jurisprudencial en el tribunal híbrido internacional de Timor Oriental. In: Revista electrónica de ciencia Penal y Criminología, no. 10-12, 2008, p. 12-62. Accessed on 8 January 2019 at: <http://criminet.ugr.es/recpc/10/recpc10-12.pdf>.

132 The first element of persecution reads as follows: "The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights" (emphasis added). In: Op. cit., ICC, Elements of Crimes..., Article 7(1)(h), Element 1.

133 Op. cit., ICC, Rome Statute of the International Criminal Court..., Article 7(2)(g).

in international humanitarian law”¹³⁴. Still, the Trial Chamber also indicates that this determination must be made on a case-by-case, taking into account their context and cumulative effect on the fundamental rights of the victims.¹³⁵ Second, this element requires that the perpetrator deliberately commit the underlying prohibited acts as part of a widespread or systematic attack, with the intention to discriminate on one of the listed grounds or others that are universally recognized as impermissible under international law. It is worth noting that this marks a substantial difference between persecution and genocide, since in the latter the perpetrator must intend not merely to discriminate but to exterminate in whole, or in part, a particular national, ethnic, racial, or religious group.

Regarding this second implication, the ICC has further established that the target group can be defined in both a positive and negative manner. Whereas in the former case the victim or victims are targeted because of their membership in a group, in the latter they are targeted for *not* belonging to a certain group.¹³⁶ In evaluating the victims’ status as a protected group, the Court must consider the objective contextual factors relevant to the discriminatory ground alleged as well as the subjective perception of belonging of both the perpetrator and the victim.¹³⁷ However, while it must be demonstrated that the perpetrator targeted the victim(s) based on one of the prohibited grounds, “not all victims of the crime of persecution are required to be members, sympathisers, allies of, or in any other way related to, the protected group”¹³⁸.

In sum, given its definition in the Rome Statute and interpretation in recent ICC case law, the crime of persecution can be defined as: a widespread or systematic attack perpetrated on prejudicial grounds against one or more

134 Op. cit., ICC, Trial Chamber VI, Prosecutor v. Bosco Ntaganda, Trial Judgment..., par. 991.

135 Ibid, par. 992.

136 Ibid, par, 1009.

137 Ibid, par. 1010.

138 Ibid, par. 1011.

civilians whose characteristics suggest their membership in or resemblance to a particular social sector or group, which entails the commission of prohibited acts enumerated in Article 7(1) of the Rome Statute or otherwise within the ICC's jurisdiction (such as, displacement, sexual violence, and killing, among others), in order to deprive the victims of their fundamental rights.

All in all, studying the history of the international crime of persecution shows that **the crime against humanity of persecution is the legal equivalent of prejudice-based violence. It also reveals the pernicious levels of violence that discrimination can enable as well as the international community's and international law's profound reproach of such acts.** As shown in this section, the perpetrator's perception of the victim is central to the definition of both prejudice-based violence and persecution. Indeed, it is not the victim's characteristics that make them a target of these violent acts, but rather how the perpetrator observes and associates their characteristics with social groups or sectors of society that are deemed inferior or undesirable. This helps explain why the crime of persecution has emphasized the perpetrator's discriminatory intent in connection with grounds that are typically used to restrict or deny rights since its inception. Moreover, since both prejudice-based violence and persecution are predicated on the perpetrator's discriminatory intent, they are open-ended and context-dependent categories. Just as prejudice-based violence can take on a variety of forms, so can persecution. Recall that, under the Rome Statute, persecution is not made up of a specific list of prohibited acts, but rather may consist of other crimes against humanity or war crimes.¹³⁹ The only way to determine what actually constitutes persecution is to examine the context in which the acts occurred. Taken together, these parallels indicate that persecution is the ideal legal characterization for prejudicebased violence committed against LGBT people during the Colombian armed conflict.

139 Ibid, par. 1023.

2. Sexual orientation and gender identity as prohibited grounds for persecution under the Rome Statute

According to Article 7(3) of the Rome Statute, “for the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”¹⁴⁰. This, of course, includes gender as a prohibited ground of persecution. Though this provision was intended as a compromise (the definition of gender was highly contested during the Rome Conference),¹⁴¹ it represents a restrictive and simplistic conception of gender as anchored in binary sex that has been repudiated in academia, international human rights law, and Colombian constitutional case law. In any case, given our current understandings of the relationship between sex, gender, and sexuality and protections against SOGI-based discrimination, neither a literal nor a dynamic interpretation of the provision excludes LGBT people. On the contrary, both interpretations make room for SOGI-based violence to be classified as gender-based persecution under the Rome Statute. This is especially true for a tribunal like the Special Jurisdiction for Peace, since Colombia has recognized sexual orientation and gender identity as protected classes.

The definition of gender that the Rome Statute embraces reproduces the view of gender as sex-dependent. Proponents of this view see sex as a fixed biological fact and gender as the cultural interpretation of that fact. In essence, gender refers to the ways in which society assigns rights, responsibilities, rewards, and restrictions, to paraphrase Facio and Frías,¹⁴² on the basis of

140 Op. cit., ICC. Rome Statute of the International Criminal Court..., Article 7(3).

141 COPELON, Rhonda. Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law. In: McGill Law Journal, vol. 26, 2000, p. 217-240; Op. cit., HALLEY, Rape at Rome...

142 Op. cit., FACIO & FRÍES, Feminismo, género y patriarcado...

this ‘natural’ division of the sexes. This conception of gender emerged from a second-wave feminist tradition that contends that sex (again, a fixed biological fact) has been used to create a system of oppression that empowers men and disempowers women. In other words, men and women may not be biologically the same, but many of the differences and unequal power relations between them have been culturally constructed. In such a world, a person with genitalia identified as male would be born into unearned privilege while a person with genitalia identified as female would be born into unearned disadvantage. As such, gender is understood a culturally constructed system that puts women at a systemic disadvantage on the basis of their sex.

In contrast, contemporary studies concerning the intersections between gender and sexuality challenge the twin assumptions of dichotomous sex and gender.¹⁴³ From their perspective, sex is not a prediscursive binary, but rather a cultural construct. The meanings of gender also shift in this literature. Butler, one of the foremost scholars in the field, for example, draws attention to the circular relationship between sex and gender. If we accept that sex is culturally constructed, “gender out not to be conceived merely as the cultural inscription of meaning on a pre-given sex...gender must also designate the very apparatus of production whereby the sexes are themselves established”¹⁴⁴. In other words, we may be born with certain genitals, but it is society, not nature, that transforms those genitals into a socially relevant (and dimorphic) category called sex and it does so through gender. These works also reinsert desire (or sexuality), previously erased by compulsory heterosexuality, into the discussion about sex and gender, as yet another a culturally mediated category. None of this is to say that there is no measurable distinction between sex, gender, and sexuality. On the contrary, they explain different phenomena and play different roles in society, though they often overlap and conspire to

143 Op. cit., BUTLER, *Gender Trouble...*, pg. 45.

144 Ibid, pg. 7.

marginalize and exclude non-conforming bodies. The IACHR summarizes these concepts well:

Sex assignment is not an innate biological fact; rather, persons are socially assigned a sex at birth based on the perception others have of their genitals. While in most cases people are easily identified as female or male, some presentations of the body are perceived as “ambiguous,” and the sex assignment is not immediate. The “anatomical sex, and its presumed dichotomy (male/female), are the result of an ideological reading”. Moreover, “labeling someone as a man or woman is a social decision. We may use scientific knowledge to help us make the decision, but only our beliefs about gender – not science – can define our sex. Further, our beliefs about gender affect what kinds of knowledge scientists produce about sex in the first place”¹⁴⁵.

The shift in the conceptions of these three categories – sex, gender, and sexuality (including sexual orientation) – has been crucial for shining a light on violence against LGBT people. The process of contesting and reimagining their definitions and intersections has shown that the insistence on viewing sex as static and innate obscures the ways in which society reifies and reinforces the sex/gender binary by policing ‘deviant’ bodies and sexualities. These ideas bring us back to the sex/gender/desire system explained in the first section of this chapter, which Butler strengthened by revealing the narrow and arbitrary configurations of sex, gender, and desire imposed by society. The brunt of the violence that seeks to uphold these configurations is borne by LGBT people.

The law has not been far behind in acknowledging this fact. Over the past decade, domestic and international law has evolved to recognize sexual orientation and gender identity as fundamental aspects of human identity and thus to protect against violence and discrimination on these grounds. In fact,

¹⁴⁵ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (IACHR). Violence against LGBTI Persons. OEA/Ser.L/V/II. Doc.36/15Rev.2. 2015, par. 16.

both international human rights law¹⁴⁶ and Colombian constitutional case law¹⁴⁷ recognize sexual orientation and gender identity as protected classes under the right to equality and non-discrimination. The implications of this recognition are twofold: not only do these legal instruments prohibit SOGI-based discrimination, but they also create an obligation for states to create more equal and democratic societies. In other words, they must guarantee both formal and material equality for people with diverse sexual orientations and gender identities.

Based on these international and domestic legal standards, one of the guiding principles of the 2016 peace deal is equality and non-discrimination. This principle enabled LGBT inclusion and thus the recognition of the war's unique and disproportionate impact on LGBT people in the transitional justice arrangements created under Point 5 of the agreement. This recognition

146 The United Nations human rights system first recognized the rights of lesbian and gay individuals in *Toonen v. Australia* (1994), a landmark decision in which the Human Rights Committee held that states were obligated to protect against discrimination on the basis of sexual orientation. This position is reflected in later decisions of the Committee (e.g. *Young v. Australia* (2000) and *X v. Colombia* (2005)) and in general comments of other human rights treaty bodies such as the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and CEDAW. These subsequent comments have also recognized gender identity as prohibited grounds of discrimination. In 2011, the Human Rights Council (HRC) requested a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (A/HRC/RES/17/19) and later adopted the recommendations that came out of this study via Resolution A/HRC/19/41. The Office of the High Commissioner for Human Rights (OHCHR) has also published two additional reports with recommendations promoting equality for LGBT people, the first being “Born Free and Equal” (2012) and the second “Living Free and Equal” (2016). In 2016, the HRC also appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity via Resolution A/HRC/RES/32/2. On a regional level, both the Organization of American States (OAS) and the principal organs of the Inter-American system have asserted that states have an obligation to protect individuals against violence and discrimination on the basis of sexual orientation or gender identity. Though the OAS has been issuing resolutions that promote the eradication of violence and discrimination against LGBT people since 2008, the Inter-American Court set a conclusive precedent on the matter via contentious cases and advisory opinion no. 18 (OC/18/03), which recognized sexual orientation and gender identity as protected classes under the jus cogens right to equality and non-discrimination. In this sense, international human rights law categorically prohibits discriminatory treatment on the basis of sexual orientation and gender identity. For more information about the Inter-American Court decisions, see: INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012, par. 91; *Case of Duque v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016, par. 104. (Only in Spanish); *Case of Homero Flor Freire v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2016, par. 118-120; *Advisory Opinion 24. Gender Identity and Equality and Non-Discrimination of Same-Sex Couples*. OC-24-17. 2018, par. 84.

147 COLOMBIAN CONSTITUTIONAL COURT. Judgment C-075 of 2007, Justice writing for the Court: Rodrigo Escobar Gil; Judgment T-314 of 2011, Justice writing for the Court: Jorge Iván Palacio Palacio; Judgment T-476 of 2014, Justice writing for the Court: Alberto Rojas Ríos; Judgment C-071 of 2015, Justice writing for the Court: Jorge Iván Palacio Palacio; Judgment T-030 of 2017, Justice writing for the Court: Gloria Stella Ortiz Delgado.

is reflected in the legal framework of the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR, by its Spanish acronym) and its component institutions, including the Special Jurisdiction for Peace. First of all, Legislative Act 01 of 2017, which, as previously mentioned, formally created the SIVJRNR, stipulates that, “the Comprehensive System shall incorporate a territorial, differential, and gender perspective, which recognizes the particularities of victimizations in each territory and each population, with special emphasis on the protection and priority attention of women, boys, and girls who are victims of the armed conflict”¹⁴⁸.

The JEP’s Statutory (Law 1957 of 2019), Rules of Procedure (Law 1922 of 2018), and internal regulations (Agreement No. 001 of 2018) followed suit. The first of these incorporates a differential perspective that “emphasizes the needs of women, boys, and girls who are victims of the armed conflict, since they suffer the grave infractions and violations committed in the context of the conflict in a disproportionate and differential manner” (article 18) that must be implemented in accordance with the principle of victim centrality, which recognizes the war’s differential impacts on LGBT people (article 13). The second takes it a step further, since it establishes an LGBT-sensitive differential perspective as one of the guiding principles of the JEP. According to Article 1(c) of the Rules of Procedure, “the JEP shall incorporate in all of its actions, procedures, decisions, and controls, differential approaches related to disability; sexual orientation or membership in the LGBT population; race or ethnicity; religion or creed; the elderly; boys, girls, and adolescents; among others; and territorial diversity”¹⁴⁹. In keeping with these provisions, the JEP’s internal regulations then set up a Gender Commission, an advisory body meant to promote the implementation of the peace deal’s gender perspective, with an LGBT-inclusive mandate and responsibilities (articles 104 and 105).

Together, the robust body of scholarship on the complex and culturally

148 Op. cit., CONGRESS OF THE REPUBLIC OF COLOMBIA, Legislative Act 01 of 2017..., Chapter 1, transitory article 1, par. 1. Quote translated from Spanish.

149 CONGRESS OF THE REPUBLIC OF COLOMBIA. Law 1922 of 2018. Article 1(c). Quote translated from Spanish.

mediated interplay between sex, gender, and sexuality and the conventional, constitutional, and legal recognition of sexual orientation and gender identity as protected classes reveal that exclusionary conceptions of gender under the Rome Statute hold no water. On one hand, scholars and international human rights bodies alike have shown that SOGI-based violence is intrinsically related to sex and gender. Forcing LGBT people into narrow gender roles, which are based on a binary conception of sex, fits perfectly into a textual interpretation of Article 7(3) of the Rome Statute. Other legal scholars have expressed this position as well. Rhonda Copelon has explained that “even the accepted definition of ‘gender’ necessarily embraces discrimination based upon a decision not to behave according to a prescribed gender role, whether it be in the realm of housekeeping, work, or sexuality”¹⁵⁰. Lisa Davis likewise endorsed this view in her article on gender-based persecution and torture in Iraq and Syria.¹⁵¹ On the other hand, given that international human rights law, Colombian constitutional case law, and the laws governing the SIVJRNR recognize sexual orientation and gender identity as protected classes, and in accordance with the *pro homine* principle, the institutions that make up the SIVJRNR, including the JEP, have the duty to interpret the Rome Statute’s definition of gender in a way that favors the protection of LGBT victims of the armed conflict.

Nevertheless, even if the Jurisdiction were to reject both of these positions, it is worth remembering that the list of prohibited grounds of persecution included in Article 7(3)(h) of the Rome Statute is non-exhaustive. Since international human rights standards recognize SOGI rights as human rights, sexual orientation and gender identity qualify as “other grounds that are

150 Op. cit., COPELON, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law...*, pg. 237.

151 DAVIS, Lisa. “Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons.” In: *William & Mary Journal of Women and the Law*, vol. 24, no. 3, 2018, p. 513-558.

universally recognized as impermissible under international law”¹⁵² and must be regarded as part of this list.

In this chapter, we have brought feminist and gender theory to bear on international criminal legal standards that have often trivialized gender crimes and excluded LGBT people. The implications of these dialogues have led us to rethink three key concepts at the core of ICL in hopes of promoting access to justice for LGBT victims of the Colombian armed conflict before the Special Jurisdiction for Peace. Our three (re)definitions are as follows:

Systematicity: The proposed definition challenges the widespread assumption that systematicity depends on the existence of a state or organizational plan or policy. Generally speaking, it posits that when an attack directed against a civilian population occurs in contexts marked by systems of oppression like the sex/gender/desire system and in connection with an armed conflict that reinforces said system, proving the existence of a plan or policy becomes unnecessary. Contextual evidence regarding the pervasiveness of the system is enough to reveal the organized, rational, and non-arbitrary character of the crimes.

Patterns of prejudice-based violence against people with diverse sexual orientations and gender identities: Drawing on Wood and Gutiérrez-Sanín’s definition of patterns of violence, we define this notion as a series of criminal acts (repertoire) carried out in a similar manner (technique) by a particular armed group in a wide geographic area over a

152 Op. cit., ICC, Rome Statute of the International Criminal Court..., Article 7(1)(h).

particular period of time. These acts target a specific sector of the population (target) and stem from (i.e. are prescribed and legitimated by) a particular set of moral and cultural imperatives entrenched in our society, meaning that they do not need to be planned beforehand. We call this latter element motivation and introduce it to Wood and Gutiérrez-Sanín's paradigm. This definition can be summarized as: the repeated use of violence rooted in a preexisting system of oppression directed against a civilian population in the context of an armed conflict.

Crime of persecution and the interpretation of 'gender' in the Rome Statute: The crime against humanity of persecution is the legal equivalent of prejudice-based violence. This crime reveals the pernicious levels of violence that discrimination can enable as well as the international community's and international law's profound reproach of such acts. In regard to the relationship between persecution and prejudice, it is important to recall that the perpetrator's perception is central to the definition of prejudice-based violence and, therefore, of persecution. Indeed, it is not the victim's characteristics that make them a target of these violent acts, but rather how the perpetrator observes and associates their characteristics with social groups or sectors of society that are deemed inferior or undesirable. For this reason, per article 7(1)(h) of the Rome Statute, the perpetrators' discriminatory intent in relation to grounds that are typically used to restrict or deny rights, such as political views, race, nationality, ethnicity, culture, religion, and, of course, gender, are fundamental to the crime of persecution.

In the next chapter, we will apply these definitions to the cases of prejudice-based violence documented by Colombia Diversa in two regions of Colombia in order to illustrate how they can be put into practice in the Special Jurisdiction for Peace.

CHAPTER



*PREJUDICE IN ACTION: REFLECTIONS ON THE ORDERS
OF PREJUDICE IN THE COLOMBIAN ARMED CONFLICT*

COLOMBIA DIVERSA

“If our—the LGBT community and trans women’s—rights were recognized, what rights? Education, health, mobility, work. [...] The history of LGBT people in Chaparral wouldn’t have so much violence. If the rights of the LGBT community had been recognized, the right to education, or the right to work, those trans people wouldn’t have been excluded from those spaces and they could have grown and thrived somewhere other than in prostitution.”
Trans leader, Chaparral, 2019.

