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My Experience in Three International Tribunals

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I am grateful to Dr. Renée Römkens, to the Atria Institute on Gender Equality and Women's History, the University of Amsterdam, and the International Office of the Municipality of Amsterdam for this invitation to participate in the important symposium dedicated to Gender Based Violence and Human Rights: International Perspectives. I am deeply honored.

I have known her and her dedication to the subject that concerns us today, since the time I came to Holland to work as a judge in an international criminal justice experiment called the Ad Hoc International Criminal Tribunal [hereinafter ICTY], for the former Yugoslavia. It was a decision adopted by the Security Council of UN in 1993, as we all know[1].

Atrocious crimes were being committed every day in the civil war that ensued since 1991 in the former Yugoslavia. Europe and the UN's efforts to bring about peace and stop the massacres, in which an appalling sexual violence against women of all sides of the conflict was used as an instrument of ethnic cleansing and terror, had been up until then few and futile.

For the ICTY to function, 11 judges, 2 women and 7 men, including myself, were elected in September 1993.

During ICTY's first years and continuing up to this day, in which the Tribunal carries out its mandate, case by case, sentence by sentence, the ad hoc criminal justice was also operating in Arushia, where the Ad Hoc Tribunal for the genocide in Ruanda, committed during those same years, and also

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[1] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY, is a body of the United Nations established to prosecute serious crimes committed during the Yugoslav Wars, and to try their perpetrators. The Court was established by Resolution 827 of the United Nations Security Council, which was passed on 25 May 1993. It has jurisdiction over four clusters of crimes committed on the territory of the former Yugoslavia since 1991: grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. The maximum sentence it can impose is life imprisonment.

created by decision of the Security Council, resulted in a groundbreaking *corpus iuris*. This newly born international criminal law added its contributions to Classic international public law and opened new perspectives to international humanitarian law and international human rights law, both products of the twentieth century's postwar period of the 40s.

The jurisprudence of the ad hoc tribunals affirmed the conviction of both academics and politicians that an international criminal justice, with a universal vocation and gender perspective, was possible. The successful experience of the ad hoc tribunals resulted in the signing of the Treaty of Rome. In addition, the Rome Statute was passed in 1998 and the International Criminal Court [hereinafter ICC], started functioning in 2003[2].

I also had the privilege of being elected to this International Criminal Tribunal, among its first 18 judges, 7 of them women. I concluded my duties in 2012 and I returned to Costa Rica. In 2015, I was elected judge in the Inter-American Court of Human Rights, my current position. I am the only woman among 7 judges. This Court began operating in 1979[3], it is the highest judicial body of the Inter-American Human Rights System, and in all these years, only 5 women have served as judges[4]. I leave the conclusions to you.

Almost 15 years of experience as an international criminal judge, have put me in daily contact with human victims of serious international crimes committed in the context of armed conflicts. I have been able to see how victims' lives, those of their families and communities are completely destroyed by the irrational and perverse violence that, since the most remote antiquity, in war and armed conflicts, has unleashed its rage on the enemy among whom are women on both sides, turning them into victims of all forms of sexual atrocities.

[2] The General Assembly convened a conference in Rome in June 1998, with the aim of finalizing the treaty to serve as the Court's statute. On 17 July 1998, the Rome Statute of the International Criminal Court was adopted by a vote of 120 to 7, with 21 countries abstaining. Following 60 ratifications, the Rome Statute entered into force on 1 July 2002 and the International Criminal Court was formally established, date in which the ICC began functioning. The first bench of 18 judges was elected by the Assembly of States Parties in February 2003. They were sworn in at the inaugural session of the Court on 11 March 2003.

[3] The IAHRS originated in 1948 with the approval of the American Declaration of the Rights and Duties of Man at the Ninth International Conference of American States held in Bogotá in 1948, within which the OAS Charter itself was also adopted. The OAS Charter establish in their article 106:
There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.
An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters. In 1969, the American Convention on Human Rights was adopted. The Convention entered into force in 1978. The Convention also creates the Inter-American Court of Human Rights and defines the functions and procedures of both the Commission and the Court. The IACHR also possesses additional faculties which pre-date and are not derived directly from the Convention, such as the processing of cases involving countries which are still not parties to the Convention.

