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ARTICLE



Transformative gender justice: criminal proceedings for conflict-related sexual violence in Guatemala and Peru

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ABSTRACT

Drawing on Andrea Durbach's work around post-conflict transformative gender justice, this paper asks if criminal justice for conflict-related sexual violence (CRSV) can bring about transformative gender justice in Latin America. The paper offers a comparative analysis of two judicial cases of conflict-related rape: the *Sepur Zarco* case in Guatemala and the *Manta y Vilca* case in Peru. The paper argues that domestic courts can have important transformative effects on victim-survivors, their families and on criminal justice practices for CRSV, when international standards for evidentiary practice are adhered to within the specific local context of the case in question, as was the case of *Sepur Zarco*. If international standards of evidentiary practice are not considered, it is much less likely that such cases are transformative, in fact, the process might do harm, as in the case of *Manta y Vilca*. Therefore, criminal justice processes are not by default transformative, but good practice can be important to transformative gender justice by providing redress for victim-survivors and affected communities, unsettling hierarchies and building accountability.

KEYWORDS

Transformative gender justice; conflict-related sexual violence; Peru; criminal justice; crimes against humanity

The recognition of sexual violence as part of conflict-related harms is a major step forward for gender justice and the global response to conflict and peace building. The UN Security Council Resolutions and the *Rules and Procedures of Evidence of the Rome Statute* that inform the practice of the International Criminal Court (International Criminal Court 2002; De Brouwer 2005; Heathcote and Otto 2014) show this to be the case. However, as Andrea Durbach has observed (Durbach and Chappell 2014; Durbach 2016b), considering ongoing and persistently high levels of gender-based violence in post-transition societies, we must re-examine the available justice mechanisms to seek the transformation of the structures that facilitate such violence. Transitional justice is not sufficient if it cannot deliver gender justice. In such a context, transformative gender justice refers to the idea of the potential of transitional justice mechanisms such as truth commissions, criminal justice, and reparation programmes to transform the conditions that fuel gender-based violence in war and in peace (Durbach and Chappell 2014, 545).

In this paper I revisit criminal justice cases for conflict-related sexual violence in Guatemala and Peru with the objective to examine whether these difficult judicial processes contribute to what Durbach and others have called 'transformative gender justice'. When is criminal justice a tool for repair and redress, and to what extent does this

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lead to a more profound transformation of gendered structures of society? A first-hand account of the ongoing trial against 13 Peruvian former soldiers on charges of rape, an ongoing case known as *Manta y Vilca* (2016-2018, 2020-21, ongoing) after the affected communities, is contrasted with the transformative experience of the *Sepur Zarco* trial in Guatemala (2016), in which two ex-military were convicted of sexual and domestic slavery as crimes against humanity. This trial, closely followed and analysed by Burt (2019), was transformative in its practice and outcome, as I will discuss below. Comparing the two cases allows for the identification of elements in the process that may make criminal justice for conflict-related sexual violence transformative, and what elements might in fact do harm.

In what follows I will first define what we, following Durbach and others, may consider transformative gender justice in a context of the pursuit of criminal justice for international crimes. I will then briefly frame the discussion in the field of International Criminal Law and the pursuit of justice for conflict-related sexual violence. The analysis of the *Sepur Zarco* case as transformative, as outlined by Burt (2019), will be followed by an analysis of the ongoing *Manta y Vilca* trial in Peru. In the conclusion I will reflect on the question if and how domestic criminal trials for CRSV in the Latin American context can be considered transformative gender justice.

Criminal justice as transformative gender justice?

The idea of transformative gender justice allows us to think about post-conflict justice mechanisms in holistic and forward-looking terms. Rather than seeking repair of what was broken—a return to what was before conflict ensued—feminist scholars have argued for the need to use transitional periods to seek transformation of underlying inequalities that not only contribute to political violence, but to ongoing ‘peacetime’ gender-based violence (Reilly 2007; Ní Aoláin, Haynes, and Cahn 2011; Ní Aoláin 2012; O’Rourke 2012; 2020; Durbach and Chappell 2014; Boesten and Wilding 2015). Increasingly, the tools and mechanisms of transitional justice—truth-seeking, institutional reform, reparation, and accountability—include at least some awareness of gender in the way they are deployed. Importantly, these tools and mechanisms provide the basis for a conversation about gendered harms, its roots, and consequences. But case studies show that gender is often included in limited ways that prevent rather than stir the much-needed reflection on gendered violence (Ross 2002; Scanlon and Muddell 2009; Boesten 2014; Kent 2014; Lynch 2018). Hence, feminist researchers and transitional justice practitioners are interested in the detail of transitional justice mechanisms to examine where and how these could be more transformative and forward-looking (e.g. Durbach and Chappell 2014; Boesten and Scanlon 2021).