A. General Overview of Prejudice-Based Violence against LGBT People in the Colombian Armed Conflict

The radicalization of gender roles during times of political violence is, as of 2020, a well-documented and well-known phenomenon, one that has been the object of feminist scrutiny for at least three decades.¹⁵³ Wars and dictatorships alike have instrumentalized gender norms as tools of control, regulation, violence, and social legitimation, taking a disproportionate toll on those who dare defy them. In Colombia, the existence of a half-century long armed conflict has continually reinforced LGBT people’s subaltern status, inexorably marking the way they are seen (and see themselves) as well as the roles they are afforded in society.

¹⁵³ See, for example: KIRKWOOD, Julieta El feminismo como negación del autoritarismo. Presentation for Consejo Latinoamericano de Ciencias Sociales (CLACSO) Working Group on Women. Buenos Aires: Facultad Latinoamericana de Ciencias Sociales (FLACSO), 1983; COCKBURN, Cynthia. From Where We Stand: War, Women’s Activism and Feminist Analysis. London: Zed Books, 2007; Op. cit., BELL & O’ROURKE, Does feminism need a theory on transitional justice? ...; Op. cit., HALLEY, Rape at Rome...; Op. cit., SEGATO, La guerra contra las mujeres...

In the first chapter of this book, we explained the concept of prejudice-based violence and anticipated examples of how it has operated against LGBT people in the Colombian armed conflict. As noted, our fieldwork has shown that armed groups targeted LGBT people both for instrumental and symbolic purposes and relying on both hierarchical and exclusionary uses of violence. As far as instrumental targeting goes, the first chapter offered the example of a gay man from Tumaco whom the FARC-EP attempted to coerce into becoming an informant. Others can be found throughout this chapter. With respect to symbolic targeting, arguably one of the best and most devastating examples is the staggering prevalence of sexual violence in Tumaco. These forms of violence left physical and emotional scars that sent a clear message to local communities, and especially to LGBT people, that they were unwanted and unwelcome in that region. In some of these cases, the violence can be characterized as hierarchical and in others as exclusionary. While coercing victims into working for the armed group reminds them of their inferiority and leaves them with little room to exert their agency (hierarchical), murdering or displacing (through threats or sexual violence, for example) LGBT people deemed incompatible with prevailing social norms means excluding them from society (exclusionary).

In addition to these findings, there are two additional characteristics regarding conflict-related violence against LGBT people that are worth emphasizing. First, armed struggles and widespread violence often radicalize social norms regarding gender and sexuality, exacerbating and transforming preexisting forms of gender-based violence and exposing feminine (or feminized) and non-conforming subjects like LGBT people to a great deal of cruelty. There are many explanations for why this happens, but when it comes to combatant behavior, one of the primary reasons is armed group socialization. In civil war contexts, state armies and insurgencies nurture hyper-masculine attitudes and forge militarized masculinities. In fact, military training instills masculine values of honor and virility while feminizing and dehumanizing the

enemy in order to feed soldiers' capacity for violence. A similar process occurs in insurgent armies. Hugo Vezzetti explains that insurgencies like the FARC-EP cultivate revolutionary subjectivities by appealing to the Guevarist ideal of the "new man," which likewise emphasizes virility and willingness to sacrifice for the greater good.¹⁵⁴ The primacy of this heterosexual male figure makes 'revolutionary' projects into hostile spaces for sexual and gender diversity. This is why former FARC-EP combatants often scorned homosexuality and branded it a "product of capitalist decay" (*degénero capitalista*).¹⁵⁵ Their prejudice toward homosexuality is clearly reflected in the cases of violence against LGBT people documented by Colombia Diversa.

Second, there are also common threads leading up to and after the commission of a specific act of violence against an LGBT person. Such violence is usually preceded by broad social stigma and followed by a simultaneous deepening and erasure of its impacts, which must be understood from an intersectional perspective.¹⁵⁶ In discussing the notion of prejudice-based violence, it was mentioned that there is no prejudice without social complicity. This means that armed groups are not alone in enacting violence against LGBT people. To the contrary, they are regularly stigmatized, marginalized,

154 VEZZETTI, HUGO. *Sobre la violencia revolucionaria. Memorias y olvidos*. (1st Ed.) Buenos Aires: Siglo Veintiuno Editores, 2009.

155 This is a direct quote from a FARC-EP combatant: "in the FARC there wasn't room for homosexuals. Lesbians were more common than gay men, though that also wasn't allowed. They were there, but the subject was completely off-limits. Because we're a product of this society, mainly rural, that has conservative views, so it was really difficult to have conversations about sexuality. [...] We saw homosexuality as a product of capitalist decay (degénero del capitalismo), but we were wrong" (emphasis added). In: UNIVERSIDAD CENTRAL. *Proyecto digital: Masculinidades, relatos de excombatientes*. Relato: Buenos días a todos y todas. Accessed on 30 January 2020 at: <https://www.ucentral.edu.co/masculinidades/masculinidades-relatos-ex-combatientes>. Quote translated from Spanish.

156 Coined by black feminist Kimberlé Crenshaw, intersectionality is both a political practice that highlights the heterogeneous and multifaceted nature of women's oppression and an analytical approach that examines the intersections between different categories of difference and systems of oppression. For more information, see: CRENSHAW, Kimberlé. "Mapping the Margins: intersectionality, identity politics, and violence against women of color." In: *Stanford Law Review*, vol. 13, no. 6, July 1991, p. 1241-1299; VIVEROS VIGOYA, Mara. "La interseccionalidad: una aproximación situada a la dominación." In: *Debate Feminista*, vol. 52, 2016, p. 1-17.

and rejected by societal institutions and members of their communities. This everyday violence and discrimination normalizes, trivializes, and helps enable armed violence against LGBT people, while also leaving them with a diminished capacity to resist and manage its impacts.

This diminished capacity, which may take the shape of reduced support networks or limited financial resources (it's worth remembering that LGBT survivors are often poor and sometimes racialized), makes it harder for them to recover. When the victims are racialized, moreover, the initial act of armed violence may also lead to other forms of racist violence. This has been the case, for example, of afro-LGBT people who were forcibly displaced from Tumaco, a majority-black municipality, to majority-*blanco-mestizo* cities. Even as the impacts of the violence exacerbate initial conditions of structural poverty and discrimination, government institutions and communities often turn the other way, leaving victims feeling isolated and atomized and rendering their trauma socially invisible.

With these general characteristics in mind, this chapter focuses on conflict-related prejudice-based violence against LGBT people in two regions of Colombia. The first is the southern region of the Tolima department, a primarily agricultural and rural area located in the center-west part of the country and the birthplace of the FARC-EP guerilla. Within this region, we concentrate on the municipality of Chaparral. Though the victims who contributed their stories to this book hail from different municipalities across the region, all but one of the cases documented occurred in Chaparral, some in urban and others in rural areas. The remaining case occurred in the municipality of Rioblanco. The second region is San Andrés de Tumaco, a majority-black port city and municipality located on the southwestern coast of Colombia bordering Ecuador.¹⁵⁷ Tumaco is the main urban hub for the Nariño department's Pacific

¹⁵⁷ Colombia's Pacific coast is a majority-black region that spans four departments. San Andrés de Tumaco is located in the southern part of this region.

coastal region and also one of the territories hardest-hit by the war.

Throughout the chapter, we will examine the violence in each region through the lens of the three notions that we interrogated and engendered in Chapter 1: **(I)** contextual analysis of systemic oppression, especially as it pertains to the sex/gender/desire system, as proof of the systematic nature of the violence; **(II)** the identification of patterns of prejudice-based violence; and **(III)** the application of the elements of the international crime of persecution to the cases documented and currently represented by Colombia Diversa before the JEP. In doing so, we hope to model how these concepts can be used to litigate and prosecute cases of conflict-related violence against LGBT people in the Special Jurisdiction for Peace as well as other tribunals that draw on international criminal law. This analysis will be broken up into three sections. While the first and second will address the context and patterns of violence in southern Tolima and Tumaco, respectively,¹⁵⁸ the third section will show that these patterns of violence constitute SOGI-based persecution.

As a final note, it is important to bear in mind that most of the stories documented in both regions and therefore cited in this book correspond to gay men and trans women. One bisexual man also participated in Tumaco. Though Colombia Diversa made a concerted effort to document cases across the LGBT spectrum, we were not able to identify cases of violence committed by the FARC-EP against lesbian and bisexual women or trans men. This does not necessarily mean that such violences did not occur, or even that they occurred at lower rates, but rather that these populations face more barriers to organizing and speaking out and therefore may be less likely to seek justice. In fact, not only has the National Center for Historical Memory referenced cases of prejudice-based violence (committed by the FARC-EP and other armed groups) against lesbian and bisexual women and trans men in Tumaco

158 Note that the conceptual and theoretical approaches discussed in section B, which focuses on southern Tolima, also ground the analysis for section C, which focuses on Tumaco, even though they are explained only in the former.

and southern Tolima,¹⁵⁹ indicating that these violences did in fact occur, but it has also stressed that lesbian women in Chaparral “live in a harsh situation of invisibility, repression, and silencing,”¹⁶⁰ which makes it harder to access their stories. In any case, since Colombia Diversa was only able to document cases of violence against gay men, one bisexual man, and trans women, we focus primarily on these populations. Where appropriate, however, we continue to use the acronym LGBT. In this regard, it is important to bear in mind that while these incidents may not have *literally* targeted lesbian and bisexual women or trans men, they still signaled to these populations what would happen if they were every ‘found out.’

B. Conflict-Related Violence against LGBT people in Southern Tolima

1. Gender (and sexuality) arrangements¹⁶¹ as contextual evidence of the systematic nature of prejudice-based violence against LGBT people

The gender (and sexuality) arrangements mentioned throughout this book are contingent and historical. As such, although women and other gender-subordinated subjects can be said to share certain experiences of oppression due to the historical inequality between the ‘sexes’, in reality, patriarchy and compulsory heterosexuality operate in idiosyncratic ways in every corner of

159 In its first report on violence against LGBT people in the Colombian armed conflict, the National Center for Historical Memory reported a case of sexual violence with extreme cruelty against a trans man in Tumaco. Similarly, in its subsequent report on trans historical memory and resistance in southern Tolima, it indicated that there is a strong social stigma around lesbian sexuality in the region, which leads many lesbian women to seek out male partners in order to hide their true identity and avoid becoming targets of guerilla or military violence. It also reported cases of sexual violence against lesbian women at the hands of soldiers. For more information, see: CNMH. Aniquilar la Diferencia. Lesbianas, gays, bisexuales y transexuales en el marco del conflicto armado colombiano. Bogotá: CNMH, 2015. Pg. 258, 343-344; Un carnaval de resistencia..., pg. 36-28, 136-137.

160 Op. cit., Un carnaval de resistencia..., pg. 21. Quote translated from Spanish.

161 According to the National Center for Historical Memory, “gender arrangements are legal pacts or informal agreements that ascribe certain attributes to men and others to women in a given social order. The interactions that result from these pacts and agreements structure the power dynamics that typically assign more power to masculinity over femininity. Social actors end up understanding and reproducing this as ‘natural’ and ‘biological’ even though it has been culturally constructed”. In: Op. cit., CNMH, Aniquilar la diferencia..., pg. 67. Quote translated from Spanish. This book uses the notion of “gender arrangements” (as well as “gender norms” and “gender orders”) as synonymous with the sex/gender/desire system described in the first chapter.

the planet. In this sense, this section will delve into the idiosyncrasies of the gender (and sexuality) arrangements at work in southern Tolima, especially Chaparral, in order to identify the sociocultural elements that shape the scripts of prejudice that predominate in the region. Subsequently, we will show how these orders gave rise to a series of violent acts perpetrated by two armed actors (the Colombian military and the FARC-EP), which constitute patterns of prejudice-based violence.

1.1 Masculinities and femininities

According to Raewyn Connell, “masculinity, to the extent the term can be defined briefly at all, is simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in bodily experience, personality and culture”¹⁶². Though this explanation is closer to a general conception of gender roles than a specific definition of traditional masculinity, it shows that the notion of masculinity does not refer to a specific set of characteristics inherent to men. On the contrary, it denotes a series of culturally constructed behaviors that are learned via processes of socialization that ascribe meaning and power to specific bodies, personalities, sexualities, and dispositions. In this sense, the concept of masculinity speaks to the characteristics that are ascribed to ‘men’ (i.e. people born with penises) in a particular social, political, historical, and cultural context, which in turn create certain societal expectations about their behaviors and roles in society.

At any given point in time, one form of masculinity reigns (i.e. is culturally exalted) over others. This is what Connell calls *hegemonic masculinity*, defined as “the configuration of gender practice which embodies the currently accepted answer to the problem of legitimacy of patriarchy, which guarantees

162 CONNELL, Raewyn. *Masculinities*. Berkeley & Los Angeles: University of California Press, 1995. Pg. 71.

(or is taken to guarantee) the dominant position of men and the subordination of women”¹⁶³. The key word in this definition is *currently*. Connell stresses that hegemonic masculinity is a *currently accepted* strategy that prevails in a particular moment in time because dominant discourses and institutions produce and reproduce its position of privilege.¹⁶⁴ However, this strategy may change when the “conditions for the defence of patriarchy”¹⁶⁵ change. Moreover, though hegemonic masculinity may be the measuring stick used to evaluate all other masculinities, there are *always* other masculinities. Those that flout dominant configurations can be characterized as alternative, subaltern, and/or disruptive masculinities, since they do not occupy the same place of privilege as their hegemonic counterpart. In this sense, masculinity, and by extension gender roles, are neither static nor ahistorical nor absolute.

A variety of masculine identities converge in southern Tolima, some hegemonic and others disruptive. Since it is a primarily agricultural region where working the fields is a way of life, one of these ideal types is that of the *hombre campesino* (roughly, the rugged peasant). The *hombre campesino* is a tireless, vigorous, hard-working, and tenacious man, a man who is cognizant of nature’s possibilities and willing to fight for his land. This may be the primary form of hegemonic masculinity in the region, especially because it has a long and celebrated history of organizing against entrenched patterns of land accumulation and promoting agrarian reform and social justice for the Colombian countryside.

The second mold of hegemonic masculinity prevalent in southern Tolima is *el hombre guerrero* (the warrior) and it is similarly linked to the region’s history of armed peasant struggles. These are known for giving rise to

163 *Ibid*, pg. 77.

164 *Ibid*.

165 *Ibid*.

liberal and communist guerillas during *La violencia*¹⁶⁶ in 1940s and to the FARC-EP insurgency, which went on to become the most powerful guerilla in Colombian history, in the 1960s. In addition to embodying the *campesino* ideals of honor and tenacity, the *hombre guerrero* courageously takes up arms against the landed oligarchy in favor of a more equitable distribution of land. State soldiers and paramilitary groups, which also have deep roots in southern Tolima, also fall into this category. Though they do not share their counterparts' commitment to increased land access, all three associate masculinity with war and belligerence. In the words of Tamara Shefer and Nyameka Mankayi, there is no doubt that, as an institution, the military "is highly masculinist, remains dominated by men, and certainly foregrounds traditional male principles of competition, aggression, power and control"¹⁶⁷. The same is true for guerilla groups, since, as noted at the beginning of the chapter, both foster and wield militarized masculinity as a weapon of war. These militarized masculinities have a particularly strong hold in the rural areas of southern Tolima, where people come into contact with armed groups at young ages and see them as early models of power and prestige:

Obviously, as a 10, 11-year-old kid, I'd never seen an armed group or the army. I didn't know. A *campesino* boy, I never came into town, to Chaparral. It was over there [in the rural areas] that I began to see people, when I was still a little kid, people with guns¹⁶⁸.

Yet another ideal type of hegemonic masculinity in southern Tolima is the dignitary who gains recognition by holding a prominent public office or *hombre público*. A number of renowned jurists and even presidents have hailed

166 The period known as *La violencia* was a 10-year civil war between the Colombian Conservative and Liberal parties.

167 SHEFER, Tamara & MANYAKI, Nyameka. "The (Hetero)Sexualization of the Military and the Militarization of (Hetero)Sex: Discourses on Male (Hetero)Sexual Practices among a Group of Young Men in the South African Military." In: *Sexualities*, vol. 10, no. 2, April 2007, p. 189–207. Pg. 192.

168 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

from Tolima, creating an aspirational ideal around men who participate in and influence the most important decisions in the country. In this sense, political participation is considered a male responsibility reserved for a privileged few, particularly since those who have historically lacked privilege and suffered inequality, mainly *campesinos*, have tended to engage in politics through armed violence.

Writing for the National Center for Historical Memory, Alanis Bello recounts her experience with a local taxi driver in Chaparral. In their conversation, the driver perfectly encapsulates the three ideals of hegemonic masculinity discussed thus far:

the taxi driver mentioned that Chaparral was a “land of great men,” great presidents of the Republic, a coffee-growing municipality with hardworking and honest *campesinos*, and also great guerilla fighters, “*verracos* (tough as nails), never let the government get the best of them”. Perplexed, I get out of the taxi and the man sends me off with a worrying phrase: “So that you realize that Chaparral of Kings is a land of great men and not just *maricas* (faggots)”¹⁶⁹.

Yet, as hinted in the opening reflections on the nature of hegemonic masculinity, disruptive masculinities have also cropped up around these ideal types. In fact, neither the *campesino* nor the *hombre público* archetypes have been entirely restricted to heterosexual, cisgender men. On the contrary, gay men, lesbian women, and trans people have also been raised in and often identify with *campesino* masculinity, particularly if they work the fields to subsist: “[...] that’s how I grew up, I grew up in the countryside. [...] So when they displaced me it was because I had started to *botar muchas plumas*”¹⁷⁰.

169 Op. cit., CNMH. Un carnaval de resistencia..., pg. 29. Quote translated from Spanish.

170 In a literal sense, the expression “botar plumas” means to shed feathers. Metaphorically, this is a common (and usually pejorative) way of referring to a gay man’s feminine gender expression. In this particular case, the phrase indicates that the participant was displaced because it “started to show” that he was gay. In: COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

LGBT people (mainly gay men) have also aspired to public office, often in hopes of making up for negative stereotypes or as a means of reclaiming other forms of being political. One such example can be found in the testimony of an openly gay politician from Chaparral, who emphasized that, while homosexual sex may be seen as an undesirable or wretched practice, it did not hinder his ability to govern:

I'm afraid of the political rejection I encounter because politics has become so dynamic. [...] And I have said it, in social media and I'll say it here, I have sex with my ass, but I will not govern with my ass. I will govern with my head. And I have said it, and there's very little understanding, and I said it, and it sparked a controversy and they were going to sue me¹⁷¹.

Perhaps unsurprisingly, the brand of hegemonic masculinity that has left the narrowest space for transgression is the *guerrero* masculinity. There is no information currently available about LGBT participation or enlistment in the military, paramilitary groups, or guerrillas in southern Tolima.

