Advances in International Jurisprudence Relating to Sexual Violence Against Women During Armed Conflicts

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This article originally appeared in Spanish in The Journal Jurisprudence, Vol 15.

1. Introduction

During the last few decades we have witnessed substantial advances in material relating to the recognition and the respect of women's rights, and specifically the rights of women who are seen to be vulnerable to violence within a framework of armed conflict.

According to international statistics, at least one in three women have experienced battery, have been forced to have sexual relations, or have been physically mistreated in some way during the course of their lives. This figure tends to rise in the context of armed conflicts. Ayaan Hirsi Alí has previously noted, "The world-wide violence against women is already another holocaust", making reference to the figures contained in the 2004 report elaborated by the Centre for the Democratic Control of the Armed Forces in Geneva, "…between 113 and 200 million women in all the world have disappeared demographically."

It is therefore notable that, until recently, there has been little congruency between the aforementioned statistics and the specific references to crimes of a violent sexual nature against women in the framework of international regulation. Despite beginning to be sketched out from the middle of the 20th Century, the rights of women in relation to equality, non-discrimination, the prohibition of cruel treatment, freedom from

sexual aggression, or the right to effective recourse[1], had been absent in the resolutions of national and international courts. In the latter case, international jurisprudence has made it clear that that states have an obligation to prosecute crimes of sexual violence. However, it has not been until relatively recently that the prosecution of such crimes has become effective in some areas. Only when these offences are prosecuted as crimes do they cease possessing the character of collateral damage, as being inevitable or private in nature. Only when they are prosecuted are they understood in their own right to be serious crimes against humanity, crimes against international criminal law and crimes against international humanitarian law.

It is of historical significance that not a single one of the declarations made at the courts of Nuremberg included a reference to rape, forced prostitution or any other sexual crime. The word 'woman' does not even appear, despite the fact that crimes against women were extensively documented. Nor does the Charter of London, which created the Nuremburg court, include a reference to crimes of sexual violence. For its part, the Geneva conventions of 1949, with its 429 articles, only one phrase (Article 27 IV) prohibits sexual violence and forced prostitution.

Concurring with Ada Facio, it seems surprising and *"even more difficult to believe, [...]that the Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts of 1974 omits any explicit reference to sexual violence. In the additional protocols of the Geneva Conventions of 1977, which were negotiated with the idea of clarifying them and to fill-in some gaps, only one phrase in each explicitly protects against sexual violence, article 76 of Protocol I, which established that* ***"Women will be the object of special respect***

[1] (Art. 3 of the Universal Declaration of Human Rights, 1948. Art. 2 of the Pact of Civil and Political Rights 1966. Art. 3 of the International Pact of Economic Social and Cultural Rights, 1976. Art.1 & 2 of The Convention on the Elimination of all Forms of Discrimination against Women, 1979. Art 1 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984).

and will be protected particularly against rape, forced prostitution and any other form of indecent attack*" and in Article 4 of Protocol II, where the second paragraph (subparagraph (e) speaks of "insults to personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution and any other form of indecent attack.*
The statute of the International Criminal Court for the Former Yugoslavia specifically mentions rape as a crime against humanity and a competency of the court, not as an offence to the laws and customs of war. Furthermore, in the first formal charges bought before the court the crime of sexual abuse was not even included, despite the fact that the entire world had been shaken by press reports of ethnic cleansing in this republic, carried out through by means of forced pregnancies[2]."

Sexual violence in scenarios of armed conflict is one of the most instructive examples of how the use of violence is never neutral in respect to the gender of the victim. Sexual violence is used discriminatingly, making use of stereotypes and gender meanings in order to humiliate, defeat and control the adversary, and also to reward and to foster cohesion amongst troops. Some of the crimes of sexual violence, by their very nature, are only committed against women and children. Such is the case with forced abortions, forced pregnancies and breast mutilation. In these contexts, violence against women is extensively used as a weapon of war.

It is through the bodies of women who are sexually abused that an act of aggression is produced against the men with whom these women form relationships of dependency. In the Congo, the destruction of women's bodies through genital mutilation is an indirect but extremely efficient way to destroy the morale of the tribal group on whom the woman depends. As a report into gender-specific crimes has noted,

[2] Women and the International Criminal Court, Alda Facio.
Http://www.uasb.edu.ec/padh/revista1/analisis/aldafacio.htm

"Before the decade of the 1990's, rape and other sexual offences were considered as collateral damage of war and armed conflicts, or as attacks against the honour of families, attacks against masculine honour or private offences. This trend has changed from the time of the International Courts for the former Yugoslavia and Rwanda, holding individuals criminally responsible for acts of violence of based on gender or with a sexual nature, as well as after the inclusion of various specific forms of gender crimes in the Rome Statutes. Likewise, the implementation of a gender perspective in international jurisdictions also reaches courts with a regional character such as the Inter-American Court of Human Rights."
(Women's link Worldwide. Gender Specific crimes at the International Criminal Court. Guatemala, August,2010).

II. International Treatment of Gender-Specific Violence

A. The evolution of international regulations regarding sexual violence within a context of armed conflict.

Violence against women in any forms is extensively recognised in international law and jurisprudence as a form of gender-specific discrimination. It is understood that one of the principal causes of violence is the application of sexist stereotypes[3] to women and that, additionally, the violence infringes or annuls the potential for women to enjoy or exercise their rights and fundamental liberties.[4]

Beginning in the 1990's, and partly thanks to organisations that promote the defence of women's rights, an abundance of recommendations were generated along with the adoption of

[3] We use the term 'Sexist Stereotypes" in order to refer to the social and cultural constructions of the characteristics possessed or the roles that women or men should perform owing to their distinct physical, biological, sexual or social condition.
[4] "Violence against women is a form of discrimination which seriously infringes upon their rights and liberties in regard to their equality with men." Violence Against Women: General Recommendation No.19 UN Document HRI\GEN\1\Rev.1 at 84 (1994) United Nations Committee for the Elimination of Discrimination Against Women. 11TH Period of Sessions. 1992.

specific norms addressing sexual violence in the context of armed conflict. This helped foster greater international concern about the use of sexual crimes as a weapon of war.

