

**The integration of gender perspective in the  
prosecution of international crimes. Lessons to be  
drawn from the Sepur Zarco's Case.**



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## **ABSTRACT**

This thesis seeks, on the one hand, to analyse both the normative and jurisprudential advances of the integration of the gender perspective in the prosecution of international crimes that have occurred in the international criminal law scene through the analysis of the jurisprudence emanating from the Ad Hoc Courts and the International Criminal Court in order to carry out a comparative analysis with the Sepur Zarco's case. On the other hand, based on the international advances, the analysis focuses on the emblematic Guatemalan case of Sepur Zarco, through which those responsible for the international crime against Humanity in its forms of sexual violence, domestic slavery and sexual slavery against indigenous women were prosecuted. Starting from the comparative analysis of two similar scenarios - at the national and international level - this thesis seeks to contribute with the lessons to be drawn from the Sepur Zarco case at the level of reparations and protection of the victims, which should be applied in the international system. This study has been framed in the theory of masculinities, applied not only for the analysis of gender relations in the armed conflict, but also in the application of the law and its prosecution.

## **RESUMEN**

Esta tesis busca, por un lado, analizar los avances tanto normativos como jurisprudenciales de la integración de la perspectiva de género en el enjuiciamiento de crímenes internacionales que ha habido en el panorama de derecho penal internacional a través del análisis de la jurisprudencia emanada de los Tribunales Ad Hoc como de la Corte Penal Internacional, para poder así llevar a cabo un análisis comparativo con el caso de Sepur Zarco. Por otra parte, partiendo de los avances internacionales, el análisis se centra en el emblemático caso guatemalteco de Sepur Zarco, a través del cual se enjuició a los responsables del crimen internacional de Lesa Humanidad en sus formas de violencia sexual, esclavitud doméstica y esclavitud sexual contra las mujeres indígenas. Partiendo del análisis comparativo de dos escenarios similares -a nivel nacional e internacional- esta tesis persigue la búsqueda de lecciones a extraer del caso de Sepur Zarco a nivel de reparaciones y protección a las víctimas, que deberían ser aplicadas en el sistema internacional. Este estudio se ha enmarcado en la teoría de las masculinidades aplicada no solo para el análisis de las relaciones de género en el conflicto armado, sino en la aplicación de la ley y su enjuiciamiento.

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## CHAPTER I: INTRODUCTION

In recent decades, the nature of conflicts has evolved, so that the hostilities no longer conform to what was traditionally considered “legitimate” or “illegitimate” according to International Humanitarian Law (hereinafter, IHL). These changes are observed in current conflicts, where the civilian population has become the target of the troops, despite the prohibition expressed by IHL. Women during conflicts have become direct victims of the attacks. In most cases the attacks and abuse of women have not been fortuitous, but rather they responded to a military objective. Due to the patriarchal reality that frames conflicts, the body of women has been and continues to be used as a weapon of war. In them, women are subdued not only to rape, but to sexual slavery, forced prostitution, female genital mutilation, forced sterilization and forced pregnancy. As the United Nations Special Rapporteur on Violence against Women, Radhika Coomaraswamy (1998) points out, *“perhaps more than the honour of the victim, the target of sexual violence against women is what is perceived as the honour of the enemy. Sexual assault is often considered and practice as a means to humiliate the adversary. Sexual violence against women is committed in order to show victory to the men of the other side, who have failed to protect their women. It is a message of castration and mutilation at the same time. It is a battle between men that is fought in the body of women.”* (Doc. ONU E/CN.4/1998/54, par. 12).

Attacks on women in conflict situations are a global phenomenon in which the use of women's bodies is not accidental but responds to a military objective. This universal weapon is used to dominate and control women and their communities in times of conflict, in addition to depriving them of their dignity and integrity. During conflicts, violations are systematic and collective. These are used for various purposes, from destroying and terrorizing entire communities, in which women are publicly attacked to demonstrate the inability of men to defend them, even to carry out ethnic “cleansing”. It has been proven that these attacks are directed mainly at women and girls of reproductive age *“on the basis of their perception as transmitters of cultural and ethnic identity, and as symbolic repositories of family and national “honour”* (Security Council 2018, par. 13). These events lead to the perpetuation of the patriarchal system, which currently legitimizes violence. This patriarchal system based on hegemonic masculinity generates accepted behaviours in the field of sexuality. Behaviours that are based on a biological conception of women associated with motherhood and that, in times of war, exacerbate the situation of vulnerability of women (Arias, 2016). These same behaviours and assumptions lead men to characterize themselves by seeking authority, power, domination through violence against women and other men with masculinities other than the hegemonic.

Women, girls, and their children become direct victims of stigmatization and exclusion from polarized societies as a consequence of the sexual violence suffered. Therefore, the exclusion of this group places them in a position of greater vulnerability to trafficking networks or possible radicalization or military recruitment. Forced displacement must be considered as a consequence too, according to UNHCR (2013), women represent 49% of the refugees attributable to conflicts, having to overcome greater obstacles in comparison with men in the same situation. On the other hand, the fear of

suffering sexual violence again makes it difficult for women to return to the communities from which they were displaced, this fear is based on Rohingya women's testimonies, reports about rapes in Darfur villages and complaints of sexual harassment of women who returned to Burundi (Security Council 2018, par.15). The importance of justice in restoring peace and protecting victims should not be overlooked. The fact that currently there are cases of women with fear of reporting, victims who have been revictimized and stigmatized in judicial proceedings, or victims who have suffered attacks again after their complaints reflect the inadequacy of judicial actions during and after the proceedings. This situation is closely linked to masculinities and their influence on the judicial system, not only by legislators but also by prosecutors. The law and the rights, like any other social and legal dimension, are crossed by gender. At the same time, law and rights construct, discipline gender in various ways by saying what is proper and legitimate of man and woman, as well as of the relationships between them (Pitch, 2010. Pg.440).

Given this, there have been numerous legislative advances both in IHL and in International Criminal Law (hereinafter, ICL), due to the influence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which judged the human rights violations during the conflict in the Balkans, and the International Criminal Tribunal for Rwanda (ICTR), which condemned sexual violence as genocide. Both tribunals set an international precedent, directly influencing the drafting of the Rome Statute (RE). The Rome Statute can be considered to be the ICL instrument with the highest depth on gender, both for its definitions and for the detailed classification of crimes of a sexual nature. However, despite the favourable position adopted by the courts in the protection of women, in Rwanda, according to Human Rights Watch and the United Nations Research Institute for Social Development, the International Criminal Court on its tenth anniversary had handed down twenty-one judgments, of which most of them ignored the acts of sexual violence perpetrated during the conflict. On the other hand, in the Balkans, while the Court condemned rape and other forms of sexual violence, the reports published by Amnesty International assure that part of the victims continued living with their perpetrators, who in most cases are part of the regional authorities (Amnesty International 2014).

However, the Sepur Zarco's case, tried by the Guatemalan courts, knew how to apply the progress made by the aforementioned international tribunals and it represented an evolution concerning the treatment of victims during the process and afterwards. During the conflict of Guatemala, up to 71 women, mostly indigenous, suffered forced disappearances from their husbands, murders of their relatives, in addition to sexual violence and sexual slavery by the military, who acted under the inactivity and silence of the Guatemalan government (Impunity Watch, 2007). The election of the Sepur Zarco case is due to both the international and national impact of the Judgment. This ruling constitutes a historical precedent since, furthermore, it is the first time that a national court has brought a trial and sentenced military personnel for sexual slavery against indigenous women in the context of an armed conflict. This judgment shows that a national court can hear, prosecute, and condemn gender crimes that are committed during armed conflicts, evidence and makes effective the right to truth, justice and reparation that victims of these crimes have in the national justice system.

## CHAPTER II: METHODOLOGY, DATA AND SOURCES

This section seeks to explain the methodological framework of this thesis, including the decisions made in relation to the choice of method, data collection and other sources. As it has been introduced in the previous chapter, the thesis presented seeks to study the integration of the gender perspective in the prosecution of international crimes. Due to my law studies and the Latin American specialization studied in the master's degree, I have considered interesting the study of a subject that would allow me to combine both disciplines. As is well known, law is a discipline that is constantly evolving, however, it is pursued more intensely in some areas than in others.

The election of the topic is due to the misinformation that exists in international law about gender issues. It is generally understood that the international system, meets the human rights standards, however, with this thesis I seek not only to analyse the important jurisprudential contributions made by the Ad Hoc courts, but also to make visible the gaps that continue existing during and after prosecution in the international arena. On the other hand, it is assumed that Latin America is one of the regions where most of the human rights violations are committed, without highlighting in turn that it is one of the regions with the greatest legal awareness in this matter, with institutions such as the Inter-American Court and with numerous emblematic jurisprudences. To this end, I have decided to carry out a case study regarding Guatemalan armed conflict, to reflect how despite being in a similar situation to the ones presented before the international tribunals, the Guatemalan thanks to the gender perspective with which it has prosecuted - even though it is not included in its legislation - has favoured and fairly treated women victims of sexual violence. I consider that the conclusions of this thesis may be crucial for its incorporation into the international criminal system, in terms of reparations to victims, their protection during the procedure, as well as the adoption of new means of proof, which will allow the international system to live up to human rights standards.

To carry out this thesis, I have used the inductive method, through which, through particular observations of the judgments, as well as the advances in Sepur Zarco's case, I seek to reach general conclusions about where the international system is in terms of the prosecution from a gender perspective and what lessons can be drawn from the actions of the Guatemalan national court. After having studied both scenarios, although it is true that it is a thesis in which the conclusions drawn are personal observations, the nature of the project will be mostly narrative and comparative. This analysis will focus particularly on a comparison of the sources of information, as well as the application of theoretical foundations to the problem presented. This thesis will revolve around these questions:

- How have jurisprudential advances impacted the international arena?
- What are the limitations of the international criminal system?
- How has Guatemalan jurisprudence contributed after the Sepur Zarco's case prosecution?

Questions like these are going to be necessary to answer the research question about what are the lessons that international courts should draw from the Sepur Zarco case, in order to move forward and offer fair treatment to victims of sexual violence.

For a better understanding of the legal situation of women victims of sexual violence during the commission of international crimes, I have considered relevant the study of gender relations and the different roles adopted by women and men legitimise by the patriarchal system, which reflect the taken-for-granted assumptions by both the perpetrators and the prosecutors. For this reason, regarding the theoretical framework I will focus mainly on the study of the masculinity's theory, in particular Connell's hegemonic masculinity. Through this, the adopted behaviour patterns that legitimize the dominant position of men over women are explained. This theory helps to frame the acts carried out in armed conflicts, understanding the adoption by men of hegemonic masculinity that seeks qualities such as authority, power, or domination through violence over women and other men. Considering that the studies on masculinities are, in turn, an interdisciplinary academic field, they have highlighted the contributions from sociology, anthropology or psychology, predominantly approached from a critical perspective that has assumed a good part of the theory and the feminist approach. Therefore, I have decided to approach this theory as well from a legal perspective, defending that the law continues to be a subordinate discipline to the patriarchal system, in which many women continue to be victimized and stigmatized due to laws passed by men and trials without gender awareness. Law and rights are therefore sexed, and the modalities of their sexualization, on the one hand, respond to the dominant modes of social organization, and on the other, they not only legitimize and contribute to perpetuating them, but are one of the factors that produce them (Pitch).

