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## Advancing Reproductive Justice in Latin America Through a Transitional Justice Lens

Rosario Grimà Algora

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ADVANCING REPRODUCTIVE JUSTICE IN LATIN  
AMERICA THROUGH A TRANSITIONAL  
JUSTICE LENS

*Rosario Grimà Algora\**

ABSTRACT

*Reproductive autonomy is a pivotal part of women's access to equal citizenship, yet it has not been included in any international nor regional human rights treaty. In the past decades, the U.N. Committees, notably the CEDAW Committee, and regional human rights bodies, particularly the Inter-American System for the Protection of Human Rights, have timidly advanced reproductive justice through their jurisprudence, including through the use of reparations. Drawing from the standards of reparations developed in the field of transitional justice, human rights bodies increasingly rely on reparations to enhance the transformative effects of their decisions. These reparations intend to include a gender-perspective in their design and aim to ensure the non-repetition of human rights violation, not only to the victim, but to society. Constitutional courts in Latin America are increasingly relying on the standards of reparations in their own decisions, including in those on reproductive justice. In this Article, I analyze two recent rulings from Latin American constitutional courts—one from Colombia and one from Ecuador—to understand how courts can use reparations to advance reproductive justice. I analyze these particular rulings for two reasons: (1) Both rulings have the potential to develop reproductive jurisprudence in the region where high courts have traditionally imported international and comparative law to resolve legal debates over reproductive rights; and (2) Both rulings challenge the traditional concept of reparations and offer an opportunity to rethink how the remedy can be deployed in a human rights context.*

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\* I would like to thank Ruth Rubio-Marín for her encouragement and inspiration in writing this article, and Graeme Simpson for his support and guidance.

## TABLE OF CONTENTS

ABSTRACT	• 155
I.	INTRODUCTION • 156
II.	REPRODUCTIVE JUSTICE: TOWARDS AN EQUAL CITIZENSHIP • 162
III.	REPARATIONS IN THE TRANSITIONAL JUSTICE FIELD • 166
IV.	REPARATIONS IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS BODIES • 169
	A. <i>International Human Rights Bodies</i> • 170
	B. <i>Inter-American System for the Protection of Human Rights</i> • 175
V.	REPARATIONS IN CONSTITUTIONAL COURTS • 180
	A. <i>Overview of the Region</i> • 180
	B. <i>Ecuador</i> • 183
	1. Facts • 183
	2. Decision • 184
	3. Reparations • 185
	4. Significance of the Case • 186
	C. <i>Colombia</i> • 187
	1. Facts • 190
	2. Decision • 191
	3. Reparations • 192
	4. Significance of This Case • 192
VI.	CONCLUSION • 193

## I. INTRODUCTION

Women's right to participate in the political, social, economic, and cultural life in equal conditions to men is enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>1</sup> Reproductive rights<sup>2</sup> are a pivotal part of women's citizen-

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1. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

2. By reproductive rights I mean the basic rights of all persons to reproductive self-determination. This includes freedom to decide on the number, spacing and timing of their children, access to the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. Reproductive rights also include the right to make these decisions free of discrimination, coercion, and violence. UNITED NATIONS POPULATION FUND, THE DANISH INST. FOR HUMAN RTS. & UNITED NATIONS HUMAN RTS. OFF. OF THE HIGH COMM'R, REPRODUCTIVE RIGHTS

ship, but they were not included in the text of the CEDAW nor in other international human rights treaties: reproductive rights are not mentioned in the plain text of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Cultural and Social Rights (ICESCR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) nor in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>3</sup> Yet these rights have, scarcely and slowly, been developing in international law. The U.N. Committee on the Elimination of Discrimination against Women (CEDAW Committee), as well as other U.N. Committees responsible for monitoring the implementation of the above-mentioned treaties,<sup>4</sup> have been advancing these rights through their concluding observations, general comments, and commu-

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ARE HUMAN RIGHTS: A HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 19 (2014), <https://www.unfpa.org/sites/default/files/pub-pdf/NHRIHandbook.pdf> [<https://perma.cc/3VJ2-KQRK>]. Reproductive rights can be distinguished from reproductive autonomy, which is the capacity of individuals to freely decide their reproductive matters, and reproductive justice, which is a health and advocacy framework started in the United States to address the shortcomings of the pro-choice movement. *Id.* at 26; *see also* Part II below (explaining the reproductive justice framework).

3. *See International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85, 113.
4. The U.N. Human Rights Committee, the U.N. Committee on Economic, Social and Cultural Rights, and the Committee against Torture have interpreted the meaning of the rights in their treaties to include reproductive rights. *See, e.g.*, Comm. on Economic, Social and Cultural Rights., General Comment No. 22: Article 12 on the Right to Sexual and Reproductive Health, ¶ 1, U.N. Doc. E/C.12/GC/22 (May 2, 2016) (stating that the right to health includes sexual and reproductive health); *L.M.R. v. Argentina*, Hum. Rts. Comm., Comm. No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007, ¶¶ 9-11 (Apr. 28, 2011), <https://www.escri-net.org/sites/default/files/Decision.pdf> [<https://perma.cc/E63Q-F4AM>] (concluding that the denial of access to an abortion caused L.M.R. “physical and mental suffering” that amounts to a violation of Article 7 of the ICCP which prohibits torture, or cruel, inhumane or degrading treatment); Comm. Against Torture, Concluding Observations of the Committee against Torture: Nicaragua, U.N. Doc. CAT/C/NIC/CO/1, ¶ 16 (June 10, 2009), <https://www.refworld.org/publisher,CAT,,NIC,4a85632bd,0.html> (urging Nicaragua to review its legislation on abortion); Concluding Observations on the Second Periodic Report of Honduras, Committee against Torture, U.N. Doc. CAT/C/HND/CO/2 ¶¶ 47-48 (Aug. 26, 2016) (stating its concern with the restrictions on access to abortion in Honduras, and recommending the state to ensure that women who decide to terminate their pregnancy have access to safe, legal abortions), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fHND%2fCO%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fHND%2fCO%2f2&Lang=en).

nications.<sup>5</sup> Regional human rights bodies have also timidly addressed reproductive rights, with the Inter-American System for the Protection of Human Rights leading this trend.<sup>6</sup> Despite these slight developments, women's reproductive autonomy and self-determination is constantly violated by state and non-state actors. Attacks on this include restrictive abortion legislation,<sup>7</sup> state-sponsored forced sterilization,<sup>8</sup> criminaliza-

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5. See Part IV below.

6. *Id.* The Inter-American System of Human Rights is composed of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). These entities were established in the American Convention on Human Rights (Pact of San Jose). *Id.* Article 41 establishes that the Commission is responsible for promoting "respect for and defense of human rights." Organization of American States, American Convention on Human Rights art. 41, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The Commission also serves quasi-judicial functions. *What is the I/A Court H.R.?*, INTER-AMERICAN COURT OF HUMAN RIGHTS, [https://www.corteidh.or.cr/que\\_es\\_la\\_corte.cfm?lang=en](https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en) (last visited Nov. 12, 2021) [<https://perma.cc/R9Z9-464S>]. Individuals, groups, and nongovernmental entities must first lodge their petition alleging a violation of human rights to the Commission. See American Convention on Human Rights art. 44, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The Commission assists parties in reaching a friendly settlement or, if this is not reached, it develops a report containing the facts and its conclusions, and transmits the report to the states concerned. *Id.* at arts. 48-50. If the Commission considers it pertinent, it can submit a case before the IACtHR – only the Commission and States can submit a case to the Court directly, the rest of actors must first send the petition to the Commission. *Id.* at art. 61. If the matter has not been settled or submitted to IACtHR, and its jurisdiction accepted, the Commission may provide its opinions and conclusions on the question, if an absolute majority of its members vote to do so. *Id.* at art. 51.

7. See *International Human Rights Law and Abortion in Latin America*, HUMAN RIGHTS WATCH (July 2005), <https://www.hrw.org/legacy/backgrounder/wrd/wrd0106/wrd0106.pdf> [<https://perma.cc/BU3Q-TY8V>] (providing an overview of the status of abortion legislation in Latin America); *Latin America's Draconian Abortion Laws and Policies Punish Millions of Women and Girls*, AMNESTY INTERNATIONAL (May 28, 2015, 2:14 PM), <https://www.amnesty.org/es/latest/news/2015/05/latin-americas-draconian-abortion-laws-and-policies-punish-millions-of-women-and-girls/> [<https://perma.cc/K562-3ZUQ>] (denouncing the effects that the draconian abortion legislation in the region have on women and girls).

8. See, e.g., *Chávez v. Peru*, Case 12.191, Inter-Am. Comm'n H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 (2003), <https://www.cidh.oas.org/annualrep/2003eng/peru.12191.htm> [<https://perma.cc/9SAD-7EFN>].

tion of abortions, miscarriages, and stillbirths,<sup>9</sup> obstetric violence,<sup>10</sup> and forced abortions and use of contraceptives.<sup>11</sup>

In the United States, women of color addressed the importance of ensuring reproductive autonomy to all women in the 1990s by conceptualizing the reproductive justice framework.<sup>12</sup> This framework expanded on the pro-choice movement's focus on negative rights—such as ensuring access to abortion and contraceptives—and calls for the importance of including access to positive rights—including socio-economic rights—in the quest for reproductive justice. This framework is therefore based on three primary values: the right to have a child, the right not to have a child, and the right to parent in a safe and healthy environment.<sup>13</sup> It also relies on an intersectional approach to highlight how the intersection of gender with race, sexual orientation and gender identity, socio-economic status, migration status and other dimensions of inequality all shape the experiences of women and heighten the inequalities of reproductive decision making.<sup>14</sup>

In this Article, I examine how reproductive justice can be achieved in Latin America. I propose that transitional justice mechanisms can be a tool to advance reproductive justice, not only in countries transitioning from an armed conflict or authoritarian regime, but also in consolidated democracies.<sup>15</sup> Transitional justice is “the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability,

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9. See, e.g., *Inter-American Commission on Human Rights files case of Manuela vs. El Salvador before the Inter-American Court of Human Rights*, CTR. FOR REPRODUCTIVE RTS., (Oct. 10, 2019), <https://reproductiverights.org/press-room/inter-american-commission-human-rights-filed-case-manuela-vs-el-salvador-inter-american> [https://perma.cc/5ZRG-K2S7] [hereinafter Press Release].

10. See Part V below.

11. See Part V below (explaining the Colombian case of Helena, a former member of the FARC who was forced to use a contraceptive and have an abortion).

12. LORETTA ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION 2* (2017) (using a human rights analysis to introduce and frame a discussion of reproductive justice in the twenty-first century).

13. *Id.* at 9.

14. *Id.* at 65, 72.