[4] And just one served as President of the Tribunal. Cecilia Medina from Chile (2008-2009).

I am grateful to those members of international bodies, the academy and NGO's who supported my candidacy to serve as an international criminal judge so that sexual violence crimes, until then ignored, could be addressed included in the sentences we were dictating.

I am especially proud to have contributed, along with my colleagues at ICTY, especially Judge Gaby McDonald, to typify sexual violence against women in armed conflicts as an international crime. Not only just rape, the quintessential crime, but also sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and any act of sexual violence of comparable severity. These crimes appear in Articles 7 and 8 of the Rome Statute typified as crimes against humanity and war crimes, respectively. Characterized in this manner, they are now included in various national criminal legislations of modern democratic states governed by the rule of law.

Likewise, our work was enriched by the jurisprudence of the Rwanda Ad Hoc International Criminal Tribunal [ICTR], where the contributions of Judge Navi Pillay were fundamental. It was thanks to her that, in the Tribunal's very first sentence [Akayesu, ICTR-96-4-T, of September 2, 1998] sexual violence committed against Tutsi women was typified as a constituent element of the genocide committed by the Hutus.

All this corpus of jurisprudence –prosecutors and investigators were also part of these efforts– for the first time brought a gender perspective to sentences, where crimes committed against women because they were women, were recognized[5].

Nevertheless, during their first few years, ICTY and ICTR experienced severe limitations stemming from their Statutes, because victims of atrocities were not considered anything more than witnesses during the trials. Those women and men of all ages received as compensation for their suffering and losses and the opportunity to demand justice and share their pain at the hearings. Neither the international community, nor those directly responsible for the crimes, nor their countries of origin foresaw the minimum compensation or reparations required to help them continue with their broken lives. Some years later, when I was no longer part of the ICTY, programs to support victims were put into effect. They were first introduced at the ICTR.

To avoid committing the same omissions and to expand the paradigm of criminal justice, the Rome Statute and its Rules of Evidence and Procedure provided that victims had the right to participate in

[5] For the purpose of this presentation, the following is the concept of gender: "The gender perspective looks at the impact of gender on people's opportunities, social roles and interactions. Successful implementation of the policy, programme and project goals of international and national organizations is directly affected by the impact of gender and, in turn, influences the process of social development. Gender is an integral component of every aspect of the economic, social, daily and private lives of individuals and societies and of the different roles ascribed by society to men and women."

the proceedings and to receive reparations. Furthermore, an innovative fund was created to raise funds for humanitarian aid for victims [Article 68 of the Rome Statute and Rules 85ss]. This represented remarkable progress in both international criminal law and international human rights law, as did the legal description in the aforementioned Statute [Articles 7 and 8] of sexual violence committed in armed conflicts.

But, it is the ICTY's contributions to international criminal law, humanitarian law, and international human rights law what encourages me to continue working in the world of international justice.

From the point of view of victims' rights and sexual violence crimes, the ICC has so far proved to be a disappointing experience. The Rome Statute, a precise, coherent, progressive international document, has yet to find the legal operators that turn it into the instrument of international criminal justice that the entire international community, states, and civil society, especially women of the world, celebrated in Rome in July 1998. The Statute was drafted from a gender perspective, and the ICC was invested with a gender mandate that has practically fallen into disuse.

The Tribunal's sentences, few until now, have avoided holding the accused responsible for crimes of sexual violence that continue unabated, and which have even been declared a global pandemic by the highest bodies of the UN and the international community.

It is troublesome to confirm that, despite Article 21, paragraph 3 of the Statute, the application and interpretation of its rules and regulations have not been consistent with internationally recognized standards of human rights, nor has discrimination been correctly examined under the gender perspective contained by the Statute, which clearly reflects the aforementioned third paragraph[6].

It was evident, since the beginning of ICC's work, that it would be difficult for judges and prosecutors to understand and apply the new paradigms of international criminal justice with the dimensions emerging from the ad hoc tribunals. But we studied, discussed, and gathered some of those advances in decisions and judgments. We were very concerned with everything related to victims' rights, and procedures were designed in connection with their participation in the processes and their rights to reparations. Not everything resulted in success, but now, in December 2017, the picture that has evolved is simply bleak. The efforts of ICC's current president, Dr. Silvia Fernández de Gurmendi, to sensitize judges in these matters have been sterile. I will give a few examples.