In a similar fashion, the culture of southern Tolima also associates a particular set of roles and behaviors with hegemonic femininity. The archetype of *el hombre campesino* has a female counterpart, which is similarly linked with hard work and tenacity. However, since the masculine coding of farm work excludes women, it centers domestic labor and care work. In fact, many of the LGBT activists and survivors interviewed by Colombia Diversa stressed that *surtolimense*¹⁷² women are confined to the domestic sphere. This does not mean that women never work the fields, as this is an economic necessity for many poor rural families, but rather that they are generally expected to remain in and manage their households. The FARC-EP's tight grip over the region, which went uncontested until the early 2000s, actually deepened this dynamic, since they enforced these gender roles:

171 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

172 Demonym for people from southern Tolima.

They were the group that works, or rather that was in control, and it was always violent. So with them you either were or you weren't. So you could never really be at ease. No. You always had to be on alert, forewarned, and everyone would say that they could come to the house and find two, three. Like how it happens to any one of us, you get home and one brother is watching television, another is *wasapeando* (using Whatsapp) another is keeping an eye on the pot. And that's what people were most concerned about, that the guerrilla could come and find the group there, the family, because they [the men] were supposed to be working outside of the house. Only the women could be in the house, and that was not even...only the woman of the house, and maybe one more, but they didn't allow that in the house...¹⁷³

Like its masculinities, however, southern Tolima's femininities are also a site of contestation and transgression. In this sense and for the purposes of this book, it is particularly important to examine the roles and expectations that shape trans femininity. Due to their prominence and visibility, trans women's bodies and behaviors are subjected to constant policing and violence at the hands of armed groups and other members of the community. As explained by the National Center for Historical Memory, much of this violence is rooted in the hypersexualization and exoticization of trans women, who are widely viewed as disposable objects that exist to satisfy men's basest sexual desires:

The feminized bodies of trans women have historically been stereotyped as exotic and overpowering sexual subjects. This method of projecting difference on trans-feminine bodies has been used as a mechanism of domination that works to deny their rights, to subjugate them and promote aggression against them. Trans women have been seen as sexed bodies, but not as equal citizens¹⁷⁴.

173 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

174 Op. cit., CNMH. Un carnaval de resistencia..., pg. 156. Quote translated from Spanish.

These prejudices have pigeonholed trans women into economic activities that are seen as “transsexualized” like beauty and sex work. Of course, the prevalence of these activities is not devoid of agency: trans women frequently turn to hair styling and sex work because they know that working in these spaces will allow them to survive and potentially even challenge the cis- and heteronormative society in which they live. In these spaces, they build support networks and often start to engage in activism:

Well there are no opportunities, and no guaranteed rights, the only accessible job is prostitution, because business doesn't really give opportunities to LGBT people, even less so to trans women, because trans women are always sexualized. We're seen as sex targets, wherever we go we're seen as sex targets, for men [...]. So because of this lack of opportunities and rights, the only option was sex work. Whether it's during the day or night, you know what we find doing sex work? We find older men, who want to play out their sexual desires, mocking trans women, because for us it's an insult that a man comes and we have to sell our bodies for a few cents¹⁷⁵.

Still, it remains deeply disturbing that trans overrepresentation in sex work feeds a surreptitious yet hegemonic form of male desire that casts trans women as outlets for taboo or abject sexual desires. Men work out these desires on trans women's bodies through extremely violent practices of domination that in some cases go as far as homicide:

The eroticism that springs forth every which way, I imagine that it sends those people's imagination flying toward “I want to do that with that one”. For trans women, experiencing certain roles, unusual roles, turns them into a type of abuse and a type of sexual abuse. As I just told you, it's not

175 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

easy pulling it out from your rectum and sticking it in your mouth because it's not easy. Or it's not easy to have a man tell you, "I'm horny, fuck me in the ass" or "stick your finger up my ass because it's the only way I'm going to come" or "suck my ass". I'm supposed to be a woman and why do I have to go there. It's a series of abuses that men have. They're degrading our status as women because they're not seeking us out just because we're trans women but rather to satisfy certain aggressions and abuses¹⁷⁶.

Finally, it is important to emphasize that a particularly virulent strand of this debasing form of desire, whereby the hegemonic male objectifies, claims, exploits, and even destroys trans women's bodies, can be found within the Colombian military. Soldiers regularly solicit trans sex work and trans women often fancy them as clients. For the troops, it seems that, as suggested above, the point of these experiences is to fulfill desires that are especially forbidden to them because of their role as standard-bearers of hegemonic masculinity. For the trans women with a fondness for this clientele, however, having sex with soldiers, whose performance of masculinity is considered to be vigorous, absolute, and complete, may also serve as an affirmation of their femininity:

Military men are normal, ordinary people, but the thing is that [...] as a trans woman, you look at them because of the sense of manhood they give off. They display a masculinity that is absolute, in contrast with village men who are more *criollo*,¹⁷⁷ slower, sleepier, stiller, while they're a bit more active¹⁷⁸.

1.2. The lived experiences of LGBT people in southern Tolima

As the National Center for Historical Memory has pointed out, "the different arenas in which structural heteronormative violence is produced and enacted

176 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

177 In this context, the speaker is using *criollo* to mean more native to the place in question (i.e. Chaparral).

178 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

(the family, schools, work, government institutions, churches, communities) are not isolated, rather they create a sequence of different experience of violence, which continues over time and ends up forming a *continuum* of violence”¹⁷⁹. As a result, when armed groups commit acts of prejudice-based violence, they are targeting people who have faced prejudice in many, if not every, sphere of their lives. This does not make conflict-related violence against LGBT people any less unique or conflict-specific, since, as we explained in the first chapter of this book, the war seizes, intensifies, and folds ordinary gendered orders into its script of armed violence. However, it does mean that in order to understand the logics of conflict-related violence against LGBT people, we must understand how these underlying orders interact with the dynamics of war. In this sense, here, we draw attention to certain aspects of LGBT people’s lives in southern Tolima that help set the stage for the rationalization of armed violence against them.

a. Family and community settings

LGBT people in southern Tolima are often orphaned at early ages, either because of war deaths that shatter their protective childhood environments or because of prejudiced attitudes. In some cases, families detect their budding (diverse) sexual orientations or gender identities and toss them out on the street. In others, LGBT people who are beginning to discern and grapple with the source of their difference and *know* that this difference will eventually result in corporal punishment, choose to leave on their own. This was the case of one of the survivors interviewed by Colombia Diversa. Though his parents were unaware of his sexual orientation, he left home soon after his mother passed away because he knew that he would be severely reprimanded if his family were to find out he was gay. The following excerpts illustrate these points:

¹⁷⁹ Op. cit., CNMH, Aniquilar la diferencia..., pg. 94. Quote translated from Spanish.

I fled from my parents, because there was too much whipping, back then they used to whip us as punishment, now more so. If you let it slip that you were a gay kid, they'd grab you and hang you and kick you so you'd kick *el resabio* (bad habit). I don't think you ever kick the habit, because we are what we are. That was one of the rights violations we sometimes faced in our families¹⁸⁰.

If they saw a couple of boys touching each other's privates, they'd beat you, they'd beat you because they'd say that that wasn't right. It was the same way for a couple of girls, the same way [...] you couldn't let others know you were gay. I had relations with other little boys, with my boyfriends, because I was also a little boy, so I'd look for kids my age. But I had to keep it as secret as possible¹⁸¹.

One of the most pervasive stereotypes about LGBT people in general and trans people in particular is that they have a limited capacity to support themselves financially and therefore become a burden to everyone around them. Yet, the life stories of trans women from Chaparral show that they often take on the role of primary breadwinner and shoulder the responsibility of supporting their families. Even in these cases, however, the violence does not cease. This reveals the harsh realities that LGBT people encounter in their homes: even when they are the main source of economic support for their families, LGBT people continue to face animosity from their loved ones. This forces LGBT people into an impossible situation in which they often end up prioritizing the economic wellbeing of their families over their own emotional and mental health and internalizing rejection as a natural part of relationships. Speaking about a trans woman who had been murdered, one participant shared that:

She suffered all the pains of rejection. Starting with her older brother,

180 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

181 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

who used violence against her for being gay, and her mom too, because she also [...] discriminated her, but then she'd seek her out for financial support. But she never stopped hurting her¹⁸².

As can be seen, LGBT people's early relationships are poisoned by prejudice, a situation that effectively communicates the animosity that they are doomed to experience for the rest of their lives. This prejudice also exposes them to armed violence from a young age. One gay man from Chaparral, for example, was caught in the middle of a homosexual encounter when he was a young boy. Not only did his grandparents beat him as a result (both because of the encounter and because of their frustration with his feminine demeanor), but they also assented when FARC-EP militia members punished him with forced labor for being gay.

LGBT people likewise encounter these forms of discrimination in the education system, which often ends up pushing them out from formal schooling (either because they drop out or are expelled). Like the family unit, schools are one of the primary vehicles of socialization and thus similarly reproduce discourses, impose rules, and reward behaviors intended to stamp out non-conforming expressions of gender and sexuality. One participant recounted that his dad used to insult and beat him, even taking up a demeaning nickname that his classmates had come up with: “¡Ay, Susi!”, they nicknamed me ‘Susi’ and that made me cry. They called me ‘*el marica*’, *el maricón* (the faggot), ‘here comes Susi, *el maricón*’”¹⁸³. Another participant was harassed for wearing gloves to school, which he used to avoid getting calluses during physical education classes. Upon seeing the gloves, his teacher remarked, in front of his classmates: “Careful, *mi terroncito*.¹⁸⁴ Are you gay? Are you a delicate little sugar cube that’s going to melt?”¹⁸⁵.

182 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

183 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

184 The word *terroncito* literally means ‘sugar cube.’ However, for the purposes of this quote, a better equivalent might be ‘sweetie.’

185 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

b. Painful uprootings and the streets

In many cases, the hostility that LGBT people encounter in their early lives ends up pushing them out of their places of origin or in which they had more or less established support networks. When they uproot their lives, frequently relocating to places where they do not know anyone, they often end up subjecting themselves to dangerous, even illegal, medical procedures and relying on high-risk and precarious jobs.¹⁸⁶ Southern Tolima is no exception. Since their first experiences of violence and discrimination often occur at the hands of their families, many *surtolimense* trans women and gay men have been forced to spend their lives on the streets. This situation is particularly prevalent for trans women. The relatively high visibility of their transitions creates a paradox: in order to deflect attention, they have to overexpose themselves to high-risk scenarios where they might find the means to survive:

After being rejected by your family, you fall into the world of the streets. There, on the streets, the lives of trans women and homosexual people are very different from the moral family lives they could have led, if they'd been accepted in their homes [...] When you fall into the streets and start working in an undignified job like sex work, in addition to having a different sexuality [...] you end up being more discriminated, marginalized, violated. And, of course, armed groups, in addition to ridiculing us, in addition to murdering us and all that, they also end up degrading and violating us sexually, in different types of sexual conflict¹⁸⁷.

The above situations reveal just how deeply entrenched SOGI-based prejudices are in *surtolimense* society, which makes understanding them essential to explaining armed groups behavior toward LGBT people. In the next part of this section, we will show how this context of prejudice helped enable armed violence against LGBT people in the region.

186 BERKINS, Lohana. "Travestis: una identidad política." In: Alfredo Grande (comp.) *La sexualidad represora*. (1st ed.) Buenos Aires, Argentina: 2008. Accessed on 17 May 2017 at: <https://www.topia.com.ar/editorial/libros/la-sexualidad-represora>. Pg. 4.

187 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

2. Patterns of prejudice-based violence against LGBT people in Chaparral

In southern Tolima, primarily Chaparral, Colombia Diversa identified two patterns of prejudice-based violence against LGBT people, one perpetrated by the military and another by the FARC-EP. This section focuses on the latter for the sake of comparison with Tumaco, where we only identified a pattern of prejudice-based violence committed by the FARC-EP (more information on this matter will be provided in the next section). In doing so, it will address the four dimensions of patterns of violence discussed in the previous chapter, demonstrating that the FARC-EP **(I)** deployed a particular *repertoire* of criminal conducts; **(II)** with a similar *technique*; **(III)** against a particular sector of the population or *target*, that is, gay men and trans women; and **(IV)** with a prejudiced *motivation* that materialized as insults and other forms of humiliation. It should be noted that the repertoires of violence enacted by the military are documented at length in Colombia Diversa's report to the Truth Commission, which we also recommend to readers.

2.1 Pattern of prejudice-based violence committed by the FARC-EP

a. Repertoire

The repertoire of prejudice-based violence deployed by the FARC-EP's 21st Front in southern Tolima consists of various forms of violence: threats and other cruel, inhuman, and degrading treatments; forced labor; homicide; sexual violence; and forced displacement.

Every single episode of prejudice-based violence against gay men and trans women recorded in southern Tolima involved *threats and other displays of cruelty and humiliation*. Each of the survivors represented by Colombia Diversa

was told that they were being targeted because of their ‘aberrant’ sexual orientations or gender identities, which were sometimes also associated with other ‘morally reprehensible’ conducts (e.g. drug consumption). Two cases in particular are worth emphasizing. In the first, FARC-EP members threatened a gay man from rural Chaparral when he was an adolescent. According to the guerrilla, his long hair, a product of the feminine gender expression he had been exploring since puberty, made him a “*marihuanero*” (marijuana addict). This was enough of a reason for them to forcibly cut his hair and displace him:

They never really used the word “gay,” rather faggot or *volteado* (inverted), that’s how they treated us...I wasn’t threatened with death at that time but they did tell me I had to cut my hair because long hair was for *marihuaneros*, even though I didn’t have any vices. I ended up making friends with another kid and together we decided that we should come to Chaparral. That was the first time, because from then on we couldn’t continue because they didn’t answer for anyone’s life¹⁸⁸.

The second case concerns a gay teacher from rural Chaparral. Every year, the 21st Front went to his village to collect *vacunas* (war taxes) from teachers, but in this particular instance the participant in question was forced to pay a higher fine because of his sexual orientation. In 2012, a member of this armed structure descended from *el monte* (the mountain) in order to charge him a million-peso tax, saying “a *maricón* (faggot) like you here in the region, you’re corrupting others, you’re a bad influence, you have to pay double”¹⁸⁹. If he refused to pay, they warned, he should not dare return because they would drag him off his motorcycle and burn it. If he tried to fight back, they would do the same to him. The next day he went to the town center to pay the *vacuna*.

In addition to threats, the FARC-EP used *forced labor* as a ‘corrective’ mechanism in order to ‘rectify’ sexual and gender deviance. In this regard, it

188 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

189 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

is worth recalling that the persons that participated in the production of this book were gay men and trans women, in other words, people whose assigned sex at birth was male and who continued to be seen as such by much of society. This explains why the corrective mechanism (i.e. forced labor) referenced here naturally sought to reestablish the victims' masculinities by casting them into the role of the *hombre campesino*. This does not necessarily mean that the FARC-EP did not employ other 'femininity-affirming' corrective mechanisms against lesbian women or trans men, particularly since such practices, for example, forced marriages and so-called 'corrective' rape, have been documented elsewhere.¹⁹⁰ In any case, it is important to emphasize that these supposedly corrective practices pervaded *surtolimense* survivors' testimonies, having occurred in different places across the region. The 21st Front's militias and armed structures both engaged in this practice with the support of the community in order to transform these deviant individuals into productive men worthy of the attributes of the *hombre campesino* and thus of a place in a FARC-EP-controlled society.

Three cases illustrate these acts of violence. One participant was forced to work on farms controlled by FARC-EP militias in a rural area of Chaparral between the ages of 9-12. These jobs entailed "*bolear machete, coger cacao, coger café*"¹⁹¹ (clearing overgrowth with a machete and harvesting cocoa and coffee). Another one was forced to engage in "*guachapeo*" (again, clearing overgrowth in roads, cemeteries, and fields, among others, with a machete) so that he would shed *el resabio* (bad habit), which referred to his feminine gender expression. Both of these cases occurred in the late 1990s, when the FARC-EP still controlled the region. Finally, in 2002, a militia member forced a gay man who sold sweets and cigarettes on the side of the road that connects the municipalities of Chaparral and Rioblanco to help transport materials to various villages along this route.

190 Op. cit., CNMH, Aniquilar la diferencia...

191 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

Though homicide was not a recurring element of the FARC-EP's prejudice-based repertoire in southern Tolima, the commander of the 21st Front ordered the murder of a gay man in the early 2000s. A militia member carried out these orders, shooting the victim seven times, a clear sign of (prejudice-based) overkill. In this particular case, as in others, the stereotype that people with diverse sexual orientations or gender identities have a penchant for gossip played against the victim. The FARC-EP had been coercing him into running errands for them when suddenly one of its members accused him of owing the guerrilla money and being an army informant, leading to his assassination. This accusation is leveled frequently against LGBT people and used to justify violence against them. In fact, another participant narrowly escaped death at the hands of the FARC-EP due to a similar allegation.

Likewise, though sexual violence was not a staple of the FARC-EP's repertoire of violence toward LGBT people in southern Tolima, it was used in one case in the mid-2000s to punish a trans woman who was protecting her son from forced recruitment. After months of harassing her and ordering her to turn him over, a group of guerilla members finally stormed into her hair salon asking for her son. When she told them she did not know his whereabouts, they forced her to perform oral sex on the man that appeared to be leading the operation.

Finally, *forced displacement* was the primary form of prejudice-based violence deployed by the FARC-EP in southern Tolima. This is no coincidence. The act of ordering another person to leave the territory in which they grew up, where their social and cultural roots are, due to their sexual orientation or gender identity, triggers a process of uprooting that teaches victims that their only hope for survival is to live a clandestine life. At the same time, armed groups benefit from frequent displacements. Given the pervasive social stigma against LGBT people, expelling these *undesirables* helps them gain legitimacy as the *de facto* authority of the community. Yet, even in cases

where the underlying conditions of war do not allow armed groups to cash in on community approval (e.g. in contested territories where no one group wields hegemonic power), displacing LGBT people helps them instill fear, thereby keeping local populations (and especially other LGBT people) afraid and docile so that they can easily summon them if they need to.