15. Consolidated democracies is a term used in the transitional justice field to categorize countries that are not transitioning from an armed conflict or authoritarian regime. The term was first defined by Juan J. Linz and Alfred Stepan as “a political regime in which democracy as a complex system of institutions, rules, and patterned incentives and disincentives has become, in a phrase, ‘the only game in town.’” Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, 7 J. DEMOCRACY 14, 15 (1996).

serve justice and achieve reconciliation.”<sup>16</sup> Transitional justice, with mechanisms such as reparations, truth commissions, institutional reform, accountability and reconciliation, initially served as a path for countries transitioning to a democracy from an armed conflict or authoritarian regime, as a form of addressing past mass atrocities and systematic abuse, and ensuring accountability and redressing victims. Truth commissions, for example, are used to clarify and seek the truth of passed atrocities that took place in an armed conflict or period of repression.<sup>17</sup> However, transitional justice mechanisms are today used to contribute to a range of goals that are not limited to the transition to democracy.<sup>18</sup> One of these increasing developments is precisely their application in consolidated democracies to address situations of systematic violence and discrimination, or past unjust practices.<sup>19</sup> This is for example the case with the Truth and Reconciliation Commission of Canada, which introduced the broader Canadian public to the “cultural genocide” committed against Aboriginal communities through Indian Residential Schools.<sup>20</sup>

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16. U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* 1, 3 (Mar. 2010), [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf) [<https://perma.cc/K6BK-VFN5>].
  17. Perhaps the most well-known example of a truth commission is the South African Truth and Reconciliation Commission, which was established after apartheid to understand what happened, confront the reality of the violence and human rights violations that occurred and take steps to prevent similar atrocities in the future. For more information on South Africa’s truth commission, see ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION* (2001) (providing a detailed account of the establishment of the Truth and Reconciliation Commission, its hearings, and criticisms of the final report).
  18. See generally Thomas Obel Hansen, *The Time and Space of Transitional Justice*, in *RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE* 34, 35 (Cheryl Lawther, Dov Jacobs & Luke Moffett eds., 2017).
  19. *Id.* For details revealed by the Truth and Reconciliation Commission of Canada of human rights abuses committed against Canadian indigenous children in “Indian Residential Schools,” see GOVERNMENT OF CANADA, *Truth and Reconciliation Commission of Canada*, <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525> [<https://perma.cc/GHE8-XNAS>] (last updated June 11, 2021).
  20. The establishment of the Truth and Reconciliation Commission was part of the Indian Residential Schools Settlement. Indian Residential Schools separated over 150,000 Aboriginal children from their homes, families, traditions and cultures, and force them to assimilate into the dominant culture. See STEPHEN HARPER, GOVERNMENT OF CANADA, *Statement of Apology to Former Students of Indian Residential Schools*, (June 11, 2008), <https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655> [<https://perma.cc/5XRK-CQ6A>]; see also TRUTH AND RECONCILIATION COMMISSION OF CANADA, *HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA* 3-4 (2015), <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021>

All transitional justice mechanisms could be used to advance women's citizenship.<sup>21</sup> While acknowledging this, I focus on reparations because they are the most victim-centered mechanism and they have already been used to advance reproductive justice at the international, regional, and national level.<sup>22</sup> I specifically focus on the potential value of judicial reparations, which are those issued by courts for a specific case, and are designed on a case-by-case basis and decided in strict proportion to the harm caused—as opposed to large-scale administrative reparation programs that target a wide pool of victims.

In Part II, I present the reproductive justice framework and the advantages of using it to analyze violations of women's reproductive autonomy and self-determination. In Part III, I examine the development of the right to reparations in the transitional justice field. In Part IV, I explore how the different modalities of reparations derived from the transitional justice field have been used by international and regional human rights bodies to address reproductive violations. In Part V, I analyze two recent cases on reproductive justice—one from the Ecuadorian Constitutional Court and another from the Colombian Constitutional Court to explore their potential impact on reparations and the wider understanding of reproductive justice in the region. They represent a case from a consolidated democracy (Ecuador) and another from a country in transition (Colombia), to illustrate how the continuum of violence against women<sup>23</sup>—in these cases, violations to women's reproductive autonomy—transcends the current categories of war and peace. I conclude by noting that the standards of reparations developed in transitional justice context are influencing ordinary justice procedures.<sup>24</sup>

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/01/Executive\_Summary\_English\_Web.pdf [https://perma.cc/SF67-63U9] (summarizing the work of Canada's truth and Reconciliation Commission).

21. See, e.g., Daniel Aguirre & Irene Pietropaoli, *Gender Equality, Development and Transitional Justice: The Case of Nepal*, 2 INT'L J. TRANSITIONAL JUST. 356 (2008) (examining the links between development, transitional justice and gender equality).
22. See Section IV "Reparations in International and Regional Human Rights Bodies", below (analyzing how the CEDAW and CCPR, and the Interamerican System for the Protection of Human Rights have been using reparations to advance reproductive justice).
23. The continuum of violence is a concept used by activists and scholars to understand the links between various forms of violence against women, ranging from sexual harassment to rape and murder, in order to understand that these are not isolated behaviors or experiences. See, e.g., LIZ KELLY, SURVIVING SEXUAL VIOLENCE 75-77 (1988) (linking this continuum to structural inequalities, aggression, and patriarchal norms that influence a range of male behavior).
24. Ordinary justice procedures are those that apply in times of peace and general circumstances, as opposed to those procedures that have been designed to apply to a specific context. For example, the Colombian Special Jurisdiction of Peace has been

Human rights bodies and national courts already started to move beyond reparations that only restore the victim to the original situation before the violation, and are instead awarding reparations that address the root causes of structural violence. This creates an opportunity for litigators to request more transformative reparations before national constitutional courts. The highest courts of Latin America rely on international and transnational law for reasoning and political legitimacy in their decisions, including those concerning reproductive justice. Thus, these cases have the potential to advance reproductive justice and the use of reparations in the region.

## II. REPRODUCTIVE JUSTICE: TOWARDS AN EQUAL CITIZENSHIP

The core idea of the reproductive justice framework is that reproductive autonomy is key to women's citizenship.<sup>25</sup> Only if women's reproductive autonomy and self-determination is respected and protected can they have full control over their own bodies, determine their life's course, and access all the benefits promised to citizens, whether economic, political, or social. Created in the 1990s by women of color in the United States, the reproductive justice framework challenged the limited scope of the pro-choice movement—led mostly by white women—which sought to ensure women's access to abortion and contraceptives without the interference of the state.<sup>26</sup>

The United States Supreme Court framed both rights to access to abortion and contraceptives—as part of the individual right to privacy—as negative rights.<sup>27</sup> Thus, states do not have positive obligations to ensure that women have access to these rights; they just need to refrain from interfering with women's path to terminate their pregnancy or access contraceptives.<sup>28</sup> Yet the uneven distribution of economic resources

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designed to have the exclusive jurisdiction over the crimes and violations that were committed during the Colombian armed conflict, whereas all other matters are addressed through the court system established in the Constitution, with the Supreme Court of Justice being the highest court. *Jurisdicción Especial Para la Paz*, JURISDICCIÓN ESPECIAL PARA LA PAZ, <https://www.jep.gov.co/JEP/Paginas/Jurisdiccion-Especial-para-la-Paz.aspx> [<https://perma.cc/DD7E-KRBW>] (last visited August 26, 2021, 9:12 pm).

25. See, e.g., Barbara Stark, *Reproductive Rights and the Reproduction of Gender*, GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 345 (Linda C. McClain & Joanna L. Grossman eds., 2009).

26. ROSS & SOLINGER, *supra* note 12, at 55.

27. *Id.* at 80.

28. *Id.* at 80-81; see also *Harris v. McRae*, 448 U.S. 297, 316 (1980) (upholding the Hyde Amendment and finding that an individual's right to access an abortion does

means that women of color do not have the same choices as many white women.<sup>29</sup> Women of color developed the reproductive justice framework to call for a wider understanding of the context, structures, and conditions that shape access to reproductive autonomy.<sup>30</sup>

The reproductive justice framework is anchored on human rights law, consolidating the notion that reproductive matters “are not just favors or luxuries, but [] are rights,” that women are entitled to demand the state to respect, protect, and fulfill.<sup>31</sup> It further advocates for the analysis of these matters through an intersectional approach. An intersectional approach specifically examines the gender, racial, social, political, and economic systems and inequalities that impact women’s reproductive health and their ability to control their reproductive lives.<sup>32</sup>

This framework has three primary values: the right to have a child, the right not to have a child, and the right to parent in a safe and healthy environment.<sup>33</sup> By expanding the debate over “choice” to one of safe and dignified access to childbirth, parenting and fertility management, reproductive justice quickly began to replace the language of the movement in the United States and internationally.<sup>34</sup>

Various human rights bodies have also taken a broader approach to recognizing when sexual and reproductive violence is rights violative. The CEDAW Committee has recognized that violations of sexual and reproductive health and rights are forms of violence against women and therefore a form of discrimination.<sup>35</sup> These violations include, “forced

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not entitle them to financial resources to access this service, and holding that a lack of resources is not an obstacle created by the state, whose only obligation is to “not place obstacles in the path of a woman’s exercise . . . it need not remove those not of its own creation. Indigency falls in the latter category”).

29. ROSS & SOLINGER, *supra* note 12, at 79-81.

30. *Id.*

31. See Alejandra Cardenas, Director of Global Legal Strategies of the Center for Reproductive Rights, United Nations Population Fund, *What’s Next? ICPRD Through the Lens of Reproductive Justice*, YOUTUBE (Oct. 14, 2020), <https://youtu.be/qEma4fPUeFA> [<https://perma.cc/WH4V-RD89>] for a discussion of how human rights have been instrumental to pursuing a reproductive rights agenda.

32. See generally Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2053-54 (2021) (discussing the historic intersection of gender, race and reproduction through an intersectional analysis).

33. ROSS & SOLINGER, *supra* note 12, at 65.

34. See UNFPA Handbook, *supra* note 2; see also ROSS & SOLINGER, *supra* note 12, at 65-71 (detailing the expanded use of “reproductive justice” after it was created in 1994).

35. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, at 6, CEDAW/C/GC/35 (July 14, 2017), <https://tbinternet.ohchr.org>

sterilizations, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services,<sup>36</sup> as well as obstetric violence.<sup>37</sup> The U.N. Committee on Economic, Social and Cultural Rights has clarified that sexual and reproductive health is an integral part of the right to health enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights.<sup>38</sup> The U.N. Committee Against Torture and the U.N. Human Rights Committee have also determined that under certain circumstances, reproductive violations amount to torture, inhumane, or degrading treatment.<sup>39</sup>

Violations of reproductive autonomy need to be placed within the continuum of violence against women and girls that they experience throughout their lifetime.<sup>40</sup> Recognition of this continuum promotes the understanding that acts of violence against women and girls are not

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/Treaties/CEDAW/Shared%20Documents/1\_Global/CEDAW\_C\_GC\_35\_8267\_E.pdf [https://perma.cc/7BZL-QJAJ].

36. *Id.*

37. The U.N. Special Rapporteur on Violence Against Women defines obstetric violence as “violence experienced by women during facility-based childbirth” and constitutes a “fundamental obstacle for ensuring women’s reproductive autonomy before, during, and after childbirth.” This includes unnecessary Cesarean sections or other procedures, as well as performing procedures without the informed consent of the patient. Dubravka Šimonović (Special Rapporteur), Rep. of the Special Rapporteur on Violence Against Women, its Causes and Consequences, at 6, U.N. Doc. A/74/137 (July 11, 2019) [hereinafter Special Rapporteur Report].

38. Comm. on Economic, Social and Cultural Rights., General Comment No. 22:Article 12 on the Right to Sexual and Reproductive Health, ¶ 1, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

39. *See, e.g.*, Hum. Rts. Comm., Commc’n No. 1608/2007, L.M.R. v. Argentina, ¶¶ 9-11 U.N. Doc. CCPR/C/101/D/1608/2007 (Apr. 28, 2011), <https://www.escri-net.org/sites/default/files/Decision.pdf> [https://perma.cc/E63Q-F4AM]; Comm. Against Torture, Concluding Observations of the Committee against Torture: Nicaragua, ¶ 16, U.N. Doc. CAT/C/NIC/CO/1 (June 10, 2009), <https://www.refworld.org/publisher,CAT,,NIC,4a85632bd,0.html> (urging Nicaragua to review its legislation on abortion); Comm. Against Torture, Concluding Observations on the Second Periodic Report of Honduras, ¶¶ 47-48, U.N. Doc. CAT/C/HND/CO/2 (Aug. 26, 2016) (stating its concern with the restrictions on access to abortion in Honduras, and recommending the State to ensure that women who decide to terminate their pregnancy have access to safe, legal abortions), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fHND%2fCO%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fHND%2fCO%2f2&Lang=en).

40. Indeed, many violations of reproductive autonomy meet the definition of “incidents which women experience as abusive are not defined legally as crimes.” KELLY, *supra* note 23, at 76.

isolated but are connected through underlying patriarchal structures that perpetuate the subordination of women to men in society.<sup>41</sup> These patriarchal structures intersect with other forms of inequalities to shape and heighten the forms of violence. Unless the underlying structural dimensions are addressed, responses to violence will fail to have a transformative impact. In recognition of this, the Inter-American System for the Protection of Human Rights has developed a comprehensive understanding of the challenges that impede the implementation of reproductive justice, including the “subordination of women in both the public and private spheres, socio-cultural practices that place women’s role as mothers before their role as autonomous individuals, and stereotypes, policies and practices that give control and decision-making power to men.”<sup>42</sup>

Using the continuum of violence, feminist scholars have also suggested the need to provide a gender perspective<sup>43</sup> “on the successive moments in the flux of peace and war is not an optional extra but a stark necessity.”<sup>44</sup> A gender perspective challenges traditional patriarchal definitions of what constitutes a society in conflict or in peace.<sup>45</sup> It renders meaningless the flawed distinction between peace and war; any definition of peace as the absence of conflict is based on a male conception of violence.<sup>46</sup> Women experience systematic violence and discrimination in times of peace as well. This logic has also been used by the CEDAW Committee and the Inter-American Court of Human Rights (IACtHR).<sup>47</sup>

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41. *Id.* at 75-77.