Considering that this thesis focuses on the study of both international judgments and the Sepur Zarco judgment, it is not possible to speak of a single primary source. For the development of this thesis, I have resorted to qualitative data, on the one hand, legal decisions on which my study deals, such as Sepur Zarco, *Akayesu* and *Musema* by the International Tribunal for Rwanda and *Furndzija* and *Celebici* of the International Tribunal for the former Yugoslavia. On the other hand, it is of great importance to highlight the document provided by the Commission for Historical Clarification after the conflict in Guatemala, which I have used to a greater extent to analyse the economic, political, and social background of the country. On the other hand, there has been a study of legal sources such as laws, conventions, and international treaties, as well as doctrinal sources, such as articles, books, and other projects mainly for the theoretical framework.

## CHAPTER III: THEORETICAL CONSIDERATIONS AND ANTECEDENTS

### THEORETICAL CONSIDERATIONS:

Through *What's the problem represented to be?* approach, Bacchi defends that the creation of norms emanates from the assumption that there is something that needs to be solved, in her words, "*policies give shape to problems*" (Bacchi 2015, p. i). From such statement, it can be understood that norms are not only solutions but through them, problems are identified. However, it should be mentioned that norms are not just limited to the problem representation but are considered as cultural products of those who legislate, "*it highlights the creative or productive role of government in shaping particular understanding of problems*" (Bacchi 2015, p. ii). For instance, the author understands the representation and description of any relevant issue as the result of the legislator's interpretation. On that account, even though norms are considered as fixed, they have been drafted through the interpretation of problems, and therefore they should be "*problematized*" (Foucault's concept).

Bacchi's proposal can be applied to this study as the need to integrate the gender perspective in public International Law. Following the author's line of argument, to study the relevance of gender lens integration, it is essential to understand it as the representation of a problem: the invisibility and stigmatization of women in international criminal proceedings. The gender perspective's integration represents, on the one hand, the current gaps and limitations that exist in international norms regarding gender and, on the other, the assurance and perpetuation of the patriarchal system that continues to favour gender roles and the abuse against women. In this case, the study will focus on the position of women in the Guatemalan armed conflict and the important figure of national courts in the prosecution of the perpetrated crimes and, more importantly, the reparations. It is for this reason and focusing on Bacchi's understanding of norms and public policies, that it is essential to carry out a detailed analysis of the assumptions, premises, and discourses that underlie the behaviour patterns of both men in war and the courts. Besides, why such integration continues to be necessary, which leads theorists to continue reflecting on this topic or why there continues to be a male hegemony in law. Therefore, Connell's theory can be considered of great use to reveal the taken-for-granted-knowledge and the conceptual logic that is behind the represented problem.

As mentioned, the topic of the thesis is the integration of the gender perspective in the prosecution of international crimes, therefore, this chapter includes an in-depth study of the theoretical considerations regarding the hegemonic masculinities system, based on the Gramscian concept of hegemony, the patriarchal dividend and violence among others, its influence in Latin America and the way in which it affects International Law. On the other hand, it will be described the antecedents of International law, as the creation of the Ad Hoc tribunals and the International Criminal Court in order to understand the



treatment given by the Guatemalan's court of international law in the Sepur Zarco's judgement.

### 1. Hegemonic Masculinity:

Studies on masculinities can be found, among others, in R.W Connell's work, *Masculinities*, published in 1995, and its second edition in 2005. In her work, Connell develops the idea of hegemonic masculinity, which has subsequently been key in studies on masculinities. Generally speaking, it is understood that when scholars mention hegemony refers to a cultural dynamic through which a group maintains a social position of power, understanding this position as natural without viable alternatives. But it is a concept not only used by Connell, but by other scholars such as Bourdieu (1990), Clatterbaug (1998) and Weltzer Lang (2000) who understand hegemonic masculinity as a product of the double historical but naturalized paradigm of male superiority and heterosexuality. In the Latin American region, authors such as Fuller (2001), Olavarría (2001) and Viveros Vigoya, (2001) make a clear methodological approach for the study of masculinities by analysing the confluence of class, race, and region in order to understand the aspects of social inequalities, as well as drawing a panorama of the transformations that have occurred in identities and gender relations.

Connell defines hegemonic masculinity as "*the configuration of gender practice which embodies the currently accepted answer to the problem of legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women.*" (2005, p.77). Moreover, Bonino (1999) offers the definition of hegemonic masculinity as a structure that is formed as a complex and compact conglomerate made up of socially hierarchical values, desired for men, which are conveyed through a norm (the hegemonic norm of gender) made up of prescriptive and proscriptive mandates that promote qualities, attributes, social demands of and towards men.

Acting as a structural reference for relationships throughout society, the hegemonic model lays the foundations for relationships not only between men and women but also between men and other men. With regards to the relationships between masculinities, starting from the class position in combination with other axes of differentiation such as race and class, Connell (1997) suggests studying masculinities in terms of hegemony, subordination, complicity, and marginalization. As mentioned, scholars in Latin America point out that although class analysis is important for the study of masculinities, it should be integrated into other analyses such as generation, ethnicity, and region to gain an understanding of the mutual influences of each and every change that are taking place in men and in male identities (Fuller, 2001; Olavarría, 2001 and Viveros Vigoya, 2001).

Derived from the Gramscian postulate, the concept of hegemonic masculinity must be understood under the essence of what Gramsci understands as hegemony. Therefore,

the analysis will rely on authors such as Kate Crehan, Raymond Williams, and Perry Anderson, who have tried to provide a definition of hegemony.

### **The Gramscian background on masculinities**

In terms of Gramsci, hegemony is the ascendancy of one group over another, which subordinates and establishes the terms that define a conception of the world. He argues that hegemony is the formulation and elaboration of a conception of the world that has been transformed into the assembly of accepted and “normal” ideas and beliefs that interpret and define the world. It is pertinent to point out that according to Gramsci (1968), the exercise of hegemony is not total, nor it dominates all areas but rather, hegemony is a balance between force and consensus, a combination of both without one imposing too much on the other. It should be clarified that, according to the author, there can only be one hegemony and therefore, resistance should not be interpreted as counter-hegemonic acts. That is to say, the term counter-hegemony is inoperative and inappropriate.

Drawing on Machiavelli, Gramsci (1986) speaks about the dual perspective in all political action, force and consent, domination and hegemony, violence, and civilization (Anderson 1981). According to Gramsci, the supremacy of a social group takes two forms: domination and moral and intellectual direction. According to Anderson (1981), the first thing Gramsci says is that hegemony (leadership/power) belongs to civil society, and coercion (domination) belongs to the state. In this way, it reveals two superstructural levels: civil society, defined as the dominant group in society, and a political society characterized by the State, which exercises direct domination.

Hence, how do we approach a definition of hegemony? Raymond Williams (1983), inspired by Gramsci's theory, provides a definition in which both class and culture come together to build a system of structured practices. In this way, Williams defines Hegemony as; *“A living system of meanings and values - constitutive and constituent - that when lived as practices seem to confirm each other. Thus, it constitutes a sense of reality for the majority of the population, a sense of the absolute because it is a living reality beyond which mobility is very difficult for the majority of society in practically all spheres of life. It is therefore about "culture" in the strong sense but a culture that must also be seen as the domination and subordination that each class experiences ”*. In general, hegemony has been understood as a form of power and not as the way in which power is produced and reproduced (Crehan 2002). In this sense, Williams underlines the importance of understanding hegemony by analysing power as a fusion between cultural and material. In this way, understanding that culture is how the idea of “class” is experienced, *“the concept of hegemony helps us understand how power is lived in a given context, and how certain regimes of power are produced and reproduced”* (Crehan 2002, p. 222).

Hegemony is, therefore, how class relations are reproduced, and contradictions are hidden, the way in which power is lived in particular historical contexts and times.

Hegemony, from a Marxist perspective, refers to the role of the cultural elite to ensure and perpetuate domination. Viewed as a power relationship, hegemony cannot be substituted by the concept of culture or ideology. From this same perspective, another issue that is worth clarifying, based on the uses that have been given to the concept of hegemony and hegemonic masculinity, is that in Gramsci, the main actors are the classes, not individuals. Hence, the agency is collective. Individual agency, that frames freedom of movement, is limited by structures. In this sense, one of the criticisms that the concept of hegemonic masculinity received is that it loses sight of the subject and concentrates on structures (Whitehead 2002), which is why it fails to clarify by what means men produce, create, and legitimize his domination over women and other men. For Whitehead (2002), the important thing is to analyse the discourse, that is, the way it forms men, and the way practices are produced. In this regard, it is important to note that gender relations go beyond a discourse, are taken on materiality and are rooted in non-discursive practices of everyday life such as the division of labour, the exercise of sexuality, violence (Connell 2005).

### **Notions about masculinity and the benefit/limitation of the Patriarchal Dividend**

It is not easy to limit the concept of masculinity, Connell (1995) proposes a concise statement asserting that all masculinity arises in a system of gender relationships, consisting of the position and practices by which men are compromised with that gender position, as well as the effects derived from these practices in their bodies, their personalities, and their culture. A position in which men occupy an exclusivist privileged place, while women are considered as an appendix (the famous Adam's rib), essentially useful for the propagation and biological development of the species (Lerner, 1990).

In the same vein, it must be highlighted that gender relations have not been developing in all societies in the same way. In the global south, Latin America in particular, the gender order was imposed by colonialism. Amina Mama (1997) reflects on the importance of understanding the violence of colonialism to understand the gender roles imposed in post-colonial societies. We must not forget that the conquering Christian societies already responded to a patriarchal military organization for war. The masculinities of the empire were necessarily linked to the enabling of sufficient violence to overcome the capacities of the colonized societies (Connell). Warriors were pigeonholed into the categories of “manly” or “effeminate” (Sinha 1995). A characteristic of colonialism was the double movement of disruption of the indigenous gender orders as well as the creation and imposition of new ones. This new “order” of gender relations was carried out in various ways, among which Stauffer (2004) and Connell (2016) highlight “*rape, which was endemic in conquest and disrupted indigenous kinship and communal relations with the land; forced migrations, up to the huge scale of the Atlantic slave trade; the loss of women’s land rights, a feature of colonialism in the Pacific and the suppression of gender groupings such as the two-souled people of indigenous North America.*”(p.307). Definitely, the creation of colonial societies profoundly influenced gender. On the other hand, for all colonized societies, the religious missions themselves

undertook the direct imposition of new gender orders, influencing gender and sexuality, through the segregation of spaces by gender, regulated indigenous marriage, women's rights, and inheritance (ibid).