All of the victims included in this book suffered forced displacements at one point or another. First of all, expulsion was the FARC-EP's go-to response toward gay men and trans women who refused to be 'corrected' (i.e. perform hegemonic masculinity) by forced labor. For example, the young man who was forced to work on farms controlled by FARC-EP militia members was reprimanded four times in the presence of family members because he had failed to "straighten out". During their last visit, they asserted that "they couldn't do anything else, they'd already told me, they'd already warned me, but I hadn't shed *el resabio*. So I had to figure out what I was going to do or they were going to make decisions. [...] What they wanted to say was that either I left the village or they'd kill me, because what else could you expect from them"¹⁹². Second, forced displacement also resulted from death threats or other threats implicit in more immediate forms of violence (in contraposition to those who were subjected to longer-term forced labor). This was the case for the man whose hair was cut off, the woman who was sexually assaulted, and the professor who was extorted.

b. Technique

In order to identify the technique with which the aforementioned forms of violence were carried out, it is essential to return to the uses and ends of prejudice-based violence. In southern Tolima, prejudice-based violence was never purely instrumental. Despite the prevalence of forced labor and other activities that benefitted the organization, these forms of violence followed a procedural and long-term logic that went beyond any immediate gains.

192 Ibid. Quote translated from Spanish.

The fact that the 21st Front consistently turned to ‘masculinizing’ forms of forced labor (e.g. tasks considered to require physical strength) reveals their intention to use them as a ‘corrective’ mechanism for non-normative sexual orientations and gender identities. In this sense, the violence can be characterized both as **symbolic-hierarchical and instrumental**. Symbolic-hierarchical, because it sought to convey to the victim, other people like the victim, and the community at large that any gender (or sexual) deviance would incur a similar fate, thus reminding them of LGBT people’s inferior place in society. Instrumental, because it helped further the FARC-EP’s war aims. On one hand, by displaying their ability to use punitive power to stamp out uncomfortable realities, it generated legitimacy vis-à-vis the communities under their control. On the other, it contributed to the war apparatus that they had established directly or by way of militia members, particularly in rural areas of southern Tolima.

In our view, this violence was **procedural and complex** in nature. Underlying each of the violent acts, there was a long-term process aimed at repressing non-hegemonic expressions of gender and sexuality and coercing the victim into conformity. At the same time, the victim, who in the eyes of the perpetrator had harmed the community, was forced to contribute their labor to repair the damage done by their deviance. This is why the cases cited in this book span several years throughout which the FARC-EP’s violence toward each of the victims varied in intensity and scale until finally triggering their forced displacement.

These displacements can also be characterized as constituting a **symbolic-exclusionary** repertoire of violence. The act of casting out victims who refuse to adhere to rigid social norms regarding gender and (hetero)sexuality from their territories, from the only support system they have ever known, represented a rational and deliberate attempt to exclude them from society because their difference was deemed incompatible with the FARC-EP’s political and ideological project. The same is true for the above-mentioned murder of the gay man who was denounced as an army informant. As soon

as he was no longer useful to the FARC-EP, he was branded a potential threat and disposed of. They no longer had to tolerate his sexual deviance.

In addition to this typology, it is also important to note the recurring elements in the *mode of commission* of the FARC-EP's prejudice-based repertoire in southern Tolima. First, the sexual and gender dissidence of the victims was 'detected' at very early ages, either as children or adolescents. Second, their identification as "*maricas amanerados*" (feminine faggots) resulted in the emergence of death threats, threats of forced displacement, or the imposition of forced labor in order to 'correct' their deviance. Third, each of the cases presents a dialectical and symbiotic relationship between the prejudice expressed by local communities and reinforced by the guerilla, as we see in the cases where participants were identified and 'outed' by family members or members of their communities, ultimately leading to their forced displacement.

c. Target

Clearly, the target of the documented pattern of prejudice-based violence was people who fell under the 'LGBT' umbrella. While they materially targeted gay men and trans women, the symbolic messaging behind each of the violent acts was also directed at others who might identify as LGBT or otherwise break with the gender binary or compulsory heterosexuality. While some of the victims were from rural Chaparral, others hailed from nearby *surtolimense* municipalities such as Rioblanco, Ataco, and Planadas.

In all of these cases, the rumors circulated by the victims' family or community members regarding their potentially diverse sexual orientations or gender identities put a target on their back. Not only did 'outing' them brand them as particularly susceptible to or in need of the guerilla's authority, but it also linked them with harmful stereotypes, for example, that LGBT people are gossips, which exposed them to more violence. Moreover, sexual violence was specifically used to punish a trans woman whose gender performativity

openly contested the FARC-EP's 'revolutionary' model of society on various levels: not only did her body and identity defy the logics of the sex/gender/desire system implicit in revolutionary ideology, but her role as a mother also challenged traditional models of motherhood *and* the FARC-EP's persistent attempts to recruit her son. Finally, prejudice-based violence as punishment was also deployed against a gay teacher, who was seen as occupying a role (teacher) that was not conceived for someone of his sort (i.e. someone with a non-normative sexual orientation) and that made him a danger to society (since he was in a position to 'corrupt' others).

d. Materialization of the motivation

For all of their differences, there is a running theme in all of the cases documented by Colombia Diversa in southern Tolima (and in Tumaco, as we will see in the following section): prejudice against the victims' disruptive sexual orientations and gender identities. One FARC-EP commander, quoted by the survivor who was falsely accused (and nearly killed) of being an army informant, summarizes this prejudice well:

“If you’re a thief, it’s not a big deal, just don’t do it again, okay? What we’re not going to forgive [...] are the *sapos* (informants), the extortionists”. They never forgave that. “If I had found out that you were a *sapo*, I would have killed you myself. [...] We don’t want thieves or whores,” he said, “*maricas* (faggots), we don’t want any of that, because that leads people to rebel, it leads them to bad things [...] you’re kind of *amanerado* (feminine),” he said there, “Man up! How old are you?” And I responded, “12”. “Ah, it’s fine! You have time to become a man, to join our ranks, use a rifle, fight for our country, for the rights of the *campesinos*, of the people”¹⁹³.

We will explore this motivation, which we argue constitutes the *mens rea* of the international crime of persecution, in the final section of the chapter. For the time being, it is important to stress that the fact that prejudice connects

193 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

these acts of violence, revealing the ways in armed groups instrumentalize the sex/gender/desire system to the detriment of LGBT people, affirms the non-arbitrary nature of the violence. There is an underlying selection principle guiding these acts that is rooted in the broader societal conception that we (read: heteropatriarchy) simply cannot coexist with non-normative expressions of gender and sexuality. In the section that follows, we analyze FARC-EP violence in Tumaco before finally showing that both of these patterns constitute SOGI-based persecution.

C. Conflict-Related Violence against LGBT people in Tumaco

1. Gender (and sexuality) arrangements as contextual evidence of the systematic nature of prejudice-based violence against LGBT people

1.1 Masculinities and femininities¹⁹⁴

As noted in the previous section, gender arrangements are contingent. Their characteristics change depending on the context in which they arise and, in this case, on the nature of the armed conflict that reinforces it. In order to examine the gender arrangements in Tumaco, a majority-black municipality located in the Colombian Pacific, one of the poorest and most conflict-ridden regions in Colombia, it is essential to begin with a reflection on systemic racism, gender, and war.

In the hegemonic and racist narrative of Colombia, the Colombian Pacific, Tumaco included, exists in a permanent state of exception because its inhabitants are human savages who have not relinquished the state of nature and thus are incapable of self-governance.¹⁹⁵ This narrative has colonial

194 This section was written in conjunction with Lucía Baca.

195 SERJE, Margarita. "Geopolítica de la ocupación territorial de la nación en Colombia." In: *Gestión y Ambiente*, vol. 9, no. 3, December 2006, p. 21-28.

roots¹⁹⁶ and it has facilitated the (state, criminal, civil) exercise of violent power, defined by its ability to decide who lives and who dies. Drawing on Achille Mbembe's reflections on colonial oppression, "the sovereign right to kill is not subject to any rules in the colonies. In the colonies, the sovereign might kill at any time or in any manner"¹⁹⁷. In Tumaco, drug cartels, state security forces, armed groups, and other criminal enterprises vie for power, regularly exercising their sovereign power to kill over the civilian population and reproducing the idea that all bodies therein are potential enemies or objects to be appropriated. This violent competition for territorial control and (in some cases) expansion has also helped radicalize and further sexualize gender difference, feeding a perverse dynamic whereby feminine or feminized bodies can be disposed of at will in furtherance of each groups' political and military objectives.¹⁹⁸

Against this backdrop of extreme expendability of black (and feminized) bodies, LGBT people are among those sectors of the population that find themselves at constant risk of exploitation by any of the powers that operate in the territory. This heightened risk derives, in part, from the existence of strict gender roles and long-standing, colonial stereotypes about black bodies. As we will see below, these racist stereotypes cast people of African descent as beasts of burden with a voracious and uncontrollable sexual appetite best suited to heavy labor.

In Tumaco, the mental configuration of space, public and private, is deeply

196 For more information, see: HOFFMAN, Odile. *Comunidades negras en el pacífico colombiano. Innovaciones y dinámicas étnicas*. Quito: IFEA, IRD, Ediciones Abya-Yala, CIESAS, CEMCA, 2007. Pg. 55.

197 As explained by Achille Mbembe, "In the eyes of the conqueror, savage life is just another form of animal life, a horrifying experience, something alien beyond imagination or comprehension...The savages are, as it were, 'natural' human beings who lack the specifically human character, the specifically human reality, so that when European men massacred them they somehow were not aware that they had committed murder. For all of the above reasons, the sovereign right to kill is not subject to any rule in the colonies. In the colonies, the sovereign might kill at any time or in any manner. Colonial warfare is not subject to legal and institutional rules". See: MBEMBE, Achille. "Necropolitics." In: *Culture*, vol. 15, no. 1, 2003, p. 11-40. Pg. 24-25.

198 CORPORACIÓN HUMANAS. *Violencia sexual contra mujeres de Tumaco. Documentación y reflexión sobre los daños en mujeres racializadas*. Bogotá: Corporación Humanas–Centro Regional de Derechos Humanos y Justicia de Género, *Ánthropos*, 2018.

gendered, both reflecting and reinforcing hegemonic masculinities and femininities. In the southern Pacific region of Colombia, life revolves around three focal hubs: the home/river, *el monte* (jungle),¹⁹⁹ and the sea, which speaks to inhabitants' spiritual connection and material reliance on nature as a source of sustenance, particularly in rural areas. As Eduardo Restrepo points out, each of these hubs is divided into masculine and feminine spaces, which map onto other divisions in the conception of space: inside/outside as dangerous/safe and as nature-produced/human-produced. In this sense, whereas the open sea and depths of the jungle are coded masculine (as well as inside/dangerous/nature-produced), the ocean shore, river, and fields near the home are coded feminine (as well as outside/safe/human-produced). In rural areas, this dichotomy flips inside the home itself, since the front (outside, closest to river) of the house is associated with men and socialization, and the back (inside, closest to jungle), which houses the kitchen, is associated with women and homemaking.²⁰⁰

As a result of this configuration, two of the most important hegemonic male and female archetypes in Tumaco (and the broader southern Pacific region) are the virile provider *macho pescador* (fisherman) and the servile homemaker and caregiver, respectively. Men have also traditionally been associated with other physically demanding jobs like construction. Here, it is important to clarify that the term 'homemaker' does not necessarily mean that women are confined to the home in a literal sense, but rather to spaces associated with the home and femininity like the river (where women wash clothes). This also extends to ocean-related activities. To quote Restrepo, "The beach, like the river, emerges as a fundamentally feminine space,

199 Though the literal translation of *monte* is 'mountain,' in this context, it refers to the thick undergrowth in the depths of the rainforest.

200 The river and (food-producing) fields near the home are associated with human production due to their proximity to the home in rural areas, in contraposition to spaces like the deep jungle. See: RESTREPO, Eduardo. "Los tuqueros negros del Pacífico Sur colombiano." In: Del Valle, Jorge Ignacio & Restrepo, Eduardo. *Renacientes del guandal: 'grupos negros' de los ríos Satinga y Sanquianga*. Bogotá: CEREC, 1996.

where women collect a variety of shells and take advantage of the ocean tide to catch crabs, shrimps, and *jaibas* (a type of crab). The open sea, however, is an exclusively male space associated with men who fish using nets and hook lines²⁰¹. The former activity is a traditionally female profession called *concheo*.²⁰² According to one of the participants, however, the escalation of the armed conflict during recent years, combined with patriarchal attitudes about who can occupy public space, have obstructed women's participation in this activity:

You used to see more women here, that's why I say that men are sexist because they to stop women from going to work, to keep them at home, like a slave, cooking, washing. They think they own everything in their house. I see it as a way of being macho, and it tries to keep women from advancing, it doesn't even allow them to study²⁰³.

The family plays a fundamental role in shaping these configurations of masculinity and femininity, especially the female archetype of woman as caretaker. In Tumaco, as in other municipalities of the Colombian Pacific, the notion of the family extends beyond immediate blood lines: "the basic family unit is inserted in [...] broader networks of coexistence and solidarity, which

201 RESTREPO, Eduardo. *Cultura y Biodiversidad*. In: Escobar, Arturo & Pedrosa, Álvaro. *Pacífico: ¿desarrollo o diversidad? Estado, capital y movimientos sociales en el Pacífico colombiano*. Bogotá: CEREC, 1996. Quote translated from Spanish.

202 Concheo, a traditional economic activity of the Colombian Pacific, refers to the harvesting of mollusks among mangrove roots. González Cuesta describes it as follows: "To do this, they must wait until the tide is low and then walk, with their feet submerged in the mud, through the mangrove areas to dig with their hands between the roots of the mangrove and find shells, in an endeavor that lasts between four and six hours. When the tide comes in again and floods the mangrove, the daily work of the shells concludes". In: GONZÁLEZ CUESTA, Ángela Edith. *Modernización, conflicto armado y territorio: El caso de la asociación de Concheras de Nariño*. Asconar, municipio de Tumaco. Seminario Internacional "Dimensiones Territoriales de la Guerra y la Paz en Colombia". Maguaré no. 1, 2004. Retrieved from: <http://docplayer.es/55896458-Y-territorio-el-caso-de-la-asociacion-de-concheras-de-narino-asconar.html>. Pg. 104. Quote translated from Spanish.

203 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

do not have limits *a priori*, but rather can be extended at any time and place”²⁰⁴. In addition to its open-ended and networked structure, the concept of family is also rooted in the notion of a territory, revealing the intimate connections between the natural and spiritual ecosystem of the Colombian Pacific and the idiosyncratic cultural, community, and familial practices that have arisen in the region over time.²⁰⁵ This relationship is reflected in the words of Nixon Ortiz, director of the Fundación Afrocolombiana Arco Íris, the foremost LGBT rights organization in the Pacific coast of the Nariño department:

The people of the Pacific are a unique family, of brotherhood, of solidarity. We don’t separate from our family. [...] We want to affirm the territory, to pray to Mother Earth, to the gods of the Pacific. That’s why we say we’re not leaving...Here I am and here I am staying. I’m not leaving my territory. The Pacific is my dream, my life, my air. I like to see my people...”²⁰⁶

Within these extended and community relationships, women often take on a role as caregiver that extends beyond the family unit to the community. Women are in charge of the “reproductive and care work of the family unit, and in many cases, they also carry out activities to support the family economically, such as washing other people’s clothes or doing paid domestic work in the homes of families with higher incomes”²⁰⁷. In doing so, women also assume the role of cultural representatives, since they not only manage community ties but also look after the survival of the community and its traditions.²⁰⁸

204 HOFFMANN, Odile. Familia y vereda en el Río Mejicano (Tumaco): revisión de algunos conceptos. Working Paper No. 36. Centro de Investigaciones y Documentación Socioeconómica (CIDSE), Facultad de Ciencias Sociales y Económicas, Universidad del Valle, Valle del Cauca, Cali, Colombia: April 1999. Pg. 8. Quote translated from Spanish.

205 FUNDACIÓN IDEAS PARA LA PAZ (FIP). Territorio, seguridad y violencias de género en Tumaco. Bogotá: 2018. Retrieved from: http://ideaspaz.org/media/website/FIP_SerieLGBTI_Tumaco.pdf.

206 COLOMBIA DIVERSA. Interview with Nixon Ortiz, Tumaco, 28 February 2019. Quote translated from Spanish.

207 Op. cit., CORPORACIÓN HUMANAS, Violencia sexual contra mujeres de Tumaco. Documentación y reflexión sobre los daños en mujeres racializadas..., pg. 31. Quote translated from Spanish.

208 Op. cit., FIP, Territorio, seguridad y violencias de género en Tumaco..., pg. 22.

In any case, it is important to note that, despite their misogynistic environments, *tumaqueña*²⁰⁹ women are not merely passive subjects who simply accept the traditional roles assigned to them. They frequently contest and reconfigure dominant notions of femininity. In recent decades, for example, they have developed spaces of empowerment and rights advocacy as well as of resistance and healing in the face of the unceasing violence of the armed conflict. Corporación Humanas points out that many women victims of the conflict build support networks through “workshops and meetings with other women promoted and organized by civil society organizations” that allow them to improve their material and emotional wellbeing.²¹⁰

Another fundamental feature of masculinities and femininities in Tumaco is the hyper-sexualization of black bodies. As suggested earlier in the section, one of the most pernicious racist colonial stereotypes exaggerates the insatiability of black sexuality. Under this stereotype, black men become sexual predators while black women are insatiable sex objects always available to satisfy (white) men’s desires. This hyper-sexualization has been used since colonial times as a dehumanizing control tactic that enables black oppression. In the case of black women, specifically, it has served to justify their sexual debasement and abuse.²¹¹ Though much has changed since the colonial era, this racist framing continues to structure modern-day discourses, which continue to exoticize and fetishize black female sexuality, and therefore to justify sexual violence committed against them across Latin America. As indicated by the Afro-Brazilian feminist Sueli Carneiro:

The colonial rape perpetrated by white men against indigenous and black women and the resulting mixture is at the origin of all the constructions

209 Demonym for people from Tumaco.

210 Op. cit., CORPORACIÓN HUMANAS, *Violencia sexual contra mujeres de Tumaco. Documentación y reflexión sobre los daños en mujeres racializadas...*, pg. 94. Quote translated from Spanish.

211 DAVIS, Angela. *Women, Race, and Class*. (1st Ed.) New York: Vintage Books, 1983.

about our national identity, structuring the disproved myth of Latin American racial democracy..This colonial sexual violence is also the foundation of all the gender and racial hierarchies present in our societies, configuring what Angela Gilliam defines as “the great theory of sperm in national conformation,” through which: 1 The role of black women is rejected in the formation of national culture; 2. inequality between men and women is eroticized; 3. sexual violence against black women has been turned into a romance²¹².

In a similar vein, the National Centre of Historical Memory has echoed this concern over the prevalence of sexual violence against black women and girls in the Colombian Pacific:

The women of the Proceso de Comunidades Negras (Black Communities Process)²¹³ were emphatic in stating that rape was a widespread practice by white Spanish men against women of indigenous and black peoples, since colonial times and the transatlantic human trafficking of persons from the African continent. The perpetuation of hierarchical logics enables the present-day maintenance of practices of gender and racial violence directed especially at the bodies that have been marginalized from the hegemonic project of the nation: women, girls and boys²¹⁴.