Along these lines, the Committee for the Elimination of Discrimination against Women (General Recommendation 19, 1992) interpreted the term 'discrimination' used in the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) to include gender-specific violence as "violence directed against a women because she is a women or which affects her disproportionately. It includes acts which inflict damage or suffering of a physical, mental or sexual nature, threats to commit such acts, coercion, and other forms of deprivation of liberty." Violence against women can contravene dispositions of the Convention, (taking into account whether or not they explicitly mention violence) and the responsibility held by states if they do not adopt the necessary measures to impede these acts or to investigate and punish them. Likewise, it was emphasised that women are in particular danger in cases of war or conflict: "The wars, armed conflicts, and occupation of territories frequently lead to an increase in prostitution, sex slavery and acts of sexual aggression against women, which require the adoption of protective and punishing measures".

For its part, the preamble of the United Nations Declaration on the Elimination of Violence against Women, formulated in 1994, recognises that the most profound cause of violence against women is their subordination within society "violence against women constitutes a manifestation of historically unequal power relations between men and women, that has led to the domination of women and discrimination against them by men, impeding their full advancement, and that violence against women is one of the fundamental social mechanisms by which women are forced into a situation of subordination (in respect to men) making special mention of the particular vulnerability of determined groups of women…such as women who belong to minorities, indigenous women,

refugees, migrants, women who inhabit remote or rural communities, homeless women, institutionalised or detained women, children, disabled women, elderly women, and women in **situations of armed conflict, who are particularly vulnerable to violence.**

In Article 4, states are urged to act: "States should condemn violence against women and not invoke any custom, tradition or religious consideration in order to avoid the obligation to try to eliminate it."

The Security Council of the United Nations has raised the issue of sexual violence against women in situations of armed conflict and adopted various related resolutions:

- In resolution 1325 adopted in 2000, the Council urged member states to incorporate a "gender perspective" and place women on an equal footing in the prevention and solution of armed conflicts and the maintenance and fostering of peace and security." The sides involved in armed conflict are also urged to obey international laws protecting the rights of civilian women and children, and to incorporate policies and processes that protect women from gender-related crimes such as rape and sexual aggression.
- In resolution 1820 (2008), the Council demanded an end to all brutal acts of sexual violence against women and children when used as a war tactic and an end to their author's impunity. The United Nations and its Secretary General is also requested to facilitate the protection of women and girls in security initiatives directed by the UN, including in refugee camps, and that women be invited to participate in all aspects during peace processes.
- In resolution 1888 (2009), the Council details measures to increase the protection of women and girls in the face of sexual violence in situations of conflict, such as that of formally requesting the Secretary General to name a

special envoy to coordinate missions, send a team of experts in the case of especially worrying situations, and ordering peace-keeping forces to protect women and children.

- In resolution 1889 (2009), the previous resolution 1325 is reaffirmed and the persistent sexual violence against women in situations of conflict is condemned. Additionally, member states of the UN and civil society are urged to take into account the need to protect and empower women and girls, including those linked to armed groups, in the programmed activities that are carried out after conflicts.
- The Statute of Rome of 1998 now includes sexual violations not as offences against the honour of a person as it is listed in the Geneva Convention, but instead as an offence that is as serious as torture, slavery etc., and recognizes explicitly that the catalogue of sexual crimes is not closed. In the preamble, it is declared that all states have the duty to exercise criminal jurisdiction over those responsible for crimes categorized in international law. Article 6 of the Statute of Rome, lists the crimes of genocide, sexual aggression, and the forced imposition of reproduction; in Article 7.1g, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexual crime of a comparable nature, are identified as crimes against humanity when they are committed as a part of a generalised or systematic attack against the civilian population. In Article 8, these acts are also categorised as war crimes.

- REGIONAL TREATIES

In Article I of the American Declaration of the Rights and Duties of Man, formulated in 1948, it was affirmed that, “all human beings have the right to life, liberty and personal security”. In Article V it is established that, “Every person has

the right to the protection of the Law against attacks against their honour, their reputation and their personal and family life". In article XVIII of the Declaration, it is also affirmed that, "All people can appeal to the courts in order to exercise their rights".

In Article 3 of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence Against Women (*Convención de Belém do Pará*), adopted in 1994, it was affirmed that every woman has the "right to a life free from violence, in the public and private spheres". Article 4.g states that all women have "the right to uncomplicated and prompt access to competent courts that support them against acts that violate their rights […]". According to Article 7, the signatory states should practice due diligence in preventing, investigating, and punishing violence against women and "[…] include in their domestic legislation the criminal, civil and administrative norms, as well as those of any other nature which are necessary for the prevention, punishment and eradication of violence against, and to adopt the appropriate administrative measures where necessary […]"

In Article 3 of the Maputo Protocol it is stated that the signatory states will adopt and apply all necessary measures to guarantee the protection of rights of all women to their dignity, as well as the protection of women against all forms of violence, in particular sexual and verbal violence.

In Article 4 of the same protocol, the signatory states also recognise the obligation to "promulgate and apply law that prohibit all forms of violence against women, including undesired or forced sexual relations, whether they take place in public or private […]". Article 11 stresses the vulnerability of women in situations of armed conflict, and includes a paragraph exhorting the signatory states to promise to protect women who request asylum, refugees, women who are returning or displaced, against all forms of violence, rape and other forms of sexual exploitation and guarantee that these acts will be considered as war crimes, genocide and crimes and humanity, and that their authors will face court in a competent criminal jurisdiction.

In section 4 of the Declaration on the Elimination of Violence against Women in the ASEAN region (formulated in 2004), the signatory states agree to: promulgate laws for the prevention of violence against women and, when necessary, strengthen and modify them; promote the protection, treatment and reintegration of victims and survivors by, for example, adopting measures for the investigation, prosecution, punishment and, in pertinent cases, the rehabilitation of perpetrators; and impede that women and girls who have been subject to whatever form of violence become the object of victimization again, be it in the home, workplace, community, society, or in custody.

Of special significance for the Colombian case is the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, known as the *Convención de Belém do Pará.* The convention, which entered into effect in 1995, has bee applied on innumerable occasions by the Inter-American Court of Human Rights and is binding on those states which form part of that court, including Colombia, obliging them to comply with its dispositions for the prevention, punishment and eradication of violence against women.

Simultaneously, protection against discrimination based on sex, age, ethnicity or other conditions is rooted in international human rights law and has *jus cogens* status.[5] Also noteworthy is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and especially General Recommendation 12 for its reference to discrimination against women in sexual violence and its obligatory eradication.