42. Ciara O’Connell, *Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like?* 16 HEALTH & HUM. RTS. J. 116, 120 (2014).

43. Gender perspective is used here to mean a consideration of women’s experiences and concerns by focusing on differences “on gender-based differences in status and power, and considers how such discrimination shapes the immediate needs, as well as the long-term interests, of women and men.” *Gender Perspective*, EURO. INST. FOR GENDER EQUAL., <https://eige.europa.eu/thesaurus/terms/1197> [<https://perma.cc/4L7L-DQ8C>] (last visited Aug. 29, 2021).

44. Cynthia Cockburn, *The Continuum of Violence: A Gender Perspective on War and Peace*, in *SITES OF VIOLENCE: GENDER AND CONFLICT ZONES* 24, 25 (Wenona Giles & Jennifer Hyndman eds., 2004).

45. *See, e.g.*, Ruth Rubio-Marín & Dorothy Estrada-Tanck, *Transitional Justice Standards on Reparations for Women Subjected to Violence in the CEDAW Committee’s Evolving Legal Practice*, 14 INT’L J. TRANSITIONAL JUST. 566, 567 (2020).

46. *See, e.g.*, Jacqui True, *Continuums of Violence and Peace: A Feminist Perspective*, 34 ETHICS & INT’L. AFFAIRS 85, 88 (2020) (arguing that defining peace as the absence of organized violence presents a narrow and harmful understanding that does not properly account for the “range of gender-based physical and nonphysical violence and threats experienced by women and girls”).

47. *See* Part IV below.

## III. REPARATIONS IN THE TRANSITIONAL JUSTICE FIELD

Reparations constitute one of the fundamental pillars of transitional justice, together with accountability, truth recovery, institutional reform, and reconciliation.<sup>48</sup> Compared to all these mechanisms, reparations represent a more victim-centered tool because they tailor measures to victims' needs.<sup>49</sup> Reparations are also "the most tangible manifestation of the state's efforts to remedy the harms victims have suffered."<sup>50</sup> They acknowledge the legal obligation of states to repair the consequences of human rights violations, either because the state directly committed these violations, or because the state failed to prevent them.<sup>51</sup> Reparations serve to express to victims and society the state's commitment to addressing the root causes of past violations and ensuring that they do not happen again, helping to (re)build trust in the system.<sup>52</sup>

The right to reparations under international law has become well established,<sup>53</sup> especially after the adoption of the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines).<sup>54</sup> These Basic Principles and Guidelines constitute the

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48. See Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFFAIRS 17, 19-24 (2006).

49. See, e.g., Luke Moffett, *Transitional Justice and Reparations: Remediating the Past?*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 377, 382 (Cheryl Lawther, Dov Jacobs & Luke Moffett eds., 2017); see also Fionnuala Ní Aoláin, Catherine O'Rourke, & Aisling Swaine, *Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice*, 28 HARV. HUM. RTS. J. 97, 109 (2015) (noting that reparations are "the most victim-centered of existing transitional justice mechanisms and encompass material and symbolic forms of redress[]").

50. Boraine, *supra* note 48, at 24.

51. Rubio-Marín & Estrada-Tanck, *supra* note 45, at 566.

52. *Id.* at 567.

53. Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 63, 68 (Ruth Rubio-Marín ed., 2009).

54. UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [hereinafter Basic Principles and Guidelines] UN Doc. A/RES/60/147, (Dec. 16, 2005). Restitution restores "the victim to the original situation" before the violation; compensation provides for "any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case;" rehabilitation "include[s] medical and psychological care as well as legal and social services;" satisfaction can include the verification of facts and full and public disclosure of the truth, the search of the

most significant global effort to codify existing standards relating to the right to reparations for the purpose of redressing gross violations of human rights.<sup>55</sup> They identify the following types of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>56</sup> All of them are necessary to repair the harm and avoid redundancy.

However, the Basic Principles and Guidelines are silent on women's experiences, particularly because they focus exclusively on violations of civil and political rights and violations committed in the public sphere. Because of this, civil society organizations met in 2007 in Nairobi and developed the Nairobi Declaration on the Right to Remedy and Reparation of Women and Girls (2007) (Nairobi Declaration) to supplement them.<sup>57</sup> The Nairobi Declaration calls for the inclusion of a gender perspective in the design of reparations<sup>58</sup> based on two key principles: Reparations involve the transformation of society as a whole (addressing the root causes that enabled the violence to take place) and the participation of women is integral to this process.<sup>59</sup> The Declaration takes into account the "particular circumstances in which women and girls are made victims of crimes and human rights violations in situations of conflict require approaches specially adapted to their needs, interests and priorities, as defined by them."<sup>60</sup> With this, the Declaration specifically aimed to give a voice to women and girls who are survivors of sexual violence.<sup>61</sup>

There are two main forms of discharging state's obligations to provide reparations: judicial reparations and administrative reparation programs.<sup>62</sup> Judicial reparations permit the assessment of violations on a case-by-case basis and decide compensation in strict proportion to

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whereabouts of the disappeared, an official declaration or judicial decision restoring dignity and the reputation of the victim, a public apology, commemorations, etc.; and guarantees of non-repetition ensure that the harm is not repeated. *Id.* at ¶¶ 19-23.

55. Pamina Firchow, *Do Reparations Repair Relationships? Setting the Stage for Reconciliation in Colombia*, 11 INT'L J. TRANSITIONAL JUST. 315 (2017).

56. Basic Principles and Guidelines, *supra* note 54, at 18.

57. Valérie Couillard, *The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence*, 1 INT'L J. TRANSITIONAL JUST. 444 (2007).

58. NAIROBI DECLARATION ON THE RIGHT OF WOMEN AND GIRLS TO A REMEDY AND REPARATION, § 3, at 4 (2007), [https://www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf) [<https://perma.cc/9M6C-NWMJ>].

59. Couillard, *supra* note 57, at 450.

60. *Id.*

61. *Id.* at 456.

62. Ruth Rubio-Marín & Pablo de Greiff, *Women and Reparations*, 1 INT'L J. TRANSITIONAL JUST. 318, 321 (2007).

harm.<sup>63</sup> Legislative and administrative reparation programs access a wider pool of victims of different violations.<sup>64</sup> Here, I will exclusively focus on judicial reparations, as courts are increasingly using a gender perspective to award reparations that have transformational potential. I do so while acknowledging the obstacles to accessing judicial reparations, including the high cost of litigation and the inordinately lengthy litigation process.<sup>65</sup>

In the case of judicial reparations, Rubio-Marín and Sandoval propose that courts employ a “holistic approach” to ensure that courts adequately address women’s needs in their reparation schemes,<sup>66</sup> as courts have traditionally not been successful in including a gender perspective in awarding reparations and in transforming pre-existing situations for women and girls. The holistic approach is developed in response to the IACtHR’s inability to devise reparation schemes that sufficiently challenged sexual hierarchies or improved outcomes for women and girls in the long run.<sup>67</sup> In order to provide meaningful remedies, courts should start with the relevant facts, violations, victims, and the proper assessment of harms that accompany the violations.<sup>68</sup> It is essential to determine these preconditions to be able to respond properly to the violations. Then, courts should consider what type of reparation both improves the starting position of victims and helps to dismantle the structural conditions that enabled the violations to take place.<sup>69</sup> Whenever possible, reparations should be transformative, aiming “to subvert, instead of reinforcing pre-existing structural . . . inequalities and thereby to contribute, however, minimally, to the consolidation of more inclusive democratic regimes.”<sup>70</sup> These transformative reparations can be achieved with the creative use of the different modalities of reparations, particularly through guarantees of non-repetition “given their preventive role as well as potential reach.”<sup>71</sup>

In the case of violence against women, transformative reparations should also aim at recognizing and reinforcing women’s role as social and economic actors, including by promoting the active participation of

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63. *Id.*

64. *Id.*

65. *Id.* at 322.

66. Ruth Rubio-Marín & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment*, 33 HUM. RTS. Q. 1062, 1064-71 (2011).

67. *Id.* at 1064.

68. *Id.*

69. *Id.*

70. Rubio-Marín, *supra* note 53, at 66.

71. Rubio-Marín & Sandoval, *supra* note 66, at 1071.

women as citizens.<sup>72</sup> For instance, reparations should assert women's full agency over their reproductive autonomy. They should also specifically, although not exclusively, address gender stereotypes of women as mothers that limit their full access to their citizenship rights,<sup>73</sup> and stereotypes of what type of women are deemed a fit or unfit mother—thus legitimizing discrimination and violence to the latter.<sup>74</sup>

#### IV. REPARATIONS IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS BODIES

Reparations have increasingly been applied by international and regional human rights bodies to address structural discrimination against women in consolidated democracies, by drawing from reparation standards developed within transitional justice contexts.

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72. Sanne Weber, *From Victims and Mother to Citizens: Gender-Just Transformative Reparations and the Need for Public and Private Transitions*, 12 INT'L J. TRANSITIONAL JUST. 88, 105 (2018).

73. Laws restricting access to abortion are based on ideas that a woman's role in society is to become a mother. The criminalization of abortion is based on the assumption that women are obliged to devote themselves to the work of raising children, and the states will only subordinate the welfare of the unborn to that of the mother when the state judges that women have a reason for avoiding motherhood sufficiently weighty, such as a risk to her life. See Reva B. Siegel, Siegel, J., Concurring, in WHAT ROE V WADE SHOULD HAVE SAID, 63, 63-82 (Jack Balkin ed., 2005). Similarly, legislation in most countries has been based on ideas of women as mothers and wives. For example, limitations are imposed on night work or on working in certain jobs that are dangerous or that might affect women's capacity to later become pregnant. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (holding that a statute prohibiting women from being employed in any mechanical establishment, such as factories and laundries, for more than 10 hours a day was constitutional, as the differences between the sexes justify having different rules, specifically based on a woman's physical structure and performance of maternal functions. "Healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Id.* at 421; Bundesverfassungsgericht (BVerfGE), 1992 Nocturnal Employment Case, 85 191 (Ger.) (the court examines the constitutionality of a statute prohibiting female employees from working at night in certain jobs).

74. States also engage in practices that restrict women's access to motherhood when they are not considered "fit" for motherhood. A common form of limiting women's access to motherhood is through forced sterilization of certain women. For example, this occurs in the cases of *I.V. v. Bolivia* and *María Mamerita Mestanza Chávez v. Peru* (2003). *I.V. v. Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶¶ 64-70 (Nov. 30, 2016); *Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm'n H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 ¶ 14 (2003).

### A. *International Human Rights Bodies*

The CEDAW Committee is a body of independent experts that monitors the implementation of the CEDAW.<sup>75</sup> Its duties include interpreting the CEDAW through general recommendations,<sup>76</sup> considering State Party Reports on measures adopted to give effect to the CEDAW,<sup>77</sup> and examining communications from those State Parties that have ratified the Optional Protocol to the CEDAW. These latter communications are reports of violations of the CEDAW that are submitted on behalf of individuals or groups of individuals under the jurisdiction of a State Party.<sup>78</sup> After reviewing the communication, the CEDAW Committee presents its views and makes non-binding recommendations.

The CEDAW Committee started to advocate for reparations as a response to violence against women in 2005.<sup>79</sup> In doing so, the CEDAW Committee has relied on the parameters of transformative reparations developed in the transitional justice field that have influenced the adjudication of reparations in consolidated democracies.<sup>80</sup> As explained below, the use of transformative reparations has proven particularly effective in cases of sexual and reproductive rights violations.

In *L.C. v. Peru* (2011), a 13-year-old girl became pregnant following a rape.<sup>81</sup> She attempted suicide by jumping from a building and was taken to the hospital for emergency surgery to prevent her injuries from leading to a permanent disability, but her treatment was denied as it was contraindicated during pregnancy. She then sought to have legal termination of her pregnancy but was denied this service. When reviewing this case, the CEDAW Committee recommended that Peru review its legislation and decriminalize abortion when the pregnancy results from rape,<sup>82</sup> making it the first time an international body explicitly directs a

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75. CEDAW, *supra* note 1, art. 17.