In addition to enabling sexual violence, as noted by afro-Colombian feminist Mara Viveros Vigoya, the assumption of heterosexuality that underlies black hyper-sexualization also creates an apparent incompatibility between blackness, on one hand, and gender and sexual difference, on the other:

The forms of representation and stereotypes of “black” people as symbols of a “natural” sexuality in which it is assumed that black women and men are evidently heterosexual, making sexual practices that do

212 CARNEIRO, SUELI. “Ennegrecer el feminismo. Número especial sobre Feminismos disidentes en América Latina y el Caribe.” In: *Nouvelle Questions Féministes*, vol. 24, 2005, p. 21-26. Quote translated from Spanish.

213 The Proceso de Comunidades Negras (PCN) is a coalition of grassroots and human rights organizations and community councils that advocates for the rights of black, afro-descendant, raizal, and palenquero communities.

214 Op. cit., CNMH, *La guerra inscrita en el cuerpo...*, pg. 203.

not confirm these assumptions an impossibility. For this reason, black people face the dilemma of not being able to be homosexual in order to remain “authentically” black [...] racism and heterosexism are systems of oppression that rely on each other to exist. It is their interrelationships that have created the assumption that all Black people are heterosexual and all LGBT people are white, distorting the experiences of Black LGBT people and trivializing the importance of sexuality in racism and race in heterosexism²¹⁵.

The consequences are twofold. In many cases, this perceived tension prevents black LGBT people from fully embracing their sexual and gender difference, feeding internalized shame and self-loathing instilled by society. Furthermore, it also creates an increased risk of violence because, given that their sexual orientations and gender identities are considered disruptive of blackness, it makes them a more visible target for armed groups.

In fact, instead of acknowledging their disruptive masculinities and femininities, Tumaco society sees gay and bisexual men and trans women²¹⁶ as feminized subjects (i.e. incomplete men that are more aligned with femininity). This view has played both in favor (to an extent) and against these populations. On one hand, gay men have gained greater acceptance in *tumaqueño* society by participating in the arts and culture (traditionally feminine spaces). In the 1980s, gay teenagers joined youth groups that had cropped up in their neighborhoods in order to “keep the artistic and cultural expressions of the past alive” and to preserve traditional songs and dances called *arrullos* and *alabao*.²¹⁷ According to the Fundación Ideas para la Paz (FIP), it was here that they finally found “a place of inclusion, respect, and

215 VIVEROS VIGOYA, Mara. La sexualización de la raza y la radicalización de la sexualidad en el contexto latinoamericano actual. Retrieved from: http://ucaldas.edu.co/docs/seminario_familia/Ponencia_MARA_VIVEROS.pdf. Quote translated from Spanish.

216 The cases of FARC-EP violence committed in Tumaco that were documented and included in this book correspond to six gay men, five trans women, and one bisexual man.

217 Op. cit., FIP, Territorio, seguridad y violencias de género en Tumaco..., pg. 40-41. Quote translated from Spanish.

protection that made them visible to the community in a functional role as cultural agents”²¹⁸. Nixon Ortiz affirmed this conclusion, referring to cultural spaces as “a refuge of recognition” where LGBT identities were neither questioned nor delegitimized.²¹⁹ The fact women had played a historical role as cultural brokers and representatives allowed gay men to thrive in these spaces, since it aligned with dominant conceptions about where feminized subjects should and should not be. However, it also indicates that gay men had (and continue to have) room to negotiate their inclusion in feminized spaces and that, like armed groups,²²⁰ the community was also more accepting of their sexual difference when they appeared useful to their interests. In this sense, these efforts to participate and win inclusion through the arts and culture have both expanded and reaffirmed the boundaries of masculinity and femininity.

On the other hand, however, the fact that gay and bisexual men and trans women in Tumaco are seen as feminized subjects has also constrained their employment prospects and subjected them to similar forms of gender-based violence faced by *tumaqueña* women. On the first point, as in southern Tolima, LGBT people in Tumaco are often pushed into traditionally feminine roles such as beauty (hair stylists and makeup artists) and domestic work (cooking and cleaning houses). One of the LGBT participants quoted in the FIP’s report on gender-based violence in Tumaco indicated that, “society still thinks that gays should be errand boys [and] cooks”²²¹. In fact, most of the gay men and trans women victims of the armed conflict interviewed by Colombia Diversa for this book work in these roles.

In addition, the feminization of gay and bisexual men and trans women has also made them victims of much of the gender-based violence faced by

218 Ibid. Quote translated from Spanish.

219 Op. cit., COLOMBIA DIVERSA, Interview with Nixon Ortiz... Quote translated from Spanish.

220 Op. cit., CNMH, Aniquilar la diferencia...

221 Op. cit., FIP, Territorio, seguridad y violencias de género en Tumaco... Quote translated from Spanish.

tumaqueña women. This includes the sexual violence rooted in discourses of hyper-sexualization. During fieldwork, we encountered a perception of gay men and trans women as hyper-sexualized bodies that could be seized and violated with impunity. As in southern Tolima, moreover, one expression of hegemonic male desire sees them as (inexhaustible, in this case) sex objects that it can use to channel its basest sexual drives. These stereotypes are evidenced in the following testimony:

Being gay doesn't mean we want to sleep with any man, no matter how much he has, no. I always tell them that, the bald young men I don't like I tell them, "No, I don't like you. If I don't like you I don't have to sleep with you. No matter how good-looking you are". I call them that. They see us as a sex object. It shouldn't be like that, it shouldn't be like that²²².

In this sense, men who perform hegemonic masculinities have a relationship to these LGBT populations that cannot be reduced to hate or disgust. Rather, gay and bisexual men and trans women oscillate between distinct yet deeply interconnected roles: they can be sex objects or targets of violence or both. In fact, the gay men interviewed by Colombia Diversa explained that ostensibly heterosexual men pursue them in private and attack them in public:

Most of this town, the men, before being with a woman, almost all of them have been like gay people [i.e. have slept with other men]. They simply do it to pass the time, for the pleasure of using us. When they see them [the man they slept with] on the street they begin to discriminate him, like treating him as an object of ridicule, to mistreat him, because there are people who have relations with another person, it can be at this moment, and soon after they find him and start to *tirarle palo* (to hit him) or to treat him badly, to discriminate against him. After you have sex with one of them, they try to steal from you, to take things by force or if they run into you somewhere else they'd beat you²²³.

222 COLOMBIA DIVERSA, Semi-structured interview, 2018. Quote translated from Spanish.

223 COLOMBIA DIVERSA. Semi-structured-interview, 2018. Quote translated from Spanish.

The consequences of these violent and sexualized discourses are also reflected in the violence deployed against LGBT *tumaqueños*, primarily gay men and trans women,²²⁴ in the context of the armed conflict. In contrast with southern Tolima, Tumaco presents a marked prevalence of sexual violence across armed groups, including the FARC-EP. The following excerpts speak to the violent and deeply sexualized nature of the interactions between LGBT people and armed actors in this municipality:

[We] are seen as sex objects, because of the fact that you are gay, they think that you have to sleep with them, that you have to do what they want and they pull you and it's like...it's like when you have a cattle and you own the cattle and you use them for whatever you want. If I'm friends with a person who is in an armed group, well, they'll [...] invite me over [and say] "charge me, cook for me," and if I don't do it, he tries to force me. It's like when a man and a woman get together, but he doesn't see it that way, but rather as if I were a slave"²²⁵.

Because they see us, because they see that we were gay people, and that we were young, because I was not even 18 at the time. Imagine, it's like eating, as men say *desde la morbosidad* (with lasciviousness): "*Comérsela tiernita*"²²⁶. Preying on a person who is just starting to live their life [...]. I will never forget that²²⁷.

Finally, it is worth drawing attention to two additional stereotypes of LGBT people in Tumaco, both of which transcend the local context and thus were also found in southern Tolima. The first associates LGBT people,

224 Similar violence against a trans man in Tumaco has also been documented by the National Center for Historical Memory. For more information, see: Op. cit., CNMH, *Aniquilar la diferencia...*, pg. 258, 343-344.

225 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

226 Men who use this expression intend to communicate that they have a preference for young or adolescent girls. The predatory connotations of the expression reveal their patriarchal desire to exploit young girls' youth and inexperience in order to reaffirm their hegemonic masculinity.

227 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

again, especially gay men and trans women, with promiscuity and sexually transmitted diseases, particularly HIV/AIDS.²²⁸ The second associates LGBT people with gossip or *bochinche*,²²⁹ which becomes even more dangerous in Tumaco (than in southern Tolima, for example) because of the conflict dynamics specific to the municipality. Over the past several decades, armed groups have imposed ‘invisible boundaries’ between the various neighborhoods of the city of Tumaco. These neighborhoods have changed hands many times but the boundaries have remained, such that crossing from one neighborhood to the other means stepping into the domain of a different armed group. As such, when LGBT people cross into other neighborhoods, they are seen as potential informants and thus targets for violence. This is especially problematic given that many LGBT people work as hair stylists who do not have their own salons and thus have to cross into different neighborhoods on a regular basis in order to see clients.

1.2 Lived experiences of LGBT people in Tumaco

a. Family and community settings

Due to the multiplicity of armed groups as well as geostrategic factors that make Tumaco a highly desirable location for armed violence and drug trafficking, the people of Tumaco have experienced a bloodier and more

228 As one trans man points out in the CNMH report, in the eyes of the armed groups “all maricas (faggots) have AIDS, all trans people have AIDS”. In: Op. cit., CNMH. *Aniquilar la Diferencia...*, pg. 117. Quote translated from Spanish.

229 On the Pacific coast, *bochinche* has been identified as one of the most important factors of social conflict. Restrepo points out that “through *bochinche* and collective observation, actions are recorded down to the millimeter: where you’re going, who you’re with, what you’re doing. Therefore, *bochinche* is the mechanism through which all of the happenings in the municipality are made known and which enables the regulation of the behavior of its inhabitants”. In a context of war where multiple armed actors operate illegally and clandestinely, being perceived as a *bochinchera* can be deadly. If armed groups see the person as a potential informant and thus threat to their survival, it could cost the person their life. See: RESTREPO, Eduardo. *Aletosos: Identidades generacionales en Tumaco*. 1999. Retrieved from: <http://www.ram-wan.net/restrepo/documentos/aletosos.pdf>. Pg. 159. Quote translated from Spanish.

violent armed conflict than those in southern Tolima, which, as noted, was long controlled by one armed group. The deadly nature of the conflict, combined with the family abuse and ostracism that comes with having a diverse sexual orientation or gender identity in a deeply prejudiced society, made loss into one of the most significant and traumatic early childhood experiences for many of the *tumaqueño* LGBT people included in this book. In the words of a gay man from Tumaco:

The situation I lived through, I don't wish it on my worst enemy. It was hard for me being left without a dad, and my mom psychologically abused me, she didn't feed me, she threw me out on the street, I had to sleep on the street. Do you think that's fair and necessary? Being forced to go through that as a teenager²³⁰.

Despite this gut-wrenching testimony, LGBT people in Tumaco generally grew up in safer and more loving homes than those in southern Tolima. However, even though they gave LGBT people a stronger support system, these protective environments were still not enough to shield them from being targeted by armed groups during childhood or adolescence. One of the trans women who contributed their stories to this book was lured away from her house when she was a young child. FARC-EP members took her to an isolated encampment and sexually abused her. Similarly, the gay man mentioned in the above testimony was sexually assaulted by members of the same guerilla in a dark area of downtown Tumaco.

As in southern Tolima, many gay men and trans women also grew up to be the primary breadwinner in their families. One participant indicated that his job as a stylist is the main source of income for his family unit, which consists of his mother and her partner, his brother, and two nephews whom she identifies as her *hijos de crianza*²³¹. Despite facing some discrimination from her family, she stressed that they have been, above all, a source of love

230 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

231 This expression indicates that she raised her nephews as if they were her own children.

and support. When asked about her relationship with them, she responded, “Pretty good. Yeah, we all get along. [...] I’m responsible for all of them because my mom doesn’t work, because she’s 51 and doesn’t work. And my stepfather, he does his best to pull some money together. But it’s not much. So I have to get enough to pay the water and power bills [...]. All that²³².”

Finally, it is important to note that in Tumaco both armed groups and community members publicly insult LGBT people on a regular basis. One gay man indicated that members of the FARC-EP harassed him throughout much of his life:

There’s an insult always directed at us gays, and it’s like, when there’s a group of two or three men, and one says to the other “*ve, ahí te pago*” (look, that’s how I’ll pay you), when a gay man passes by. You get what I mean? Like, “*ahí te pago*” means that they’ll use us to pay the other guy. You get me now? It’s mocking us. So, that’s the attitude they came with, with that same insult. That “*ve, ahí te pago. Ahí llegó lo tuyo*” (look, that’s how I’ll pay you. I have what’s yours)²³³.

b. Painful uprootings and forced displacement

Despite having more protective households than LGBT people in southern Tolima, many LGBT people in Tumaco likewise leave their homes or are cast out and displaced by their families due to their diverse sexual orientations and gender identities. As before, being thrown out on the street by their families makes LGBT people more vulnerable to conflict-related violence:

In the rush to escape their hostile home environments, they end up being thrown/pushed into economic survival prospects that reproduce gender stereotypes and that entail very specific jobs like hairdressing, and the offers to get involved in activities controlled by armed groups and that leave them in the middle of territorial disputes²³⁴.

232 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

233 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

234 Op. cit., FIP, Territorio, seguridad y violencias de género en Tumaco..., pg. 47. Quote translated from Spanish.

Yet, even those that do not end up living on the streets due to family prejudice are often uprooted from their homes at one point or another. In fact, the interplay of entrenched prejudice and fragmented territorial control²³⁵ create a constant dynamic of forced displacement in Tumaco. Of the 12 LGBT survivors from Tumaco whose stories are included in this book, all but two were forcibly displaced as a result of the violence committed by the FARC-EP. Of these two people, one did not relocate because she was targeted as a young child and kept the assault from her family. Moreover, of these 10 people who were displaced, 9 were forced to leave Tumaco.²³⁶ Most of these survivors had either been forcibly displaced in the past (by a different armed group and then returned to Tumaco) or were later forcibly displaced once again after returning.

For black LGBT people, the consequences of being forcibly displaced from Tumaco are particularly severe. This is not only because of the structural, institutional, and interpersonal racism they tend to face in majority-*blanco-mestizo* cities like Bogotá and Pasto, the capital of the Nariño department, but also because of the unique ties between family, culture, and territory explained in the previous section. In this sense, having to relocate away from Tumaco, even if it is to a more diverse city like Cali, Valle del Cauca, produces a profound sense of dislocation and culture shock.

2. Pattern of prejudice-based violence committed by the FARC-EP

As in southern Tolima, the acts of violence described in this section likewise constitute a pattern of prejudice-based violence. As mentioned, all of the cases can be attributed to the FARC-EP, namely to three of the guerilla's most important armed structures in the region: the 29th Front and the mobile columns known as 'Daniel Aldana' and 'Mariscal Sucre.'

²³⁵ More information will be provided on this matter in the discussion on the pattern of prejudice-based violence perpetrated by the FARC-EP in Tumaco, particularly as it pertains to the question of technique.

²³⁶ The eleventh person was displaced from one part of Tumaco to another.

a. Repertoire

The repertoire of prejudice-based violence deployed by the FARC-EP in Tumaco consists of various forms of violence: sexual violence; threats and other cruel, inhuman, and degrading treatments; forced labor; forced displacement; and violations of the right to life such as homicide and enforced disappearance.

Sexual violence (accompanied by outrages on personal dignity and forced displacement) was the primary strategy of social control employed against LGBT people in Tumaco. Indeed, of the 12 cases of violence against LGBT people in Tumaco documented for this book, six were of sexual violence, and five of those six resulted in the forced displacement of the victim. These acts are intended to communicate to the victim and others that looked, felt, or otherwise identified with them that their presence was undesirable and warranted sexualized punishment that would remind them of their inferior place in society. In this sense, such violence was always symbolic and never instrumental:

So, I told them not to do anything to me and they were like, “You’re gay, we can do this so you become a man or we’ll kill you right here” [...]. I’m here now, I had to do whatever I could because my life was at stake. It was either rape me or kill me. So I said, “Do whatever you want” [...]. They said, “*maricón hijueputa, volvete hombre* (You faggot son of a bitch, become a man”. That gays shouldn’t exist²³⁷.

The majority of the cases of sexual violence committed against the *tumaqueño* survivors included in this book evidence deliberate premeditation and signs of extreme cruelty. Two of the people who participated in this documentation process were victims of collective acts of multiple-perpetrator sexual violence during an event that had been organized weeks in advance. This happened when they were adolescents. One of the victims, a trans woman, had

237 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

been contacted by an imposing man who exercised some level of authority in the guerilla. He spent weeks courting her at her workplace (a hair salon), when he finally told her that he wanted to hire her to participate in a beauty pageant/dance at a celebration organized by the group. The other victim, a gay man, was invited by an acquaintance that appeared to be a member of the guerilla. He (the acquaintance) was charged with scheduling the performers, all gay men (who did drag) or trans women. The aforementioned trans woman and gay man were both picked up and taken from downtown Tumaco to a remote location in the countryside. After the celebration came the sexual violence. The trans woman was sexually assaulted by eight men, who penetrated her, forced her to perform oral sex, beat her with sticks, threw ants at her, and left multiple wounds throughout her body. The gay man was sexually assaulted by two men, who forced him to perform oral sex at gunpoint. Throughout the course of the violence, these men yelled homophobic and transphobic slurs, mocking and threatening the victims with death if they did not submit.

In another case, when a gay man and his five friends, all of whom were also either gay men or trans women, were celebrating a birthday in rural Tumaco, a group of armed men who identified themselves as members of the FARC-EP took them to an isolated area away from the village. Once there, they subjected the trans women to cruel acts of sexual violence, including forced penetration, oral sex, and nudity. Meanwhile, the gay men were forced to watch their friends suffer as the perpetrators hit and shouted homophobic insults at them:

They said, “if you’re pretending to be faggots, you’re gonna feel pain like women do”. They said ugly things to them [to the trans women], abused them, said, “Fags, you’re a bunch of *hijueputas maricones, vuélvanse hombres* (motherfucking faggots, turn into men). That’s how you end up becoming *maricones* (faggots) even with so many women around”. [...] We were beaten, pushed around, things like that, yes. It’s like we were put into the role of spectator to watch a movie²³⁸.