[6] 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or others status.

One example is what has happened to the victims [child soldiers] of the first sentence handed down by the Court on March 14, 2012, condemning Lubanga Dyilo as the perpetrator responsible for war crimes. [ICC-01/04-01/06-2842].

The current Chamber, which was in charge of preparing the reparations program for the victims of that case, has been absolutely incapable of doing so regarding individual or collective reparations. Judge Olga Herrera de Garbucci has been the dissenting voice.

In another case, that of Prosecutor vs. Jean Pierre Bemba Gombo, did the prosecutor fully presented the facts of sexual violence. After several years, a judgment was handed down in the lower court, but the decision on reparations to the victims is still pending. In summary, until today, the results expected from the International Criminal Court have not been produced.

In contrast with what ICC has to offer, my incipient experience in the Inter-American Court of Human Rights has been most stimulating. It is, of course, a regional human rights court, the judicial body of the inter-American system. Its judgements establish the responsibility of member States vis a vis their international obligation of respecting and protecting their inhabitant's human rights. However, the approach, progress, and scope of said judgements give life and meaning to the paradigm of equality, in terms of dignity and rights for all human beings, and it constitutes an ethic intrinsic to international human rights law. This paradigm should, in my opinion, also guide the ultimate goal of international criminal law through its judgments.

The jurisprudence of the Inter-American Court [also supported by the work of the Inter-American Commission] in the matter of reparation for victims is a pioneer in the world.

Starting in the decade of the 90s and during the first years of the 21st century, the Court has handed down sentences of great transcendence regarding the responsibility of the States, as well as victims' rights to reparations.

It should be noted that the judgments of the Court are binding for the defendant countries. Additionally, all member states under the Court's jurisdiction must take note of the general obligations of respect for human rights that emanate from them [Article 68 of the Convention][7].

[7] **Article 68 of the Inter-American Convention of Human Rights**
1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

For the purpose of our conversation this morning, I will focus on a few emblematic sentences of the Court that, since 2006 have introduced fundamental advances in the human rights of women victims of violence and discrimination in the continent, in the reparations they have granted, and in the important procedures for monitoring compliance with judgments handed down.

The Latin America continent, from Mexico to Tierra del Fuego, has been a pioneer in the development of international human rights law. The judicial instruments and the System's bodies have brought progress and protection to the different countries of the continent. Notwithstanding, this has been and still is a continent of enormous violence.

Although the social and economic conditions of our countries are far from being the best for all their inhabitants, it is undeniable that the situation of inequality, discrimination, and violence that historically has engulfed women is much worse.

Given that the situation is not much better in the planet's different continents, in the decade of the 70s it became necessary to draft a specific international convention, the International Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], that came into force on the September 3, 1981[8].

CEDAW's Committee greatly strengthened women's human rights by including, since 1989, the obligation of States to "protect women against any type of violence that occurs in the family, at work, or in any other area of the social life." And a short time later, it began to point out that violence against women is a serious form of discrimination that prevents women from enjoying their human rights.

The general instruments on gender equality are obviously shared by both the European and the Inter-American system. In fact, the number of specific documents is even greater in the European system, whose first documents on gender violence are from 1985. Nevertheless, in 1994, the Inter-American system adopted a vital convention aimed at Preventing, Sanctioning, and Eradicating Violence against Women. This convention is better known as the Convention of Belém do Pará[9].

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[8] The **Convention on the Elimination of all Forms of Discrimination Against Women** (**CEDAW**) is an international treaty adopted in December 18, 1979 by the United Nations General Assembly. Described as an international bill of rights for women, it was instituted on 3 September 1981 and has been ratified by 189 states.