Likewise, international human rights law consolidates the protection against gender-related violence committed during armed conflicts through the resolutions of the Security Council

[5] See CEDAW. General Recommendation No. 19, 1992. http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19
Inter-American Court of Human Rights. Case of Gonzalez and others ("Campo Algodonero") vs. Mexico. 16th November, 2009. http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_esp.pdf

and the General Assembly[6] and the interpretation of treaties at a regional and international level. Regional courts and United Nations committees have adopted the definition of rape established by the International Criminal Courts.[7]

B/ THE PROSECUTION OF GENDER-RELATED CRIMES IN INTERNATIONAL CRIMINAL LAW

In 1994, during the time in which the armed conflict persisted in Rwanda, approximately 500.000 women were tortured, raped, mutilated and massacred.[8] In Bosnia-Herzegovina, it has been calculated that soldiers and members of the police force raped more than 60.000 women and girls in an organized and systematic manner.[9]

In 1993 and 1994, The United Nations Security Council created the courts for the former Yugoslavia and Rwanda, respectively. For the first time rape was treated as a crime against humanity. Through their findings, these courts established the precedents in the terms of categorisation and punishment of these crimes.

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[6] Security Council Resolutions: 1325, October 21 2001; 1822, June 20 2008; 1888, September 30, 2009; 1960, December 16 2010.
General Assembly Resolution: 61/438
Beijing Platform Action, 1995

[7] See, for example, Inter-American Court of Human Rights. Case of Rosendo Cantú and other vs. Mexico. 15th May 2011.
Inter-American Court of Human Rights. Case of Fernandez Ortega and Others vs. Mexico. 30th of August, 2010.

[8] Report by the Special Rapporteur on Violence Against Women, its causes and consequences, Sra. Radhika Coomaraswamy, United Nation Human Rights Commission, 55th Period of Sessions. Integration of the Rights of Women and Gender Perspective: Violence Against Women, prepared in conformity with Resolution 1997/44 of the Commission on Human Rights. E/CN.4/1999/68/Add.4. January 21, 1999.

[9] United Nations Secretary General Report 1996, Aggressions and Violations of Women in Areas of Armed Conflict in the Former Yugoslavia. Cited by Roxana Arroyo Vargas and Lola Valladares Tayupanta in Report in Sexual Violence Against Women, Series Legal Documents, Year 1.

The international jurisdiction on sexual violence since the resolutions of these courts and the special court for Sierra Leone has established that rape and sexual aggression in itself can constitute genocide, crimes against humanity, war crimes and torture. Likewise, they have established that rape is an element of other crimes such as sexual slavery and forced prostitution.

The prevention and the fight against genocide and crimes against humanity possess the status of *ius cogens (peremptory norm)* and impose upon states an inalienable obligation or duty: *obligatio erga omnes.* Gender-related violence can constitute the *actus reus (guilty act)* of the crime of genocide or of crime against humanity, and thus its prosecution and reparation is obligatory under international criminal law.

The Evolution of the Crime of Rape in International Jurisprudence.

The crime of rape was the first to be recognised as a crime against humanity, genocide or war crime in international jurisprudence. Today, we can assert that the prohibition of rape and sexual violence has the status of international customary law under international criminal law and international humanitarian law. Along the same lines, the field of international law and human rights, the regional courts and committees of the United Nations have adapted the definition of rape established by the International Criminal Courts.

The interpretation of the crime of rape has evolved due to the jurisprudence of the international criminal courts for the former Yugoslavia and Rwanda, jurisprudence that has subsequently been considered by the special court for Sierra Leone and The International Criminal Court (ICC). In the case of the International Criminal Courts for the former Yugoslavia and Rwanda, the aforementioned evolution has turned primarily on two constitutive elements of the crime of rape: the acts of penetration and consent. Previously, it had been understood that

rape had only occurred with vaginal penetration by the aggressor's penis, and that this took place without the victim's consent.

The aforementioned courts have broadened the concept of penetration and have established in which cases we can consider *per se* that there was no consent from the victim.

In regards to penetration, it was the International Criminal Court for Rwanda (ICCR) that presented, in the case *Akayesu*, a new definition of rape. It did so by broadening, on the one hand, the act of rape to any type of bodily penetration and, on the other hand, to any type of bodily invasion with any type of object without consent.

In its judgement, the court explained that "rape is a physical invasion of a sexual nature, committed against a person under coercive circumstances […] Rape is not limited to the physical invasion of the human body and can include acts that don't implicate penetration or even physical contact". This definition was subsequently adopted by the International Criminal Court for the Former-Yugoslavia (ICCY) in the *Celebici* case. However, the judges incorporated a new definition of rape in the *Furundzija* case, where it was established that objective elements of the crime of rape are: "i. Sexual penetration, including minor penetration: a) of the vagina or anus of the victim with the penis of the perpetrator or any other object used by the perpetrator; or b) of the victim's mouth with the penis of the perpetrator; ii. Under coercion or by force or by use of threat against the victim or a third person. This new definition generated extensive debate surrounding the interpretation of the crime of rape, which was finally dealt with in the ruling in the case *Musema* in which the ICCR analysed the two definitions that had been given until that time, and ruled that the definition in the case of *Akayesu* was preferable to that of the case of *Furundzija*, because the former included all the conduct defined in the latter.

Despite this, the discussion surfaced again with the ruling in the case *Kunarac et al*, in which the ICCY again adopted the definition of the *Furundzija* case. It did, however, add a new element to the debate by analysing the interpretation of consent. Here, the court ruled that in order for rape not to exist, "consent should be given voluntarily, as a result of the willingness of the victim as evaluated in the context of the existing circumstances."

In cases of rape, "the *mens rea* is the intention to carry out sexual penetration, and the knowledge that this will occur without the consent of the victim". The court that studied the appeal that was lodged in the *Kunarac* case agreed with this definition and, furthermore, clarified that "there are factors 'beyond the use of force' that could cause an act of non-consensual or involuntary sexual penetration of the victim. A restricted interpretation limited to the use or threat of force could permit the perpetrator to escape responsibility for their sexual activity by taking advantage of the coercive circumstances and without depending strictly on physical force. The court went further and signalled that the circumstances that led to the charges of rape as a crime against humanity or war crimes "will be almost always universally coercive", in a manner in which "true consent would be impossible".

Consensus regarding the definition of rape was finally reached in the case of *Muhumana*, in which the ICCR signalled, "the definition given in *Akayesu* and the given elements in *Kunarac* are not incompatible or substantially different in their application. While *Akayesu* refers in general terms to a "physical invasion of a sexual nature", *Kunarac* centred on the articulation of the parameters within which physical invasion of a sexual nature can be constituted in order for it to be classified as rape".