Andrea Durbach and Louise Chappell looked at transformative gender justice from the perspective of reparations. Reparative justice can be powerful as a mechanism for transformation as it tends to focus on longer term interventions aimed at what Nancy Fraser has termed ‘parity of participation’ (2009, cited in Durbach and Chappell 2014, 551). Drawing on Fraser’s three-dimensional understanding of justice, Durbach and Chappell identify political, economic, and social dimensions of post-conflict transformative gender justice. In my own work, together with Helen Scanlon, we looked at symbolic reparations as transformative, or, at the arts as a medium to unsettle persistent gender stereotypes and prejudices (Boesten

and Scanlon 2021). Memory work is important in maintaining a conversation about past and present violences. Criminal justice has an important contribution to make to this conversation as it defines what is acceptable and what is not; as Durbach (2016b) observes, impunity for sexual violence is what has helped entrench its practice. In addition, as Burt (2019) observes, the process of criminal trials can help re-shape narratives of past violence. Thus, while transformative gender justice is perhaps elusive as a tangible and measurable goal with too many inter-dependent and abstract variables, it is also a necessary ambition within transitional justice to actively strive for post-conflict social change that provide the conditions for gender equality. Thus, transitional justice processes may be gender transformative if they contribute to the unsettling of gender roles and stereotypes (Boesten and Scanlon 2021); provide redress for victim-survivors and the broader affected community (Rubio-Marín 2009); and determine the social, economic, political, and legal conditions for equality and accountability (Durbach and Chappell 2014). Criminal justice has an important role to play in unsettling hierarchies, providing redress and building accountability.

Since much of the global peacebuilding community's attention has focussed on sexual violence as one of the worst wartime atrocities possible, particularly after the 2014 Global Summit to End Sexual Violence in Conflict held in London, the focus has been on tackling impunity as a main force for justice and deterrence (Houge and Lohne 2017). Sexual violence in conflict was long seen as collateral damage, but the tribunals for Rwanda and the former-Yugoslavia in the 1990s pushed wartime rape to the forefront of International Humanitarian Law and International Criminal Law, and from there on the agenda of global policy making regarding gender and post-conflict justice.¹ But such a shift in international law does not necessarily mean that justice is achieved, let alone transformative justice. Rather, there is wide variety in how cases of CRSV are prosecuted in different courts (military, domestic, hybrid, or international courts and tribunals, see Seelinger 2020), with diverse results.

Scholars disagree on whether war crime tribunals provide satisfactory justice for victim-survivors and affected communities, promote reconciliation and historical memory in post-conflict societies (for a discussion, see Burt 2019, 70). In the case of sexual violence, the opinions are perhaps even more widely contested: while many see criminal accountability as essential to curbing gender-based violence in conflict (e.g. Houge and Lohne 2017; Burt 2019; Seelinger 2020), others draw attention to the potential harm that badly managed trials can do to victim-survivors, and to how the foregrounding of rape in war might have unintended negative consequences (Campbell 2004; Henry 2014; Engle 2020). To foreground negative consequences, the international rules of procedures and evidence developed to guide criminal trials are victim-centred, intended to avoid re-victimisation and stereotyping and aimed at including comprehensive redress for victim-survivors beyond criminal accountability via a clearly outlined set of reparative recommendations (Durbach and Chappell 2014).² These rules and procedures are complex and resource dependent, which are not always available. National courts may not have resources at their disposal as do international tribunals and courts, and no domestic legal frameworks to deal with the complexities of crimes against humanity, mass atrocity, and war crimes. The balance and interaction between international criminal law and rules and procedures, and domestic law and practice is therefore essential in the analysis of criminal justice for conflict-related (sexual) violence.

Conflict-related sexual violence and international and domestic law

Accountability for sexual violence is high on the agenda of the International Criminal Court, which has repeatedly expressed its commitment to investigating and prosecuting sexual violence (Bensouda 2014). International law is well-developed regarding sexual violence, and the *Rome Statute Rules of Procedure and Evidence* (International Criminal Court 2002) provide clear guidelines. It is therefore surprising and frustrating that there has only been one ICC conviction for sexual violence to date (*Ntaganda*, International Criminal Court 2019), even if some rulings on reparations for a broader category of ‘victims’ include victims of sexual violence (Durbach and Chappell 2014). Then again, the ICC has arguably not been very successful in prosecuting international crimes overall, with only five convictions in the 19 years of its existence.

The forerunners of the ICC, the International Tribunals for Rwanda (ICTR 1994–2015) and the former-Yugoslavia (ICTY 1993–2017) provide the groundwork for and precedence in defining international law regarding sexual violence. The ICTY ‘delivered a trove of jurisprudence refining sexual offences, confirming their status under customary international law and clarifying ways in which high-ranking officials could be held responsible’ (Seelinger 2020, 220). The ICTR, in turn, delivered landmark judgements in relation to sexual violence as genocide, crime against humanity, war crime and form of torture. In particular, the 1998 conviction of Jean Paul Akayesu, which built on the ICTY judgement of the *Tadic* case, provides the widely used definition of conflict-related sexual violence in hybrid and domestic courts globally (International Criminal Tribunal for Rwanda 1998, 688). The *Akayesu* case also establishes the central notion of a coercive context as evidence of force without the need for ‘a show of physical force’ (International Criminal Tribunal for Rwanda 1998, 688), and that considering such coercive contexts, single testimony of sexual violence does not have to be corroborated by further evidence ‘provided that such testimony is relevant and credible’ (International Criminal Tribunal for Rwanda 1998, 134, 135). The *Akayesu* ruling is a landmark ruling that shapes international law regarding conflict-related sexual violence and it is often invoked, including in the discussed cases in Latin America, if not always consistently applied.