Connell (1995), like Mosse (2000), question a single male identity, so talking about masculinity would not be entirely correct. There have been throughout history different masculinities that are specific to each socio-historical cultural formation. Both authors argue that the masculinities that are known in modern Western societies are associated with the construction of the modern stereotype of “hombria” (manhood). On the other hand, Burin and Meler (2000) add that it consists of a symbolic -arbitrary-structure, made up of a set of myths, beliefs and meanings about being a man, which tells us how an “authentic” man has to be. In this regard, the ethnographic contributions made by Latin American authors Viveros (2001), Fuller (2001), Valdéz and Olavarría (1997 and 1998) and Olavarría (2001) clearly denote how male identities in their respective countries of origin (Colombia, Peru and Chile) vary culturally: men from impoverished rural areas and belonging to ethnic or racial groups conceive being a man in a way that is closer to machismo, while men from urban-developed areas and mestizos rethink their identities men and advocate more for equal gender relations. Guatemalan society, for example, rests on a form of social organization, whose system overvalues the male figure; therefore, the practice of power and authority articulates around it, both at the macro and micro-social levels. On the contrary, the figure, activities and power of women are devalued, discriminated and their contributions to development are made invisible. (Andrade, 2006)

Men occupy different positions in society, as well as, they have different capacities to access property, power, and social prestige, “*what is presented as the ideal model of man is not only related to power over women but also with power before the world: possession of objects and power over other men*” (Lomas 2003, p.70). The French philosopher Elisabeth Badinter (1992), in the same line, rejects the idea of a unique masculinity and a universal masculine model, valid for any place and at any time, “*masculinity does not constitute an essence but an ideology that it tends to justify male domination*” (Badinter 1992, p.43). As Connell states, only a small group of men can practice dominant hegemonic masculinity, as few meet its standards. This leaves a large mass of men outside this framework of analysis, who, due to their gender practices, are linked to other types of masculinities such as complicit masculinity. The concept of complicit masculinity was born from Connell's book “*Masculinities*”. Complicit masculinity is the relationship between men who do not meet the criteria of hegemonic masculinity but contribute to the stability of the social dominance of their gender, without being militant in their defence.

Concerning the different types of masculinities, Connell (2005) emphasizes the importance of analysing both the privileges and the disadvantages that men have when they are included in such broad concepts as, Hegemony and Masculinity. Therefore, it is interesting to mention the concept of patriarchal dividend. According to the author, the patriarchal dividend comes to mean the set of advantages that cumulatively benefit men

compared to women. However, it is very interesting to study the patriarchal dividend as a double-sided coin, in which the man is in a privileged position, but at the same time, that privileged position carries harmful assumptions and expectations for some men. For instance, in Latin America the concept of masculinity, or “machismo”, as it is known in the Americas, carries three general risks: risk for women and children, in the form of violence, sexually transmitted infections, and lack of shared responsibility at home; risk to other men, such as accidents, homicides and other violence; and risk to oneself, in the form of suicide, accidents, alcoholism, and other addictions. The executive summary of the report “*Masculinidades y Salud en la Region de las Américas*” carried out by the Pan American Health Organization in Guatemala, highlights that the social expectations of men to be providers of their families, to participate in risky behaviours, being sexually dominant and avoiding discussing their emotions or seeking help - behaviours commonly known as “toxic masculinity” - contribute to higher rates of suicide, homicide, addictions and traffic accidents, as well as non-communicable diseases.

For Connell (2005), complicit masculinity distances itself from the direct display of power but accepts the patriarchal dividends without any intention of questioning or rejecting them. However, we must bear in mind that the patriarchal order influences the way men think, this order constantly invites them to be accomplices in the maintenance of hegemonic masculinity, since no social system can be maintained without people who support it and serve as watchers. It is because of the above that, although men who practice complicit masculinity do not embody hegemonic masculinity nor will they benefit from all its privileges, they receive certain gains as incentives to contribute to maintaining the social domination of their gender (Jimenez 2020). At the same time, since this asymmetry of power in their relationships with women and other men is daily, they often do not realize how they contribute to the reproduction of the patriarchal hegemonic project (idem).

Additionally, according to Connell (2005), masculinity would be based on different gender relations, such as: a) power relations; b) production relations; and c) sexual desire. In this first class, the main axis of power in the gender system is, as we have already mentioned, the general subordination of women to the domination of men (patriarchy). These dynamics persist despite the resistance of movements such as feminism and which represent difficulties for the patriarchy (Robert W. Connell). Secondly, production relations refer to the divisions of labour, that is to say, how tasks are assigned. The importance of this resides in giving equal attention to the economic consequences of that assignment of work, in other words, to the accumulated dividend for men as a consequence of unequal distribution. One of the issues that are observed in this reflection about the relations of production is wage discrimination. If we consider capitalism as the current economic system, we can observe that it works through a division by gender of labour. Therefore, we cannot speak of an “accident”, but we must be aware that it is part of the social construction of masculinity that men are the ones who obtain the highest salaries, or that the fact mostly men are the owners of great private fortunes (idem). While it is true that feminist economics is booming, we must not ignore the relationship that exists between capital accumulation and the reproductive sphere.

Lastly, sexual desire, also coined as *cathexis*. As Connell points out, “*the practices that shape and actualize desire are one aspect of the generic order*”. At this point, questions are posed to the relationships involved in these practices, such as whether they are consensual or coercive, whether pleasure is equally given and received. Despite not being the subject of the project, questions have been raised about the connection between heterosexuality and the social domination of men (heteropatriarchy), a subject on which I am absolutely convinced.

## **Violence and Masculinities**

Unfortunately, over the years, violence has become part of the meaning of masculinity, by which men have measured, tested and demonstrated their identity “*With no other cultural mechanism by which young people can come to see themselves as men, they have assumed violence as the way to become men*” (Hernández 2007, p.106. Translated by me). The connection between both concepts can be understood according to Hernández (2007) as a social phenomenon that is linked to the construction of male identity to a much greater extent than of women. In the Latin American context, in order to address violence as a reaffirmation of masculinity, the understanding of what “*machismo*” is about, is crucial. According to Carmen Lugo (1985), machismo is “*a series of behaviours, attitudes and values that are fundamentally characterized by a systematic and repeated self-affirmation of masculinity, or as an attitude typical of a man who has serious doubts about his virility. ... or as the exaltation of the masculine condition through conducts that exalt virility, violence or to respond violently to the aggression of the other; in short, machismo is the expression of the magnification of the masculine to the detriment of the constitution, the personality and feminine essence, the exaltation of physical superiority, brute force and the legitimation of a stereotype that recreates and reproduces unjust relations of power and violence*” (p.40).

According to Montero (2007), it would be an acquired, learned behaviour, in a concrete social context through socialization processes, only the intergenerational transmission of values and codes of domination is already a factor in itself that predisposes to the exercise of violence, a risk factor for men to exercise it and for women to suffer it. Needless to say, this is a clear generalization but although not all men can indeed be classified in the same category of masculinity, in general terms, violence is the social instrument used by men against women or other men as a means of resolving conflicts. There are social mechanisms that link patriarchal hegemonic masculinity with the use of violence with explicit forms of expression such as violence against women. According to Osborne (2012), violence against women is exercised through a combination of factors ranging from direct coercion to indirect avenues of domination at all levels. It is the result of learning, in a society, where women and feminine culture occupy a secondary place, and this entails an asymmetric relationship between women and men.

It should also be taken into account that, eradication of violence against women is often approached as if it were about solving attacks that exclusively affect women but in reality, men are also victims of their violence. To the extent that, men focus the construction of their personality around violence, they limit themselves in their emotional education.

Furthermore, Connell (2005), in her analysis, points out the way in which the concept of hegemonic masculinity affects criminology and war. As maintained by the author, all the data show that both, boys and men, perpetrate more crimes and of a more serious nature than women. The background that she explains goes beyond understanding hegemony as the cause of the perpetration. According to Connell (2005), different investigations have concluded that the behaviour patterns that men who commit crimes follow, are focused on the pursuit of hegemony. (Messerschmidt 1997; Bufkin 1999). *“This idea of superiority of one over the other (almost always of the man over the woman) brings with it the objectification of that other who is considered “inferior.” The dehumanization that accompanies turning the other into an “object” (of amusement, anger, frustration) projects a feeling of possession (it is mine or for me) and submission of the body of the other”* (Hernández 2007, p.109.).

It is difficult to imagine without violence the inequality observed in contemporary societies. This is reflected in acts that try to maintain the power of men over women, to perpetuate hegemonic patterns. This reasoning also applies in war contexts. The army becomes the privileged terrain to reinforce and exalt this masculinity. During the Guatemala civil war -explained in the future sections- the Guatemalan army used in the formation of its troops the exaltation of all masculine values: honour, courage, strength, rigor and discipline. These values are useful only insofar as they can be displayed to others. These values are meaningless alone. The feeling of group identity was accompanied by the exaltation of virile and “machista” values. (Bailey and Ibarra, 2014)

Discouragedly, extreme acts such as rape are observed as an instrument of application or extension, of the already explained, patriarchal dividend. In war contexts, soldiers become the representation of the collective of men, as well as street intimidation, domestic violence, fulfilling all the same functions outside the context of the conflict. In Guatemala, sexual crimes were meticulously planned and executed by the army to subdue, instil terror, break down any type of opposition, and massacre the “internal enemy” through women’s bodies (Fulchirón 2016). The military formation had three main ideological axes: anti-communism, the exaltation of “machismo” and the rejection of the Mayan identity. The three elements are almost inseparable from the culture of power and masculinities that was historically shaped in the country. Scholars affirm that gender violence exerted in the Guatemalan conflict not only sought to attack women’s bod, or humiliate men but it sought, through sinister language, to attack and mark the entire social body, and in rural Mayan areas to plant the stake of the extermination of a millenary collective consciousness. It was part of the planning to deconstruct ethnic resistance, the continuity of the identity and integrity of an ancient people. (González. 2012). Achieving the patriarchal dividend is a work based on violence in most cases,

carried out by certain types of men and through different types of masculinities. It should be borne in mind that the patriarchal system does not perpetuate itself automatically but requires active agents - dominant masculinity - and passive agents - complicit masculinity - to guarantee its foundations. With a practically masculine dominance in terms of representation, war is an objective context in which these behaviours can be observed. It is a field in which male domination is clearly seen in an expansive and threatening mode (Pablo K, 2011). It is evident that masculinity is a key element of warfare, as a practice in various senses, such as the patterns acquired by men and boys in their physical training; exclusively male armies; taboos related to female fighters; the feminization of enemies as a rhetorical tool to spread violence. For all this, it can be affirmed that war is a discursive field for the legitimation of male power, in addition to a clear conduct influenced by gender.

## 2. The influence of Masculinities on Public International Law

As Connell (2005) defends, we cannot understand big global problems — problems faced by international relations or international law — without gender. Understanding gender is also understanding the mechanisms that build masculinity and the way it interacts and is projected onto other social constructions, including international ones. The reflection on the influence of masculinities on International Law proposes some questions such as: Is war a phenomenon derived from masculine schemes? Would wars be reduced if we educate those who perpetrate them - from those who order them (rulers) to those who execute them (soldiers) - in a culture of equality and different models of masculinity from the prevailing ones? And, finally, is it possible to end the gender bias that affects International Law? Is it possible to de-patriarchalize International Law? (García Sáez, 2019).