In addition to the aforementioned elements, the *Kunarac* case also warrants attention given other important elements of the ruling: it was established that, "the forms of forced sexual penetration inflicted upon women with the purpose of interrogation, punishment or coercion **constitute torture**, and that the sexual access to women, exercised as a form of property right, constitutes a form of slavery and therefore a crime against humanity".[10]

In regards to **slavery**, the appeal court established that slavery could occur through the sexual exploitation of women and girls. It considered that in order to be regarded as such other factors should also be taken into account, such as "the control of somebody's movement, the control of the physical surroundings, psychological control, measures taken to prevent escape, force, threats, coercion, duration, affirmation of exclusivity, subjugation to cruel treatment and abuse, the control of sexuality and forced labour.[11]

Concerning **consent in case of slavery**, the appeal court accepted that a lack of consent was not an element of the crime which the prosecution must prove because slavery is based on the exercise of the right to property and considering such circumstances, it was impossible to express consent. As such it was sufficient to presume that in these cases consent is absent. [12]

In regards to **torture**, the appeal court considered that this is constituted by an act or negligence that causes pain or serious suffering, be it physical or mental, but that there are not other specific requirements that permit an exhaustive classification or listing of the acts that could constitute torture.[13] Beforehand, a court had thrown out the argument of the appealing parties

[10] Viseur-Seller, Patricia: Gender-Based Persecution, United Nations Expert Group Meeting on Gender-Based Persecution, Toronto, Canada 9-12 Nov. 1997. EGM/GBP/1977.3. November 6, 2007.
[11] Sentence, Court of Appeal, Paragraph 119.
[12] Idem. Paragraph 120.
[13] Idem. Paragraph 129.

which posed that suffering should be visible, because they considered that some acts establish *per se* the suffering of the victims, and that rape is one of these. The court went further and took the existence of suffering to be already proven, without need of a medical certificate, establishing that sexual violence caused pain and serious suffering, be it mental or physical. In other words once rape is proven to have occurred it is also considered to be proven that the suffering or severe pain of torture has also taken place, because rape implicitly involves said pain or suffering.[14]

Cesic Case

In this case the accused, Ranko Cesic, was investigated for various charges which including the sexual assault of two detained Muslims. During the process, the accused accepted the charges and was found guilty by the court for crimes against humanity for intentionally forcing two Muslim brothers to perform oral sex on one another while other soldiers watched them. The court considered that this type of action constituted a degrading and humiliating act, in violation of international humanitarian law.

The court considered the action as 'aggravated', taking into account the impact that it had on the victims and their family, and also for having been committed in front of a third party, heightening the humiliation of the victims.

Tadic Case

Members of the Serbo-Bosnian forces acting in the municipality of Prijedor were declared by the Commission to be culpable of crimes against humanity and war crimes perpetrated throughout 1992. They were not found guilty of committing an act of sexual aggression, but were found guilty of participating in a campaign of generalized and systematic torture by means of

[14] Sentence, Court of First Instance, Paragraph 205.

actions such as beatings, torture and sexual assault. Despite the fact that the offence of sexual assault in the original charges was included, it was subsequently dropped owing to the victim's unwillingness to declare.

The sentence affirmed categorically that, "rape and sexual abuse can be considered as forming part of a generalised and systematic campaign of terror against the civilian population. It is not necessary to prove that the rapes themselves were generalized or systematic but that rape constituted one of numerous types of crimes which were committed in a general and systematic manner, and included a campaign of terror on the part of the aggressor".

For its part, in the case of Prosecutor vs. Issa Hassan Sesay, Morris Kallon and Augustin Gbao, known as the RUF case, the Special Court for the Sierra Leone (SCSL) considered that rape exists when the accused invades the body of another person and whose conduct results in penetration, as minor as it may be, of any part of the body of the victim, using his sexual organ or penetrating the anus or genitals of the victim with any object or any part of this body, always being the case that the invasion has been the result of the use of force or coercion. The court considered that the use of force or the threat to do so produces the victim to suffer from a fear of violence, aggression, detention, psychological oppression or fear of abuse of power, against her or against some other person, and taking advantage of a climate of coercion.

Likewise, in the Statute of Rome, it is stated that consent "cannot be inferred from any word or form of conduct of the victim when the use of force, the threat of force, coercion or the use of a climate of coercion, have reduced the victim's capacity to give their consent voluntarily and freely". Nor can it be inferred when the victim is incapable of giving their free consent. Also in the statute of the SCSL it is signalled that consent cannot be understood to exist when the victim remains

silent or doesn't resist sexual violence, and further clarifies that the credibility, honour or the sexual availability of the victim or of a witness, cannot be used to infer anything about the sexual character of the anterior or subsequent behaviour of the victim or witness.

As can be observed the definitions of rape given in the SCSL and the Criminal Court are derived from definitions that emanate from the courts *ad hoc*. In much the same way, the remarks surrounding consent are fruits of the evolution of the jurisprudence of the courts for the former Yugoslavia and Rwanda.

Today, rape and sexual assault can in themselves constitute genocide, crimes against humanity, war crimes and torture. Similarly, rape is now considered as an element in other crimes such as sexual slavery and forced prostitution.

C/ The International Criminal Court.

The first cases of investigations relating to sexual violence to occur within the framework of the ICC have been developed in response to the situation in the Democratic Republic of the Congo (DRC). The reports presented to the court are centred on cases of torture, forced removal from homes, recruitment of children and sexual abuses. The United Nations estimates that more than 40.000 women and girls were raped. The case which is most advanced corresponds to the investigation of Germain Katanga "Simba" and Mathieu Ngudjolo Chui, two of the guerrilla leaders of the DRC who were accused of recruiting child soldiers, as well as the murder, rape and forcing women into sexual slavery. Their case is the second to arrive at the court, and is centred on the events of 2003 in Bororo, a village in the region of Ituri, in the northeast of the country. According to the prosecution, Katanga and Chui joined forces to launch their troops against the inhabitants of the village, killing 200 people. They later took at least 15 children for the purpose of

adding to their ranks. Many of the victims were mutilated with machetes while the women were raped by the attacking forces.

Katanga, alias 'Simba', was the chief of the Patriotic Force of Resistance. He belonged to the *Lendu* ethnic group, a group with agricultural traditions and in competition with the *Hema* ethnic group who were pastoralists. Chui, also *Lendu*, commanded the National Integration Front. The chief prosecutor at the ICC, Luis Moreno Ocampo, assured that the conflict in Ituri, an area rich in gold deposits, "formed part of the civil war that desolated Congo after the genocide perpetrated in neighbouring Rwanda in 1994". After reviewing almost 17.000 documents, the prosecution called 26 witnesses to the stand. Of these, 21 hid their identity for fear of reprisals. Before the opening of the case, Katanga stated his "*confidence in the impartiality of the process"*. Chui considered himself *"yet another victim of the war"*.[15]

The decision confirming the charges was made in September of 2008, and the case has been in trial phase since the 24th of November 2009.