Hybrid courts and tribunals such as the Special Court for Sierra Leone (2002–2013), the Extraordinary Chambers in the Courts of Cambodia (2003), Bosnia–Herzegovina’s War Crimes Chamber (2005), Senegal’s Extraordinary African Chambers (2013), and the Special Criminal Court for the Central African Republic (2015), have been more successful in judicialising cases of conflict related sexual violence than the ICC, as they tend to be closer to the contextual evidence, local expertise and affected communities (Seelinger 2020). As Seelinger argues (2020), these courts are commended for their far better record in providing justice than the ICC so far, ‘shining with promise’ because of their more local procedures, the connection with and involvement of regional and national lawyers and legal experts, the potential of involving victim-survivors groups, and the interface with other local transitional justice efforts such as truth-seeking processes and reparation programmes. While firmly embedded in domestic judicial systems, these tribunals and courts are also supported by the international legal infrastructure that provides financial resources and expertise (Seelinger 2020).

In Latin America the situation is somewhat different, and no such hybrid courts exist. Latin American human rights lawyers and activists are more reliant on the Inter American Commission of Human Rights (IACHR) and its counterpart, the Inter American Court of

Human Rights (CORTEIDH, for its initials in Spanish). Because of the existence of these institutions, there is less of a tendency for recourse to the ICC and its off-shoots of expertise as might be the case in Africa and former Yugoslavia, although international criminal jurisprudence is often invoked. Where domestic courts are unwilling or unable to provide satisfactory justice, cases can be referred to the IACHR and the CORTEIDH. But the Inter-American system only deals with states, not individual perpetrators. For example, in a ruling of 1999, the Inter-American Court ordered the Peruvian state to release a particular prisoner, Maria Elena Loayza Tamayo, pay reparations for incurred suffering, and investigate and punish the perpetrators of the sexual abuse she suffered while in detention (Inter-American Court of Human Rights 1999). However, the state subsequently refused to comply on the grounds that Loayza Tamayo had not exhausted domestic jurisdiction—even if it was clear that the domestic system did not respond adequately. The authority of the Inter-American Court is thus not always recognised, and reparations are unenforceable. In 2007, the Criminal Court in Lima dropped the case against two identified perpetrators accused of torturing and raping Loayza Tamayo while in detention, first on the basis that the CORTEIDH had already ruled over the case (admitting its authority!), and then because the case would fall outside the statute of limitations—that is, the court decided to frame the case within domestic criminal law as a common crime, rather than the contextual international crime (Inter-American Court of Human Rights 2007). While the Inter-American Court responded with another ruling against the Peruvian state, it does not have the power or means to enforce any of its rulings nor can it order punishment for individual perpetrators. It can only put pressure on states and provide some satisfaction to victim-survivors and their defenders that a higher court has delivered some form of justice. As such, the Inter-American system provides resources and expertise for human rights jurisprudence in the region, an essential source of support and protection for human rights activists (Engstrom 2019), and some satisfaction in terms of perceived and symbolic justice. With its rulings it contributes to transformative gender justice by unsettling patriarchal gender norms and stereotypes that put blame on women. It promises some redress via reparations but cannot provide actual accountability. As such, its contribution to transformative gender justice is important but also limited.

As part of agreements established in the post-conflict transitional justice procedures, Guatemala and Peru have established their own domestic courts to prosecute war crimes and gross violations of human rights, including sexual violence.³ They have done so out of a preference for domestic justice rather than international procedures, but at the same time, these procedures are grounded in the various international conventions and agreements to which states have signed up—the *Inter-American Convention on Human Rights* (1969), and the *Rome Statute of the International Criminal Court* (2002). The Guatemalan *Sepur Zarco* case is the first in Latin America that has successfully prosecuted sexual violence as a crime against humanity in a domestic court, and it has done so in a manner that is transformative for gender justice.

Post-conflict Guatemala and the prosecution of conflict-related sexual violence

Guatemala established a 'High Risk Court' in 2009 to prosecute high-profile violations of human rights. The court provides extra security measures to ensure the safety of judges, prosecutors, defence lawyers and witnesses. Cases of genocide, femicide and torture are

automatically referred to this high-risk court, but it can also see cases of high-level corruption and trafficking (Seelinger 2020; Kravetz 2017). It was this high-risk court that convicted former president Rios Montt in 2013 for genocide of indigenous communities in the 1980s. The judgement did not hold and was overturned by the constitutional court soon after. Nevertheless, it created an important precedent for the possibility of justice for crimes against humanity and generated confidence in the system that convicted Rios Montt in the first place. In addition, the ruling included the consideration of sexual violence against women as a tool of genocide and took women's cultural position as reproducers of community into account. The case laid the groundwork for the 2016 *Sepur Zarco* case, in which two ex-military were convicted of rape and domestic and sexual slavery of Maya women.

The *Sepur Zarco* case provides an example of successful and transformative prosecution of conflict-related sexual violence in Latin America, firmly grounded in both international law and domestic jurisdiction. The case was exemplary in how it gathered evidence, involved victim-survivors, and resolved the case quickly and efficiently. Burt (2019) finds the outcome particularly transformative because of the legal and evidentiary practices that led to conviction, placing the victim-survivors at the centre of the proceedings. This, plus the conviction of the accused and the integral package of reparations the court ordered, has contributed to a 'pathway from victimhood to citizenship' for the women of *Sepur Zarco* (Burt 2019, 72).