76. *Committee on the Elimination of Discrimination Against Women: General Recommendations*, UNITED NATIONS HUM. RIGHTS OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> [https://perma.cc/P4PY-Y2F2].

77. CEDAW, *supra* note 1, art. 18.

78. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, Oct. 6, 1999, 2131 U.N.T.S. 83.

79. Rubio-Marín & Estrada-Tanck, *supra* note 45, at 2.

80. *Id.*

81. *L.C. v. Peru*, CEDAW Committee, Comm. No. 22/2009, U.N. Doc. CEDAW/50/D/22/2009, ¶ 2.1 (Oct. 17, 2011).

82. *L.C.*, U.N. Doc. CEDAW/50/D/22/2009 at ¶ 12(b)(ii).

state to liberalize its abortion legislation.<sup>83</sup> This case illustrates how the CEDAW Committee is increasingly trying to capture the specificity of reproductive harms when it comes to recommending adequate forms of reparations, even those that require legal reforms.<sup>84</sup>

*Alyne da Silva Pimentel v. Brazil* (2011) is the first case on maternal mortality decided by an international human rights body.<sup>85</sup> In Brazil, preventable maternal death disproportionately affects low-income, Afro-Brazilian, and indigenous women, as well as women living in rural areas and in the Brazilian north and northeast.<sup>86</sup> Alyne da Silva Pimentel was an Afro-Brazilian who experienced health complications during her pregnancy, and was given medication to induce the delivery of her still-born fetus.<sup>87</sup> Her health worsened and she had to be transferred to a superior facility. Only one public hospital had available space for her but refused to use their only ambulance to transport her at that time despite her critical condition, and only did so after eight hours. At the new hospital, she continued facing mistreatment and died from a digestive hemorrhage. The doctors confirmed that this was a result from the delivery of the stillborn fetus.<sup>88</sup> The CEDAW Committee concluded that the mistreatment Alyne experienced from the health services resulted from systematic discrimination in the Brazilian health system against Afro-Brazilian, low-income, and rural women.<sup>89</sup> They recommended transformative reparations to address this systematic discrimination and to improve the treatment of pregnant women—including ensuring affordable access to adequate emergency obstetric care for all women, training health workers, ensuring compliance with national and international standards in private healthcare facilities, and reducing preventable maternal death.<sup>90</sup> By making these recommendations, the CEDAW Committee aimed to avoid the repetition of preventable maternal death in

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83. See Charles G Ngwena, *A Commentary on LC v Peru: The CEDAW Committee's First Decision on Abortion*, 57 J. AFRICAN L. 310 (2013) (providing a commentary of this case and its importance as the first decision of the CEDAW Committee on Abortion).

84. Rubio-Marín & Estrada-Tanck, *supra*, note 45, at 581.

85. Center for Reproductive Rights, *Alyne v. Brazil: Case of Alyne da Silva Pimentel Teixeira ("Alyne") v. Brazil*, [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/LAC\\_Alyne\\_Factsheet\\_0.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/LAC_Alyne_Factsheet_0.pdf) [<https://perma.cc/EEE6-KM3G>].

86. *Id.*

87. *Alyne da Silva Pimentel v. Brazil*, CEDAW Committee, Comm. No. 17/2008, U.N. Doc. CEDAW/C/49/177/2008, ¶ 2.5 (Sept. 27, 2011).

88. *Pimentel*, U.N. Doc. CEDAW/C/49/177/2008 at ¶¶ 2.1-2.12.

89. *Pimentel*, U.N. Doc. CEDAW/C/49/177/2008 at ¶¶ 7.4, 7.6.

90. *Pimentel*, U.N. Doc. CEDAW/C/49/177/2008 at ¶ 8.

the future and to ensure the amelioration of the treatment of pregnant women in Brazil.

*S.F.M. v. Spain (2020)* is the first case on obstetric violence decided by the CEDAW Committee.<sup>91</sup> During *S.M.F.*'s pregnancy, she was subjected to a series of unnecessary interventions, such as up to ten digital vaginal examinations that caused her an infection which was then transferred to her daughter, the administration of intravenous oxytocin to induce the labor without her consent, an unnecessary episiotomy, inability to move and be forced to give birth in the lithotomy position, and an immediate separation from her daughter after birth.<sup>92</sup> The CEDAW Committee found that the presence of these interventions was due to the presence of "structural discrimination based on gender stereotypes regarding sexuality, maternity and childbirth."<sup>93</sup> These were carried out without providing her with the necessary information nor obtaining her consent,<sup>94</sup> and had a significant adverse effect on *S.M.F.*'s physical and mental health, her psychological integrity and health of her baby.<sup>95</sup>

*S.F.M.* requested that the CEDAW Committee recommend that Spain issue transformative reparations to ensure that these practices do not continue.<sup>96</sup> This case is a great example of how reparations add to survivor's satisfaction – as *S.F.M.* specifically asked for these reparations to avoid the recurrence of obstetric violence in Spanish hospitals to other women. This turned her from a victim-survivor into an agent of change.<sup>97</sup> The CEDAW Committee recommended Spain to conduct a study on obstetric violence to shed light on the prevalence of this form of violence and provide guidance for public policies to combat such violence; ensure women's right to safe motherhood and appropriate obstetric services, including by requiring free, prior, and informed consent for invasive treatments; respect women's autonomy; and train health per-

91. *Spain needs to combat obstetric violence - UN experts*, UNITED NATIONS HUM. RIGHTS OFF. OF THE HIGH COMM'R (March 9, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25688&LangID=e> [<https://perma.cc/Q9X6-2CE>].

92. *S.F.M. v. Spain*, CEDAW Committee, Comm. No. 138/2018, U.N. Doc. CEDAW/C/75/D/138/2018, ¶¶ 2.1-2.6, 3.1 (Feb. 3, 2020).

93. *S.F.M.*, U.N. Doc. CEDAW/C/75/D/138/2018 at ¶ 7.2.

94. *S.F.M.*, U.N. Doc. CEDAW/C/75/D/138/2018 at ¶¶ 2.1-2.9 (the procedures included up to ten digital vaginal examinations that caused her to have an infection which was then transferred to her daughter; the administration of intravenous oxytocin to induce the labor without her consent; an unnecessary episiotomy; inability to move, which forced her to give birth in the lithotomy position; and an immediate separation from her daughter after birth).

95. *S.F.M.*, U.N. Doc. CEDAW/C/75/D/138/2018 at ¶ 2.7.

96. *S.F.M.*, U.N. Doc. CEDAW/C/75/D/138/2018 at ¶ 3.10.

97. Rubio-Marín & Estrada-Tanck, *supra* note 45, at 13-14.

sonnel and judicial and law enforcement personnel.<sup>98</sup> Significantly, some of these recommendations aim to further women's agency during childbirth by addressing the acute power imbalances between patients and healthcare personnel.<sup>99</sup>

In *S.N. and E.R. v. North Macedonia* (2020), the CEDAW Committee addressed the eviction of two minor girls of Roma origin who were pregnant, alongside other minors and adults.<sup>100</sup> After being evicted by government authorities, they were left with no shelter, no access to water and nowhere to go.<sup>101</sup> Neither of the two girls had public or private health insurance nor did they receive social support,<sup>102</sup> and they were left without access to their basic needs and without any maternal health-care assistance.<sup>103</sup>

The CEDAW Committee acknowledged the intersecting forms of discrimination against Roma women based on their gender, age, ethnicity, and health conditions.<sup>104</sup> It further stated that in evicting the minors without ensuring "appropriate alternative housing, health and maternal care" the state "did not consider their extremely vulnerable situation and the particularly disproportionate and discriminatory effect on Roma pregnant adolescents."<sup>105</sup> The CEDAW Committee recommended that the state guarantees several economic and social rights, including access to adequate housing, poverty alleviation, and affordable health and reproductive health services.<sup>106</sup> The recommendation of these socio-economic rights is essential to ensure the transformative effect of reparations, especially in a context where Roma women and girls are systematically discriminated against and do not have access to the socio-economic rights on an equal basis to the non-Roma population. Although not directly a reproductive autonomy case, the CEDAW Committee is advancing a more nuanced understanding of how intersectional discrimination heightens and shapes violations of women's reproductive autonomy. These violations do not only occur through the denial of access to reproductive and sexual health rights, but also by not creating an environment where women can access these rights, such as in the case where women's socio-economic rights are not guaranteed.

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98. *S.F.M.*, U.N. Doc. CEDAW/C/75/D/138/2018 at ¶ 8.

99. *See S.F.M.*, U.N. Doc. CEDAW/C/75/D/138/2018 at ¶ 8.

100. *S.N. and E.R. v. North Macedonia*, CEDAW Committee, Comm. No. 107/2016, U.N. Doc. CEDAW/C/75/D/107/2016, ¶ 1.1 (Mar. 19, 2020).

101. *S.N. and E.R.*, U.N. Doc. CEDAW/C/75/D/107/2016 at ¶ 2.9.

102. *S.N. and E.R.*, U.N. Doc. CEDAW/C/75/D/107/2016 at ¶ 2.4.

103. *S.N. and E.R.*, U.N. Doc. CEDAW/C/75/D/107/2016 at ¶ 2.9.

104. *S.N. and E.R.*, U.N. Doc. CEDAW/C/75/D/107/2016 at ¶ 9.2.

105. *S.N. and E.R.*, U.N. Doc. CEDAW/C/75/D/107/2016 at ¶ 9.2.

106. *S.N. and E.R.*, U.N. Doc. CEDAW/C/75/D/107/2016 at ¶ 11.

The CEDAW Committee took into account the context within which the violations happened, to design reparations that can adequately address the root causes of such violations and avoid their repetition.

Finally, the U.N. Human Rights Committee has also reviewed some cases on reproductive justice and, while not developing the reparations in the same systematic manner as the CEDAW Committee, it did remind states of their obligation to take steps to prevent similar violations in the future,<sup>107</sup> and even recommended transformative reparations in more recent cases. These types of transformative reparations are seen in the case of *Amanda Jane Mellet v. Ireland* (2017)<sup>108</sup> and its companion case *Siobhán Whelan v. Ireland* (2017).<sup>109</sup> Amanda and Siobhán were denied access to abortion despite having a fetal impairment that would result in the death of the fetus in utero or shortly after birth, and both had to travel to the United Kingdom from Ireland to obtain an abortion. Apart from the economic cost and psychological impact of arranging the trip and leaving their country “feeling like ‘a criminal,’”<sup>110</sup> once back in Ireland neither Amanda nor Siobhán could access aftercare assistance or bereavement counselling.<sup>111</sup> All of this had caused them psychological, physical and financial consequence.<sup>112</sup> To prevent similar violations occurring in the future, the Committee held that Ireland should:

amend its law on voluntary termination of pregnancy, including, if necessary, its Constitution, to ensure compliance with the Covenant, including with respect to ensuring effec-

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107. *K.L. v. Peru*, Hum. Rts. Comm., Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003, ¶ 8 (Nov. 22, 2005); *L.M.R.*, Commc’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 at ¶ 11.

108. *Amanda Jane Mellet v. Ireland*, Hum. Rts. Comm., Commc’n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (Nov. 17, 2016).

109. *Siobhán Whelan v. Ireland*, Hum. Rts. Comm., Commc’n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (July 11, 2017).

110. *Whelan*, U.N. Doc. CCPR/C/119/D/2425/2014 at ¶ 2.4.

111. *Mellet*, U.N. Doc. CCPR/C/116/D/2324/2013 at ¶ 2.5 (the hospital only provided bereavement counseling for couples who have suffered a spontaneous stillbirth, not for women who had voluntarily terminated their pregnancy as a result of fatal fetal impairments). *See also Whelan*, U.N. Doc. CCPR/C/119/D/2425/2014 at ¶¶ 2.4, 2.6, 3.2 (Whelan was given information about bereavement services in the United Kingdom, but she did not have any information on similar services in Ireland. Once in Ireland, the doctor never offered any grief counseling. The healthcare system abandoned their care for her, including through their failure to provide her with any counseling services or information about her options).