238 COLOMBIA DIVERSA. Semi-structured interview, Tumaco. Quote translated from Spanish.

In the previous part of this section, we also mentioned two cases of multi-perpetrator sexual violence against a gay adolescent and a trans child, which also make up this repertoire of prejudice-based sexual violence. Finally, in the last case, a group of armed men who had been harassing a gay man broke into his house and forced him to perform oral sex.

In addition to sexual violence, another of the most common elements of the FARC-EP's repertoire of prejudice-based violence in Tumaco was *threats and other displays of cruelty and humiliation*. While all of the victims suffered insults, humiliations, beatings, cuts, and/or other attacks against their physical and mental integrity, the cases of two gay men are particularly illustrative of the reasons for their prevalence. In the first case, when the victim was 17 years old, he was stopped by two members of the guerilla while walking in downtown Tumaco for being too effeminate. They tried taking him to an alley, where he was sure they would rape or murder him. To prevent this, he grabbed onto a pole and convinced them to accompany them to his home so he could give them money. Not long after, he left Tumaco for fear of reprisals from the perpetrators.

The second case concerns a bisexual man who has been forcibly displaced from Tumaco on more than three occasions. The episodes of violence began during adolescence, at 14 years of age to be exact, when the guerilla began contacting him because of the visibility he had acquired while performing in a traditional Afro-Pacific dance group. In the eyes of the perpetrator, who perceived him as a gay man, being gay made him an extroverted and friendly person, two attributes that could be beneficial to their organization. As a result, they tried pressuring him to become an informant on multiple occasions both directly (face-to-face conversations, text messages) and indirectly (messages from other people). However, the victim systematically refused to become in any way involved with the FARC-EP. In response, the guerilla circulated rumors that he had HIV, making him a potential target of so-called 'social

cleansing' campaigns.²³⁹ These rumors led to his forced displacement, which boosted the guerilla's legitimacy.

As in southern Tolima, *forced labor* was also a recurring element of the FARC-EP's repertoire in Tumaco. However, in sharp contrast with Tolima, it was employed for purely instrumental, not corrective (i.e. symbolic) purposes. The case of a trans woman who was expelled from her home and then forced to serve the insurgency in order to recover it illustrates this behavior well. The men were retreating from a firefight with another armed group and barricaded themselves in her house, ejecting her and her relatives. The selection of the house was not related to the victim's gender identity, but a relationship of instrumental prejudice did emerge from that episode. When the victim returned to recover some of her belongings, she was forced to wash clothes and prepare food for members of the group (i.e. feminized tasks assigned due to their prejudiced perception of women and, in particular, of trans women).

In another instance, a gay man was forced to transport FARC-EP guerilla members on his motorcycle taxi under the threat of death. His selection was not accidental; rather he was targeted because guerilla members perceived him to be particularly vulnerable due to his diverse sexual orientation. In this sense, they believed he could be easily subdued into engaging in high-risk activities like transporting guerilla members across urban Tumaco's invisible boundaries. The cases in which the guerilla attempted to recruit gay and bisexual men as informants due to their perceived vulnerability can similarly be classified as instrumentally motivated forced labor. Finally, the last of the forced labor cases involves a trans woman who was used to create and maintain sex trafficking networks of cisgender women and other LGBT people. She was coerced into this role because the guerilla stereotypically believed that sociable gay men and trans women like her had a better chance

239 In Colombia, the practice of social extermination, better known as "social cleansing," refers to the serial killing of members of a particular social group in order to "clean out" a "criminal" or undesirable populace. For more information, see: CNMH. *Limpieza social. Una violencia mal nombrada*. Bogotá: CNMH – IEPRI, 2015.

of building trust and luring in potential victims *and* because her socially subordinated position made her easily disposable if any issues were to arise.

Elimination through homicide or enforced disappearance was also used as a form of prejudice-based violence in Tumaco. On one hand, the homicide case concerns a trans woman who was killed by members of the insurgency near her home in downtown Tumaco. Prior to the femicide, this young trans woman, who was only beginning to transition, had been harassed and threatened by the guerilla multiple times, causing her to leave Tumaco on two occasions in order to protect her life. Though she reported these incidents to the authorities, their inaction left her at the mercy of the FARC-EP, who killed her when she was only 18 years old. On the other hand, the case of enforced disappearance concerns the aforementioned trans woman who was coerced into managing sex trafficking networks for the guerilla and who had been expressing discomfort with this role. After finally agreeing to participate in an event organized by the guerilla linked with this network, she and the other women who had been invited or deceived into attending were disappeared after a rumor spread that they had HIV.

Finally, *forced displacement*, yet another core element of the FARC-EP's repertoire of prejudice-based violence in Tumaco. As should be clear by now, forced displacement never occurs in a vacuum, rather it is always set off by other acts of violence and often recurs in the life of a single victim. As previously mentioned, ten of the 12 cases from Tumaco cited in this book involved at least one instance of forced displacement. These displacements occurred in a variety of contexts.

An illustrative example is that of the gay man who was used to transport guerilla members on his motorcycle taxi. Prior to that incident, he had been threatened and forcibly displaced by the FARC-EP on three occasions. The first of these occurred at any early age, when he and his mother lived in another department of Colombia and a FARC-EP commander told his mother that her son was “ready to strap on a rifle and put on some boots” (i.e. join the guerilla):

When he said that to my mom he meant that there in the guerrilla I was

going to become *macho* and become a man because my homosexuality has been evident since I was little²⁴⁰.

Later on as an adult, he was forcibly displaced two more times. The first occurred in rural Tumaco, when he was working at a bar and members of the FARC-EP attempted to coerce him into paying a *vacuna* (war tax) with the bar's profits. Since he was not the owner of the establishment, he refused, whereupon the guerilla members insulted his gender expression ("you complain too much, little girl. You're earning well, one of these days you'll get a husband") and warned him that if he did not comply the next time around they would take him as collateral. As a result of this threat, he left Tumaco for Bogotá. The final episode of forced displacement occurred when he returned to Tumaco to visit his mother, during which a FARC-EP member publicly scolded him for being gay and for having had sexual relations with his partner prior to coming out.

In most of the cases cited here, the forced displacements are circular, meaning that they occur as part of a vicious cycle of expulsion and return, which opens the door to further violence. Notably, the propensity to return speaks to the strength of afro-*tumaqueño* LGBT people's bond with their family, culture, and territory, which are as previously stated are inextricably bound up in one another, as well as to the material difficulties of surviving in distant cities with limited (formal) education and limited financial means while facing racial discrimination.

b. Technique

In Tumaco, the predominant techniques of prejudice-based violence are **purely instrumental, symbolic-exclusionary, and symbolic-hierarchical**. In the first category, we find the cases in which the victims were coerced into performing tasks for the guerilla that corresponded to

240 COLOMBIA DIVERSA. Semi-structured interview, Tumaco, 2008. Quote translated from Spanish.

feminized chores (e.g. cooking and washing clothes) or to LGBT stereotypes (e.g. becoming informants or managing a sex trafficking network, due to their supposedly gregarious nature). Though the underlying motivation for these conducts is not necessarily a moralizing and disapproving view of their sexual orientations or gender identities, the victims were perceived as vulnerable and therefore more easily subdued, making them more amenable targets for activities that benefitted the armed group.

However, in each case of instrumental violence, there is a clear breaking point when the violence becomes *symbolic-exclusionary*: when the original reasons for involving the victim in the organization disappear, either because they rebuffed the perpetrators or refused to continue complying, SOGI-based threats emerge, drawing on stereotypes like that of LGBT people as HIV carriers in order to expel them. Rather than merely use the survivors, the violence now seeks to condemn what they are and what they represent in a particular context, which due to their loss of utility becomes incompatible with the dominion of the armed group. It is also a way of punishing such expressions of insubordination and autonomy on behalf of people assumed to be completely devoid of agency by their abusers.

The prevalence of sexual violence also speaks to the existence of *symbolic-hierarchical* violence. In these cases, perpetrators use deception, coercion, and force to remind victims, their peers, and other members of the community of their power over the territory and the subordinated role of LGBT people therein.

Along with the above, it is important to draw attention to the *mode of commission* of the FARC-EP's prejudice-based repertoire in Tumaco. The first recurring element in this regard is the *factors of vulnerability* that make some LGBT people more likely to be targeted than others. One of these factors concerns how visibly LGBT people break the constricting molds of the sex/gender/desire system. Men with feminine gender expressions and trans women, who are often perceived as men with feminine gender expressions,

are at greater risk for violence than other LGBT subpopulations. One participant noted that gay men always have to “walk well, avoid showing their condition, look presentable”²⁴¹. In other words, they have to ‘masculinize’ their gender expression and avoid wearing their homosexuality on their sleeve. Socioeconomic precariousness, having HIV/AIDS, and political activism are also key risk factors.

Second, following the selection or identification of the victim, the majority of cases also involved their *separation from protective spaces*. This practice of removing victims from populated areas or from their homes in order to commit acts of violence reveals the FARC-EP’s intention to isolate them from support systems that could come to their aid. This intention is also evident in the FARC-EP’s incursion into victims’ homes, which robs them of their most vital safe space. We see this in the cases of the trans woman who was expelled from her home along with her family members and the gay man who was forced to perform oral sex on guerilla members who broke into his home.

A third element of the mode of commission relates to the *circular nature of the violence*, particularly of forced displacement. In fact, as we saw in the discussion on the FARC-EP’s repertoire, victims of instrumental violence recounted at least two consecutive episodes of forced displacement. It should be noted that this circular nature often involves the commission of conducts similar to those that produced the initial displacement such as attacks on their personal integrity or other forms of instrumentalization.

Finally, the *inevitable impunity* creates a climate of legitimation of the violence committed against LGBT people. Though the relationship between armed and community violence is not as strong as in southern Tolima, institutional weakness in Tumaco, combined with the widespread sense of dread and fear created by the violence, help perpetuate human rights violations against LGBT people ad infinitum.

241 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

c. Target

The targets of the documented prejudice-based violence in Tumaco were black gay men, trans women, and one bisexual man. On this issue, it is worth bearing in mind that lesbian and bisexual women and trans men who were victims of FARC-EP violence did not participate in the documentation process. Without their stories, it is impossible to develop a comprehensive vision of how prejudice-based violence operated in the region. In this sense, we stress that their existence cannot be ignored and reiterate the pressing need to include their voices in future efforts to understand conflict dynamics in Tumaco.

As far as the documented pattern of violence is concerned, however, it is important to note that the target population shares two key characteristics. The first is that the victims were targeted at early ages, one as young as five years old. Though Tumaco shares this trait with southern Tolima, the key difference is that the primary form of violence deployed against *tumaqueño* victims was sexual violence. Moreover, though this sexual violence had a similar corrective animus in some instances, it never had the paternalistic and didactic tone of FARC-EP's procedural violence in southern Tolima.

The second characteristic is that, as previously noted, victims were perceived as being particularly vulnerable due to their socially subordinated position. Whether it was because they were hair stylists that constantly moved around the municipality or because of their roles as activists and cultural agents or because of their employment in the informal sector (e.g. as a motorcycle taxi driver), their selection was consistently mediated by their lack of (gender/class) privilege:

Us gay people are very vulnerable for them and we're people that they can manipulate as they wish, because we're not guerilla members, we're not armed, we don't keep guns on us. So they know that we're people, we're a community that they can abuse and exert all their power on. So I think they do it to intimidate us. I mean, because of what they do to us, they send a message.

d. Materialization of the motivation

As we have seen thus far, armed groups who target LGBT people on the basis of their sexual orientations and gender identities do not always do so with the intent to impose or reaffirm the gender binary. Prejudice can be instrumental, meaning that one can enact prejudice without feeling animosity or hatred toward a particular social group and without such prejudice being the central driver of the violence. In these cases, though there are indicators of explicit animosity, the victim's identity (or perceived identity) as LGBT serves primarily to reinforce the perception that they are a marginalized group that can be easily overpowered or otherwise subjected to the will of the armed group. In this sense, not only does war polarize and exacerbate preexisting gender arrangements or orders, but it also capitalizes on them for its own ends, for example, by forcing gay men to act as informants.

In the case of sexual violence, all of the victims indicated that they were targeted for being (or being perceived as, for example, in the case of the bisexual man) gay men and trans women. However, the aims of the sexual violence vary across the recorded episodes. In instances where the perpetrator openly condemned the sexual orientation of the victim, the violence was punitive in nature, exploiting sexuality as a form of punishment. In contrast, in cases where the perpetrator used sexual violence in order to reaffirm the femininity of trans women, it sent the message that identifying as women meant subjecting themselves to the sexualized rituals of violence scripted and prescribed by patriarchy. Here, the aim of the sexual violence was corrective, since it served to neutralize the supposed incompatibility between the cultural expectations and the reality of the trans body. Finally, both of these forms of sexual violence were committed in order to reinforce the FARC-EP's territorial control, since they communicated the formidable extent of this group's sovereign power due to their symbolic nature.

Finally, it is important to emphasize that while the broader context of

discrimination helped enable guerrilla violence against those with diverse sexual orientations and gender identities, it was the FARC-EP who relied on the power of arms to persecute LGBT people. In fact, as previously suggested, this violence was inextricably linked with the broader war dynamics that characterize the conflict in Tumaco. While the FARC-EP exercised hegemonic control of southern Tolima until the early 2000s, Tumaco has been the site of intense competition between multiple armed groups since the 1990s. These clashes have prevented any one group from reaching the same level of territorial control that the FARC-EP enjoyed in Tolima, which in turn made it more difficult for the guerrilla to build trust and legitimacy among local populations. Since it could not secure collaboration through the kind of sustained interaction guaranteed under hegemonic control, in Tumaco, guerilla members more frequently relied on violence for this purpose.²⁴² This helps explain the prevalence of both sexual violence and instrumental violence. In the words of a community communicator from Tumaco,

When the armed actors arrive, they start controlling everything that's different...there starts to be control over sexuality, sexual orientation, but also over certain practices, over women, over women's sexual liberty. For example, whether they're with one guy, two guys, three guys, that also starts being controlled. If you're lesbian or heterosexual, if you use drugs. Anything that could be annihilated was, well, annihilated²⁴³.

D. Application of the Elements of the Crime of Persecution to the Patterns of Prejudice-Based Violence in Southern Tolima and Tumaco

As we have argued before the Special Jurisdiction for Peace, Colombia Diversa identified patterns of persecution against LGBT people both in Chaparral and

²⁴² This reflection is based on Stathis Kalyvas' theories regarding the mechanisms through which armed actors secure the collaboration of the civilian population in civil wars. See: KALYVAS, Stathis. *The Logic of Violence in Civil War*. Cambridge: Cambridge University Press, 2006.

²⁴³ COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

in Tumaco. In this section, we apply the legal elements of this crime to the violence explained in the previous two sections in order to prove the existence of such persecution.

1. Severe deprivation of fundamental rights

1.1 Rights infringed

The prejudice-based violence in southern Tolima, primarily Chaparral, and in Tumaco led to the severe infringement of multiple fundamental rights of the LGBT victims. In each of the cases, the acts of harassment, intimidation, public humiliation, threats, and eventual displacement committed against them made it impossible to lead a life free of violence and discrimination and irrevocably altered the course of their lives, interrupting their hopes and aspirations.

These rights restrictions were particularly severe in cases where the violence was committed against minors. Those acts contravened the principle/right of the superior interest of the child, enshrined in article 44 of the Colombian Constitution and article 3 of the Convention on the Rights of the Child. Specifically, the imposition of forced labor, acts of humiliation, and the displacement of LGBT minors violated their right to have and not be separated from their families, to grow up in a nurturing environment that stimulated their personal growth, and to lead a life free from violence.

In addition, the acts of violence committed by the FARC-EP separated victims from their support networks. The constant violence and discrimination at the hands of this guerilla made their homes and places of origin uninhabitable, forcing them to uproot their lives and move elsewhere or risk suffering even more serious violence.

These conducts also impinged their right to freedom and free development of personality, since, as the victims point out, they were forced to conceal their true sexual orientations and gender identities as a strategy for survival.

Due to State inaction in the face of this violence, yet another right infringed was the right to access justice. Its historical failure to prevent, investigate, prosecute, and punish violence against LGBT people has led to high rates of underreporting, since LGBT victims afraid to come forward only to be turned away by the authorities. In the cases at hand, none of the survivors who mustered up the courage to report to law enforcement or other government agencies received a timely response, let alone justice or reparations.

In any case, the violence most severely restricted the right to equality and human dignity. The stigmatization, humiliation, sexual violence, beatings, and other abuses reduced LGBT people to second-class subjects, whose bodies and lived experiences were disposable. Once they outlived their usefulness to armed groups, they could easily be cast out or murdered. This, in turn, curtailed their right to remain in their place of origin, make a home, and follow their own work aspirations instead of the orders imposed by the FARC-EP.

Here, it is important to remember that the acts of violence in question were committed due to the victims' diverse sexual orientation and gender identities. However, the origin, race, class, and educational stage of the victims deepened the impacts of these rights violations, making it essential to analyze them from an intersectional perspective in order to understand the interactions between perpetrators' motivations, the effects of the violence, and the context in which they occurred. The notion of *structural, multiple, and intersectional discrimination*, which has been used in the field of human rights since the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (2001), is particularly useful in this regard.

The Inter-American Court of Human Rights has defined intersectional discrimination as that which occurs when “numerous factors of vulnerability and risk of discrimination intersect”²⁴⁴ and give rise to a complex form of

244 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of González Lluy et al. v. Ecuador. Preliminary Objections, Merits, Repa-

discrimination that leaves victims in a more vulnerable state and aggravates the impacts of the violence. As for structural discrimination, it entails the existence of a series of social, cultural, political, or economic conditions that perpetuate an individual's exclusion on prohibited grounds of discrimination in the face of State inaction vis-à-vis those conditions. This form of discrimination results in the severe and widespread infringement of the rights of people who belong to that social group.²⁴⁵

Given the number of human rights violated as well as the combination of factors that preceded the attacks, the persons who contributed their stories to this book experienced *multiple and intersectional discrimination*. The long-lasting effects of the violence committed against them exacerbated the underlying vulnerabilities that made them targets of guerilla violence in the first place. In addition, these survivors were (and continue to be) victims of *structural violence*, which in Colombia is actively promoted by political parties and fundamentalist interest groups who openly oppose LGBT rights. Those forcibly displaced and, in the case of Tumaco, who are black, were also (and continue to be) subjected to the structural discrimination that persists against these populations. In other words, when they become victims of the armed conflict, LGBT people, particularly poor and/or black LGBT people, end up embodying multiple and intersecting social conditions that favor forms of exclusion yet to be fully addressed by the Colombian government.

1.2 Gravity threshold

The structural inequality and pervasive social prejudice faced by LGBT people in southern Tolima and Tumaco greatly exacerbates the discriminatory impacts of the violence committed against them in the context of the armed

rations and Costs, Judgment of September 1, 2015, par. 290.