With a view to answer them, it is necessary to establish the framework in which International Law is found. International Law is torn between its dual nature; on the one hand, as an instrument to maintain or restore peace and, on the other, as a tool used by those who hold power. The point here is the fact that legal norms can be invoked both to support the noblest ends of humanity and to "cover" the worst atrocities.

As we have seen in the previous section, Connell (2005), defends that the construction of masculinity does not exclusively impact the way in which men individually configure their personality but that the effects of masculinity also impact the institutional settings. Thus, international institutions are not alien to the dynamics of masculinity protected by patriarchy. In fact, as Hooper (2001) points out, International Law is an elementary field for the production and perpetuation of masculinities. Undoubtedly, there are numerous feminist critiques of International Law. Mainly from the theorists Hillary Charlesworth, Christine Chinkin and Shelley Wright, who through their publication "*Feminists*



*Approaches to International Law* (2000)” have managed to demonstrate that International Law not only reproduces gender stereotypes and roles but also contributes to their consolidation. In the authors’ words, “*the symbolic system and the culture of International Law are permeated by gender values*” (idem, p.50). In the analysis of this reality, as in other disciplines, it is not only necessary to attend to the explicit contents, like norms but more importantly, to the implicit, since as stated by Charlesworth and Chinkin, silences are just as important as positive standards and norms. Although addressing the implicit issues can certainly be complicated, as it would be argued from a positivist and liberal approach-predominant in International Law-, according to Koskeniemi (2011), their study can be carried out without implying the denial of the value of the law as a normative framework.

It is necessary to focus on how International Law has been built apart from women, in addition to the implications of talking about the masculine character of International Law. Using the well-known phrase of Simone de Beauvoir, *men are not born but made*, the sex-gender polar system builds male and female identity. It is then understood that the behaviours attributed to both the masculine and the feminine are socially and culturally constructed, and, therefore, can be modified. García Sáez (2019) proposes the hypothesis that, questioning the attributes imposed on hegemonic masculinity, as well as a profound change in the discourses and practices of masculinity, could cause substantial changes in International Law. Changes like; being able to unravel the gender conditioning factors that have been silently affecting International Law since its constitution.

Noting that the world of international law is predominantly masculinized, García Sáez (2019) addresses the questions raised at the beginning of the section through the analysis of five specific elements; the idea of the state, the source system -mainly international treaties-, the application of norms by the courts, the relevance of war and the *responsibility to protect* doctrine.

### **The State as male**

The definition par excellence of State for international law is; there is a state if there is a government that effectively exercises control over the population in a certain territory (RAE). On several occasions the state has been spoken of as a male, with statements such as those by Bluntschli, who, to defend the separation between church and state, said: “*the masculine quality of the modern state [...] has been discovered in opposition to the feminine church*” or “*The supreme concept of the state [...] is this: the state is organized humanity but humanity in its masculine manifestation, not in its feminine organism. The state is male*” (p.20). What is at stake from this symbolic perspective, is the masculine nature of the state, of which impenetrability is an essential component (Sáez 2019, p.72). And it is even more when the heterosexual condition is constitutive of the hegemonic masculine identity. The control of the body-territory, marking one's personal space, exclusive and excluding, is at the base not only of what it

is to be male (Mosse, 1985) but what is to be a state. From a feminist perspective, it must be pointed out the male bias that implies understanding the national interest only in terms of security and power. About it, Tickner (1988), would not only contemplate the national interest in security terms but would be crucial to the satisfaction of material needs of people.

### **The Source System: Agreements between men**

On the system of production of norms, apparently neutral regarding gender, feminist critics have pointed out that, in reality, it hides a patriarchal dynamic that conditions entirely both the contents and the application of International Law (Sáez 2019).

Authors such as Pateman (1995) or Young (2011) coincide in pointing out that the bias of the model of the individual who participates in the elaboration of norms, far from representing the values of humanity, embodies only the values of the masculine. Thus, the idea of an individual and autonomous state that freely chooses whether to accept or reject international norms would coincide with a model of masculinized behavior (Charlesworth and Chinkin, 2000), focusing on voluntariness, ignoring that in the experiences that millions of women live daily, consent is often conditioned by totally asymmetric power relations. It is for this reason that notorious silences have been found over the years in international treaties and constituent statutes of Ad Hoc courts on gender matters. As will be seen later, in international criminal law, the integration of the gender perspective was initially carried out by the Courts, due to the legal gaps in the legislation. It can be said that this is mainly due to the masculine nature of the meetings between states and the lack of gender awareness.

On this same question, an interesting concept coined as *homosociability*<sup>1</sup> is presented. It is a concept analysed from masculinities studies, fully applicable to diplomatic meetings. Through this concept, it is possible to understand the dynamics generated in predominantly male environments in which male predilection for bonding with people of the same sex is evident.

### **Application of International Law**

According to Kelsen's (2003) theory of international law, the key to achieving peace is the creation of a permanent international court with compulsory jurisdiction. The International Criminal Court, like the Ad Hoc Tribunals, are examples of what Kelsen stood for. However, the fact that these courts, together with others belonging to regional systems, such as the European Court of Human Rights or the Inter-American Court of

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<sup>1</sup> The term is first used by Eve Kosofsky Sedwick (1985) in *Between Men: English Literature and Male Homosocial Desire*. The author tells us that it is a neologism formed from an analogy with homosexuality, due to the predilection of establishing ties between men (on the part of men) but intending to distinguish themselves from those (homosexuals).

Human Rights, have played a fundamental role in the fight against impunity and the protection of human rights, has not deprived them of also deserving criticism from some feminist positions. The criticisms come mainly from the masculine way of approaching disputes, a way in which there are two opposing parties and one of them must win and the other has to lose (Charlesworth and Chinkin, 2000 p. 288). Charlesworth and Chinkin (2000) have considered that the “different voice” of women has much to contribute to conflict resolution, proposing less rigid and more inclusive methods. These perspectives try to challenge the rigid, inflexible, and hierarchical protocols of what is typically seen as "an ancient world of gentlemen."

As an example of the rigid methods to solve conflicts, we can find the inflexible punitive justice -focused exclusively on punishing the perpetrators- as it has been occurring in international courts. However, this point will be developed throughout this thesis, since, as a criticism of the punitive justice, some Latin American Courts, as the Guatemalan are implementing the “different voice” contributing to the resolution of the conflict and the reparation to the victims from a more flexible and assertive perspective.

### **The Duty to protect**

The responsibility to protect is not different from concepts offered at different times such as “humanitarian interventions”, “democracy restoration operations” or even “just wars” (Walzer, 2006). However, the dynamics in all cases is very similar, Sáez (2019) affirms that it is the self-attribution by that state (or set of states) that, not authorized by the United Nations Security Council, understands itself powerful enough to undertake a military action with supposedly altruistic ends, which, in reality, serve to conceal his own interests.

The author performs a comparative analysis of the terms “protect” and “care” concluding that it is the protector himself who stands as protector. The protector is because he can, because he is above the protected. Protection is exercised vertically: from top to bottom. While the care relationship is horizontal. This reflects that the nation that is “protected” has no will. According to Charlesworth and Chinkin (2000), the idea of “protecting” is associated with heritage or property, while the notion of caring is linked to affection. Protection ultimately implies violence since it is associated with the implementation of security measures. Therefore, according to Sáez, the responsibility to protect responds to “*arrogant, possessive and dominant positions derived from hegemonic masculinities*” (Sáez 2019 p.82). A controversial example of the application of "protection" was in Kosovo's conflict and Lybia's, both in terms of legality and legitimacy, the latter due to problems of authenticity and selectivity, not to mention the transgressions of international humanitarian law by the interveners who to date are not justiciable for political reasons. However, in the case of Sepur Zarco in Guatemala, as we will see in the following chapters, it is observed how the state is making use of its duty to “care” by rebuilding the social fabric of the community through social measures and reparation to the victims.

## ANTECEDENTS:

In this section, the antecedents to be dealt with are those related to international criminal law. The aim of the thesis is to analyse the integration of gender perspective in international crimes and the position of Guatemalan courts in the prosecution of an international crime regulated under international criminal law sources. Therefore, it is necessary to know where International Criminal Law comes from, what are the crimes regulated, the sources of law and its instruments. It is intended to analyse the progress made by the Guatemalan court in comparison with the decisions issued by international courts on the same matter. Thus, it is essential to contextualize these international courts as well as their sources of law, in order to subsequently carry out a comparative study with the national courts approach.

### 1. An Approach to International Criminal Law

As Bassiouni argues, International Criminal Law (ICL), configures one of the strategies used to obtain the highest degree of subjection and conformity to world aspirations, such as crime prevention, protection of communities and punishments. ICL arises from the need to classify and penalize the most atrocious acts that have shocked humanity and that constitute a threat to peace, security, and common welfare, to end impunity for the perpetrators by intensifying international cooperation and promoting the adoption of national measures (UN General Assembly 1998). The international crimes included in this superior category of crimes are; the crime of genocide<sup>2</sup>, crimes against humanity<sup>3</sup>, war crimes<sup>4</sup> and the crime of aggression<sup>5</sup>.

The application of ICL is carried out by different judicial bodies, starting with the national courts that have the obligation to hear and prosecute international crimes in the

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<sup>2</sup> The definition of the crime of genocide was initially included in the Convention for the Prevention and Punishment of crime of genocide, of 1948, and later included, in practically identical terms, under article 6, Rome Statute: “*For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group; a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*”

<sup>3</sup> The definition of the crime against humanity was included in the Rome Statute, in its article 7. *For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, murder, extermination, rape, forced prostitution, forced pregnancy, sexual slavery, forced sterilization, deportation or forced population transfer, incarceration or other deprivation serious physical freedom, torture and forced disappearance.*

<sup>4</sup> War crimes are penalized in article 8 of the RS,

<sup>5</sup> The crime of Aggression was included in the RS but its definitions and provisions were postponed until 2010. Finally, this crime entered into force on July 17, 2018. “*For the purposes of this Statute, a person commits a crime of aggression 'when, being in a position to effectively control or direct the political or military action of a State, said person plans, prepares, initiates or carries out an act of aggression that due to its characteristics, severity and scale constitutes a manifest violation of the Charter of the United Nations'.*”

first instance. Regarding international courts, the difference between ad hoc tribunals and the International Criminal Court (ICC) is that, while the former had primacy over national courts, the ICC has a subsidiary nature concerning national tribunals. In addition, some courts are assisted by the United Nations - such as courts in Cambodia, special courts for Lebanon and the Sierra Leone Court<sup>6</sup>.

However, from a historical perspective, the first practical application of ICL is found after the Second World War in the so-called Nuremberg Trials, which were carried out before a court established for this purpose by the London Charter. After the Second World War there was a radical change in international consciousness, demanding the creation of exemplary justice against the atrocities that were experienced. On this basis, the Tribunal was created by the victorious powers; the United Kingdom, Northern Ireland, the United States of America, France, and the Soviet Union to prosecute war crimes and crimes against humanity. The Nuremberg Trials were tried by the International Military Tribunal and, in these, the responsibility of the high positions, officials and collaborators of the regime for the different abuses and crimes perpetrated was determined and punished (Hernández, 2016).