The defence alleged that it is bringing forward the investigation of the events because of internal orders, and for that reason the principal of *complementarity* should be respected.

The majority decision confirming the charges found that there was sufficient evidence to confirm the charges of the war crimes and crimes and against humanity in relation to the accusations of rape and sexual slavery which are alleged to have occurred in a intentional and coordinated manner, within the context of a systemized and generalised attack against the civilian population on the 24th of February 2003 during the taking of the city of Bogoro. In this context, the decision confirming the charges, together with the decision confirming

[15] http://www.agenciacna.com/2/nota_1.php?noticia_id=27976

the charges in the case of *Lubanga*, are the only two decisions of a substantive character emitted by the court until this time of writing. In this case, we can see that for the first time contextual elements of the crimes against humanity in the Statute of Rome (ER) and Elements of Crimes (EC) are dealt with, as well as the specific elements of certain offences of a sexual violence (rape and sexual slavery) categorized in the Statute of Rome as war crimes and crimes against humanity.

It should be noted, however, that in the *Lubanga* Case there was no conviction given for this type of crime, despite requests from prosecution.

D/ Regional Jurisdictions: Inter-American System of Human Rights.

The Inter-American system of human rights has also led to important advances in jurisprudence through decisions made by the commission and the jurisprudence of the court. Firstly, between 1991 and 2000 the Inter-American commission had already identified 14 cases relating to sexual and reproductive rights, of which 6 involved the use of the sexual violence as torture by the state. The Inter-American Court, for its part, has established the responsibility of states in the cases of forced sterilization, intra-family violence, and torture based on sexual abuse.

In the Inter-American Commission there have also been positive developments in areas of crimes with a sexual nature, and justice for victims of sexism. These have occurred in parallel with the development of the already mentioned jurisprudence.

The above mentioned commission made declarations regarding sexual abuses in two reports: *Informe sobre Haiti de 1995* (Report on Haiti, 1995), in which it was held that acts of violence against women qualify as crimes against humanity

when they are used as means to spread terror; and the *Informe s/Peru de 1996* (Peru Report, 1996) which after defining sexual abuse as "all acts of physical and mental abuse perpetrated as an act of violence", was categorised as a form of torture.

In parallel, the Inter-American Court of Human Rights has to this date given two relevant sentences regarding sexist violence and sex crimes, "*Castro Castro vs. Pero"* (2006) and "*Campo Algodonero vs. Mexico*" (2009).

For the first time, the gender perspective was introduced in the jurisprudence of the Inter-American Court of Human Rights in the case of "Castro Castro". In this case, the court considered it as demonstrated that during domestic and international armed conflict the opposing parties utilise sexual violence against women as a means of punishment and repression. The use of state power to violate the rights of women in an internal conflict not only affects the women directly but can also have the objective of affecting the society more generally, through such abuses or by sending a message or lesson.

The court stated in its legal reasoning (part 206) that women who were deprived of their liberty in the penal institution *Castro Castro*, " …not only received treatment contrary to their personal dignity, but were also victims of sexual violence given that they were kept naked and covered only by a sheet, surrounded by armed men who were apparently members of the armed forces of the state. What qualifies this treatment as sexual violence is that the women were constantly observed by the men." In following the line of international jurisprudence and taking into account the contents of the Convention for the Prevention, Punishment and Eradication of Violence against Women (*Belén do Para),* the court considered that "sexual violence is constituted by actions of a sexual nature which are committed without the consent of a person, and which in addition to including the physical penetration of the human

body can also include acts that don't involve penetration or even any physical contact."

Likewise, the court recognised (311), "that sexual violations against a detained woman by an agent of the state is an especially serious and punishable act, taking into account the vulnerability of the victim and the abuse of power of the agent. Likewise, sexual violation is an especially traumatic experience that can have severe consequences and cause great physical and psychological harm that leaves the victim "physically and emotionally humiliated", and in a situation that is difficult overcome in time when compared to other traumatic experiences."

Similarly, in the case of "*Campo Algodero*" the Inter-American Court of Human Rights adds to the concepts evident in the already cited precedent and established the responsibility of the state for having "remained indifferent before a chronic situation of violence... before the existence of a culture of discrimination against women". According to the Inter-American Court of Human Rights, the state is responsible for acts committed by individuals considering its condition as a guarantee against the risk of sexist violence: Theory of created risk (art.7 of the Convention of Belén do Pará)

In light of these cited antecedents, it can be concluded that the international and Inter-American jurisprudence presents itself as a point of inflexion in the development of sex crimes as crimes against humanity, making note of only some dissidence at the moment of categorisation with some sentences and opinions claiming their status to be one of an autonomous crime against humanity, and others claiming it to be a form of torture.

E/ Summaries of Particular Cases in the Inter-American Judicial Area

1. Case of Fernando y Raquel Mejía vs Peru

In this case the Peruvian state was accused of crimes relating to the events of June 1989, when a group of military personnel entered the residence of Fernando Mejía Egocheaga and his wife, Raquel Martín; He was taken away and his wife was raped on two occasions.

Mr. Mejía was found dead two days later with his body displaying signs of torture. Mrs. Martín was subjected to threats and intimidation, obliging her to leave the country.

Concerning this particular case of rape, the Inter-American Commission on Human Rights determined that the elements constituting torture as established by the Inter-American Commission for the prevention and sanction of torture (an act committed with the intention to inflict physical and mental suffering with the purpose of punishing or intimidating, and committed or instigated by a public servant.) had occurred and that the sexual assault was a deliberate offence. The Commission established there were violations of the rights to personal integrity (art.5) and honour and dignity (art.11) of the Inter-American Convention on Human Rights.

2. Case of Dianna Ortiz vs. Guatemala

Dianna Ortiz was a nun who was kidnapped and tortured by agents of the Guatemalan government in 1989. On various occasions she was raped by multiple agents and was objected to torture by means of threats and suffered injuries such as cigarette burns.

In this case the Commission determined that the inhuman treatment received by Sister Ortiz at the hands of government

agents corresponded to the definition of torture as it involved inflicting physical and mental suffering in order to punish and intimidate the victim for her participation in certain activities and for her association with certain persons and groups. The government agents, acting in an official capacity, were responsible for the violations of Sister Ortiz's rights. The kidnapping and torture of Sister Ortiz was deemed to be part of a number of activities violating human rights that were committed by the Guatemalan government.