There are three elements of the evidentiary practices in the *Sepur Zarco* case that Burt highlights as particularly contributing to the case's successful conviction as well as to its positive transformatory effect on victim-survivors and wider society. First, witness testimony was approached respectfully and with consideration for the possibility of retraumatisation. Testimonies were audio and video recorded during preliminary hearings in 2012, allowing victim-survivors to choose if they wanted to testify live in open court or preferred to have their initial testimonies be projected into the trial. This also mitigated the potential inability of victim-survivors to appear in court during the two weeks trial due to illness or death. But evidence did not only rely on women's testimonies but was complemented with testimonies from men from the community, former civil patrolmen, an ex-soldier and a former military officer. There was expertise from forensic scientists who presented detailed analysis of the content of mass graves, parts of which was presented and displayed in open court. Lastly, there were expert witnesses who contextualised the specific events on trial in a historical context of political conflict over land, the structure, organisation and doctrine of the counterinsurgency strategies deployed by the Guatemalan army, and the use of rape as a weapon of war and the associated understandings of racial and gendered understandings of reproduction of the community. There were also experts presenting findings from research on the specific case of *Sepur Zarco*. In this way, Burt argues (2019, 71), the prosecution established a rich and credible contextual understanding of the events at *Sepur Zarco*.

The second element of evidentiary practice that Burt identifies as transformative, is how the prosecution collaborated with the victim-survivors. The women were at the centre of the trial, they were treated respectfully and were intentionally protected from further harm. They were also consulted about the legal strategy, i.e. they had voice in the proceedings. Networks of care and concern emerged around the group of women through the engagement of local and international civil society organisations, which

also helped visibility of the case. All of this had such an empowering effect on the women that Burt calls this inclusion as a pathway from victimhood to citizenship (2019, 72). Arguably, in its inclusive practice the process provided redress for victim-survivors and affected communities.

The third element that made the practices in this trial transformative is that it destabilised the narrative of denial and pushed forward a different truth (Burt 2019, 94), unsettling gender norms and stereotypes in its wake. The trial, and the media coverage it received, had an important impact on the construction of historical narratives about the past which is essential in a context where the powerful—the armed forces and the state—control a narrative that denies responsibility for the political violence and thereby continues to victimise those at the margins of the state. The potentially transformative nature of the successful conviction of two ex-military for sexual violence during armed conflict is particularly important considering the persistently high levels of violence against women and femicide in post-conflict Guatemala. Narratives about the past reverberate into the present and help shape the future. This can have very concrete effects: two years after the trial, the High Risk Court convicted four retired senior military officers of crimes against humanity, aggravated sexual assault, and forced disappearance against Emma and Marco Antonio Molina Theissen (Burt and Estrada 2018 cited in Burt 2019, 95). The *Sepur Zarco* precedent was essential in this conviction, and those that are perhaps still to come. Hence, the process contributed to the building of accountability, of norms and rules regarding the tolerance for sexual violence. But to shape these narratives in a way that allows for the perspectives of the marginalised and violated in society to be heard and included, criminal justice procedures need to deploy these comprehensive evidentiary practices as described above; without those, proceedings easily retraumatise witnesses instead of providing redress, missing the opportunity to shift narratives about the past and unsettle hierarchies, and potentially even without leading to meaningful accountability.

Post-conflict Peru and the prosecution of conflict-related sexual violence

In 2003, the Peruvian Truth and Reconciliation Commission (TRC) concluded that sexual violence was used systematically by all parties throughout the conflict (1980–2000) between the insurgent group Shining Path, the Tupac Amaru revolutionary movement, and the military counterinsurgency (Truth and Reconciliation Commission 2003; Henríquez Ayin 2006; Boesten 2014). Rebels and terrorists were either killed or imprisoned during the conflict, but state forces have yet to be held to account. According to the TRC, state forces were responsible for most of the sexual violence and deployed it systematically as a tool to terrorise the population.⁴ The TRC identified 538 cases of penetrative rape, in addition to cases of forced nudity, forced prostitution, forced pregnancy and non-penetrative rape. The Victims Register Unit, established as part of a reparations programme after the results of the TRC were published in 2003, generated thousands more reports of sexual violence that has led to some degree of monetary reparation for victim-survivors (Duggan, Bailey, and Guillerot 2008; Henríquez Ayin and Layús 2018). This also means that the state and its transitional justice institutions accept and recognise the widespread occurrence of sexual violence during the conflict. Nevertheless, criminal accountability for such harms is very hard to achieve. This impunity contributes to the little importance that Peruvian society gives to gender-

based violence overall and to the widespread tolerance and even legitimization of ongoing male violence. Since 2001, however, several cases have been brought to court (see below). One case involving nine women and 13 accused, which began in 2016, is currently being heard. This case, commonly referred to as *Manta y Vilca*, is the only case in Peru so far which has a potential for drawing public attention to and accountability for the systematic abuse by military of local indigenous women during the conflict.

After the TRC, Peru set up a Special Criminal Court as part of the process of transitional justice. This court processed a series of high-profile cases of human rights violations committed during the years of political violence and handed down several important convictions. As part of this reckoning with the past, in 2009 the Supreme Court convicted former president Alberto Fujimori (1990–2000) of crimes against humanity. This conviction of a former head of state in a domestic court, in an open and transparent process, generated confidence in the rule of law and in the ability of the Peruvian judiciary to act independently, transparently and efficiently, and gave hope for a new era of accountability for other human rights violations and crimes against humanity during Peru's armed conflict. In contrast to Guatemala's conviction of Rios Montt and despite various attempts to overturn, the conviction of Fujimori has so far held up.