As Weller affirms (2016), the Nuremberg Trials were the beginning of ICL since, due to the lack of precedents in the entire history of international prosecution, the work they did to define crimes and the procedures for their development was crucial to the creation of international justice as we know it now. In this way, crimes against humanity, genocide, and others that, previously, were either absent or vaguely defined, were developed and specified. Additionally, the Nuremberg Trials set a precedent for the creation of future tribunals such as the International Military Tribunal for the Far East, also known as the Tokyo Tribunal (IMTT), to convict Japanese criminals after World War II. These two courts were considered as “*justice of the victors over the vanquished*” (Hernández 2016, p.5) since they were constituted by the allied powers in the war.

In the last decade of the 20th century, the concept of ICL was reactivated as a result of the Yugoslav Wars, which prompted the United Nations Security Council to establish the first ad hoc international court to judge the serious violations of international humanitarian law (IHL) and human rights law (HRL) that occurred during the conflict. Subsequently, the Council approved the constitution of a new ad hoc Tribunal to prosecute the atrocities committed during the 1994 Rwandan Genocide.

### **Ad hoc International Criminal Tribunals**

The United Nations Security Council created the ad hoc tribunals, whose powers were limited to a specific place and a particular time. These were constituted to judge those responsible for the serious violations of IHL and Human Rights. It is understood that the ad hoc tribunals acted as a deterrent mechanism for new crimes, even though, as

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<sup>6</sup> UN: International Law Courts. International Hybrid Criminal Courts. Disponible in: <https://www.un.org/ruleoflaw/es/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>

the International Committee of the Red Cross has affirmed, it has been impossible to assess the effect of such deterrence<sup>7</sup>. In both Yugoslavia and Rwanda, the Council determined that a massive and flagrant violation of IHL had been committed, constituting a serious threat not only to international security but also to peace (Rhenan 1993). Based on Chapter VII of the United Nations Charter, the Council was empowered to intervene in the internal affairs of the countries to cease the situation and to prosecute those responsible for the massacres.

Due to the war in the former Yugoslavia, according to reports from Amnesty International, 100,000 people were killed; two million became refugees and approximately 12,500 people are still missing today. Based on the information provided in the S / 25274 report of the UN Security Council<sup>8</sup>, as the recurrent acts of “ethnic cleansing”, mass rapes, tortures, mass killings, destruction of cultural property and other serious crimes of humanitarian law, the Court was created for crimes committed in the former Yugoslavia (UN Security Council, 1993).

Annexed to the Resolution, a Statute was presented with 34 articles regulating the functioning of the Tribunal. Among the 34 articles, the jurisdiction of the Court was determined, establishing that their intervention was limited to the geographical limits of the country so as the time limits, judging only the acts committed from January 1, 1991. Regarding the prosecution, the Statute recognized the jurisdiction of the Court to hear the major violations of the Geneva Conventions, crimes against humanity and the crime of genocide (Statute of the international criminal tribunal for the former Yugoslavia, 1991). Finally, after 154 processes, 83 sentences, 161 accused and 19 acquittals, there is no room for the denial of crimes committed in the territory, as well as the application of ICL and IHL.

Besides the International Criminal Tribunal for the former Yugoslavia, another Tribunal was created in order to arraign those responsible for the genocide and other serious violations of IHL committed in the territory of Rwanda, between January 1, 1994 and December 31, 1994. In the same way as in the case of the Court in charge of prosecuting those responsible for the conflict in the Balkans, the operation of the International Criminal Tribunal for Rwanda is governed by its Statute<sup>9</sup> created through the 955 Resolution by the Security Council<sup>10</sup>. In both Statutes, the operation of the courts was based on four objective criteria: *ratione temporis*, in other words, the Court could only prosecute acts between the established dates; *ratione loci*, which acts in the same way regarding the place; individual criminal responsibility and the object of prosecution.

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<sup>7</sup> ICRC- Ad Hoc Tribunals (2010) Disponible in: <https://www.icrc.org/es/doc/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>

<sup>8</sup> en <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/083/54/IMG/N9308354.pdf?OpenElement>

<sup>9</sup> Disponible in: <https://www.ohchr.org/en/professionalinterest/pages/statuteinternationalcriminaltribunalforrwanda.aspx#:~:text=The%20International%20Tribunal%20for%20Rwanda%20shall%20have%20the%20power%20to,1%20January%201994%20and%2031>

<sup>10</sup> Security Council, S/RES/955 (1994) 8 November, 1994. Disponible in [https://undocs.org/es/S/RES/955%20\(1994\)](https://undocs.org/es/S/RES/955%20(1994))

At the end of 2015, the Court sentenced 61 military commanders, businessmen and government officials, as well as religious, militiamen and those responsible for well-known media, after hearing more than 2,000 witnesses. Despite the convictions, as in the ICTY, 14 people were acquitted, others were referred directly to the national courts for trial and a few others died during the process (Ferrer, 2015).

## **The International Criminal Court**

The beginning of the process of institutionalization of international justice arises after Gustave Moynier's project (1872), through which the creation of a judicial mechanism was proposed on a permanent basis to prosecute crimes of serious impact for the international community (Hall, 1998). However, in line with what has been commented in previous sections, it was not until the atrocities committed during World War II that the importance of creating an international tribunal was seriously considered. Finally, after the fall of the Berlin Wall, together with the signing of the Dayton and Arusha peace accords, the 1998 Rome Statute was prepared (Cassas, 2017).

According to Escudero Espinosa (2003), the ICC has been defined as "*An international judicial institution established through an international conventional instrument, permanent, independent, with jurisdiction over persons in view of the most serious crimes for the international community as a whole, predetermined and mandatory*". These international crimes have been defined through a series of agreements and international conventions, from the first Hague Conventions of 1899, regulating the military conduct in times of war, up to the extension of criminal responsibility to those who ordered the execution of the crimes (Espinosa, 2003). Therefore, it is understood that the ICC is competent to judge the crimes typified in the Rome Statute, such as genocide, crimes against humanity, war crimes and the crime of aggression.

Within these, justice for women is included, since it establishes sanctions for gender-based assaults. Therefore, it is understood that the Rome Statute also represented the progress in terms of gender, including crimes of sexual violence in two meanings specifically. First of all, in the crime against humanity when women and girls are subjected to acts of rape, forced pregnancy or forced sterilization and secondly, in war crimes whether during international or non-international conflict. However, the effectiveness of such integration will be discussed in depth in the next block of the work together with jurisprudential analysis.

In light of the above, the ICC aims both to chase international impunity and to prevent new crimes. It is an independent, permanent, and impartial instrument to avoid what happened with previous courts in which a superior role of the winners was established over the losers, imposing decisions without the consent of the affected States (Yáñez-Barnuevo). Furthermore, it includes in its Statute the principles of individual criminal responsibility, as well as the veto of impunity. However, the ICC has limitations as the limited jurisdiction in favour of national courts. Even though the Preamble of the Statute expresses the need to prosecute "*the most serious crimes of concern to the*

*international community as a whole*”, the Court does not have universal jurisdiction, therefore, it may only exercise its jurisdiction under article 12.2 of the Rome Statute, “*If one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court*”. Therefore, the scope of its power is limited to those States that have ratified the Statute or accepted the jurisdiction of the Court.

Finally, and more relevant to the topic presented is the principle of complementarity that governs the functioning of the Court. It is essential to understand this principle and how it is regulated in the Statute in order to understand the intervention of the Guatemalan courts in the prosecution of an international crime.

The importance lies in the interaction between the ICC and national jurisdictions. The principle of Complementarity was reflected in the Preamble of the ER, where it stands out: “*the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*”. The purpose of the complementary nature of the ICC was, among others, to encourage States to incorporate the prohibitions of international crimes into domestic legislation, as well as the priority in the investigation and prosecution of these. National courts are considered to be more effective in trying crimes, for two reasons, firstly, because of the proximity of the courts to affected communities and, because of the positive impact that the proceedings can have on the rule of law. These two reasons can be translated into 3 concepts defended by the author Paul Seils (2019). On the one hand, maintaining the sovereignty of the States, secondly, efficiency –such as the use of official languages - and, finally, the recovery of trust. Normally, crimes are carried out in conflicts, where the basic norms of society are questioned and institutions are damaged, hence the importance of regaining trust in the rule of law (Seils 2019). Since the constitution of the ICC, the non-permissiveness of immunities or amnesties was agreed upon. As Seils (2019) defends, this concern lies mainly in the fact of being able to avoid the impunity of those responsible presented before the courts and which through fraudulent processes come to escape from justice or are protected by the enactment of amnesty laws or unjustified pardons, these situations occur when national courts are either coerced or unwilling to prosecute. For this reason, the complementary nature of the ICC was declared in those cases in which the national courts were inefficient, when they did not have the mechanisms to carry out an appropriate administration of justice, or, well, due to the lack of will to prosecute.



## CHAPTER IV: INTEGRATION OF GENDER PERSPECTIVE WITHIN THE INTERNATIONAL ARENA

To talk about the integration of gender perspective, we must know that the gender perspective is a type of analysis that requires the consideration and visibility of social, political, cultural, and psychological differences in the relationships between individuals according to their sex, ethnicity, age, and the role they play in a social group and in society as a whole, in order to achieve effective equality. When analysing the integration of gender perspective, it is interesting to separate the concepts of legislation and prosecution, since it may occur that standards of protection for women victims of sexual violence are adequately included in the instruments of international law, and yet its application during prosecution is inadequate or non-existent due to a lack of consideration and awareness.

In this section, a brief review on the evolution of the international codification on gender matters will be made, as well as the jurisprudential contribution of the Ad Hoc courts, in order to understand whether the integration of the gender perspective has been achieved regarding prosecution, or if, on the contrary, there is still a notable gap between theory and practice.

The codification process of sexual violence has been arduous and slow. Initially the crimes in their forms of sexual slavery, sexual violence, domestic slavery or forced pregnancies among others were not a priority for the legislator. Over the years, legislators have been mostly men, so the legislation was adapted to the problems that directly affected men interests and needs, such as armed conflicts or human rights violations in general, but without going into depth on the impact that some of the recorded atrocities could have, especially on women. Through the study of IHL instruments, it is possible to appreciate the invisibility of women's rights in the first place and its codification. In the Hague Convention (1907), sexual violence against women was limited exclusively to the violation of the “right to the honor of the family” without mentioning women’s rights to privacy and sexual freedom. Progressively, the Geneva Convention of 1949 included the prohibition of sexual violence in article 27<sup>11</sup>, in addition to Article 76.1 of its Additional Protocol I. Both establish a framework for the protection of women victims of rape and forced prostitution, by the recognition of such crimes but without an express penalty.