The Commission concluded that the Guatemalan state was responsible for the violation Dianna Ortiz's Human Rights, specifically her personal integrity, personal liberty, judicial guarantees, the right to the protection of honour and dignity, freedom of conscience and religion, right to association, and the right to judicial protection, all consecrated in the articles 5, 7, 8, 11, 12, 16, 25, of the American Convention, and also for the failure to comply with their obligations as established in Article 1.

3. **Case of Ana, Beatriz and Celia González Pérez vs. México**

In 1994 agents of the Mexican state detained the sisters Ana, Beatriz, and Celia González Pérez, and their mother, Delia Pérez de González, for the purpose of interrogation. One of the victims was a minor. During two hours they were detained, beaten and raped on various occasions by the military personnel. The state was also denounced for having neglected their responsibility to investigate, for the lack of punishment of those responsible for the violations, and for not compensating the victims.

In this case, the Commission reiterated the characteristic of torture in cases of rape and determined that: "sexual violations committed by members of the security forces of a state against members of the civilian population constitute, in all cases, a serious violation of Human Rights as protected in articles 5 and

11 of the American Convention, as well as the norms of international humanitarian law. It also noted that the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women guarantees all women the right to a life free from violence.

The Inter-American Commission considered that the abuses committed against the physical, psychological and moral integrity of the three Tzeltales sisters, as committed by the agents of the Mexican State, constitute torture and a violation of the private lives of the four women and their family as well as an illegal attack on their honour and reputation, causing them to flee their community due to fear, shame and humiliation. “According to the international jurisprudence of Human Rights, in certain circumstances, the anxiety and the suffering imposed on the immediate families of the victims of serious violations of Human Rights constitute an additional violation of the right to the personal integrity of the family members.

In the cited case, the Inter-American Court of Human Rights, found that the treatment received by the mother of the victims, Delia Pérez de González, who had to witness the humiliation of her three daughters at the hands of the Mexican Armed Forces and later share with them the ostracism of their community, constituted a humiliation and degradation which violated her right to personal integrity as guaranteed by the American Convention.

The Commission concluded that the Mexican state violated the following rights consecrated in the American Convention to the detriment of Mrs. Delia Pérez de González and her three daughters Ana, Beatriz, Celia González Pérez: the right to personal liberty (article 7); personal integrity and the protection of honour and dignity (Articles 5, 11); guarantees of judicial protection (articles 8, 25). In regard to Celia González Pérez, article 19 of the Declaration of the Rights of the Child and all articles related to the general obligation to guarantee

rights, as stated in article 1 of this international legal instrument. On the same evidence, The Inter-American Court of Human Rights also found the Mexican state responsible for the violation of article 8 of the Inter-American Convention for the Prevention and Sanction of Torture.

Additionally, the Inter-American Court has established important jurisprudence through its rulings that can be considered as an advance in the investigation and sanctioning of sex crimes at an international level.

4. Case of Inés Fernández Ortega Vs. México

This case involved an indigenous woman from teh Me'phaa village (Tlapaneco) who was threatened, beaten and raped by three members of the Mexican armed forces in the state of Guerrero in 2002

In 2004, after a series of irregularities before the Mexican Authorities, the case was taken to the Inter-American Human Rights Commission. In 2009, the Commission presented a complaint against Mexico in the Inter-American Court of Human Rights, in which it denounced various human rights abuses relating to Fernández Ortega, her husband, and her five children.

On the 30th of August 2010, Mexico was declared responsible for the violation of the human rights of Inés Fernández Ortega relating to offences against her personal integrity, dignity, private life, and for being object to arbitrary interference at her home address. In its own words, "the court reiterates that which is stated in the *Convention of Belém do Pará*, that violence against women not only constitutes a violation of human rights, but is also an "offence against human dignity and a manifestation of the historically unequal relations between men and women" which, "transcend all sectors of society regardless of class, race, ethnic group, income level,

culture, educational level, age or religion and which negatively affects its own foundations". The court, following international jurisprudence and taking into account the contents of the Convention(above), had previously considered that sexual violence is constituted by actions of a sexual nature that are carried out against the consent of a person, that in addition to physical acts to a human body can also include those acts that do not involve penetration or any physical contact whatsoever. In particular, sexual assault constitutes a paradigmatic form of violence against women whose consequences can even transcend the victim herself. *The Commission pointed out that sexual violations committed by members of state security forces against members of the civilian population constitute a serious violation of human rights as protected in Article 5 and 11 of the American Convention. In the case of sexual violations against indigenous women, the pain and humiliation is worsened by their indigenous status owing to the "lack of knowledge of the language of the perpetrator, and of the rest of the intervening authorities, and for the rejection by their community which can result from these acts."*

The sentence that condemned the violations of her husband and children's human rights also declared that the Mexican state should commit to legislative reforms concerning the military, concede scholarships to the children of Fernández Ortega, award economic compensation, and provide medical and psychological treatment to the victims.

5. Caso Castro Castro vs. Peru (2006)

This case refers to the massacre which occurred during four days of the so-called "*Operativa Mudanza 1*" in the *Castro Castro* penitentiary in Peru. The prisoners in the pavilions 1A and 4B saw their lives constantly endangered by the intensity of the attack, which included the use of military firearms and involved the participation of police agents, the army and special

forces. Forty-one prisoners were killed and many others were subjected to cruel and degrading treatment.

The significance of this case lies in what was identified as differentiated treatment in the military action against women. According to the court, "The massacre was initially directed against the approximately 133 women who were in the Pavilion 1-A of the *Miguel Castro Castro* penitentiary, and had the aim of exterminating them and turning them into singularised targets in the attack against the prison. Many of the prisoners were shot at close-range. The court also found that the instances of forced undressing which many of the women were also subjected to a form of sexual violence and therefore a violation of their right to personal integrity.

6. Caso Campo Algodonero (2009)

This complaint relates to the alleged international responsibility of the state in the "disappearance and subsequent death" of the young women Claudia Ivette González, Esmerelda Herrera Monreal and Laura Berenice Ramos Monárrez, whose bodies were found in a cotton field in Ciudad Juarez on the 6th of November 2001. The state was found responsible for: "…a failure to adopt the means to protect the victims, two of whom were minors; the failure to prevent the crimes despite the well-known existence of gender-specific violence which had already left hundreds of women and girls murdered; the failure of authorities to respond to the reporting of their disappearance; the failure to conduct due diligence in the investigation of the murders [...], as well as the denial of justice and a failure to provide adequate compensation."