245 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the Workers of the Hacienda Brasil Verde v. Brazil Preliminary Exceptions, Merits, Reparations and Costs. Judgment of October 20, 2016, par. 334.

conflict. In addition to living in peripheral regions that suffer from endemic poverty and violence, where much of the population depends on informal economies, having limited access to formal education and being pushed into precarious jobs like beauty and sex work leaves many LGBT people languishing in poverty. The combination of limited financial means and reduced support systems, both consequences of entrenched prejudice, make it more difficult for LGBT people to cope with the effects of the violence on an emotional, social, physical, and economic level. For example, many of the victims of sexual violence included in this book did not seek crucial medical attention after being attacked due to scarce financial resources, internalized shame, and fear of being discriminated in the health system.

All of these difficulties are compounded in cases of forced displacement, during which victims are forced to survive in new and often unwelcoming cities without formal education, let alone employment, while grappling with new forms of discrimination. Gay men who work as stylists, for example, have spoken about the near impossibility of creating a new client base in a city where they know no one and no one knows them. Moreover, as mentioned in the previous section, black LGBT people who were expelled by the FARC-EP from Tumaco often faced new forms of racist violence and discrimination when they relocated to majority-*blanco-mestizo* cities. In this sense, forced displacement ends up being a deeply disorienting and painful process of uprooting that gives rise to multiple forms of social exclusion.

Another element that deepens the violence committed against LGBT people in these two regions is the circularity or *continuum* of the violence. The perverse interplay between family, community, and armed group prejudice is in itself a grave occurrence because it sends the message that no place will ever be safe for LGBT people unless they repress their identities. In southern Tolima and Tumaco, these messages taught gay and trans children and adolescents that their sexual orientations and gender identities were incompatible with their cultural (being a *campesino*) and even racial identities (blackness), an

experience which was not only deeply painful but also reprehensible from a human rights point of view since it essentially conveys that they are destined to lead incomplete and second-class lives in which a part of them will always be suppressed.

Finally, because the violence deployed by armed groups against LGBT people enjoys broad social and even institutional legitimacy, perpetrators behaved with absolute certainty of impunity. This impunity entails a complete lack of due diligence from the State as well as profound social indifference, if not complicity. In this sense, far from threatening the armed group's control over a specific region, it actually operates as a signaling mechanism that communicates the group's shared values with the community while simultaneously intimidating LGBT people and pushing them toward self-censorship or ostracism.

2. The gender-based selection of the victim and the prejudiced perception of the perpetrator

As has been shown throughout this book, the perpetrators' motives were evidently discriminatory. Their intention was to produce the denial of the fundamental rights of the victims due to their prejudiced view of their sexual orientation and gender identity. Despite the fact that this prejudiced motivation was rooted in broader social and cultural norms about gender and sexuality, from a legal perspective, it is a subjective issue that must be objectified in some way. For the cases at hand, this question could not be clearer: In each of the victim's testimonies, perpetrators expressed their motivations explicitly and unequivocally, externalizing their prejudices about LGBT people as they committed the acts of violence that violated their human rights.

Asked about the motivation of the guerilla members that targeted him, one of the gay men from Chaparral said,

That’s why they personally told me ‘*chino*’ (dude), that they were ta, ta, ta, those people over there from the FARC, and that to me, personally, *por ser marica* (for being gay), so they weren’t going to kill me on the spot, but they’d give me a day to leave and if not, *me echaban al espumoso* (they’d throw me in the river, specifically the Amoyá River)²⁴⁶.

Similarly, another person from Chaparral explained that the guerilla members who threatened and displaced him said that, “you have to behave like a *macho*, because having *maricas* (faggots) in the *vereda*²⁴⁷ no [...] ‘there’s no place for *maricas* (faggots) here’²⁴⁸. Yet another indicated that when the FARC-EP threatened him, they called him “*maricón*” and “*marica*”, both variants of the slur faggot, and told him “he was a disgrace, that he was corrupting other young people”²⁴⁹. As previously noted, a similar comment was made by the guerilla member who charged a gay man a more expensive *vacuna* (war tax) simply for being gay: “a *maricón* (faggot) like you here in the region, you’re corrupting others, you’re a bad influence, you have to pay double”²⁵⁰. Finally, this discriminatory animus is also reflected in the testimony of the trans woman whose partner was forced to transport materials for and ultimately murdered by the FARC-EP. In recounting the reasons why the guerilla targeted him, she stated that,

Everybody knew. What do you say? What deduction do you make? That for being that way [being gay] you have to treat them badly [...] Do it. Because they always wanna make us sweep, mop, shake. *Que uno tiene*

246 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

247 Refers to an administrative subdivision in rural areas of Colombia.

248 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

249 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

250 COLOMBIA DIVERSA. Semi-structured interview, 2019. Quote translated from Spanish.

*que ser la soila.*²⁵¹ That’s what people expect from us. So, what I always say, they made him “bring, take, bring, take”²⁵².

The stories from Tumaco are remarkably similar in this regard. One survivor noted that the persecution that had followed him most of his life was related to the FARC-EP’s perception of his vulnerability, rooted in his feminine gender expression:

I think that, from the outset, that’s what they wanted to do at La Sonadora²⁵³ too, because, imagine them saying that they were going to keep me as collateral until they got the *vacuna* (war tax), that was obviously going to get around town. So, it was to send a message that no matter who you were, you were going to pay the *vacuna*. And they grabbed the most vulnerable, like the closest and best option to intimidate everyone. Anyway, a straight person doesn’t react in the same way as a gay person, or a woman doesn’t react the same way as a man. Women are more nervous, men may be calmer. Gays are also nervous people because we always live...the threats that don’t just come from the armed groups, we have to endure rejection, mockery, we have to endure humiliations, things they shout at us²⁵⁴.

In explaining the reasons for his victimization, the bisexual man who was targeted with the goal of making him an informant also explained that armed groups take advantage of LGBT people’s preexisting vulnerabilities in order to subject them to situations of extreme violence and fear that make it impossible to continue living in their own territories:

What marked me most in this whole experience of war, what marked me most was what happened to me in 2012, because they were about to kill

251 The term *soila* is an abbreviation of “*soy la*” (I am the) and it refers to a person who carries a heavy burden of responsibilities, particularly in the context of domestic work.

252 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

253 This was the name of the bar where the gay man in question was extorted by the FARC-EP, who wanted him to use the bar’s profits to pay a *vacuna* or war tax.

254 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

me, if it hadn't been for an act of God or whatever, they would have killed me. I had to leave just like that, and after all of that make it to Bogotá, after being kicked out of the house by my uncle, being displaced, having to look for a job, without being able to graduate, because I was going to graduate in 2012"²⁵⁵.

Moreover, it is important to emphasize that perpetrators expressed their disdain and animosity toward the victims' sexual orientations and gender identities throughout each episode of sexual violence. In these instances, guerilla members spared no derogatory, homophobic, or transphobic slur. The (prejudiced) reasons for which perpetrators were not only sexually assaulting the victims but also mutilating and insulting them were made explicit throughout the course of the violence. In addition, both the fact that victims were separated from their homes and support networks and taken to remote areas *and* that the violence occurred against a backdrop of social complicity as means of punishing or 'correcting' their sexual and gender deviance are elements that allow us to reasonably infer the prejudicial intention that motivated the violence.

3. Underlying international crimes constitutive of persecution

3.1. Outrages upon personal dignity as a war crime

Human dignity is the cornerstone of international and national human rights protections. One of the clearest expressions of this principle/right is the prohibition of cruel, inhuman, and degrading treatment, enshrined in various human rights treaties under the right to personal dignity. As the Inter-American Court of Human Rights has reiterated on multiple occasions, "the violation of the right to physical and mental integrity of the individual has different levels and encompasses torture and other types of abuse or cruel, inhuman or degrading treatment, the physical and mental aftereffects

255 COLOMBIA DIVERSA. Semi-structured interview, 2018. Quote translated from Spanish.

of which vary in intensity according to endogenous and exogenous factors that must be demonstrated in each specific situation²⁵⁶. This assessment recognizes that personal integrity encompasses certain physical and psychological conditions that enable the effective enjoyment of a dignified life. Furthermore, it recognizes that these types of treatment may vary in form and intensity, depending on their specific impact on victims and on the perpetrator's characteristics and intentions.

Given that the prohibition of torture and other cruel, inhuman, or degrading treatment is a *ius cogens* law,²⁵⁷ both international humanitarian law²⁵⁸ and international criminal law²⁵⁹ have recognized that any violation of this peremptory norm must be investigated, prosecuted, and punished even if the state is experiencing considerable upheaval. Failure to do so can incur in state responsibility as well as individual criminal liability. These treatments may take different forms, such as real and imminent threats, solitary confinement and isolation, destruction of meeting places and places of residence, among others.

The factual elements described in the patterns of violence above demonstrate the usage of intimidation techniques, humiliation, forced labor, beatings, and physical injuries, among others, to attack victims' dignity and

256 INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Norín Catrimán et al. (Leaders, Members, and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations and Costs. Judgment of May 29, 2014, par. 388.

257 INTERNATIONAL COURT OF JUSTICE (ICJ). Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Judgment of July 20, 2012, par. 96; INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Massacres of El Mozote and nearby places v. El Salvador. Merits, Reparations and Costs. Judgment of October 25, 2012, par. 147 & ss.

258 In IHL, the prohibition of cruel, inhuman and degrading treatment can be found in article 3 common to the four Geneva Conventions: "Art. 3.1. Common to the four Geneva Conventions. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (A) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (underline added). Similarly, Customary Rule No. 90 stipulates, "Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited" (underline added).

259 Under article 8(2)(c)(iii) in the Rome Statute of the ICC: "Committing outrages upon personal dignity, in particular humiliating and degrading treatment".

even deny their humanity. Such conducts show that perpetrators intended to debase and dehumanize victims in order to impart a sense of inferiority and remind them of their loathsome and thus punishable existence. As evidenced previously, acts of humiliation from FARC-EP perpetrators are a constant across the documented cases.

3.2. Forced displacement as a war crime

International human rights law does not provide a definition of forced displacement, but rather of internally displaced persons (IDP). According to Paragraph 2 of the United Nations Human Rights Commission's Guiding Principles on Internal Displacement, IDPs are

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border²⁶⁰.

Similar definitions can be found in Colombian legislation, namely Law 387 of 1997 and Law 1448 of 2011. The latter defines victims of forced displacement as “any person who is forced to migrate within the national territory, abandoning their place of residence or habitual economic activities, because their life, physical integrity, security, or personal liberty have been violated or were directly threatened,”²⁶¹ due to human rights violations in connection with the internal armed conflict.

Based on these legal definitions and the factual implications of coercing one or more persons to move from their permanent place of residence to another location within a state's borders, in 2004, the Colombian Constitutional

260 UNITED NATIONS. Guiding Principles of Internal Displacement. ONU-Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

261 CONGRESS OF THE REPUBLIC OF COLOMBIA. Law 1448 of 2011. Chapter III, article 60, par. 2. Quote translated from Spanish.

Court recognized that forced displacement involves “multiple, massive, and continuous violations of fundamental rights” and ruled that, given its scale, Colombia’s IDP situation constitutes an unconstitutional state of affairs.²⁶² In the view of the Court, forced displacement violates not only the right to free circulation and residency, but also the rights to life, the superior interests of the child, free development of personality, and social, economic, and cultural rights such as the right to health, to the minimum conditions for life, education, and adequate housing. It also infringes upon the rights to family unity, personal security, peace, legal personality, and equality.²⁶³

In the realm of international humanitarian law, article 17 of Additional Protocol II to the Geneva Conventions relating to the protection of victims of non-international armed conflicts establishes that “the displacement of the civilian population shall not be ordered for reasons related to the conflict”²⁶⁴. In accordance with this customary rule, article 8(2)(d)(viii) of the Rome Statute of the ICC establishes “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”²⁶⁵ as a war crime.

These laws indicate that forced displacement is a serious human rights violation that produces multiple impacts on victims. These impacts are exacerbated when forcefully displaced populations are considered vulnerable. In fact, as the Inter-American Court of Human Rights pointed out in reviewing the Colombian Constitutional Court’s jurisprudence, “the vulnerability of the displaced is accentuated by their rural origins and, in general, has a particularly intense effect on women who are heads of

262 COLOMBIAN CONSTITUTIONAL COURT. Judgment T-025 of 2004, Justice writing for the Court: Manuel José Cepeda. Quote translated from Spanish.

263 Ibid.

264 INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

265 Op. cit., ICC, Rome Statute of the International Criminal Court..., Article 8(2)(d)(viii).

household and represent more than half the displaced population”²⁶⁶.

The United Nations High Commissioner for Refugees (UNHCR) holds a similar view of the effects of forced displacement on lesbian, gay, bisexual and transgender people. According to UNHCR Guidelines on International Protection No. 9, people with diverse sexual orientations and gender identities and expressions are targets for persecution due to the widespread social prejudices against gender and sexual difference around the world. The UNCHR also notes that,

Intersecting factors that may contribute to and compound the effects of violence and discrimination include sex, age, nationality, ethnicity/race, social or economic status and HIV status. Due to these multiple layers of discrimination, LGBTI individuals are often highly marginalized in society and isolated from their communities and families²⁶⁷.

Although the statistics of forced displacements of LGBT people may seem trivial in light of the magnitude of Colombia’s IDP crisis, the motivations and impacts of the violence prove otherwise. Most of the victims from southern Tolima and Tumaco suffered at least one episode of forced displacement. Their cases illustrate the extreme gravity of this form of violence. In each instance, their expulsion from the community helped create an environment in which ostracizing LGBT people was accepted and legitimated, forcing them into a sort of involuntary nomadism that served as a perennial reminder of their outsider status.²⁶⁸ These cases also highlight the recurrence of forced displacement as a persecution strategy. Prejudice-based forced displacement was not the exception, but rather the rule. This means that the multiple and systematic human rights violations that arise

²⁶⁶ INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013, par. 317.

²⁶⁷ IACHR. Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/12/09, 23 October 2012.

²⁶⁸ BERKINS, Lohana. “Los existenciaros trans.” In: Ana María Fernández & William Siquiera Peres (ed.). *La diferencia desquiciada: géneros y diversidades sexuales*. Buenos Aires: Biblos, 2014.

from forced displacement were repeated incessantly throughout their lives.

Finally, in order to truly understand the seriousness of these conducts, we must consider their relationship to other aforementioned conducts, particularly outrages upon personal dignity. Indeed, as we saw in the cases that make up the repertoire of violence resulting in forced displacement, this conduct was invariably preceded by humiliations, forced labor, physical or psychological abuse, and/or threats of death or injury. In this sense, any legal analysis of forced displacement must account for its inextricable and interconnected relationship to these other forms of violence, a relationship founded on the prejudiced views of perpetrators.

3.3 Sexual violence as a crime against humanity²⁶⁹

The Rome Statute codified rape and other forms of sexual violence as war crimes, genocide, and crimes against humanity. In this case, the systematic nature of the sexual violence committed as part of the pattern of persecution in Tumaco elevates it to the status of a crime against humanity.

According to article 7(1)(g) of the Rome Statute, the underlying criminal acts that can constitute sexual violence as a crime against humanity are “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”²⁷⁰. The Elements of Crimes, moreover, establishes that the specific elements of sexual violence as a crime against humanity are:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological

²⁶⁹ This section was written in conjunction with Mariana García Jimeno.

²⁷⁰ Op. cit., ICC, Rome Statute of the International Criminal Court..., Article 7(1)(g).

oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent²⁷¹.

These two sections correspond to the objective and subjective elements of the crime. On one hand, the objective element refers to the invasion of the victim's body through penetration or otherwise, irrespective of whether a lascivious intent can be proven. As stated in the first chapter, this latter point is central to understanding and prosecuting conflict-related sexual violence, which must never be considered an act of sexual gratification but rather of power and masculine domination over a female or feminized body. The subjective element, on the other hand, refers to the absence of consent, which is considered nonexistent when the acts are committed by using force, coercion, or threats. In this sense, the Rules of Procedure and Evidence set forth a series of elements to be considered when evaluating whether consent was present or not:

- a. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- b. Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- c. Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- d. Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.²⁷²

In this context, the Office of the Prosecutor of the ICC has affirmed that sexual violence is not an isolated phenomenon in armed conflicts and

271 Op. cit., ICC, Elements of Crimes..., Article 7(1)(g), Elements 1 & 2.

272 In Colombia, the Rules of Procedure and Evidence were passed into law via Law 1268 of 2008 and declared constitutional via ruling C-801 of 2009. See: ICC. Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, 2000. Rule 70.

that it does not occur because of the sexual urges of perpetrators, but rather because of patriarchal power dynamics embedded in the societies in which those conflicts arise. This assessment dispels the common misconception that sexual violence is only committed against women. On the contrary, as had been previously recognized by the ICTY, men can also be subjected to this form of violence.²⁷³ In this sense, international prohibitions against sexual violence are gender-inclusive.

Regarding the contextual elements of crimes against humanity (i.e. the knowledge of the act and the widespread or systematic character of the attack), several clarifications are in order. First, sexual violence need not be *per se* widespread or systematic; it can be part of a broader repertoire of crimes against the civilian population, in which case “the nexus between the acts of rape and the attack”²⁷⁴ must be demonstrated. In this sense, since the *Tadic* ruling, isolated episodes of sexual violence committed as part of a broader attack against a civilian population can qualify as crimes against humanity “if it is the product of a political system based on terror or persecution”²⁷⁵.

Second, in order to prove the subjective element of the crime, one must provide evidence of the perpetrator’s *knowledge* that the specific act of sexual violence was committed as part of a widespread or systematic attack against civilian population or of their *intent* to commit the act as part of such an attack. As stated by Women’s Link Worldwide in relation to the case *Prosecutor v. Kunarac et al.* (2001), “To prove this element it is sufficient [to show] that the perpetrator had knowledge, or ‘willful blindness’, or risked committing an act knowing that it was part of an attack”²⁷⁶.

Finally, in the trial judgment of the so-called *Celebici* case (1998), the

273 Op. cit., ICTY, Trial Chamber II, Prosecutor v. Dusko Tadic, Opinion and Judgment..., par. 237.

274 ICC. Pre-Trial Chamber II. Case No. ICC-01/05-01/08. Prosecutor v. Jean Pierre Bemba Gombo, Decision on the confirmation of charges, 15 June 2009, par. 164.

275 Op. cit., ICTY, Trial Chamber II, Prosecutor v. Dusko Tadic, Opinion and Judgment..., par. 649.

276 WOMAN’S LINK WORLDWIDE. Crímenes de género en el Derecho Penal Internacional. Argentina: 2010. Pg. 50.

ICTY ruled that sexual violence can be considered torture because “such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition”²⁷⁷. In this sense, sexual violence committed in the context of an armed conflict can be seen as essential to the objectives of armed actors.