Therefore, we can observe that over time, international standards have not favored the protection of women during and after conflict. Furthermore, Additional Protocol II, in its article 4 prohibited acts of rape, forced prostitution and any form of indecent assault concerning internal armed conflicts. Accordingly, it is evident to affirm that until 1977, there was a progressive advance in international regulations related to sexual nature crimes within the Additional Protocol II. However, acts of a sexual nature were not recognized as international crimes, up to the ad hoc tribunal’s progressive jurisprudence and later, with the Rome Statute.

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<sup>11</sup> Article 27 “Women shall be specially protected against any attack on their honor and, in particular, against rape, forced prostitution and all attacks on her modesty. ”

## 1. THE TRIBUNALS' INACTIVITY AFTER THE II WORLD WAR.

Despite the diversification of women's role in conflicts after the two World Wars, a large number of the female population was objectified as a military object, victims of repression and gender violence. The attacks on women respond to a military objective, they are not accidental, but rather pursue something concrete, whether to spread terror and cause the displacement of large populations, destroy entire communities, eliminate a specific race or ethnic group, or reward the troops (Amnesty International 2004). The London Charter established the Nuremberg Military Tribunal, whose jurisdiction was limited to crimes against humanity, war crimes and crimes against peace. The crime against humanity included murder, extermination, slavery, deportation, and other inhumane acts, however, sexual abuse and rape were not included (London Charter).

According to historian Anthony Beevor (1945), by the end of the war, around two million women and girls were victims of sexual violence by Russian troops, of whom only 100,000 were from Berlin. In the concentration camps, Jewish women occupied the lowest rank in the hierarchy of prisoners due to their dual nature, Jews, and women. Their low status placed them as the main target of the violations, not only by the army, but also by the prisoners themselves. They suffered forced sterilizations based on ingesting toxic products, humiliating and degrading treatment on the grounds of gender (Martin 2012). At the same time, in Japan, there was one of the largest cases of human trafficking in the so-called "comfort stations". It has been classified as an extreme case within all crimes of war committed by the Japanese army, where it is estimated that a total of 20,000 Japanese women and up to 200,000 women of other nationalities were taken away and forced to serve as sexual slaves (Amnesty International). As Amnesty International denounced in 2008, in the context of sexual slavery, women and girls were abducted, beaten, raped, and forced to provide sexual services to the Japanese imperial army.

Despite the overwhelming evidence of sexual slavery systems imposed in World War II, neither the Nuremberg Tribunal nor the Tokyo Tribunal recognized the crime of sexual violence. As a justification, they stated that rape did not constitute a crime of war until 1949 together with the Fourth Geneva Convention (Martin 2012).

Starting in the 1990s, the international community began to become aware of the violence exerted on women during conflicts. The topic became more important and the idea of "rape, as collateral damage" evolved until it started to be understood as an androcentric domination exercised by one group over another due to gender. This progress meant the implementation of measures to prosecute crimes of a sexual nature that occurred during the conflict. This was reflected in the jurisprudence emanating from the ad hoc tribunals for the former Yugoslavia and Rwanda.

## 2. THE AD HOC JURISPRUDENCE

Although the ICTY was established a year before the ICTR, in this section it is important to mention gender integration by the Tribunal in Rwanda in the first place, as Subsequently, the ICTY's sentences of a sexual nature were inspired by the emblematic case of Akayesu.

### **The jurisprudential evolution after the Rwandan Conflict**

During the conflict that pitted the Hutus against the Tutsi, women and girls become the main military target and, as in most conflicts, the most vulnerable victims. With these acts, the aim of the radical Hutus was the destruction of the social and economic Tutsi fabric. This was carried out through the humiliation of Rwandan women, since, understanding the woman's body as part of society, their aggressions implied the disgrace of the whole family (Humans Right Watch, 2004). Despite the remarkable evidence, certain difficulties arose when trying sexual crimes due not only to the victims' fears to report it, but also to the lack of an internationally approved definition of “sexual violence” as a weapon of war.

Although the ICTR was the first tribunal to recognize women as a military target during the conflict, it did not condemn sexual violence as a crime against humanity and crime of war but recognized it as a form of genocide in the case of Akayesu. It was an emblematic decision, since the Court made a favorable interpretation of Article 2<sup>12</sup> of the Statute, which did not expressly include rape as a form of genocide.

Akayesu's sentence was the first to condemn sexual violence as a crime of genocide, setting a precedent for prosecuting crimes of a sexual nature. Jean-Paul Akayesu was the mayor responsible for inciting the inhabitants of his city to carry out the genocide where more than 2,000 Tutsis were murdered and for the rape and death of Tutsi women in a cultural center that he controlled (Bou Franch 2004). At the beginning of the proceedings, Akayesu was only charged with “*genocide, genocide complicity, direct and public instigation to commit genocide, six crimes against humanity (one count of extermination, three of intentional homicide and one of torture and one rape)*” (De la Fuente, 2012 p.13). However, charges for acts of a sexual nature such as the crime of genocide were not included until the hearings, where some witnesses vaguely mentioned the sexual subjection to which the women and girls of that city had been subjected. Finally, the facts that demonstrated Akayesu's involvement in the conspiracy, preparation and execution of the murders, as well as the knowledge and incitement of rape and sexual mutilation of Tutsi women, were considered sufficiently proven. In light of the aforementioned, Akayesu was declared individually criminally responsible for genocide

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<sup>12</sup> Article 2. *Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.* (Statute ICTR 1994)

in its forms of intentional homicide, extermination, torture and rape and direct and public instigation to commit it (ICTR-96-4 T.).

The ICTR's judgment represented the constitution of a model that served as an example for the international community and, which laid the foundations of the International Criminal Law that we now know concerning the integration of a gender. Behind the historic Judgment, it was recognized for the first time that rape may constitute an act of genocide if there is intention required for its qualification. With regards to section d) of Article 2 on genocide, the Chamber held that the expression "*Imposition of measures designed to prevent births within the group*" should not only be limited to physical measures such as sexual mutilation, forced sterilizations, forced birth control, separation regarding sexes and prohibition of marriages, but to broaden the definition and consider it from a psychological perspective, including rape cases if victims subsequently feel refusal to procreate. Additionally, the definition of the term "violation" was internationally defined for the first time: "*The Court considers sexual violence, which includes rape, to be any act of a sexual nature that is committed on a person under coercive circumstances. Sexual violence is not limited to physical invasion of the human body and may include acts that do not involve penetration or physical contact*"

Subsequently, another case tried by the Court and whose accusation included charges of sexual violence was the case of Musema. Alfred Musema was accused of raping, murdering and inciting others against Tutsi women. The Court held that he was responsible for the crimes committed as a consequence of the authority it exercised over its workers. Musema was convicted of the commission of genocide due to his participation in acts aimed at the destruction of a group, based on racial or ethnic grounds, in addition to tolerating that others under its responsibility also did it (De la Fuente, 2012). In this Judgment, the Court joined the point of view adopted in Akayesu's case, defending that the crime of rape should not consist of an enumeration of the parts of the body and the objects used, but "*that the essence lies in the fact that it is an invasion of a sexual nature and under conditions of coercion*" (Zorrilla, p.60). Finally, on appeal, despite the fact that the Judgment was not especially relevant regarding sexual crimes, this case has contributed to the recognition of rape as a crime against humanity and as a constitutive act of genocide.

### **Gender perspective after the Balkan conflict**

According to the gathered evidence, the ICTY affirmed that the violations during the Balkan conflict were organized, systematic and that, in most cases, women were deprived of their liberty and taken to concentration camps where they were sexually exploited. In other cases, violence against women was perpetrated directly in military attacks against the civilian population to force displacement (Amnesty International). Starting in 1992, they began to document acts of sexual slavery, female genital mutilation and rape to which Croatian and Bosnian Muslim women were subjected by the Serbian army, whose purpose was the elimination of any non-Serbian group (De la Fuente 2012).

Despite the numerous cases tried by the International Criminal Tribunal for the Former Yugoslavia, only a few included charges for acts of a sexual nature. The Court's first case in which serious violations of IHL were prosecuted was *Celebici* (IT-96-23-T & IT-96-23/1-T). Four Bosnian men were accused of acts of aggression, rape and torture committed in the Celebici camp, occupying all of them high positions within the prison. The four perpetrators were charged with violation of the 1949 Geneva Conventions and violations of the customs of war, due to acts of sexual violence. Even though the crime of rape is not expressly included in articles two and three of the Tribunal's Statute, the Court affirmed that there was a clear prohibition of rape and sexual assault in IHL. However, the definition of "rape" still did not appear in any of the provisions, so the main objective of the Chamber was to define it. For this, the Court used as a basis the discussion carried out by the ICTR in the *Akayesu* judgment on the concept of rape, in which a more flexible and comprehensive description was provided, considering rape as a form of torture. The Court opted for the definition provided by the ICTR, confirming that the violation constituted an act of torture. The Chamber affirmed that the violation of any person was an act against dignity and integrity, and that, if it is committed by a public official, its punishment is even more urgent. Furthermore, it recognized the physical and psychological consequences suffered by victims of sexual assaults, stating that "*the psychological suffering of those who have been victims of rape can be exacerbated by social and cultural conditions and can be especially sharp and durable*". Consequently, the Court considered that the violations of women in the Celebici camp, perpetrated by the prison authorities in coercive circumstances, constituted acts of torture. Therefore, all of them were convicted of serious violations of the Geneva Conventions of 1949 and violations of the uses of war, in the forms of crimes of sexual assault, torture, beatings, and other forms of inhumane treatment (UN Economic and Social Council).

Moreover, the *Furundzija* case was relevant as well due to the definition provided of sexual aggression in comparison with the previous cases. Anto Furundzija, a local commander, was accused of serious violations of IHL, for torturing and participating in a rape carried out during interrogation of a Bosnian Muslim woman. Rape in times of war is expressly prohibited by the instruments of IHL, such as in article 3 of the Geneva Convention and in its Additional Protocol II in their article 4. In addition, this prohibition is found implicitly in the instruments of International Human Rights Law in the provisions that protect physical integrity. Therefore, on this basis, as there are no definitions of rape in any International instrument, the Tribunal once again focused on the definition of the concept. This was one of the most relevant rulings on sexual violence since it redefined much more concrete and detailed the concept of violation (IT-95- 17/1-T).

Unlike *Akayesu* and *Celebici*, the Tribunal considered it noteworthy that the definition listed both the parts of the body, as well as the objects used. This definition was criticized for supposing a setback in the recognition of sexual violence, taking into account that this enumeration prevented other non-rated acts that could be considered as acts of sexual aggression (Rodriguez Saavedra, 2018). It should be noted that in addition to this definition, there were other setbacks. The Chamber clarified the importance of proving the victim's non-consent, indirectly imposing responsibility on them, and not on

the perpetrator. According to the doctrine, the context in which the sexual acts take place serves to determine that the victims were not able to refuse. Therefore, the Court's perspective revictimizes women and leaves them unprotected, shifting the burden of proof to them. For this reason, it is considered much broader and adequate the ICTR jurisprudence regarding the integration of the gender perspective.