Since Fujimori's conviction, however, Peru has experienced a severe backsliding on human rights prosecutions, with fewer cases and even fewer convictions. The Special Criminal Court has been burdened with all kinds of criminal cases including corruption and trafficking, which has taken valuable time and resources away from historical human rights cases. Powerful conservative and pro-military forces have launched vicious campaigns against human rights organisations and NGOs and against lawyers and advocates involved in human rights cases (Burt 2014). In 2021, Peru experienced another very polarised election marked by malicious campaigning, particularly from the *Fujimorista* camp—the political movement led by Keiko Fujimori, the daughter of the convicted criminal, herself under scrutiny on corruption charges. The campaign was marred by cases of 'terruqueo'—or calling out anyone who supports human rights and/or a leftist political agenda as a supporter of terrorism. Hence, political polarisation continues to build on an unresolved past of violence. The pressure from conservative and pro-military forces on society since the 2009 conviction of Fujimori affects the judiciary and affects the possibility of seeking criminal accountability through the courts, including cases of sexual violence. However, conservative pressure on the judiciary is certainly not the only obstacle to finding justice for cases of conflict related sexual violence, as I will discuss below.

Criminal accountability for sexual violence in Peru

As mentioned above, the TRC (2001–2003) identified 538 cases of penetrative rape in which the victim-survivor could be named but estimated that these cases accounted for circa 7% of all cases of sexual violence. During the conflict, several women and girls reported rape and torture to the authorities, but these were all dealt with in military courts—which were often 'faceless', i.e. with masked judges. Research has shown that sexual violence was widespread in the rural communities controlled by the military, in rural and

urban prisons and torture camps, and was used in massacres perpetrated against the civilian population (Truth and Reconciliation Commission 2003; Henriquez Ayin 2006; Boesten 2014).

After the publication of the final report of the TRC, human rights organisations worked hard to convince the *Ministerio Público* (public prosecutor) to bring charges of sexual violence in a range of cases. Most of these cases have been archived. The six cases of conflict-related sexual violence that were judicialised post-TRC are diverse in their outcomes, suggesting little cumulative learning in the process. Criminal justice is thus unpredictable.

In 2014, I wrote an assessment of criminal justice in cases of conflict-related sexual violence in Peru. No cases had been successfully resolved. Based on a close reading of the case files, I concluded that this impunity was the result of (1) lack of capacity and resources, (2) political–military influence, (3) normative framework that is sexist and racist. Since then, there has been one successful conviction of conflict related sexual violence as crime against humanity,⁵ and there is the inclusion of testimony of sexual violence in two cases of mass atrocity—albeit no convictions for sexual violence.⁶ There is one ruling from the CORTEIDH for reparations.⁷ Is this progress for post-conflict gender justice in Peru? Below I will look more in-depth to the ongoing trial known as *Manta y Vilca* to analyse what the current state of justice for conflict-related sexual violence in Peru is.

The test of time: *Manta y Vilca*

The TRC gathered strong testimonial evidence of systematic sexual violence against the local population in the two rural Andean communities of Manta and Vilca where a military base was established early in the conflict. The case showed clear similarities with testimonial evidence from other communities, and the TRC included this case in the 47 exemplary cases that it presented to the office of the Public Prosecutor in 2003 to be considered for prosecution in the new Special Criminal Court. Human rights organisations APRODEH and IDL, and feminist organisation DEMUS, approached the communities of Manta and Vilca to provide psycho-social and legal support to the victim-survivors.

The case came to trial in July 2016, 13 years after the first presentation of evidence to the Public Prosecutor, and 32 years after the first abuses took place in these communities. There was much hope that this would be the all-important example in Latin America that sexual violence could be prosecuted as crimes against humanity in domestic courts, following the successful Guatemalan *Sepur Zarco* case. Five years onwards, in July 2021, the *Sepur Zarco* conviction is still the landmark sentence for Latin America, and while it has led to a further conviction for conflict-related sexual violence in Guatemala (the *Theissen* case, see above), it has not proven precedent for a successful trial in Peru. By comparing the two cases—similar in the events and charges—I hope to increase our understanding of the judicial struggles and possibilities in prosecuting conflict-related sexual violence.

The *Manta y Vilca* case involves a military base established in 1984 in the district of Manta, in the Department of Huancavelica, at about 3,700 m above sea level. Huancavelica was (and still is) poor, remote, and largely forgotten by the Peruvian state. Huancavelica, together with the Department of Ayacucho, were also the main battle grounds for Shining Path, and hence, also for the military. The state of emergency that was pronounced in 1982 meant that the military was the only authority in town—they

had full reign, and they used it with impunity. The TRC recorded multiple testimonies of women, then young girls, who had been abused in their homes as well as at the military base of Manta. They were raped, gang raped and forcibly prostituted. The registrar of Manta testified of the many babies he registered in this period with father's names such as 'Pedro Militar'. The military never took responsibility.