[9] The **Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women**, known as the **Convention of Belém do Pará**, is an international human rights instrument concluded within the Organisation of American States (OAS), which calls for the establishment in the Americas of mechanisms for protecting and defending women's rights, and for combating violence against women's physical, sexual, and psychological integrity, whether in the public or the private sphere. The Convention was adopted on September 06, 1994, at the 24th regular session of the General Assembly of the OAS in Belém, the capital of the state of Pará, Brazil, and it entered into force on May 05, 1995. As at August 2012, it has been ratified by 32 of the 35 States of the OAS (Canada, Cuba and the United States of America are not parties). The adoption and widespread ratification of the Convention of Belém do Pará in the middle of the 90's represents a landmark in the struggle to protect the rights of women, particularly because it received more ratifications

The Convention's main objective is to regulate, with a human rights criterion, conducts that generally occur inside the homes and that are common practices of historically unequal relations of power between the sexes. Our continent's women have suffered, and continue to suffer from intolerable domestic violence. Thanks to the Convention, such violations of women's human rights constitute serious violations of States to their international responsibilities, when they do nothing to prevent, investigate, and punish those responsible for the violations, and deny compensation to their victims[10].

A regional legal instrument such as this Convention, far from losing relevance, has become a fundamental support in the judgments of the Court in this matter. I will refer to these sentences later. In the reality occurring today in every country and every city in Latin America, the violence to which women of all ages and all socio-economic conditions, in all spheres of their lives, both private and public, are subjected begs credulity.

The States of the inter-American system are far from complying with the duties imposed by Article 7 of the Convention and with the sense of urgency with which they committed themselves immediately upon ratification of the Convention. They flagrantly ignore their duty of due diligence to eradicate the structural violence that plagues us and against which the judgments of the Court fight.

The judgments nevertheless issued by the Court have set important standards that must be considered when studying them. In my view, the most important is that, when the rules and regulations of the American Convention are interpreted, an effort is made to integrate universal rules into the Inter-American system, in order to configure a single *corpus juris*. Therefore, the rules of the Convention are interpreted keeping in mind the obligations imposed on the State, both those of the CEDAW, as well as the Convention of Belém do Pará.

However, honesty obliges me to recognize that the progress of the system's jurisprudence is quite recent. In fact, the first sentence in which the Court introduced the gender perspective to crimes committed against women's rights was in 2006. It is the sentence known as Penal Castro Castro vs.

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than any other treaty on human rights in the hemisphere, and it is the first treaty in history that specifically covers the issue of violence against women. The bodies responsible for overseeing compliance with the Convention are the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights, both of which are organs of the OAS.

[10] The first article of the Convention defines violence against women as "any action or conduct, based on her gender, that causes death, damage or physical, sexual or psychological suffering to women, both in the public and in the private sphere."

Peru[11]. In applying Article 5[12] of the American Convention [right to personal integrity], the Court set its scope taking into consideration provisions of the CEDAW and the Convention of Belém do Pará "since these instruments complement the international *corpus juris,* of which the American Convention is a part, regarding the protection of women's personal integrity" [paragraph 306][13].

In this same judgement, the Court provides a broad concept of sexual violence, in line with international jurisprudence, and it takes into account that stipulated in the Convention of Belém Do Pará.

Among the group of important judgments issued by the Court during these first years of the 21st century regarding human rights of women, I would like to highlight, due to its international significance, the 2009 sentence known as Campo Algodonero[14].

Failure to comply with the duty of due diligence was also examined in the light of the Convention of Belém do Pará. The text of the sentence highlights the analysis of the impact of gender stereotypes in the investigation of violence against women, as well as that of the impunity of the crimes committed. Because, says the Court "it sends the message that violence against women is tolerated ... which reinforces the sense and feeling of insecurity among women, as well as their persistent distrust in the system of administration of justice."

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[11] Judgement of November 25, 2006. The facts occurred as of May 6, 1992, and refer to the grave violation of human rights during the "Operativo Mudanza 1" within the Miguel Castro Castro Prison, against more than 300 victims.

[12] Article 5. Right to Personal Integrity.

1. Every person has the right to have their physical, mental, and moral integrity respected.
2. No one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Every person deprived of liberty shall be treated with the respect due to the inherent dignity of the human being.
3. The penalty cannot go beyond the person of the offender.
4. The accused must be separated from the convicted, except in exceptional circumstances and they shall be subjected to a treatment appropriate to their condition as non-convicted persons.
5. When minors can be prosecuted, they must be separated from adults and brought before specialized courts for treatment, as quickly as possible.
6. Punishments that deprive a person of liberty will have as a vital objective, the reform and social rehabilitation of the convicted.