### 3. THE INTERNATIONAL CRIMINAL COURT: ADVANCE OR SETBACK?

As explained above, during the processes of the former Yugoslavia and Rwanda, the ad hoc tribunals established international jurisprudence. Emblematic sentences like Akayesu's, Furundzija and Celebici served as the basis for taking into account crimes of a sexual nature, such as violations of IHL, crimes against humanity or genocide. These antecedents directly influenced the Rome Statute's negotiation process, in order for said crimes to be included within the criminal types. The RS is the first binding international instrument to have integrated the concept and definition of gender. Thus, it has been a great advance for gender justice. The integration of the gender perspective in the international criminal system is manifested in various areas. For the first time, in an international instrument, the concept of gender is defined in its article 7.3, in order to avoid any misinterpretation derived from its use throughout the Statute, "*For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above*". After this definition there was a doctrine dichotomy between those who consider it as a positive advance (Spees, 2012) and those who describe it as negative and confusing. According to the first group, the definition constitutes progress in the prosecution of crimes committed not only gender-based, but also based on sexual orientation. However, the second group maintains that the Rome statute's definition provides a confusing perspective between the terms sex as a biological category, and gender as a sociological category. Nevertheless, the definition combines both positions since it makes differentiation of the sexes, but at the same time refers to the social context, facilitating the integration not only of the biological character of gender, but also the social constructions of the gender roles (Zorrilla).

The most significant advances occurred in Statute's substantive part, collaborating to improve the protection for victims and witnesses. The untying of the violations as crimes "against family honor", as occurred in the Geneva Conventions and other instruments of IHL was characteristic. In the RS, crimes of a sexual nature acquire the consideration of violent crimes, with both physical and psychological consequences, against women. The list of crimes encompassing gender-based sexual violence was extended. To this effect, the RS went from recognizing the crime of rape as the only crime of a sexual nature, to include other acts of a sexual nature. The Statute included as crimes against humanity, not only rape but also, forced pregnancy, forced prostitution, slavery, forced sterilization and other acts of a sexual nature. Additionally, it is recognized within this crime, the persecution due to gender, that is, gender is consolidated as one of the reasons for granting a refugee status (Paz 2015), as formulated in article 7.1 (h) of the ER.

Based on the precedent, although it is true that during the drafting of the Statute numerous advances in terms of gender were achieved, in practice it is appreciated that the Court's great deficiency is the absence of a gender perspective. The Lubanga's judgment (ICC-01/04-01/06), confirm said deficiency reflecting the gap between theory and practice. He was accused by the ICC Prosecutor's Office in 2006 for the recruitment of children under 15 for its army, as well as to use them for their active participation in hostilities, however, the evidence of his participation in acts of sexual violence and sexual slavery against minors was not taken into account. The Prosecutor's Office, despite knowing of all these acts, focused its prosecution strategy exclusively on crimes related to the recruitment, isolation and use of minors, ignoring the physical and psychological consequences that sexual violence has on the victims (Paz, 2015). The Court finally decided not to rule on the sexual-nature crimes committed in the Judgment, sentencing Thomas Lubanga Dyilo to 14 years in prison for recruiting children under 15 (El País, 2012).

The Prosecutor's Office had to take charge of the integration of the gender perspective in its actions. The exclusion of charges of sexual violence constituted one of the worst errors of the Court, since it implied the lack of awareness of the contextual element that has conditioned the subordination of women in the Congo throughout history.

Throughout this brief analysis on the integration of the gender perspective in the international sphere, it can be observed that, despite having certain legislative advances, it was not until the progressive jurisprudence of Rwanda and Yugoslavia's International tribunals that the courts prosecuted for the first time from a gender perspective. Sexual violence in its different forms was understood for the first time as genocide or crime against humanity, the courts debated the definition of rape, as well as the conditions for this crime to occur. Subsequently, thanks to the influence of the Ad Hoc courts, during the drafting of the Rome Statute the definitions provided were included, as well as a mechanism for the protection of victims, however, cases such as Lubanga show the need to continue working on the prosecution of international crimes with a gender perspective. The question is whether so much the jurisprudential advances of the ad hoc tribunals, as well as the legislative progress achieved with the Rome Statute, are sufficient to offer women victims of international crimes fair treatment without perpetuating their stigmatization, and if the current international system is up to its responsibilities. To this end, in the next chapter I am going to focus on a case study in which international crimes of a sexual nature have also been prosecuted, but this time by the national courts, in order to compare the treatment of the prosecution in both cases. and see the possible lessons to be learned.

## **CHAPTER V: *SEPUR ZARCO*: THE PROSECUTION OF INTERNATIONAL CRIMES BY GUATEMALAN TRIBUNALS.**

In the previous sections, it has been examined the treatment of the gender perspective by the international tribunals, both in the cases of Rwanda and the former Yugoslavia and in the ICC. While it is true that in recent decades International Humanitarian Law and International Criminal Law have deepened the maximum punishment of crimes of a sexual nature, the difficulties in carrying it out remain determinant.

Therefore, taking as a reference the international scene in the prosecution of international crimes of a sexual nature, this chapter will analyse the case of sexual violence against Mayan women during the eighties, which exacerbated and made visible the misogynistic assaults and murders perpetrated by the Guatemalan military forces. Over the years, there have been numerous cases of sexual violence during armed conflicts, however, the case of Guatemala is especially interesting because of the awareness that the court had from the beginning of the procedure, as well as the final conclusions, which were far from all the procedures previously followed on the international scene. Therefore, this chapter seeks on the one hand, the analysis of the case as well as the understanding of the causes that underlie said conflict and behaviour towards Guatemalan women, such as economic exclusion, racism, and authoritarianism and, on the other, the reflection on the importance and impact that reparations have had and will have on the community. In this way we can achieve clarifying conclusions about where the international criminal system is in terms of the prosecution of international crimes with a gender perspective and what lessons can be drawn from the procedure and ruling after the trial of the Sepur Zarco's case. This case set a paradigm for international jurisprudence by condemning two ex-military men for perpetrating violence, sexual violence and domestic slavery considering those actions as war crimes and crimes against humanity. It set a precedent for future cases such as sexual crimes committed in Peru, between the 1980s and 2000, specifically in the cities of Manta and Vilca (Montoya, 2015).

### **1. CAUSE AND ORIGINS OF THE INTERNAL ARMED CONFRONTATION.**

In the complex task of understanding the historical judgment of Guatemala and the armed confrontation, an observation is unavoidable: that this is a deeply heterogeneous and polarized society in economic, social, and cultural terms, without a common national project that effectively recognizes equal opportunities for all its citizens (Mariscal, 2007). The objective of this section is to contribute to the understanding of how Guatemalans have built their history as a way to understand and explain the origins and course of the prolonged armed confrontation. It seeks to demonstrate that it has a deep, structural historical determination, linked to the exclusionary, racist, authoritarian and centralist character that the economy, the Guatemalan society, and the State acquired especially



since the end of the last century. Since independence in 1821, the structure of economic, cultural, and social relations has been extremely hierarchical, sustained by a deeply rooted colonial heritage. This determined that the character of the State that produced the incipient Republic of Guatemala was “exclusive” and manifest a clear racist orientation. Thus, historically, and politically, the violence in the country has been directed from the State especially against the poor, the excluded and the indigenous (Méndez 2014).

According to the Historical Clarification Commission (1999), the armed conflict can only be explained by a combination of internal and external factors whose specific weight is difficult to determine quantitatively. However, it is also evident that the sum of all these historical causes would not have been sufficient by itself to produce the insurgency or the violence that the armed confrontation reached. The historical antecedents are analysed below, in the following section will deal with what will be called the immediate antecedents.

### **The state’s economic exclusivism**

Poverty has been a constant in Guatemalan society, derived from the unequal distribution of economic wealth, particularly the land. The unequal distribution of land in an eminently agricultural society like Guatemala's is one of the main causes of poverty. Furthermore, it conditions social stratification and provokes various forms of social exclusion, which are usually associated with the practice of violence. This type of control over the land has in fact originated a system of domination and control over people, to whose maintenance has been resorted to the use of force. For this set of conditioning factors, since the expansion of coffee in the nineteenth century, the State has constituted the guarantor of the labour supply and order for the farms, which in turn contributed to institutionalized militarization, not only of the State but of society (Cárcamo 1997). According to the 1964 census, 62% of the land was in hands of 2.1% of the owners; 87% of peasants lacked sufficient land to allow them to survive (Sandoval p.20). The CEPAL calculated that in 1980 only 28.9% of Guatemalans were “not poor”, that is, they could meet their basic needs. In the rural area, the situation was much more alarming, only 16.3% were not poor and of the remaining 51.5% were extremely poor (CEPAL, 1988)

Poverty should be considered as a structural antecedent of armed conflict. Misery by itself does not produce revolutions, but it can enhance them. By being excluded from the supply market and in the absence of channels for participation and expression, the deprivation that the majority experience can become a source of collective discontent. In Guatemala, the State renounced for many years its role as mediator between different social and economic interests, thus opening a void that allowed direct confrontation between those who received the benefits, defenders of that established order, and those who were obliged to vindicate their aspirations.

## **Racism and Indigenous exclusion**

Racism has been a structural historical element in the social and political history of the Latin American and Central American countries; it contributed to shaping the racist, exclusive, and authoritarian state, using the ideological apparatuses and repression of the State against the indigenous population in moments of crisis and domination. In my view, since the colonial era, race has become the articulating element of differences and inequalities justifying the existence of inferior and superior races and using discrimination as a mechanism of exploitation and domination against the indigenous population. Intersectionality and racism show oppressions and exploitation, gender and racial violence and the marginalization of youth, all these majority populations in the Guatemalan society (Pop 2000). Race is interrelated with gender system, which explains why bodies of indigenous, black, and poor women have been the most affected by the racist, class and sexist logic. Due to experience of the oppressions, isolation and invisibility in which women live, it is urgent to intersect the analysis of racism, sexism, and classism. It is crucial to make visible the intersection of the various power relations, which become tangled threads producers of oppression. Furthermore, particular political tools are needed to fight against these forms of domination (ibidem)

The poor and indigenous have suffered the marginalization of social structures built from the matrix of exclusion and discrimination. The Political violence produced during the armed confrontation has tended to reproduce and feedback this marginalization. Racism, as an ideological expression of colonization and subordination, has its origins in the Hispanic invasion. At that time, the oppression and exploitation of the Mayan people based on racial concepts and the acts of territorial and political dispossession were justified as “*A redemptive and civilizing company*” (Batalla 1981). That moment profoundly marked Guatemalan history, because if at first, the Spaniards considered superior biologically and culturally, that pattern was followed by the Creoles and then by the Ladinos.

The social, economic, political, and cultural exclusions against the Mayan people led to more violence. They have also been expressions of a power relationship that a hegemonic group has managed in a despotic and arbitrary way, it is originally tempted in colonial domination, and justified by the ideology of cultural and biological inferiority of indigenous people. Distrust and contempt for indigenous people have spread to the disadvantaged in society. Vulnerable ladinos also resisted the marginalization of an exclusive social model. However, racist ideology has usually functioned as a barrier between ladinos and indigenous people. Conscious or unconscious racism is a very important factor in explaining many of the excessive acts of violence committed throughout the history of Guatemala and the armed conflict. In the racist mindset, any indigenous mobilization recalls the atavistic image of the uprising. In this sense, it can be considered that racism was also present in the bloodiest moments of the armed confrontation, when the indigenous population was punished as if it were an enemy to defeat.