112. *See Mellet*, U.N. Doc. CCPR/C/116/D/2324/2013 at ¶¶ 2.4–2.5, 7.10; *Whelan*, U.N. Doc. CCPR/C/119/D/2425/2014 at ¶ 7.11.

tive, timely and accessible procedures for pregnancy termination in Ireland, and take measures to ensure that health-care providers are in a position to supply full information on safe abortion services without fearing being subjected to criminal sanctions.<sup>113</sup>

Therefore, the Human Rights Committee also embraced the need to recommend far-reaching measures of non-repetition to ensure that human rights violations do not take place again, including through the amendment of a constitution.

### B. *Inter-American System for the Protection of Human Rights*

While the CEDAW Committee has more recently started developing its jurisprudence on reparations, the Inter-American System for the Protection of Human Rights has substantially developed an understanding of gender-sensitive reparations. In the milestone case of *González et al. (Cotton Field) v. Mexico (2009)*,<sup>114</sup> the IACtHR articulated for the first time the need to provide reparations that do justice to women.<sup>115</sup> This case dealt with the femicides of young women committed by non-state actors in Ciudad Juárez.<sup>116</sup> Laura Berenice Ramos Monárrez, Claudia Ivette González, and Esmeralda Herrera Monreal, all of “humble origins” disappeared after work.<sup>117</sup> Their bodies, together with bodies of other women, were found in the cotton fields of Ciudad Juárez and showed evidence of torture, mutilation, and sexual violence.<sup>118</sup> Although this case occurred against a backdrop of a “critical situation of violence against women,” the state response was inadequate, failing to clarify the femicides and the irregularities in the investigations had given rise to a climate of impunity.<sup>119</sup> Since 1993, the number of disappearances and femicides of women and girls in Ciudad Juárez, especially those working in the maquila industry, had been increasing.<sup>120</sup> In this case, the IACtHR used reparations to address the root causes of this sit-

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113. *Whelan*, U.N. Doc. CCPR/C/119/D/2425/2014 at ¶ 9.

114. *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

115. Rubio-Marín & Sandoval, *supra* note 66, at 1063.

116. *Id.* at 1077.

117. *González et al. (“Cotton Field”)*, Inter-Am. Ct. H.R. (ser. C) No. 205 at ¶ 165-68.

118. *González et al. (“Cotton Field”)*, Inter-Am. Ct. H.R. (ser. C) No. 205 at ¶ 277.

119. *González et al. (“Cotton Field”)*, Inter-Am. Ct. H.R. (ser. C) No. 205 at ¶ 114, 146.

120. *González et al. (“Cotton Field”)*, Inter-Am. Ct. H.R. (ser. C) No. 205 at ¶¶ 113-14, 122-23, 129, 166, 189.

uation to avoid further disappearances, and developed the concept of “integral reparations”:

“The concept of “integral reparation” (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State . . . reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.”<sup>121</sup>

Reparations in these cases should “restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate; . . . identify and eliminate the factors that cause discrimination; . . . [and] adopt [] . . . a gender perspective, bearing in mind the different impact that violence has on men and on women . . . .”<sup>122</sup> The *Cotton Field* case was the first time where the IACtHR articulated the need to provide reparations that do justice to women.<sup>123</sup> It established the parameters to follow when ordering reparations from a gender perspective, ensuring that the root causes that enabled the violation to take place in the first place are addressed. These parameters have been used in the cases on reproductive justice.

At the same time, the Inter-American System for the Protection of Human Rights has increasingly become a forum for the advancement of reproductive justice, both through the Interamerican Court of Human Rights and the Interamerican Commission of Human Rights.<sup>124</sup> There are four main cases on reproductive justice, two of which concluded in a friendly settlement and were therefore not reviewed by the IACtHR.<sup>125</sup>

121. *González et al. (“Cotton Field”),* Inter-Am. Ct. H.R. (ser. C) No. 205 ¶ 450.

122. *González et al. (“Cotton Field”),* Inter-Am. Ct. H.R. (ser. C) No. 205, at ¶ 451. These are the elements that Rubio-Marín and Sandoval describe as the basis for transformative reparation. *See* Rubio-Marín & Sandoval, *supra* note 66.

123. Rubio-Marín & Sandoval, *supra* note 66, at 1063.

124. CIARA O’CONNELL, WOMEN’S REPRODUCTIVE RIGHTS AND REPARATIONS: LESSONS FROM THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2854922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854922) [<https://perma.cc/R62W-N5MK>].

125. A “friendly settlement” is the way that the American Convention on Human Rights refers to a settlement between the petitioners and the relevant state. It is a voluntary agreement which may include public recognition, acceptance of responsibility by the

One such case, *María Mamerita Mestanza Chávez v. Peru (2003)*, is the first case admitted on reproductive justice in the Inter-American System for the Protection of Human Rights.<sup>126</sup> The case centered around government-sponsored policies of forced sterilization of women in marginalized communities, especially indigenous women.<sup>127</sup> In this friendly settlement, Peru recognized its international responsibility and pledged to amend its legislation and policies on reproductive health and family planning to eliminate any discrimination and respect women's autonomy.<sup>128</sup> This case laid the groundwork for designing reparations that address structural factors in future cases, as it identified discrimination as being a basis for women's reproductive rights violations, and the latter cases relied on this friendly settlement to award reparations.<sup>129</sup>

In *Paulina del Carmen Ramírez Jacinto v. Mexico (2007)*, a young girl became pregnant as a result of rape.<sup>130</sup> She sought an abortion, but was prevented by the state authorities, one of whom even took her to a Roman Catholic priest to dissuade her from exercising her right to an abortion.<sup>131</sup> After her case was brought before the Interamerican Commission of Human Rights, Mexico agreed to a friendly settlement. The settlement contained a wide range of reparation measures, including payments for Paulina's legal, medical, and housing expenses, an education grant for each academic year and a grant to set up a microenterprise, economic compensation for the moral damages, and measures of satisfaction such as a public acknowledgement of the government's responsibility published in local newspapers.<sup>132</sup> Yet, despite dealing with

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state, and introduces reparation measures. See Organization of American States, American Convention on Human Rights, arts. 48, 49, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Rules of Procedure of Inter-Am. Comm'n H.R., art. 40, (2013); Impact of the Friendly Settlement, Inter-American Commission on Human Rights (2018), at ¶¶ 3-4.

126. *María Mamerita Mestanza Chávez v. Perú (Comisión Interamericana de Derechos Humanos)*, CTR. FOR REPRODUCTIVE RTS., <https://reproductiverights.org/es/case/maria-mamerita-mestanza-chavez-v-peru-inter-american-commission-on-human-rights/> [https://perma.cc/6SKW-BU9H] (Mar. 18, 2021).

127. See *Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm'n H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 ¶ 9 (2003).

128. *Mestanza Chávez*, Inter-Am. Comm'n H.R., Report No. 71/03 at ¶ 14.

129. See O'Connell, *Litigating Reproductive Health Rights in the Inter-American System*, *supra* note 42, at 121.

130. *Ramírez Jacinto v. Mexico*, Case 161/02, Inter-Am. Comm'n H.R., Report No. 21/07, OEA/Ser.L/V/II.111, doc. 22, rev. ¶ 9 (2007).

131. *Ramírez Jacinto*, Inter-Am. Comm'n H.R., Report No. 21/07, at ¶ 11 (“[T]he State Attorney General, in order to dissuade Paulina del Carmen Ramírez Jacinto from exercising her right to a legal abortion, took her and her mother to a Roman Catholic priest.”).

132. *Ramírez Jacinto*, Inter-Am. Comm'n H.R., Report No. 21/07, at ¶ 16.

reproductive justice, this agreement did not contain any specific reference to reproductive rights and failed to analyze the correlation between religion and the discriminatory attitudes of health personnel associated with reproductive violation<sup>133</sup>

In *Artavia Murillo et al. v. Costa Rica* (2012), the IACtHR itself had its first opportunity to address violations of reproductive autonomy.<sup>134</sup> The Costa Rican Decree Law No. 24029-S authorized in vitro fertilization (IVF) for married couples and regulated its practice.<sup>135</sup> In 2000, the Decree Law was declared unconstitutional and annulled by the Constitutional Chamber of the Costa Rican Supreme Court, which determined that IVF jeopardizes the life and dignity of the human being.<sup>136</sup> The Costa Rican Court interpreted the concept of “life” as beginning “as soon as conception occurs” per the American Convention on Human Rights.<sup>137</sup>

In this case, the IACtHR expanded the right to private life to include reproductive autonomy and access to reproductive health services,<sup>138</sup> provided that the embryo cannot be recognized as a person nor have a right to life,<sup>139</sup> and discussed the role of gender in reproductive health.<sup>140</sup> This was especially relevant because the petitioner and the Commission had not adequately focused on gendered implications of the IVF ban.<sup>141</sup> Despite the groundbreaking decision for advancing reproductive justice, the IACtHR limited the awards of reparations to those sought by the petitioners and Commission: compensation for the

133. O’Connell, *supra* note 42, at 121.

134. Since the two previous cases examined were settled before the Commission, the Court did not review them.

135. *Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 68-70 (Nov. 28, 2012).

136. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257 at ¶¶ 72-74 (citing Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 76 to 96)).

137. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257 at ¶ 73 (quoting Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 88, 89)). The Constitutional Chamber held that “[i]n short, as soon as conception occurs, a person is a person and we are in the presence of a living being, with the right to be protected by the legal system.” *Id.*

138. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257 at ¶ 146.

139. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257 at ¶ 264.

140. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257 at ¶¶ 294-302.

141. Ciara O’Connell, *Engendering Reproductive Rights in the Inter-American System*, in *GENDER, SEXUALITY AND SOCIAL JUSTICE: WHAT’S LAW GOT TO DO WITH IT?* 58, 62 (Kay Lalor et al. eds., 2016).

material and immaterial harm caused,<sup>142</sup> rehabilitation (psychological and psychiatric assistance to the victims that desire it),<sup>143</sup> satisfaction (the publication of the ruling of the IACtHR)<sup>144</sup>, the reversal of the IVF ban, and training the judiciary on reproductive rights.<sup>145</sup> These reparations did not specifically address the role of gender in reproductive violations in the first place, and minimally challenged gender stereotypes and discrimination.<sup>146</sup>

Finally, in *I.V. v. Bolivia* (2016), the IACtHR heard the case of a Peruvian refugee who had been forcibly sterilized.<sup>147</sup> I.V. delivered her third daughter through a cesarean section. During the procedure, the doctors also performed a bilateral tubal ligation.<sup>148</sup> I.V. had not given her consent for the tubal ligation.<sup>149</sup> When the IACtHR reviewed the case, they awarded reparations that established education programs for health providers on informed consent, gender-based discrimination and violence, and gender stereotypes.<sup>150</sup>

Through these cases, the IACtHR has recognized the underlying causes of discrimination against women, and partly addressed some of them through the reparations awarded. These non-repetition efforts are paramount. However, the Court has missed opportunities to significantly address many of the root causes of reproductive violations. Reparations like these could have tackled the relationship that exists between the Catholic Church and the state, and other sociocultural practices that contribute to inequality, discrimination, and violence.<sup>151</sup> Advocates have long criticized the Commission for not focusing enough on reparations or for not sufficiently centralizing and mainstreaming considerations of gender.<sup>152</sup> Indeed, as Rubio-Marín and Sandoval suggest, they should “not shy away from the opportunity to trigger broader structural reform” through reparations.<sup>153</sup>

As of the time of this writing, the IACtHR is reviewing the case *Manuela and Others v. El Salvador*, which centers on a woman who was

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142. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257, at ¶¶ 349-63.

143. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257, at ¶¶ 324-26.

144. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257, at ¶¶ 327-29.

145. *In vitro fertilization*, Inter-Am. Ct. H.R. (ser. C) No. 257, at ¶ 381.

146. O’Connell, *Engendering Reproductive Rights in the Inter-American System*, *supra* note 141, at 62.

147. *See I.V. v. Bolivia*, Inter-Am. Ct. H.R. (ser. C) No. 329, at ¶¶ 61-70.

148. *I.V.*, Inter-Am. Ct. H.R. (ser. C) No. 329, at ¶ 64.

149. *I.V.*, Inter-Am. Ct. H.R. (ser. C) No. 329 at ¶ 65.

150. *I.V.*, Inter-Am. Ct. H.R. (ser. C) No. 329 at ¶ 341.