In this case, the Court found that the disappearance and subsequent death of the three women in the context of discrimination in Ciudad Juarez (Mexico) constituted violence against women, based on the American Convention on Human Rights and the *Convention Belém do Para*.

7. Case of Rosendo Cantú and other Vs. Mexico (2010)

The contents of this case relate to the alleged sexual abuses committed against the Me'phaa indigenous women Valentina Rosendo Cantú, as well as the alleged failure to conduct due diligence in the investigation and punishment of those responsible for the crime; the alleged consequences of the events on the daughter of the presumptive victim; the supposed failure to provide adequate compensation to the presumptive victim and her family; the alleged use of military jurisdiction to conduct he investigation and ruling of human rights violations, and the supposed difficulties which indigenous persons, in particular women, have in acceding to the justice and health systems. The court noted that the sexual violations suffered by the indigenous woman were a violation of the right to personal integrity, personal dignity and private life.

On the 8th of November 2011, the Inter-American Commission on Human Rights accepted the case relating to the sexual torture of 11 women who were raped during police operations on the 3rd and 4th of May 2006, in Texcoco and San Salvador Atenco, in Estado de Mexico, Mexico.

F/ European System of Human Rights

The European Court of Human Rights has also found that sexual assaults can constitute torture. An example can be found in the case of Aydin vs. Turkey which involved a seventeen-year-old girl who lived with her parents in a village in south-eastern Turkey from which she had never left. In 1985, serious conflict occurred in this part of the country between the security forces and members of the Kurdish Separatist Party. Turkey has reported that more than 4000 civilians died as a result of this situation and that a similar number of the state security forces were also killed.

Within this context Aydin was beaten and raped while her father and family members had been illegally detained. When Aydin went to ask for her detained family members some of the guards took her into a room, undressed her and put her in a truck tire and made it spin. Later, they beat her and hosed her with a high-pressure water hose. They dressed her again and, blindfolding her, took her to an interrogation room where a man dressed in military fatigues ripped her clothes from her and raped her.

Finally, the case came to be viewed by the European Court of Human Rights which in a sentence in Strasbourg on the 25th September 1997, sustained that Ms. Aydin had been subject to torture, rape and ill-treatment while she was detained by the Turkish security forces, acts which are contrary to article 3 of the European convention.

In this case, the tribunal considered that the rape of a detained woman by a civil servant of the state was an especially serious and hateful act, and of a character that was so serious as to constitute torture. Furthermore, the tribunal sustained that the Turkish authorities had failed to carry out a complete and effective investigation of Aydin's complaint and that there were ineffective means for its resolution.[16]

The court determined that rape can constitute torture and expressed: "...the rape of a person who is a detained by an agent of the state should be considered especially serious and unusually cruel treatment, given the ease with which the perpetrator can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which don't heal in time as can other forms of physical or mental violence."

The court concluded that the accumulation of physically and mentally violent acts committed against the plaintiff, and

[16] http://daccess-ods.un.org/TMP/6294938.92192841.html

the especially cruel act of rape to which she was submitted, are constitutive of a the crime of torture as punishable in Article 3 of the convention.

The responsibility to investigate, punish and compensate for the damage caused by crimes of a sexual nature corresponds to the state. The international jurisdiction is complementary, and therefore necessary in itself, if the impunity of the aforementioned crimes is to be avoided and the judicial systems strengthened, thus permitting impunity to be countered in the context of armed conflict.

G/ The prosecution of Crimes of Sexual Violence in National Courts

National jurisdictions have begun to take into account the significant advances in international jurisprudence (in International Criminal Law and International Human Rights Law) in matters of sexual violence and in dealing with these crimes, is creating new jurisprudence and enriching that which already exists. This is all happening with the view to offering compensation to the victims. Some antecedents can be found in the *Juzagado Central de Instrucción no.5* of the *Audiencia Nacional* of Spain in the investigation of crimes committed by the Argentinean and Chilean dictatorships as pursued by the Judge Baltasar Garzón and supported by the principle of universal jurisdiction for crimes of genocide, torture, terrorism and crimes against humanity. Below, other cases in Argentina and Spain are outlined.

a) In Argentina, case No. 2086 and the accumulated case No. 2277 against Gregorio Molina provide an example. Here, the criminal court of Mar de Plata established in July 2010 that at a national level it had been accredited in the case of the juntas and in the reports published by the Inter-American Commission on Human Right and the National Commission on the Disappearance of Persons, that the violations suffered by the

women who were held in secret detention centres were not isolated or occasional cases but were instead constituted systematic practices carried out within a secret plan of repression and extermination set up by the state and directed by the armed forces.

In addition, the case adds that the international jurisprudence in unanimously sustaining that the crimes of rape and sexual violence committed against women in a time of war or internal conflict of a country constitute crimes against humanity.

The judgements of International courts created for the prosecution of crimes committed in Yugoslavia and Rwanda have also pointed in a similar direction. The International Criminal Court's Statute of Rome specifically mentions rape, sexual slavery, forced prostitution and forced sterilization as crimes against humanity when these are committed in times of war or armed conflict. Furthermore, in the resolution of "Complementary Activities of the Secret Detention Centre Arsenales Miguel de Azcuénaga and related Kidnappings and Disappearances", the court of Tucumán declared on 27th of December 2010 that the crimes of violation of domestic privacy, illegitimate deprivation of liberty under duress and under humiliating circumstances, torture followed by death, indecent assault, sexual assault and homicide investigated in this case, had been perpetrated within the context of a systematic attack by the state against a substantial group of the Argentinean nation (political groups, political military personnel, and groups of people involved in social struggles without belonging to any particular political party) and which had been identified as "enemies" of "western Christian" thought (cfr. Annex 5.8), which can be characterised in a context of the international crime of genocide.