Nine women, with legal and psychosocial support from several domestic human rights and feminist organisations, presented their case against 14 identified ex-soldiers to the *Ministerio Público*, and the case went to trial in July 2016. The first trial ran for two years but was annulled because of irregularities among the judges presiding the case. First, testimony was not taken seriously by the judges, and the victim-survivors were interrogated according to gendered stereotypes such as their sexual behaviour before and after the events. Second, the court tried to typify the case as common crime rather than crime against humanity, which would have imposed a statute of limitations. Third, the court responded favourably to the request from the accused of a trial behind closed doors against the wishes of the victim-survivors. Fourth, the court denied the victim-survivors psychological support, and demanded they testify in the presence of the accused.⁸ In September 2018 the trial was annulled because of these practices, and because one of the judges had appeared in a political corruption scandal. A retrial was ordered which started in 2019 from scratch. All witnesses were required to repeat their testimonies. Due to the COVID pandemic the trial was suspended in April 2020 and resumed virtually in July. In February 2021 the testimonies of the victim-survivors started, which were virtual and open to the public.⁹

In this second trial, 13 ex-soldiers are charged with crimes against 'buenas costumbres, libertad, y honor sexual'—good manners, freedom and sexual honour—within the national penal code applicable at the time of the events. However, the court has also accepted the charges of crimes against humanity as per international criminal law. Thus, the charge combines existing domestic legislation—the penal code of 1924 and in the charges of two of the accused the penal code of 1991—with international law by defining these as crimes against humanity considering the context of violence. Eleven men are charged as direct authors and two senior officers as indirect authors. One of the initial 14 accused was underage at the time of events and is dealt with separately.

This second trial started in July 2019, but there is no end in sight. While the COVID pandemic interrupted the trial between April and July 2020, this does not explain the discrepancy between this case, and the efficiency with which the *Sepur Zarco* case was resolved. The big difference is that *Sepur Zarco* was scheduled to take place over two weeks of public hearings, with pre-trial testimonies and evidence collection and submission, and with full day and continuous sessions during the two-week trial. The *Manta y Vilca* case holds sessions of maximum two hours about every two weeks, despite the Court's initial commitment to hold weekly sessions. Much of the scheduled two hours is spent on procedures rather than evidentiary practice, slowing the trial down further. In addition, the sessions are severely obstructed by the absence of some of the accused, and since July 2020 by the additional absenteeism created by COVID. Both accused and victim-survivors are not always able to attend as they are ill or taking care of ill family members. One trial lawyer of the defence team died in northern Spring 2021 of COVID. A scheduled trial with consecutive day-long sessions building on the evidence already presented, including victim testimony, would have avoided this drawn-out and inefficient process.

The drawing-out of the trial affects the victim-survivors negatively and facilitates revictimisation. It also makes the trial predictably cumbersome in terms of logistics: The women are poor rural Quechua speaking who in majority live far away from the court in Lima. They do not receive any support from the state in terms of transport or accommodation to be able to attend the trial. While the current virtual mode resolves this problem somewhat, they still must travel to urban centres to ensure availability of working Wi-Fi and coordination with their psycho-social support team. These are all predictable problems considering the situation of the victim-survivors and demonstrates a lack of a victim-centred approach, which is considered essential in international practice (SáCouto and Ford Ouoba 2020) and was so prominent in the *Sepur Zarco* case. These conditions obstruct the possibility of redress for victim-survivors and affected communities.

In the *Sepur Zarco* trial, according to Burt (2019), the plaintiffs and court did everything to accommodate the victims and prevent re-traumatisation. Victim-survivors' testimonies were given full evidentiary value and they were able to testify in a safe environment while their identities were protected. The pretrial judge recorded the testimonies the women gave in evidentiary hearings in 2012 and these were accepted as evidence in 2016. Hence, the women did not have to repeat their testimonies, nor were they interrogated. Having observed the testimonies of the women of *Manta y Vilca* in virtual court, I am confident that the same security has not been granted to them: even in this second trial, the court allows the women to be interrogated by defence lawyers about irrelevant details about time and place in the early 1980s, about the clothes they wore and about the sexual relations they had before and after the events on trial. At one point, the defence lawyer questioned the coercive nature of the sexual relationship one of the victims maintained with the rapist, suggesting this was consensual and thus undermined her claim. He also asked the women about the NGOs that support them, questioning the victim's agency in deciding to lay charges; and he questions them about the reparations they received from the state as part of Peru's post-TRCs reparation package. In one of the interrogations, the lawyers supporting the victim-survivors intervened as the defence lawyer suggested quite explicitly that the victims only reported because of external agents—NGOs told them to do so—and thereby puts into doubt the veracity of their accusations. Despite being reprimanded by the judge, he continued his line of questioning. The woman he was interrogating got angry, raising her voice to tell the court 'I didn't have the knowledge or the money to report this so I did ask the people from the TRC to help me'.¹⁰ Only then does the judge intervene more forcefully and tell the defence to stop this line of questioning. Instead of affirming the victim-survivors' legitimate anger at the repeated unfair treatment, the judge tells her condescendingly to 'calm down' and seek the support of her psychologist. None of this should be permissible if a victim-centred approach as advocated for in international criminal practice would have been adhered to. Instead of unsettling gender norms and hierarchies, these are actively reaffirmed through these practices.

One of the clear omissions in the *Manta y Vilca* case so far is the context to evidence the coercive and violent nature of the place and time in which the events took place. After almost two years of interrupted re-trial, no expert witnesses have been heard, and it is unclear if and when they will be called. The line of questioning that the defence lawyers are using so far draw into question the credibility of the victim-survivors and their

testimonies. If the context is taken seriously as per international evidentiary practices, this would not be possible. In the *Sepur Zarco* case, the claimants used a combination of witness testimony, scientific (forensic) evidence, and expert witnesses who provided crucial contextual information. The court in turn, allowed the claimants to draw on expertise beyond the immediate events to also reflect on long-term effects of state violence and the impact on their indigenous communities and culture. As such, the evidence provided a long-term contextual narrative that revealed the systematic and destructive nature of state violence against indigenous women. The women were also very much part of building the case, i.e. they were active participants in the proceedings throughout. It was this evidentiary practice, according to Burt (2019), that gave the trial its transformative potential: the outcome is just and the process itself has helped build confidence, empowerment and inclusion. None of this is currently the case in Peru.