151. O’Connell, *supra* note 42, at 122.

152. *E.g.*, O’Connell, *supra* note 141, at 63.

153. Rubio-Marín & Sandoval, *supra* note 66, at 1090.

sentenced to thirty years in prison after suffering an obstetric emergency and losing her pregnancy.<sup>154</sup> She was found guilty of aggravated homicide. Two years after her imprisonment, she died from cancer after having received inadequate medical treatment.<sup>155</sup> When deciding this case, the court will essentially be ruling on the total ban on abortion in El Salvador, which has led to the imprisonment of countless women who have suffered pregnancy-related complications and miscarriages.<sup>156</sup> This case presents a new opportunity for the court to provide reparations that can have a transformative effect, especially given the potential to amend the Salvadorian Criminal Code to decriminalize abortion.

## V. REPARATIONS IN CONSTITUTIONAL COURTS

### A. Overview of the Region

Latin America is a region with restrictive abortion laws, including some total bans, which have led to the imprisonment of women for miscarriages<sup>157</sup> or pushed many women to seek illegal abortions, with resultant risks to their health and life.<sup>158</sup> The presence of unlawful barriers to access abortions even in the cases permitted by law, including the attempts of the religious groups to limit women's access to abortion, has forced girls as young as ten or twelve years old to give birth to children that are a result of rape.<sup>159</sup> Many women who have been sterilized by the

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154. *Manuela v. El Salvador (Inter-American Court of Human Rights)*, CTR. FOR REPRODUCTIVE RTS. (March 10, 2021) <https://perma.cc/C9JF-TTYA>.

155. *Id.*

156. Press Release, *supra* note 9. Section 133 of the Salvadoran Criminal Code provides that whoever performs an abortion with the consent of the women, or the woman who causes her own abortion or consents to other person to perform it, will be punished with two to eight years on imprisonment. Decreto No. 1030, Código Penal [Criminal Code], sec. 133, (26 Apr. 1997 (El Sal.)).

157. See, e.g., Nina Lakhani, *El Salvador: Where Women May Be Jailed for Miscarrying*, BBC NEWS (Oct. 17, 2013), <https://www.bbc.com/news/magazine-24532694> [<https://perma.cc/XNQ9-JHHF>].

158. *Nicaragua: Prohibición del Aborto Supone Riesgo para la Salud y la Vida*, HUMAN RIGHTS WATCH (Jul. 31, 2017, 8:55 AM), <https://www.hrw.org/es/news/2017/07/31/nicaragua-prohibicion-del-aborto-supone-riesgo-para-la-salud-y-la-vida> [<https://perma.cc/LB2A-JFUC>].

159. See, e.g., *L.M.R. v. Argentina*, Hum. Rts. Comm., Commc'n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007, ¶¶ 3.1-3 (April 28, 2011); *Una Niña de 12 Años Tiene un Bebé Fruto de la Violación de su Padrastro*, LA VANGUARDIA (Nov. 28, 2019, 9:35 AM), <https://www.lavanguardia.com/sucesos/20191128/471926467250/argentina-morteros-nina-doce-bebe-violacion-padrastro-madre-abuso-sexual.html> [<https://perma.cc>].

state have still not achieved any type of justice.<sup>160</sup> Race and ethnicity remain powerful determinants for women's access to adequate reproductive healthcare, resulting in high numbers of preventable maternal deaths.<sup>161</sup>

At the same time, Latin America is a region with a strong feminist movement that has been advancing women's citizenship.<sup>162</sup> There have been some milestones in the last decades regarding reproductive justice. For example, in 2020 the Argentinian Senate finally approved the Law to Access the Voluntary Termination of the Pregnancy, which allows abortion for any reason up to fourteen weeks, and limits abortion to cases of rape or risk to the health or life of the mother after that point.<sup>163</sup> This followed a 2012 case from the Argentinian National Supreme Court of Justice that expanded the exception to the criminalization of abortion to all women who have become pregnant as a result of sexual violence.<sup>164</sup>

In April 2021, the Ecuadorian Constitutional Court also declared the provision 150 (2) of the Criminal Code that permitted only women with mental disabilities to have an abortion when the pregnancy was a result of rape to be unconstitutional.<sup>165</sup> The court further held that all

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[X9XD-J93X] (explaining that a 12-year-old girl was forced to give birth to a child that was a result of a rape by her stepfather).

160. *Esterilización Forzosa en Perú: La Lucha de una Mujer que Pide Justicia y Reparación*, NACIONES UNIDAS DERECHOS HUMANOS OFICINA DEL ALTO COMISIONADO (Jun. 26, 2019), <https://www.ohchr.org/SP/NewsEvents/Pages/MariaElenaCarbajal.aspx> [<https://perma.cc/L3A3-RZFF>] (reporting that many of the women who were sterilized are still waiting for their reparations from the Peruvian government).
161. *See, e.g.,* Alyne da Silva Pimentel Teixeira v. Brazil, CEDAW Committee, Comm. No. 17/2008, U.N. Docs. CEDAW/C/49/177/2008, ¶ 2.5-12 (Sept. 27, 2011).
162. *See, e.g.,* Zoë Carpenter, *This Was the Decade of Feminist Uprisings in Latin America*, THE NATION (Dec. 31, 2019), <https://www.thenation.com/article/archive/ecuador-abortion-green-wave/> [<https://perma.cc/LKE2-LXZN>] (the feminist movement in Latin America supporting the legalization of abortion has often been called the “green wave”); Vanessa Barbara, *Latin America's Radical Feminism Is Spreading*, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/opinion/latin-america-feminism.html> [<https://perma.cc/6LEF-JSE8>].
163. *Senado de Argentina aprueba proyecto de ley que legaliza el aborto*, CNN (Dec. 30, 2020, 7:17 AM), <https://cnnespanol.cnn.com/2020/12/30/senado-de-argentina-aprueba-proyecto-de-ley-que-legaliza-el-aborto/> [<https://perma.cc/HZA2-3E8J>]; Law No. 27610, Jan. 15, 2021, 34.562 B.O. 3 (Arg.), art. 4.
164. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/03/2012, “F., A. L. s/ medida autosatisfactiva,” Fallos (2012-335-200) (Arg.) (before this case, Article 83(2) of the Argentinian Criminal Code only permitted abortions in cases where the health and life of the mother was in danger or the pregnancy was a of result of rape, but only when the pregnant women had a mental disability).
165. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 28/4/2021, “J.P: Karla Andrade Quevedo,” No. 34-19-IN / 21 (Ecuador) (this decision contains

women and girls should be permitted to have an abortion when the pregnancy is a result of rape.<sup>166</sup> In 2006, the Colombian Constitutional Court declared that the total ban on abortion was a violation of women's human rights, and decriminalized abortion in the following cases: (1) when the pregnancy is a threat to the life or the health of the mother; (2) when the fetus has a grave malformation that makes it incompatible with life; and (3) when the pregnancy is a result of sexual violence, unconsented artificial insemination, or incest.<sup>167</sup>

Examining how reparations for reproductive justice have been developing in national courts in this region is important for several reasons. Latin American countries have substantially incorporated international and regional human rights standards into their domestic legislation, and courts rely on these standards to interpret their legislation, including in shaping the content of women's human rights or an expansive concept of reparations.<sup>168</sup> Secondly, national courts are awarding integral reparations—that is, reparations that include all or some of the five types of reparations established in the Basic Principles and Guidelines.<sup>169</sup> This represents a potential avenue for litigators to advance reproductive justice nationally and avoid the lengthier processes of regional and international bodies. Finally, it is a common practice in the region for courts to use comparative law to interpret their own legislation, including in reproductive justice cases.<sup>170</sup> Therefore, positive developments in one country can also have an impact in the advancement of reproductive justice in others. The two next cases of the Ecuadorian and Colombian Constitutional Courts illustrate these trends.

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important reparations, but it is not analyzed in detail here because it was decided while this article was already being reviewed).

166. *Id.*

167. Rebecca J. Cook, Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia, 15 *Reproductive Health Matters* 160, 160-61 (2007).

168. See discussions *infra* of Ecuador and Colombia.

169. See, e.g., Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 13/12/2019, "J.P. Ramiro Ávila Santamaría," Sentencia No. 904-12-JP/19 (Ecuador).

170. See, e.g., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/03/2012, "F., A. L. s/ medida autosatisfactiva," Fallos (2012-335-200) (Arg.), at 134-36, 142 (citing the Colombian law and the Constitutional Court decision that liberalized abortion law in 2006); Tribunal Constitucional [T.C.] [Constitutional Court], 28 agosto 2017, Rol de la causa: 3729(3751)-17 CPT (Chile) (analyzing comparative law in the region and in other countries on the regulation of abortion and conscientious objection); see also Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.), <https://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm> [<https://perma.cc/WFQ9-TQ2A>] (engaging in a comparative analysis of the abortion legislation of various countries to support its reasoning).

## B. *Ecuador*

Article 86(3) of the Ecuadorian Constitution enshrines the right to an “integral reparation.”<sup>171</sup> The Organic Law of Jurisdictional Guarantees and Constitutional Control (2009) further develops the right to integral reparations, providing that when there is a violation of human rights, courts can order integral reparations, which includes compensation, restitution, rehabilitation, satisfaction, guarantees of non-recurrence and the obligation to investigate.<sup>172</sup> In this section, I review how the right to an integral reparation has been used to address reproductive justice, through the analysis of the case No. 904-12-JP/19 (2019) on obstetric violence.<sup>173</sup>

### 1. Facts

Jessika del Rosario Nole Ochoa, pregnant with her fourth child, sought healthcare after experiencing pains during the pregnancy.<sup>174</sup> At the hospital, this pain intensified and, although she was screaming for help, nobody assisted her.<sup>175</sup> She eventually gave birth to a child without any type of healthcare assistance.<sup>176</sup> She testified that as she was delivering her newborn, she even had to grab his arm herself to prevent him from falling to the floor.<sup>177</sup> She did not receive any type of assistance from the health personnel who “were just putting on their gloves.”<sup>178</sup> Due to this lack of healthcare during labor, she had to receive emergency care for a laceration and hemorrhage.<sup>179</sup> After this interven-

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171. CONSTITUCIÓN DE LE REPÚBLICA DEL ECUADOR [CONSTITUTION] Art. 86(3) (2008).  
 172. Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, Registro Oficial 52, 21 septiembre 2009, art. 8 (Ecuador).  
 173. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 13/12/2019, Sentencia No. 904-12-JP/19 (Ecuador).  
 174. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶¶ 10-11.  
 175. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 12.  
 176. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶¶ 12-13.  
 177. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 13.  
 178. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 13 (citing Corte Constitucional del Ecuador, testimonio de Jessica del Rosario Nole Ochoa en audiencia, 1 de octubre de 2019, registro de audio).  
 179. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶¶ 13-14.

tion, she was transferred to a public hospital because healthcare personnel believed she was not up to date with the payments of social security.<sup>180</sup> During this transfer, Jessika del Rosario declared that she was treated like “an animal” and that this experience was painful, traumatic and her life was in danger.<sup>181</sup> She felt as if she was almost dying.<sup>182</sup>

## 2. Decision

Jessika sued the Ecuadorian Institute of Social Security requesting a declaration of the violation of the following constitutional rights: right to health, social security, rights of pregnant women, freedom, responsibilities of the State and right to emergency care, arguing that “we cannot permit that these situations happen again.”<sup>183</sup> The Ecuadorian Constitutional Court responded by clearly stating the issue at stake: every woman has a right to reproductive health, which is directly related to their rights to health, life, and personal integrity.<sup>184</sup> The court reminded the States of its constitutional obligation to ensure actions and services of sexual health and reproductive health, and guarantee the integral health and life of women—especially during their pregnancy, childbirth and postpartum.<sup>185</sup> Violations of this obligation have “grave consequences for the rights of women, especially during the pregnancy, childbirth and postpartum”.<sup>186</sup> The court gives a textured account of how women in Ecuador experience obstetric violence: hundreds of them do not receive adequate care in the health system, and this is linked to maternal and fetal mortality.<sup>187</sup> The court stated that pregnant women are part of a

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180. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 15.

181. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶¶ 16-17.

182. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 16.

183. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 22.

184. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 30.

185. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 30.

186. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 30.

187. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 31.

group that need priority attention, and for this reason it is paramount to identify the rights violated and to establish the state's responsibility.<sup>188</sup>

Since the concept of obstetric violence had not previously been recognized in Ecuadorian jurisprudence, the Court also developed a list of the elements, actions, and omissions that amount to such violence. These include the abusive use of medicines, the appropriation or lack of care of women's body and their reproductive processes, being treated in an inhumane or degrading manner, and disregarding women's autonomy and capacity to decide freely about their body.<sup>189</sup> This violence causes many women to distrust and stop using the public health system.<sup>190</sup> The Court concluded that Jessika del Rosario was a victim of obstetric violence, and that her rights to priority healthcare services, health, and social security were violated.<sup>191</sup>

### 3. Reparations

The court provided reparations including publication of an apology, publication of this ruling on the website of the Health Ministry and the Institute of Social Security, and guarantees of non-repetition.<sup>192</sup> The reparations were established upon the petition of Jessika del Rosario who declared that “we cannot permit that these situations happen again.”<sup>193</sup> The guarantees of non-repetition included the development of a healthcare assistance guide for caring for pregnant women and preventing obstetric violence.<sup>194</sup> Additionally, the Court ordered the Institute of Social Security to develop a technical plan to verify whether the healthcare centers—public and private—had the conditions necessary to care for pregnant women and address obstetric emergencies.<sup>195</sup>

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188. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 34.

189. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 67.

190. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 34.

191. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at Section V. Decision ¶ 2.

192. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at Section V. Decision ¶ 3 (d)-(g).

193. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at ¶ 81.

194. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at Section V. Decision ¶ 3 (e).

195. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Sentencia No. 904-12-JP/19 at Section V. Decision ¶ 3 (f).

#### 4. Significance of the Case

This is the first case that the Ecuadorian Constitutional Court addressed obstetric violence as a form of violence against women.<sup>196</sup> The Ecuadorian Constitutional Court relied on international human rights norms to build the content of the definition of obstetric violence under national legislation.<sup>197</sup> This decision sets a precedent in the region, specifically in a moment where obstetric violence is gaining visibility given the push from the feminist movement to include obstetric violence as a concept in national legislation.<sup>198</sup>

By requesting transformative reparations in this case, Jessika del Rosario moves from being a victim-survivor of obstetric violence to an agent of change in her society. The usefulness of these reparations to address the issue of obstetric violence goes beyond transforming only Jessika del Rosario's life, but aims at impacting a wider population of pregnant women. For example, the obligation to develop a guide on comprehensive care of pregnant women and prevention of obstetric violence will serve to avoid the mistreatment of pregnant women in future cases. Unfortunately, the Court failed to frame obstetric violence as a form of gender-based discrimination, nor included an intersectional perspective of these practices, which disproportionately affect poor, indigenous women living in rural areas.<sup>199</sup> Establishing this form of violence as gender-based discrimination is essential to understand the proper violations, which in turn enables assessing the harm from a gender perspective. In *S.M.F v. Spain*, the CEDAW Committee held that obstetric violence is a form of gender-based discrimination that takes place precisely due to the presence of structural discrimination and gender stereotypes.<sup>200</sup> Similarly, the intersectional approach would enable to craft

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196. Special Rapporteur Report, *supra* note 37, at ¶ 5.

197. See Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 13/12/2019, Sentencia No. 904-12-JP/19 (Ecuador).

198. See, e.g., Gabriela Lemos de Pinho Zanardo, Magaly Calderón Uribe, Ana Hertzog Ramos De Nadal & Luísa Fernanda Habigzan, *Violência Obstétrica no Brasil: Uma Revisão Narrativa*, 29 PSICOLOGIA & SOCIEDADE (2019) (arguing that Brazil needs a conceptualization of obstetric violence, defining and criminalizing it).

199. E.g., Alyne da Silva Pimentel Teixeira v. Brazil, CEDAW/C/49/D/17/2008, Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, ¶¶ 7.4 & 7.6 (Aug. 10, 2011), <https://www.escri-net.org/sites/default/files/CEDAW-C-49-D-17-2008.pdf>.

200. *S.M.F. v. Spain*, CEDAW/C/75/D/138/2018, Decision adopted by the Committee under article 4(2)(c) of the Optional Protocol, ¶ 7.3 (Feb. 28, 2020), <https://digitallibrary.un.org/record/3870902?ln=en>.

reparations that also target how gender discrimination interacts with other forms of discrimination, as obstetric violence disproportionately affects indigenous women from low socio-economic backgrounds and from rural areas. Thus, the health care assistance guide should target these forms of intersecting discrimination. In essence, both these approaches would have permitted the establishment of more nuanced reparations aimed at addressing discrimination and gender stereotypes as root causes of obstetric violence.

### C. Colombia

Colombia has a relatively complex institutional framework regarding reparations.<sup>201</sup> Following the Peace Accord in 2016 that put an end to an internal armed conflict of more than 50 years,<sup>202</sup> the government created the Comprehensive System of Truth, Justice, Reparations and Non-Repetition.<sup>203</sup> This system aims at guaranteeing an institutional transition from the armed conflict that satisfies the rights of the victims from the conflict and contributes to the national reconciliation.<sup>204</sup> The System is composed of a series of mechanisms to guide the transitional justice process, including, among others, a Commission for the Clarification of Truth, Coexistence, and Non-Repetition and the Special Jurisdiction of Peace.<sup>205</sup> The former seeks to find the truth of what happened during the Colombian internal armed conflict and to clarify the violations that took place during the conflict; it can only provide non-binding recommendations.<sup>206</sup> The latter investigates, judges, and pun-

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201. Colombia has a plurality of mechanisms to access reparations. It has the reparations that can be accessed through the ordinary judicial system, such as private and public laws regulating damages and torts. Reparations are also regulated through the instruments that have been created to address the violations committed during the internal armed conflict. See Nelson Camilo Sánchez León & Clara Sandoval-Villalba, *Go Big or Go Home? Lessons Learned from the Colombian Victims' Reparation System*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY 547, 549 (Carla Festman & Marianna Goetz, eds., 2020).

202. ACUERDO FINAL PARA LA TERMINACIÓN DEL CONFLICTO Y LA CONSTRUCCIÓN DE UNA PAZ ESTABLE Y DURADERA [FINAL AGREEMENT TO END THE ARMED CONFLICT AND BUILD A STABLE AND LASTING PEACE] (Nov. 24, 2016) (Colom.).

203. *Id.* at § 5.

204. *Jurisdicción Especial Para la Paz*, JURISDICCIÓN ESPECIAL PARA LA PAZ, <https://www.jep.gov.co/JEP/Paginas/Jurisdiccion-Especial-para-la-Paz.aspx> [<https://perma.cc/DD7E-KRBW>] (last visited August 26, 2021, 9:12 PM).

205. *Id.*

206. *¿Qué es la Comisión de la Verdad?*, COMISIÓN DE LA VERDAD, <https://comisiondelaverdad.co/la-comision/que-es-la-comision-de-la-verdad> [<https://perma.cc/N3N3-2LC3>] (last visited November 12, 2021, 7:05 PM).

ishes human rights violations, war crimes and crimes against humanity committed during the armed conflict.<sup>207</sup> It determines the criminal responsibility of perpetrators but does not have the competence to provide reparations.<sup>208</sup>

The responsibility to provide reparations to the victims of the armed conflict is left to the Victims' and Land Restitution Act.<sup>209</sup> This Act has been hailed for comprising one of the most "complex and integral reparations" programs, combining individual and collective reparations, including land restitution.<sup>210</sup> It determines that victims have a right to access a variety of reparations that must take into account the facts, type of harm, and vulnerability of victims.<sup>211</sup> It also uses an "imprint of transformative reparations" such as supporting rights related to "education, health, housing, employment, and income generation [programs]."<sup>212</sup>

Apart from the mechanisms established in the System of Truth, Justice, Reparations and Non-Repetition, Colombian courts, notably the Constitutional Court, are also shaping and advancing reparations.<sup>213</sup> The Constitutional Court has embedded the right to integral reparations in domestic law, recognized the jurisprudence of the IACtHR, and encouraged the participation of victims in the design, planning, and monitoring of reparation policies.<sup>214</sup> For example, the Constitutional Court determined that reparations for internally displaced persons—the vast majority of victims—should also come in the form of compensation.<sup>215</sup> Likewise, the Court recognized that sexual violence is a habitual, extended, systematic, and invisible practice in the armed conflict, and

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207. *¿Qué es la JEP? Misión, Visión y Objetivos*, JURISDICCIÓN ESPECIAL PARA LA PAZ, <https://www.jep.gov.co/JEP/Paginas/Mision-vision-objetivos.aspx> [https://perma.cc/P3XL-4K9J] (last visited November 12, 2021, 7:08 PM).

208. *Id.*

209. L. 1448/11, junio 10, 2011, DIARIO OFICIAL [D.O.] art. 2 (Colom.).

210. Weber, *supra* note 72, at 89.

211. L. 1448/11, junio 10, 2011, DIARIO OFICIAL [D.O.] art. 25 (Colom.).

212. Sánchez León & Sandoval-Villalba, *supra* note 201 at 553.

213. Since 1991, Colombia has a specific court, the Constitutional Court, that decides all constitutional law issues. The other courts in the nation do not have competence of reviewing constitutional law. The highest court in the ordinary jurisdiction is the Supreme Court of Justice. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [CONSTITUTION] art. 234. The Colombian Court is responsible for keeping the integrity and supremacy of the Constitution. This includes deciding whether legislation, governmental acts, treaties, and other acts are in accordance with the Constitution; and reviewing certain court decision on violations of constitutional rights. CONSTITUCIÓN POLÍTICA DE COLOMBIA, *supra*, art. 241.

214. Sánchez León & Sandoval-Villalba, *supra* note 201, at 567.

215. *Id.*

that displaced women are at a particular risk of experiencing it.<sup>216</sup> The Court ordered the implementation of thirteen public policy programs to specifically address the differential risks displaced women faced.<sup>217</sup> It also used transformative forms of monitoring to confront the “culture of state non-compliance” with the judicial decisions,<sup>218</sup> by assigning a Working Group to monitor compliance with the decisions and its Confidential Annexes.<sup>219</sup>

In this section, I review how the Constitutional Court has advanced reparations on reproductive justice by analyzing the case SU599/19.<sup>220</sup> This is the first case worldwide to address reproductive violations of former combatant women and girls during the internal armed conflict.<sup>221</sup>

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216. Corte Constitucional [C.C.] [Constitutional Court], Auto 092/08, section III.1.1.1. (Colom.), <https://www.corteconstitucional.gov.co/relatoria/autos/2008/a092-08.htm> [<https://perma.cc/7BSF-5DUA>]; *see also* Corte Constitucional [C.C.] [Constitutional Court], Auto 009/15 (Colom.), <https://www.corteconstitucional.gov.co/relatoria/autos/2015/A009-15.htm> [<https://perma.cc/PP53-LTM5>]. For an explanation of these autos in English, *see* AMNESTY INTERNATIONAL, COLOMBIA: HIDDEN FROM JUSTICE. IMPUNITY FOR CONFLICT-RELATED SEXUAL VIOLENCE, A FOLLOW-UP REPORT (2012), [https://www.amnestyusa.org/files/colombia\\_vaw\\_report\\_oct\\_4\\_embargoed.pdf](https://www.amnestyusa.org/files/colombia_vaw_report_oct_4_embargoed.pdf) [<https://perma.cc/7KEC-T6LJ>].
217. Erika Rodríguez Gómez, *The Peace Process Did Not Mean the End of Violence for Women in Colombia*, LONDON SCH. OF ECON. CTR. FOR WOMEN, PEACE AND SEC. BLOG (Oct. 12, 2017), <https://blogs.lse.ac.uk/wps/2017/10/12/the-peace-process-did-not-mean-the-end-of-violence-for-women-in-colombia/> [<https://perma.cc/BQF8-VUVD>].
218. Sánchez León & Sandoval-Villalba, *supra* note 201 at 567.
219. Liliana Rocío Chaparro Moreno, ACCESO A LA JUSTICIA PARA MUJERES VÍCTIMAS DE VIOLENCIA SEXUAL SEXTO INFORME DE SEGUIMIENTO AL AUTO 092 DE 2008 Y PRIMER INFORME DE SEGUIMIENTO AL AUTO 009 DE 2015, ANEXOS RESERVADOS MESA DE SEGUIMIENTO A LOS AUTOS 092 Y 009 DE LA CORTE CONSTITUCIONAL, ANEXOS RESERVADOS, 46-47, 80 (2016), [https://www.dejusticia.org/wp-content/uploads/2017/02/fi\\_name\\_recurso\\_822.pdf](https://www.dejusticia.org/wp-content/uploads/2017/02/fi_name_recurso_822.pdf) [<https://perma.cc/E6NE-F654>].
220. Corte Constitucional [C.C.] [Constitutional Court], SU-599/19 (Colom.), <https://www.corteconstitucional.gov.co/Relatoria/2019/SU599-19.htm> [<https://perma.cc/8UZC-6W6E>].
221. Christine Chinkin & Keina Yoshida, *Colombia's Recent Ruling on Reproductive Violence and Forced Recruitment is a Significant Step for Ex-combatant Women and Girls*, LONDON SCH. OF ECON. LATIN AMERICAN AND CARRIBBEAN CTR. BLOG (Feb. 19, 2020), <https://blogs.lse.ac.uk/latamcaribbean/2020/02/19/colombias-recent-ruling-on-reproductive-violence-and-forced-recruitment-is-a-significant-step-for-ex-combatant-women-and-girls/> [<https://perma.cc/GS6F-N2UA>].