The sexual violence which took place during the repression is described in the following terms: "While the impunity laws were still in effect (1987/2004), only penal

actions were initiated for the crime of kidnapping a minor and a few for the appropriation of goods. The sex crimes denounced by victims in their testimony were not subject to criminal proceedings, a result of having remained hidden until recent times. *(**Cfr. Sentence of the Oral Court of Santa Fe in the Case of "Barcos"** (no.43/08) where the crimes of sexual assault is analysed as a criminal form of torment; Sentence of the Oral Tribunal en the Molina case (n.2086/10) where it was considered as proved that, within the context of a systematic plan of repression, it was habitual for the women to be illegitimately detained in secret centres where they were submitted to sexual abuse by their captors or guardians. As a consequence the court upheld that the acts of sexual violence did not constitute isolated or occasional acts but instead formed part of a systematic and generalised practice.*

Such a situation was accordingly noted by the Committee for the discrimination against Women (CEDAW) which recommended to the Argentinean state that it adopt proactive measures that make public, prosecute and punish the incidents of sexual violence perpetrated during the past dictatorship. The Committee further recommended that this be done within a judicial framework that deals with crimes against humanity, conforming with the contents of Resolution 1820/ 2008 of the Security Council, and which concedes compensation to the victims. (Final observations, 46th Period of Sessions of 12th-30th July 2010, point 16.)"

The commencement of proceedings on 19th of May 2011 in the case involving the **Penitentiary Vila Urquiza,** established that **aggravated gender-related torture and sexist violence had been committed in a situation where women were secretly detained women during the period of state terrorism and subjected to sexual violence and sexual abuses.** This case in particular analyses the authorship, indirect or otherwise, which appears when an agent utilises another who acts, but does not commit the crime himself, whether it be acting without objective authenticity, without malice, or justifiably.

In the framework of such concepts, Roxin elaborates the thesis that there can exist another form of authorship in which the control over the act emanates from the strength of an apparatus of organised power. Roxin also sustains that the usual concepts are not applicable when dealing with crimes of the state, war and in organisations in which the determiner and determined commit the same crime, with the fungible nature of the latter being decisive, noting the possibility for it to be changed at will as if it were a mechanical artefact: *The further away the executor is from victim and the offensive conduct, the closer he is to the executive instruments of power which provide him with greater control over the act.* (Zaddaroni, Alagia, Slokar; Manuel de Derecho Penal Parte General, Edua, 2005, Chapter 24).

Consequently, and in accordance with the theory outlined above, in order to determine if a person has acted as an intermediary author in virtue of the dominance of the organisation it is necessary to demonstrate that the indicted person held a position and fulfilled its functions with decision-making capacity within the organisation, and that in such a condition they would have intervened in the offending acts in so far as these had been perpetrated by forces under their orders and effective control, or their authority and effective control. In accordance with the case their responsibility exists "...as a result of his or her failure to exercise control properly over such forces, where: a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and b) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution." (Art. 28 Statute of Rome)

Applied to the current case, it can be affirmed that the witnesses/victims that declared at the committal hearings were clear and coincide in asserting that between 1975 and 1983 the Penitentary *Villa Urquiza* operated as a place of detention in

which persons who were kidnapped by the security forces for political motives or because they had been labelled "subversive" were lodged and subjected to cruel, inhumane and degrading treatment.

The aforementioned place functioned as a "secret detention centre", administered and guarded principally by personnel from the penitentiary: prison-guards, personnel from the provincial police, the Gendarmerie (military police), and the army- and in which physical and psychological torture was inflicted on those who were detained, with some cases eventuating in death.

In order to determine the criminal responsibility for the intermediary authorship it is necessary to make inquiries as to whether in their position and functions and the environment in which these took place it can be assumed that the indicted person had intervened in the execution of criminal behaviour as corroborated in the summary hearing, and for having exercised dominance over these through *the command responsibility of the organisation*".

b) **In Spain**, in the recent proceedings of 26th of June 2011 at the Central Court of Instruction No.1, of the *Audiencia National* (D.P 331/1999), a unique precedent was set. It was the first time that a national court affirmed that an obligation exists to investigate the crimes of sexual violence that occurred during the genocide of Guatemala (1960-1996).[17] It is necessary to also highlight the recent efforts made by Guatemala itself toward the investigation and prosecution of these crimes.

III. CONCLUSION

In applying International Criminal Law, the International jurisprudence on sexual violence has been developed by the *ad hoc* courts for the former Yugoslavia and Rwanda, and had led

[17] Available at http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_proyectos&tp=proyectos&dc=22&lang=en

to the current codification of these serious international crimes in the Rome Statute of the International Criminal Court (ICC).[18]

Despite the fact the ICC still hasn't given a single sentence concerning this particular theme, there currently exist several open investigations into the crimes committed in the Central African Republic, The Democratic Republic of the Congo, the Region of Darfur in Sudan, and in Uganda. These investigations include charges of sexual slavery and rape as crimes against humanity and war crimes.

It is understood that this jurisprudence, when it comes into existence, will be of particular relevance. In the meanwhile, however, the investigation supposes a resolute message expressing the international commitment to the prosecution and punishment of sexual violence in armed conflicts. Furthermore, the new processes implemented by the ICC guaranteeing the participation of victims, something that has also been implemented by the Extraordinary Chambers of Cambodia, send a message about the need to compensate victims.[19]

In summary, it is evident that in accordance with the international jurisprudence in the spheres of both international criminal law and human rights, an obligation to investigate and prosecute crimes of a sexual character exists. As such, it is now the turn of national courts to strengthen the aforementioned jurisprudence in matters of gender, applying it and giving greater attention to these crimes at a domestic level.

In Colombia, the fact that the current process of justice and peace has only seen one case of sentencing for a gender-related crime within the context of armed conflict (for guerrillas, paramilitaries, police and military personnel) demonstrates that there are still yawning gaps in the prosecution of sexually

[18] Consult: Article 7, Rome Statutes. http://untreaty.un.org/cod/icc/index.html
[19] Sacouto, Susana. Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A feminist Project?

violent crimes. This deficiency, after 6 years, is unjustifiable. The state and Colombian justice system should recognize and act upon this challenge, make it a priority and stop accepting excuses. It is the least that can be done to address a debt to Colombian women and girls. It requires a firm and determined response on the part of the institutions, especially the judicial system, in order to make effective the right to truth, justice and compensation.

IV. NOTES (Chile: Report 2005)

1. "The fear of social shame on the part of the men, including the judges, impedes the assumption and assimilation
2. "There was a right to rape, like a right to the body of women in general; there was nothing to constrain or impede acting against it. It was logical"
3. Gender-Based violence, is a crime of genocide (sexual aggression) if it concurs with the requisite that its aim is to totally or partly destroy a national, racial, ethnic or religious group (Art. 6) Rome State of the International Criminal Court
4. In Chile, torture through sexual aggression was systematic for all female prisoners, and on the basis that they were women. The National Commission on political imprisonment and torture, released a report in 2005 in which 3394 cases of sexual violence were documented, without distinction in ages, during the period of the Pinochet dictatorship.

Bogotá, 13th of July 2012

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