The two-week *Sepur Zarco* trial not only facilitated attendance and efficiency, but also allowed for an effective mobilisation of civil society in support of the case.¹¹ In the Peruvian case there is and has been extensive national and international engagement from experts and civil society organisations as well, but it is difficult to keep this up and have a positive impact if the trial is so slow and inefficient. The victim-survivors are accompanied by two human rights organisations: DEMUS, a feminist organisation that has worked at multiple levels with the women from Manta and Vilca since 2003, and IDL, a legal activist organisation. Both provide legal support to the women, while there is also a third civil society organisation providing psycho-social support to the victim-survivors. Apart from providing legal counsel, DEMUS is activist in its engagement, using street performance, protest, and campaigns to draw attention to the case, and regularly issuing information sheets and videos on social media to inform and engage a wider public.

As in the *Sepur Zarco* case, there is international engagement with *Manta y Vilca*: different international experts have observed the trial at different stages. However, the fragmented nature of the trial prevents a more consistent observational practice. International legal experts from the War Crimes Research Office of American University also presented an *Amicus Curiae* to the National Criminal Court in anticipation of the witness testimonies scheduled for February 2021 (SáCouto and Ford Ouoba 2020). The *Amicus* helpfully outlines evidentiary considerations in cases of crimes against humanity related to sexual violence, considerations taken into account by the High Risk Court of Guatemala, but seemingly ignored by the National Criminal Court of Peru. Both the national and the international engagement with *Manta y Vilca* is difficult to sustain over a long period of time, as organisations and observers get distracted by other cases, problems, and campaigns. The case, now on its second trial in five years, 35 years after the events, drags on and on without much expectation for finding justice, redress for victim-survivors and affected communities, and even less so an unsettling of hierarchies.

Conclusion

Criminal justice for sexual violence in domestic courts is not impossible. It can even be transformative of the gendered structures of injustice—the successful prosecution of the *Sepur Zarco* case in Guatemala shows that criminal justice can be (1) reparative and empowering for those who have been harmed, providing redress; it can (2) re-shape the narratives about histories of violence towards more inclusive understandings, unsettling hierarchies; and

it can (3) lead to further disclosures of sexual violence and (4) to more successful prosecutions of crimes against humanity, building accountability.¹² The case also confirms that it matters that these cases were tried before a domestic court; the outcome was indeed, in Seelinger's words (2020) 'closer to home' justice for victims and affected populations, and hence for justice practices after that first successful conviction (see also Burt 2016). But *Sepur Zarco*, in the comparison with the discussed Peruvian case, also shows that complementarity between domestic and international law is essential for such complex cases of crimes against humanity to succeed—no domestic judiciary has the legal tools to prosecute such cases without drawing extensively on international criminal law and expertise.

The Peruvian and Guatemalan cases show that political will is essential, and that that political will must be within the state and with the judiciary. In Guatemala, plenty of powerful political resistance to human rights trials exist. Ten days after the conviction of General Jose Efraín Ríos Montt in 2013 for genocide and crimes against humanity by the Guatemalan High Risk Court, the Constitutional Court overturned the verdict (Burt 2016). Likewise, in Peru, the pressure upon the judiciary has been tremendous through campaigns of *terruquear*—accusing anyone with a pro-human rights stance publicly of terrorism. However, this appeal to the fears of the past heavily relies on impunity: it denies any responsibility of the state or the military for the violence that was unleashed, and the atrocities committed. This is true for genocide as well as for sexual violence; impunity ultimately lets the blame sit with the victims. Hence, the unsettling of such harmful narratives is essential, even if through imperfect trials.

The ongoing trial against 13 ex-military accused of sexual violence and crimes against humanity in Peru shows that a lack of attention for and engagement with international evidentiary practices impedes a victim-centred approach. The *Manta y Vilca* trial is so far not a positive, transformative experience as was the Guatemalan *Sepur Zarco* trial. Instead, the trial is drawn out and uncaring of the victim-survivors. Its inefficiency reduces the possibility of constructive societal engagement and jeopardises a fair trial as per international criminal law for conflict related sexual violence and crimes against humanity. In addition, the evidentiary practices that were so essential in making the *Sepur Zarco* case transformative, are not heeded in the *Manta y Vilca* case: while the women of *Sepur Zarco* were treated with respect, their testimonies recorded in pre-trial to avoid re-traumatisation, and their voice heard in the development of a judiciary strategy, in the *Manta y Vilca case*, victim-survivors are treated as witnesses whose testimonies need to be questioned and they have had to do so several times over five years; they are not provided with financial, psychological or physical support and protection by the state; and the judiciary treats them condescendingly at best. No expert witnesses have been called to provide contextual evidence, leaving the weight of evidence rely heavily on the victim-survivors and the accused.