These rulings are crucial to understanding conflict-related sexual violence because they take us beyond the restrictive legal description of the crime enshrined in international humanitarian law and in the ICTY and ICTR Statutes, which only focus on rape. Indeed, these judgments opened the door for a more comprehensive view of sexual violence, one that not only broadens the scope beyond the penetration of sexual organs via coercion, but that also understands it as an act of control and domination over female or feminized bodies rooted in the contexts of structural discrimination against populations such as women or LGBT people.

Bearing this mind, it is important to return to the pattern of prejudice-based violence documented in Tumaco, which incorporated a *modus operandi* of multi-perpetrator rape involving other forms of sexual violence. While some of these episodes involved multiple victims, others targeted a single victim. In the first case, where perpetrators targeted multiple victims, the episodes began with deceit or other forms of coercion meant to isolate the victims from urban spaces or other places where authorities or members of the community could come to their aid. Subsequently, the would-be victims were forced to remain in the remote area to which they were taken and subjected to all kinds of sexual violence in addition to beatings, hair pulling, clothes tearing, ant bites, death threats, and/or discriminatory slurs. Upon conclusion, whereupon victims returned to the urban area of Tumaco, perpetrators threatened them

277 ICTY. Trial Chamber. Case No. IT-96-21-T, Prosecutor v. Mucic et al., Judgment, 16 November 1998, par. 471.

once again. As a result, in less than a week, all of the victims who suffered this form of violence were forcibly displaced from Tumaco to other parts of Colombia or Ecuador.

In the second case, where perpetrators targeted a single victim, perpetrators overpowered victims in settings where they were particularly vulnerable. Taking advantage of this vulnerability, they proceeded to assault each of the victims, engaging in a collective affirmation of militarized masculinity and of the power bestowed upon them by their guns. This form of violence enabled warrior men to reassert their physical superiority over female or feminized bodies, while reminding those who defy the acceptable canon of sex/gender/desire that their only options are to serve the will of hegemonic masculinity or be disposed of.

3.4 Forced labor as a crime against humanity

Forced labor is prohibited under the general prohibition of slavery and servitude enshrined in the Slavery Convention of 1926 and subsequently incorporated into human rights law. According to article 2(1) of Forced Labor Convention No. 29, “the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”²⁷⁸.

Likewise, article 6 of the American Convention on Human Rights stipulates that freedom from slavery means:

2. No one shall be *required to perform forced or compulsory labor*. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or

278 INTERNATIONAL LABOR ORGANIZATION (ILO). Forced Labor Convention (No. 29). 1930.

the physical or intellectual capacity of the prisoner²⁷⁹ (emphasis added). Based on this provision, the Inter-American Court of Human Rights has indicated that forced labor refers to: **(I)** services rendered “under the threat of penalty”; **(II)** for which the victim would not have offered themselves voluntarily. Regarding the first element, the Court has stipulated that “threat of penalty” may consist of “the real and actual presence of intimidation that can assume multiple forms and degrees, the most extreme of which are those that entail coercion, physical violence, isolation, or restriction of movement, as well as death threats addressed at the victims or their family members”²⁸⁰. The second element or “unwillingness to perform the work or service” entails the “absence of consent or of free choice at the time of beginning or continuing the situation of forced labor. This can occur for different reasons, such as the unlawful deprivation of liberty, deception or psychological coercion”²⁸¹.

In a similar vein, the Rome Statute recognizes slavery as a crime against humanity under article 7(1)(c). According to the Elements of Crimes, the specific element of slavery requires that the perpetrator exercise “any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”²⁸². In the attached footnote, the ICC clarifies that “such deprivation of liberty may, in some circumstances, include *exacting forced labour or otherwise reducing a person to a servile status* as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also

279 ORGANIZATION OF AMERICAN STATES (OAS). American Convention on Human Rights, “Pacto de San José de Costa Rica”. 22 November 1969. Article 6: Freedom from slavery.

280 Op. cit., INTER-AMERICAN COURT OF HUMAN RIGHTS, Case of the Workers of the Hacienda Brasil Verde v. Brazil Preliminary Exceptions, Merits, Reparations and Costs..., par. 293.

281 Ibid.

282 Op. cit., ICC, Elements of Crimes..., Article 7(1)(c), Element 1.

understood that the conduct described in this element includes trafficking in persons, in particular women and children”²⁸³ (emphasis added).

Taking these standards into account, the extraction of involuntary services from several LGBT persons by members of the FARC-EP guerrilla in southern Tolima and Tumaco clearly amounts to forced labor, which is prohibited under international human rights law and international criminal law. Of the cases examined in this book, it can be affirmed that services such as washing clothes, caring for the sick, transporting passengers or goods, *guachapeo* (clearing overgrowth with a machete), farming, and cleaning cemeteries, among others, were all carried out under the “threat of penalty,” that is, the potential murder of the victim if they refused to comply. Moreover, these activities were carried out involuntarily because the victims never sought them out of their own accord. On the contrary, they were permanently subjected to the power of the FARC-EP’s weapons, which rendered the autonomous provision of services impossible. In fact, at least as far as southern Tolima is concerned, these tasks were imposed as a ‘corrective’ punishment for the victim’s non-conforming sexuality.

3.5 Attacks on life as a crime against humanity

The right to life has been considered a fundamental human right “the enjoyment of which is a prerequisite for the enjoyment of all other human rights. If it is not respected, all rights are meaningless. Because of the fundamental nature of the right to life, restrictive approaches to it are not admissible”²⁸⁴. Violations of this right can occur through arbitrary deprivation of life, as well as through failure to guarantee the right to enjoy dignified conditions of existence. Given the cases analyzed in this book, this section will consider two types of attacks on the right to life: murder and enforced disappearance.

²⁸³ Ibid.

²⁸⁴ INTERAMERICAN COURT OF HUMAN RIGHTS. Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Judgment of November 19, 1999, par. 144.

In international criminal law, the arbitrary deprivation of life is recognized as a crime against humanity, genocide, and a war crime. As a crime against humanity, murder is enshrined in article 7(1)(a) of the Rome Statute. According to the Elements of Crimes, the specific element of murder is that “the perpetrator killed one or more persons”²⁸⁵.

Like other crimes against humanity, murder has an objective and subjective element. In this regard, the UN ad-hoc international criminal tribunals have set forth a series of considerations. On one hand, regarding the **actus reus**, according to the ICTR, the victim’s death must be the result of the illegal acts or omissions of the accused²⁸⁶ or a subordinate²⁸⁷. As such, per the ICTY, the conduct of the accused or a subordinate must be a substantial cause of the victim’s death²⁸⁸. The subjective element, on the other hand, has been the object of intense debate in international criminal jurisprudence. In this regard, the ICTR has stipulated that, at the time of the murder, the defendant or his subordinate must have intended to kill or inflict serious bodily injury on the deceased, knowing that such bodily injury could cause the death of the victim.²⁸⁹ The ICTY, however, has held that this requirement entails the intent to kill or the *intent to inflict serious injury as a result of a “reckless disregard”*²⁹⁰ for human life (emphasis added). This interpretation lowers the standard of proof established in prior rulings, as it clarifies that premeditation need not be proved for murder to be recognized as a crime against humanity.²⁹¹

285 Op. cit., ICC, Elements of Crimes..., Article 7(1)(a), Element 1.

286 ICTY. Trial Chamber. Case No. IT-96-21-T. Prosecutor v. Zejnil Delalic, Zdravko Mucic alias ‘Pavo’, Hazim Delic, Esad Landzo alias ‘Zenga’, Judgment, 16 November 1998, par. 424.

287 Op. cit., ICTR, Trial Chamber I, Prosecutor v. Akayesu, Trial Judgment..., par. 589.

288 Op. cit., ICTY, Trial Chamber, Prosecutor v. Zejnil Delalic, Zdravko Mucic alias ‘Pavo’, Hazim Delic, Esad Landzo alias ‘Zenga’, Trial Judgment..., par. 424.

289 Op. cit., ICTR, Trial Chamber I, Prosecutor v. Akayesu, Trial Judgment..., par. 589.

290 ICTY. Trial Chamber. Case No. IT-95-16. Prosecutor v. Kupreskic et al., Judgment, 14 January 2000.

291 This doctrine was confirmed by a subsequent judgment of the ICTY. See: ICTY. Trial Chamber. Case No. IT-95-14/2. Prosecutor v. Kordic and Cerkez, Judgment, 6 February 2001, par. 235

That said, the ICC’s most recent interpretations of the Rome Statute establish that for a murder to occur: **(I)** the victim must be dead and that death must result from the act of killing²⁹²; **(II)** the act itself must have been committed by action or omission²⁹³; and **(III)** the death of the victim must be capable of being inferred from the facts of the case²⁹⁴. Article 7(1)(a) of the Rome Statute does not specify a special *mens rea*, leading ICC to extend the requirement of proof of intent and knowledge set forth in article 30 to murder as a crime against humanity.²⁹⁵

Turning now to enforced disappearance, the Inter-American Court of Human Rights has defined this crime as “an unlawful act that gives rise to multiple, continuing violations of several rights protected by the American Convention and places the victim in a state of complete defenselessness, which involves other related crimes” that inflicts suffering on the victim and their family.²⁹⁶ In line with this definition, the Rome Statute recognizes enforced disappearance as a crime against humanity in the following terms:

“Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time²⁹⁷.

Furthermore, the ICC lays out six specific elements of enforced disappearance, recognizing its plural and complex nature and elaborating

292 Op. cit., ICC, Pre-Trial Chamber I, Prosecutor v. Katanga & Ngudjolo, Confirmation of Charges..., par. 421; Op. cit., ICTR, Pre-Trial Chamber II, Prosecutor v. Jean Pierre Bemba Gombo, Decision on the confirmation of charges..., par. 132.

293 Op. cit., ICC, Pre-Trial Chamber I, Prosecutor v. Katanga & Ngudjolo, Confirmation of Charges..., par. 287; Op. cit., ICTR, Pre-Trial Chamber II, Prosecutor v. Jean Pierre Bemba Gombo, Decision on the confirmation of charges..., par. 132.

294 Ibid.

295 Op. cit., ICC, Pre-Trial Chamber I, Prosecutor v. Katanga & Ngudjolo, Confirmation of Charges..., par. 423; Op. cit., ICTR, Pre-Trial Chamber II, Prosecutor v. Jean Pierre Bemba Gombo, Decision on the confirmation of charges..., par. 183.

296 INTERAMERICAN COURT OF HUMAN RIGHTS. Case of Alvarado Espinoza et al. v. Mexico. Merits, Reparations and Costs. Compensation and Costs. Judgment of November 28, 2018, par. 253.

297 Op. cit., ICC, Rome Statute of the International Criminal Court..., Article 7(2)(i).

on each of the issues raised in article 7(2)(i). In relation to the *perpetrator*, the Elements of Crimes require evidence of one of two types of conduct: an action, which involves the arrest, detention, or abduction of one or more persons; or an omission, which involves the refusal to acknowledge the commission of one of the aforementioned acts, or to give information on the fate or whereabouts of such person or persons. As for the subjective element, the Elements require that the perpetrator was aware either that “such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons”²⁹⁸; or that their denial was preceded by a refusal to acknowledge or account for a person’s whereabouts. With respect to the nature of the perpetrator, the Elements require that the arrest, detention or abduction be “carried out by, or with the authorization, support or acquiescence of, a State or a political organization”²⁹⁹. Finally, it also requires that this perpetrator have “intended to remove such person or persons from the protection of the law for a prolonged period of time”³⁰⁰.

In relation to the *conduct*, the Elements also establish passive or active requirements. In the former scenario, the arrest, detention or abduction is required to have been followed by a refusal to acknowledge the deprivation of liberty or to give information on a person or group of person’s whereabouts. In the latter scenario, it is required that the perpetrator’s “refusal was preceded or accompanied by that deprivation of freedom”³⁰¹.

The patterns identified by Colombia Diversa included two murders (a gay man in Tolima and a trans woman in Tumaco) and one enforced disappearance (trans woman in Tumaco). In the homicide cases, both people were deprived of their lives in an arbitrary manner as a direct result of the illegal actions of members of the FARC-EP guerrilla, that is, firing at the victims with loaded

298 Op. cit., ICC, Elements of Crimes..., Article 7(1)(c), Element 3.

299 Ibid, Element 4.

300 Ibid, Element 6.

301 Ibid, Element 3.

weapons. This means that their subsequent deaths were caused by the actions of members of this group. Furthermore, these actions had the clear intention of bringing about the death of the victims. This can be inferred not only from the type of injuries caused, which would invariably lead to their death, but also because both the trans woman from Tumaco and the gay man from southern Tolima had been previously subjected to death threats and other forms of harassment by the guerrilla.

Finally, as was illustrated in the discussion of the repertoires of violence used in Tumaco, the trans women who had been coerced into cultivating and managing a sex trafficking network for the FARC-EP was disappeared along with other women in that network due to a rumor about their HIV status. This can be inferred from the fact that **(I)** the woman had a prior relationship with the insurgency whereby the guerrilla coerced her to facilitate sexual encounters with women and other LGBT people; **(II)** it was in the context of this relationship that she agreed to attend a ‘celebratory’ event in a remote area of rural Tumaco organized by the armed group; **(III)** after the event, the whereabouts or fate of the victim were unknown; **(IV)** to date, the victim’s whereabouts remain unknown, such that until she or her body is found, her legal status will remain uncertain; and finally, **(V)** the members of the armed group were the last to know her whereabouts and yet later refused to account for her fate or that of her body.

CONCLUSIONS

In this book, we presented a series of theoretical, conceptual, and methodological tools for understanding prejudice-based violence against people with diverse sexual orientations and gender identities during wars and other contexts of generalized violence. In particular, we advanced a series of argumentative and interpretative strategies meant to facilitate the application of the international legal standards applicable in these situations, primarily international criminal law, in order to promote access to truth, justice, and reparations for LGBT survivors.

In doing so, the book seeks to resolve the question of how we can use the law to address the historical debts owed to LGBT victims of the Colombian armed conflict. The answer to this question is simple: What we need are not new protections for LGBT people, but rather to reinterpret existing protections in ways that transcend the superficial enunciation of categories like “gender approach” or “differential perspective.” Taking feminist approaches seriously means recognizing the structural deficiencies of the law as a language founded on patriarchal and heteronormative logics and being willing to reinterpret that language in order to capture the realities and experiences of oppression of LGBT people.

Bearing this in mind, we return to the three (re)definitions at the core of this text:

1. The notion of systematicity, where we contend that when an attack against a civilian population occurs in the context of systemic oppression, for example, as a result of the sex/gender/desire system, and in connection with an armed conflict that exacerbates that system, proving the existence of an organizational plan or policy to commit the attack becomes unnecessary. Contextual evidence regarding the existence of this system of oppression can show the organized, rational, and non-random nature of the conducts in question.

2. The notion of pattern, which has been the object of serious misunderstanding and imprecise interpretations in domestic and international tribunals, and which, in order to recognize these realities of structural domination and exclusion, must be used to identify: a series of criminal conducts (repertoire) carried out in a similar manner (technique) by an armed group over a particular period of time which arise not (necessarily) from a predetermined plan but rather from a set of moral and behavioral precepts that justify the commission of such acts (externalization of prejudicial motivation) against a given populace (target). Applying these elements to concrete cases can help reveal the underlying systems of oppression that scripted the violence used by armed groups, but should not limit it since identifying patterns is not an end in itself.

3. The international crime of persecution as the potential legal characterization of prejudice-based violence against LGBT people in the context of armed conflict: Persecution is the legal equivalent of prejudice-based violence, an analytical category that has helped explain violence against LGBT people both within and beyond the Colombian armed conflict. The existence of this crime also reveals the pernicious levels of violence that discrimination can reach as well as the international community's and international law's profound reproach of such acts. As explained in this book, the perpetrator's perception of the victim is a defining element of both

persecution and prejudice, as it is not an individual's personal characteristics that make them a target of discriminatory violence but rather how the perpetrator observes and associates these characteristics with a particular group or sector of society. These groups or sectors are considered inferior or undesirable, making violence against them appear justified. For this reason, per article 7(1)(h) of the Rome Statue, the perpetrators' discriminatory intent in relation to grounds that are typically used to restrict or deny rights, such as political views, race, nationality, ethnicity, culture, religion, and, of course, gender, are essential to the crime of persecution.

This last category, gender, must be understood in light of existing human rights standards, which recognize sexual orientation and gender identity as protected classes. Various human rights bodies, particularly the Inter-American Court of Human Rights, have interpreted the right to equality and nondiscrimination, enshrined in all international human rights treaties and thus constituting an international obligation for states, as recognizing that SOGI-motivated violence is founded on grounds of discrimination on the basis of which rights cannot be restricted. In this sense, the Special Jurisdiction for Peace and every institution charged with implementing provisions related to 'gender' in the Rome Statute, must do so in accordance with the *pro homine* principle and, in the case of states parties to the Inter-American Convention on Human Rights (such as Colombia), with Inter-American case law.

Recognizing the existence of *orders of prejudice* in war and other contexts of human rights violations is a useful tool for administering justice, especially transitional justice, because it allows us to focus on what is necessary: on unpacking the gender regimes of armed groups; on shedding light on the ways in which societal and armed group prejudice intersect to exclude or instrumentalize LGBT people in areas of fragmented or hegemonic control; on recognizing the prevalence of certain forms of violence over others and

the deployment of certain repertoires of violence according to the type of armed group and their relationship with the civilian population; in short, on seeing what prejudice has never let justice see.

It is also important for activism since, as evidenced in the first chapter of the book, this type of analysis can be applied to other forms of prejudice-based violence (i.e. on the basis of class, race, ethnicity, political position, among others) that occur in armed conflicts or other contexts of generalized violence. Recognizing the systems of oppression that precede and enable large-scale violence can help promote access to justice not only for victims of violence rooted in the logics of patriarchy and compulsory heterosexuality but also for oppressed populations who suffer violence on the basis of other discriminatory logics. The analytical framework proposed in this book could be used to examine the paradigmatic and unceasing violence committed against social leaders and human rights defenders in Colombia, for example.

Of course, coming to grips with the fact that the inability to contend with difference by other than violent means is a precursor to barbarity and oppression can be a painful process. However, our final call is to continue seeking out interdisciplinary and comprehensive explanations of the violence entrenched in our societies and to continue fighting against impunity with a creative, academically rigorous, and ethically feminist spirit and with the unapologetic conviction of the importance of human dignity, the centrality of victims' rights, and the need to achieve a broad social transformation.

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