## 1. Facts

Helena was recruited by members of the Revolutionary Armed Forces of Columbia (FARC) at the age of 14. They informed her that it was forbidden to have children and that all women were obliged to use contraceptives.<sup>222</sup> Helena felt obliged to be injected with Mesigyna—a hormonal contraceptive.<sup>223</sup> In 2007, she found out that she was six months pregnant and was forced to have an abortion at seven months. She did not want the abortion, but members of FARC threatened her with death. Without her consent, she was supplied drugs and a doctor performed an abortion through a Cesarean section.<sup>224</sup> She was allowed to go to her family's home to recuperate.<sup>225</sup> A month after the surgery, she started experiencing pain and health problems as a result of the surgery.<sup>226</sup> Members of the FARC went to her family's home demanded her to return to the FARC, therefore she fled to another city.<sup>227</sup> She sought health assistance and, even though she indicated she was a victim of a forced abortion, she was not given adequate care in the public health system.<sup>228</sup> She had to go to a private health center, and, thanks to the help of the organization *Profamilia*, she also made an appointment with a psychologist.<sup>229</sup> She was diagnosed with depression, post-traumatic stress disorder, and feeling of frustration and helplessness.<sup>230</sup> Moreover, she eventually had the needed surgery.<sup>231</sup>

In order to access the reparations and services established in the Victims' Act, Helena sought to be recognized as a victim of the armed conflict, but was rejected.<sup>232</sup> The authorities argued that she did not present the petition within the established time frame,<sup>233</sup> and, importantly, that she did not fulfill the requirements to be recognized as a victim under the Victims' Act. Article 3 of the Victims' Act defines victims as those persons who suffered a harm due to the facts that took place after January 1<sup>st</sup>, 1985, and as a result of the internal armed conflict, as a consequence of violations of international humanitarian law or of grave vio-

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222. SU-599/19 at ¶ 1.3 (Colom.).

223. *Id.*

224. *Id.* at ¶ 1.5.

225. *Id.*

226. *Id.* at ¶ 1.7.

227. SU-599/19 at ¶ 1.8.

228. *Id.* at ¶ 1.12-1.14.

229. *Id.* at ¶ 1.15.

230. *Id.*

231. SU-599/19 at ¶ 1.16.

232. *Id.* at ¶ 1.19.

233. *Id.*

lations of international human rights law. However, it states that members of armed groups organized on the side of the law will not be considered victims unless they were recruited and left the armed group while still minors.<sup>234</sup> Although Helena had been recruited as a minor, she was an adult when she left the armed group.<sup>235</sup>

## 2. Decision

The Colombian Constitutional Court examined whether the exclusion from the inscription in the Single Registry of Victims (RUV)<sup>236</sup> was a violation of Helena's fundamental rights. The court pointed out that the timeframe established in Victims' Act is flexible and authorities must consider the specific individual circumstances which may delay people being designated as victims.<sup>237</sup>

The court then analyzed the provision excluding former members of armed groups of the Victims' Act. In its previous jurisprudence, the court had established that under certain circumstances, former members of armed groups can be recognized as victims, but only if they also participated in a social reintegration process.<sup>238</sup> However, the court noted that forcing Helena to go through the process of social reintegration would revictimize her: it identifies her as a member of the FARC—the same group that violated her fundamental rights—and would have required her to participate in the program next to the perpetrators.<sup>239</sup> The court held that denying the recognition of victimhood to former members of armed groups that have suffered sexual violence by the armed groups would be contrary to international law.<sup>240</sup>

Moreover, the court noted that forced abortion and contraceptives constituted a form of sexual violence and a war crime.<sup>241</sup> Women who experienced sexual violence in the context of internal armed conflict must be recognized victims through the process established in the Vic-

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234. *Id.*

235. SU-599/19 at ¶¶ 1.3, 2.5.

236. The Single Registry of Victims was created in 2012 due to the Law 1448/2011. This Registry coordinates the measures of assistance and reparations for the victims of the armed conflict. For more information, see UNIDAD DE VÍCTIMAS, <https://www.unidadvictimas.gov.co/> [<https://perma.cc/H53P-3643>].

237. SU-599/19 at ¶¶ 2.3, 3.4.

238. *Id.* at § 2.5.

239. *Id.* at § 2.8.1.

240. *Id.* at § 2.11, 3.2.

241. *Id.*

tims' Act and should have access to reparations.<sup>242</sup> Excluding them from this process and making them to seek reparations through the ordinary justice procedures<sup>243</sup> is a violation of their effective access to justice.<sup>244</sup>

### 3. Reparations

The court ordered Helena's inclusion in the Single Registry of Victims as a victim of minor forced recruitment, sexual violence, and forced displacement, and instructed the Reparations Unit to ensure a gender perspective within the reparations process and due diligence obligations in relation to Helena's fundamental rights.<sup>245</sup> Although the court did not itself provide transformative reparations, ordering the recognition of Helena as a victim is *per se* transformative, as she would have access to the array of measures of the domestic reparation program and will enable other former FARC members who have been subjected to sexual violence to also access these reparations. The court also awarded reparations in the form of rehabilitation, including immediate healthcare, psychosocial and psychological care with a gender perspective to appease the emotional consequences of the sexual violence.<sup>246</sup>

### 4. Significance of This Case

This case confirmed that the use of forced contraceptives and forced abortions is a violation of women's sexual and reproductive rights and constitutes a war crime.<sup>247</sup> Since reproductive violations had previously been minimally addressed in transitional justice contexts or international criminal law,<sup>248</sup> the case set an important precedent. This ruling also provides an account of the gendered dynamics within armed groups, including the control over the reproductive autonomy of young girls.<sup>249</sup> Furthermore, the recognition of these practices within armed groups "is an essential element for the removal of stigma, for building a

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242. *Id.* at § 3.6.

243. As opposed to the Special Jurisdiction of Peace, which has sole jurisdiction over the crimes committed during the Colombian armed conflict, ordinary justice procedures are those that apply to the rest of circumstances.

244. SU-599/19 at ¶ 3.2.

245. *Id.* at Part III.

246. *Id.* at Section 2.10.

247. SU-599/19 at ¶ 3.2.

248. Rosemary Grey, *The ICC's First "Forced Pregnancy" Case in Historical Perspective*, 15 J. INT'L CRIM. JUST. 905 (2017).

249. Chinkin & Yoshida, *supra* note 221.

comprehensive and gendered understanding of the different ways in which young girls were forced to support the armed groups and for moving forward in post-conflict societal reconstruction.”<sup>250</sup> At the same time, the court could have provided further details to the Victims Units on the design of reparations, such as taking into consideration the conditions of former members of the armed groups, or the inclusion of reproductive violence as a separate category of harm.<sup>251</sup>

This case establishes the conditions for expanding the understanding of reproductive justice in the region beyond the transitional justice context. It recognizes that interventions into a woman’s decision to have a child are also a form of violation of their reproductive autonomy. The awareness of these violations will likely increase substantially due to the recent filed violations in some of the armed groups in the Colombian conflict.<sup>252</sup>

## VI. CONCLUSION

Reproductive justice is essential to women’s equal citizenship. In this Article, I have examined how women’s reproductive autonomy and self-determination can be expanded through reparations. International

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250. *Id.*

251. Angelica Cocomá Ricuarte & Juliana Laguna Trujillo, *Reproductive Violence: A Necessary Category of Analysis in Transitional Justice Scenarios*, LONDON SCH. OF ECON. CTR. FOR WOMEN, PEACE AND SEC. BLOG (Jun. 24, 2020), <https://blogs.lse.ac.uk/wps/2020/06/24/reproductive-violence-a-necessary-category-of-analysis-in-transitional-justice-scenarios/> [<https://perma.cc/6E7C-CCYQ>]. Although reproductive autonomy and sexual violence are conceptually different categories, the litigator—Women’s Link Worldwide—chose to frame these violations within the concept of sexual violence. In this case, the Court’s decision expands the concept of sexual violence to include violations to reproductive autonomy, opening the path for the advancement of reproductive justice through their litigation as a form of sexual violence, as recognized in national and international law. However, scholars still debate as to whether the category of sexual violence is adequate to include reproductive violations, or whether it is necessary to create a new category for reproductive violations. Indeed, these are two separate categories and are not necessarily linked. Instead of having to stretch to include women’s experiences in existent categories, Charlotte Buch suggests that legislation should start from women’s lives and forge categories of rights and protections that better reflect the daily features of women’s experiences. See Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS Q. 486 (1990).

252. This report is confidential. However, the executive summary is available. See Women’s Link Worldwide, REPORT: “A VIOLENCE WITHOUT NAME: REPRODUCTIVE VIOLENCE IN THE COLOMBIAN ARMED CONFLICT”. EXECUTIVE SUMMARY, <https://www.womenslinkworldwide.org/en/files/3122/executive-summary-reproductive-violence-in-the-colombian-armed-conflict.pdf> [<https://perma.cc/KS79-YNAB>].

and regional human rights bodies have been incorporating the parameters of reparations developed in transitional justice contexts. However, the transformative potential of these reparations can only be achieved if the root causes that enabled the violence to take place are addressed. For this reason, it is important for courts to adequately establish the facts, violations, harms, and determine who is a victim. For reproductive violations, root causes include socio-cultural practices that legitimize this form of violence and perpetuate stereotypes that limit women's citizenship to their role as mothers.

The decisions of Latin American courts showcase different forms of reproductive violence that still have not been significantly addressed in the international and regional arena and serve to expand the understanding of reproductive justice. These cases set a precedent for how reparations can be used to address reproductive violations and advance women's citizenship. Access to reproductive justice enables women to have full control over their bodies (essential to anybody's personhood), it enables them to have autonomy to determine the life's course and access all the possibilities promised to citizens, including the economic, political and social life.<sup>253</sup> Importantly, it addresses the gender discriminatory stereotypes that continue to constrain women's lives to their role as mothers and wives. Of course, there are limits to how much can reparations achieve, especially judicial reparations. These include obstacles on the costs of litigation, the lengthy time-expand of court decisions, the limited access of many women to courts, as well as to what extent some of the transformative reparations intrude with the legislative power.<sup>254</sup> Courts might also apply different standards to reparations in each case and there are some concerns to whether judicial bodies have the necessary knowledge and training to order integral reparations<sup>255</sup> that would be necessary to unsettle gender hierarchies. Despite the fact that some of the aforementioned cases do not fully grasp all the dimensions that enable reproductive violations, reparations are being used to advance women's reproductive autonomy and to recommend non-repetition at the international, regional, and national level. These are very positive examples indeed. ❀

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253. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992).

254. See, e.g., Rubio-Marín & de Greiff, *supra* note 62, at 322-23. See generally Manuel Iturralde, *Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH 361 (Daniel Donilla Maldonado ed., 2013) (exposing the criticism to the judicial activism or new constitutionalism of the Colombian Constitutional Court).

255. Sánchez León & Sandoval-Villalba, *supra* note 201, at 570.