While *Manta y Vilca* could have the same transformative influence on the narratives of past violence and on gender justice in Peru as *Sepur Zarco* did in Guatemala, the trial seems to be wasting the opportunity. While there are circumstantial difficulties—COVID being one, the overloaded nature of the courts being another—there also seems to be a wilful neglect of international jurisprudence. If international law and guidelines are not invoked, then it is impossible to prosecute sexual crimes that occurred more than thirty years ago in a context of generalised armed conflict. Peruvian judges have done so before, so this is not a question of a lack of expertise per se.¹³ In addition, the current presiding judges could draw on the Amicus Curiae submitted in October 2020 by the War Crimes

Research Office regarding evidentiary practices (SáCouto and Ford Ouoba 2020). The judiciary could also make more effort to control the time frame in which the trial takes place. As in the appeal to the *MMMB* case (Corte Suprema de Justicia de la Republica 2017, see note 6), taking international law into account allows for a perspective that considers the coercive context of violence and sexual violence as a crime against humanity. Therefore, the political will of the judiciary, and the judges involved, matters.

What do the very different likely outcomes of these two otherwise similar cases mean for transformative gender justice in Latin America? The positive assessment of the *Sepur Zarco* case, as outlined by Burt (2019), provides a hopeful scenario for the transformative potential of criminal accountability for sexual violence, providing redress, and unsettle hierarchies contributing to a more gender equal and less violent future. Impunity feeds ongoing gender-based violence (Durbach 2016a). Unfortunately, accountability for this historical case also indicates the limits of criminal justice on its own: the conviction of two ex-military commanders is unlikely to change any of the underlying social, political, and economic structures that make the ongoing violence against women in Guatemala so persistent (see Fuentes 2020).

In Peru, the court is constrained by lack of resources, expertise, and acumen in terms of international criminal law and gender. The ongoing *Manta y Vilca* case, a seemingly straightforward and well-researched case of sexual violence at and around military bases during conflict, is a tour de force that holds victim-survivors and accused in its grip since procedures started in the mid 2000s. The victim-survivors of Manta and Vilca are brave and patient in their persistence, and it would be a tremendous blow if their efforts ended in another mistrial, or in acquittal. Post-trial reflection will have to determine what this has done for the victim-survivors and for future generations. Considering the analysis above regarding the evidentiary practice and the inefficiency of the trial, *Manta y Vilca* will unlikely produce transformative gender justice. Nevertheless, criminal justice is not lost yet: there is still a possibility that the case leads to a conviction. Such an outcome would still be very important for the state of accountability for sexual violence in Peru.

Notes

1. This does not mean that sexual violence was never prosecuted as war crimes before, or never given importance. See Seelinger (2020) for a brief overview of rape in historical war crime tribunals; Bourke (2015, 2015) for a history of rape; Heineman (2011) for a longer global history; and Harrington (2010) for contemporary politicization of conflict related rape.
2. The *Rome Statute Rules of Procedure and Evidence* (International Criminal Court 2002), and *UN 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* (UN General Assembly 2005).
3. The other significant contemporary case is, of course, Colombia, which also established domestic procedures – a ‘Special Jurisdiction for Peace’, a three-chamber court to establish, investigate and prosecute crimes against humanity. This special court is part of the Peace Accords signed in 2018 and is grounded in international law, making explicit efforts to facilitate testimony and evidence in cases of sexual violence (Burnyeat et al. 2020).
4. Following critique of the idea of ‘rape as a weapon of war’, later research shows that state forces used sexual violence to do more than strategically spreading fear. For an analysis see: (Boesten 2009, 2014).

5. Case *MMMB*, with a successful conviction of three ex security personnel for kidnap and rape as crime against humanity, on appeal confirmed and sentences raised, with the judges arguing that the first sentence did not take the seriousness of the crimes into account (Corte Suprema de Justicia de la Republica 2017). The main accused sentence is increased from 10 to 16 years, the second from 8 to 12, and the third one was not increased, but the amount of reparations to pay was doubled to 500K soles.
6. On appeal in 2018, the judges in the *Chumbivilcas* case ordered a re-trial of the case of sexual violence that was included but dismissed in the initial sentences of crimes against humanity (Corte Suprema de Justicia de la Republica, Sala Penal Permanente 2018). In *Los Cabitos 83*, testimony regarding sexual violence was heard, but excluded from the sentencing as they were categorised as individual common crimes, and hence, subject to the statute of limitations (Corte Suprema de Justicia de la República, Sala Penal Nacional 2017).
7. In 2014, CORTEIDH ordered the Peruvian state to pay \$105,000 reparations for the rape and torture of GCEG while she was in prison on terrorism charges. It is unclear if this was paid to her before her death in 2020 (Inter-American Court of Human Rights 2014).
8. This explainer is from the NGO DEMUS which provides legal support to the victim-survivors of MyV: <https://www.youtube.com/watch?v=HqP48icGxxM>
9. The petitioners and their teams wanted the trial to be public as an extra level of scrutiny, while the defence did not want that. The petitioners won, and the trial is recorded and transmitted via a state television channel.
10. Audiencia *Manta y Vilca* 22/4/21, virtual.
11. Jo-Marie Burt, personal communication May 2021.
12. At the same time we must recognise the continuous precarity of the political situation in Guatemala, and hence, of the judiciary. Particular circumstances allow progressive judges and prosecutors currently do their work independently, but they are also under constant serious threat.
13. The one successful conviction to date, *MMMB* (Corte Suprema de Justicia de la Republica 2017), had the same judges in their appeal as the one case where the appeal judges decided to order a retrial for the sexual violence committed during a military terror campaign. In this latter case, *Chumbivilcas* (see note 7), a previous judgement that had decided rape was a common crime, and hence subject to a statute of limitations was overturned (Corte Suprema de Justicia de la Republica, Sala Penal Permanente 2018). In both appeal cases, the judges explicitly decided to draw on international law in their judgement, making these decisions possible.

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