[13] The events to which this judgment refers occurred in a penal center by the name of Miguel Castro, where, as a result of disturbances that occurred in the Center, the women there detained were subjected to acts of sexual violence committed by State agents. They were raped, exhibited naked, held incommunicado, separated from their children and, in different ways, denigrated and tortured.

[14] Judgment of November 16, 2009. It is the case González and others vs. Mexico, in which the Court comprehensively addresses the rights of women. An attempt was made to determine whether the State of Mexico had incurred international responsibility for irregularities and delays in the investigation and subsequent death of three young women [17, 20, and 15 years old] in Ciudad Juarez, Chihuahua. They had been reported missing without the authorities investigating, and weeks later they were found in a cotton field with signs of all kinds of sexual violence and physical abuse.

In this case, the Inter-American Court applies, in a context of structural inequality, the absence of the State and state corruption. From this sentence, the borders of State responsibility were broadened by means of the acts of individuals, in other words, non-state actors.

In the Campo Algodonero Case by the rapporteur judge, Dr. Cecilia Medina, introduces numerous considerations on women's rights in the face of the States' international responsibility, and she even analyzes femicide as related to "homicide for reasons of gender." She emphasizes the linkage of gender violence with the breach of the non-discrimination obligation contained in Article 1.1 of the American Convention.

In the reparations chapter, this sentence introduced State obligations that motivated new public policies and legislative and administrative changes aimed at structurally changing gender stereotypes in Mexico.

Finally, due to its importance, I want to mention the 2002 Atala Riffo vs Chile[15] case.

In its judgment, the Court held that the fundamental principle of equality and non-discrimination has integrated the *jus cogens,* and that sexual orientation and gender identity of persons are categories protected by the Convention. Therefore, neither state nor private authorities can diminish or restrict in any way the rights of a person based on their sexual orientation.

An essential part of the judgments of the Court is that concerning to the reparations granted to the victims.

Similarly, pursuant to Article 63.1 of the Convention[16], the Court is responsible for overseeing compliance with judgments by the States. The content of this rule indicates that, when an illicit act is imputable to the State, the duty arises to repair in full and to make the consequences of the violation cease.

The Court has established the following categories of reparations: "restitution, compensation, rehabilitation, satisfaction, non-repetition, and investigation and legal actions against those responsible for the crimes." Reparations can be individual or collective, which are applied when, due

[15] Judgment of February 24, 2012. The mother of three girls loses custody of her daughters for living together with a same-sex partner after divorcing her husband.

[16] **Article 63 of the Inter-American Convention of Human Rights**

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

to the magnitude of the crimes, it is impossible to identify the individual victims [cases of massacres and crimes against humanity].

The Court's most recent jurisprudence already incorporates a gender perspective in the design of the different measures of reparation, as well as measures that seek to dismantle situations of structural inequality that enable gender violence within society.

It is in this category of reparations, that the Court finds the greatest deficiencies and obstacles in determining the degree of compliance by the State. However, it does not mean that the Court abandons its obligations to periodically monitor compliance. Different means are used, but the most important one is that of public or private hearings, where the State must report back and where the victims and the Commission intervene with their points of view and claims. Progress is slow, but little by little, some measure of justice at least, and some of the reparations sought are being obtained for the victims.

I am very grateful that you have allowed me to share with you how so many years and so many different experiences in the world of international justice, criminal justice, and human rights, my conclusion is the most important, essential element in any system, is human beings themselves, women and men, whose rights and protection are the primary responsibility of States. Likewise, the system's bodies, courts, and judges should never lose sight of the fact that they are entrusted with the delicate task of ensuring those rights forever enshrined in Article 1 of the Universal Declaration of Human Rights. The perspectives are different, but the purpose is the same: to contribute with our work to make our societies more equitable, more inclusive, without discrimination of any kind, without violence of any kind. That someday, somehow, in these societies, women will be able to live free and equal, without fear and without violence.