## **Dictatorship and Authoritarianism**

In Guatemala there has been a long tradition of dictatorship, understood as total power concentrated in one man or a small group and that is exercised without legal or institutional controls. All constitutions have formally established a republican model of government, with a democratic system of elections, alternation of power, control of powers. However, the national experience has been marked by more authoritarian forms of government exercised fundamentally by the military, through dictatorships, military boards, etc. Guatemala is one of the Latin American countries that have had the most military governments and dictatorships during their republican life. The dictatorial tradition has left a very strong mark on the national political culture and has meant the continuous closure of spaces for political expression and participation by citizens. The dictatorial form of government has also meant the indiscriminate exercise and uncontrolled violence by power. Social, political, economic and cultural demands have been a reaction to repression. Dictatorship and authoritarian forms of government have generally been in function of minority interests.

### **Immediate Antecedents (1944-1961)**

The confrontation's closest antecedents document the way in which political and ideological tensions accumulated since the 1940s and early 1950s, including the renewing emergence of 1944 and its rapid radicalization. The armed confrontation broke out in Guatemala due to a sum of internal phenomena such as the fall of Arbenz's regime, the fierce anti-communism of important sectors of the population and the Catholic Church, and the defensive alliance of the military, businessmen and other segments of the population fearful of social change. Likewise, external factors such as the cold war and the influence of the triumphant Cuban revolution encouraging the nascent guerrilla movement throughout Latin America.

From a historical perspective, tensions in Guatemala began after the end of the colonialist system - in which the agrarian structure consisted of the distribution of large lands in hands of a few large landowners- and with the beginning of the 20th century, where the first mobilizations were led by peasants to recover their lands. During the 1944 revolution, after the Agrarian's Reform implementation, a large number of hectares were returned to the indigenous community (González ND). Additionally, the military and repressive governments that followed the overthrow of constitutional president Jacobo Arbenz in 1954, made anti-communism the ideology of the state by applying the National Security Doctrine. The state counterinsurgency strategy defined as an internal enemy not only the armed organizations' members but also all those citizens, organized or not, who could be classified as opponents, understood as communists. The vast majority of the victims were not combatants. In other words, the driving force behind the repression was

political. However, the structural racism against the Mayan population, favoured, as an ideological element, that the Army assimilated the indigenous people, a kind of ancestral enemy, with the insurgents. (CEH, 1999) The CEH established that in the eighties, the Army came to identify the indigenous with the internal enemy, because it considered that the guerrillas had managed to grasp the historical problems of the highlands indigenous populations, the scarcity of land and poverty, appropriating their claims. The Army considered that “the great indigenous masses” of the altiplano constituted the social base of the guerrilla movement.

Therefore, in 1954 with the Counterrevolution and after the seizure of power by the military, the economic policies carried out legitimized the expropriation of land previously returned to the indigenous community. These repressive policies elicited rejection and demonization of the indigenous community (Méndez 2014). This political situation generated a tension and discontent atmosphere that led the peasants in 1978 to initiate a mobilization to Panzós city, in order to pressure the Mayor to obtain the regularization of the land’s titles. However, the Guatemalan army opened fire on all the peasants who were on the march, initiating the greatest massacre of the internal conflict, causing 53 mortal victims (Impunity Watch 2017). Since the Panzós massacre, all the areas, including Sepur Zarco, were militarized. At the same time, the different revolutionary organizations were unified, creating the Guatemalan National Revolutionary Unit (URNG). Meanwhile, counterrevolutionary state politics aimed at destroying the revolutionary movement.

It was not until 1962, with the emergence of insurgent groups identified with Marxist ideology, that the internal armed conflict officially began. These groups had the main objective of continuing with the ideals of the 1944 revolution to build an egalitarian society where the means of production were fairly distributed. From then on, a series of altercations between military and guerrilla groups developed both in the cities and in the rural areas where the rebel groups had their hiding places. Repression, terror and the closure of political spaces were part of daily life during the 36 years of conflict. However, it was in the 1980s, especially during the government of Efraín Ríos Montt (1982-1983), that the most violent phase of the conflict occurred. The military forces were trained by the United States of America to implement the scorched earth policy, which justified the destruction of lands, properties, and other means that could be useful to the guerrillas, since these were considered “internal enemies” of the State (Bonifazi 2018).

What has been explained above is a representation of how the rape of indigenous women reproduces the logic of the structural racism system, whose imaginary places them on the lower scale of the human hierarchy because they are women, indigenous and poor. As will be explained in later sections, the spaces on which racism was built and reproduced in Guatemala, from the Colony to the present day, remains intact and there does not seem to have been any indication that the sustained stereotypes and prejudices have been disabled. On the contrary, the emergence of the Mayans as a social and political movement and the counterinsurgent war exacerbated racism to its maximum expression, such as genocide and femicide.

## 2. WHAT HAPPENED IN SEPUR ZARCO?

Under the aforementioned strategy, human rights violations that resulted in the Mayan genocide, crimes against humanity, extrajudicial executions, forced disappearances, sexual violence, and domestic slavery, were committed. The genocide was committed against the indigenous communities under the presumption that they were part of or supported the guerrillas. The genocidal nature of the murders was evidenced in the form of their commission: the murder of children and pregnant women under the pretext of stopping the birth and development of new “guerrillas”; the murder of the elderly, who represent ancestral wisdom, as a means to destroy traditions and the imposition of the mestizo culture on the survivors, thus eradicating their culture, language, traditional clothing, and worldview (Bonifazi, 2018). All these actions are a clear example of the intention to exterminate Mayan groups in certain regions of Guatemala. The CEH (1999) pointed out that 93% of the human rights violations perpetrated during the conflict were at the hands of the State Forces, while the remaining percentage corresponded to insurgents and unknown perpetrators. In 1982, Sepur Zarco had become a military detachment that led to the disappearances, torture, and murders of many of the leaders of the indigenous community. The bases on which this strategy of war and terror was mounted against the indigenous populations was not accidental. It has evident historical elements which demonstrated that racism is a historical-structural component that is key to understand the magnitude of these collective massacres and femicide against indigenous women.

Before developing what concerns the abuses suffered by indigenous women in the Sepur Zarco military detachment, it is important to explain the origin of its creation and the counterinsurgency strategy in the region. Sepur Zarco is a small rural community in the area called Valle del Polochic in northeastern Guatemala, between the departments of Izabal and Alta Verapaz. In the 1980s, as part of the state's counterinsurgency policy, the area was militarized. As a consequence, the detachment in Sepur Zarco was built with the objective of serve as a place of rest and recreation for soldiers operating in the area. Among the insurgent operations carried out, others were. “permanent patrols of army troops, recruitment of men from the communities as Military Commissioners, deployment of various military detachments and organization of Civil Self-Defense Patrols (PAC)”. (Gutiérrez, 2014, p. 46). According to the ruling issued by the Higher Risk Court -El Tribunal de Alto Riesgo- (2016) in the Sepur Zarco case, which recognized military expert opinions as evidence, the army’s modus operandi was evidenced: “*Men were first disappeared, and then women were raped and the destruction and robbery of properties took place later... the people were taken to spaces of military reduction... causing that the civil population fled to the mountain, where children, women and men died of hunger and cold ... women were forced to cook for the soldiers undergoing degrading treatment, thus such as physical and sexual abuse.*” (p. 474-475). The reason why men were

disappeared and killed has a socio-economic background. Many these men, husbands and children of women victims of sexual violence, were part of the so-called Land Committees, which had the main objective of processing applications for legalization of land. This relationship demonstrates the collusion between economic groups and the army in order to silence the social movement, since these men and their communities were considered as enemies of the State and therefore, military targets.

Sepur Zarco was the scenario in which unequal gender relations were reflected. Women of the Mayan Q'eqchi 'ethnic group, whose husbands had been murdered or were missing, came to be called “the widows” and consequently, repeatedly reified and subjected to prolonged sexual violence, domestic and sexual slavery and inhuman, cruel and humiliating practices. Sexual violence is always gender violence. As Rita Segato (2003) posed, it is “the use and abuse of one another's body” in which the components of this relationship reappear as a “power structure”, “*the aggressive impulse proper and characteristic of the male subject towards who shows the signs and gestures of femininity*”. The masculine signifier: aggression and power, and the feminine signifier: subdued, weak, conquered, dominated. This material, symbolic, subjective power structure is presented both in interpersonal sexual violence relationships and in intergroup relations: State or parastatal agents vs. insurgent or dissident population / groups, as we see in the case of Guatemala. Sexual violence seeks to subdue, destroy and humiliate, not only individual people, but also the collective as such. 89% of the women who suffered sexual abuse were Mayans because the perception of inferiority is configured in addition to gender, ethnicity and social position and evidently legitimize by the racist state regime. The percentage of raped minors is very significant. Regarding the identified victims, with age and sex information, registered by the CEH, 62% were adult women: between 18 and 60 years old, 35% were girls between 0 and 17 years old and 3% elderly. As the CEH (1999) points out, women were subjected to constant rape for 6 months. However, the detachment was active for 6 years, so the remaining time women continued in domestic slavery. According to Elizabeth Wood (2012), the war-sexual attack against women and men finds its foundation in the notion of masculinity. To become men, boys must first become warriors. Enemy domination is understood in terms of gender and sexual violence is used against enemy populations. As stated in the Judgment(C-01076-2012-00021), women were forced to work in slavery conditions, forced to cook and wash Guatemalan Army's clothes, working days of more than twelve hours. During housework, they suffered rape by several soldiers, every day and for years. These practices constitute a form of submission and control over women who are forced to contribute their production-reproduction relationships (Trejo, 2016). If this occurs in conditions of forced and mass kidnapping, forced domestic labour and slavery Indigenous women's sexual activity not only affects the individual sphere of their lives, but affects the social life of the entire community, since it is being dispossessed of the workforce essential for the reproduction of life (Trejo, 2016). The conditions in which women lived in Sepur Zarco were very poor, since their houses were made of sheet, almost resembling “*chicken coops or dog houses*” (Gutiérrez, 2014, p. 50).

These violations were perpetrated systematically in common areas including the soldiers' bedrooms, the military compound or on the streets. Some of the victims were forced to move near the military detachment of Sepur Zarco based on, as noted by the Court, *“in benefit of its condition of woman that placed them in total defencelessness (...), because their husbands had been missing, their houses burned, their property destroyed, as well as their crops and animals’ homes razed, all by members of the Guatemalan Army, military commissioners, and civil self-defence patrols.”* (Sepur Zarco’s Judgement p. 4. - Translated by the author). Although it is recognized that men are also subjected to rape during war, the phenomenon seems to occur more regularly in the female population. Some of the causes could be the following: women have historically been perceived as a property of men, which in war is attacked and looted; rape is related to forced pregnancy as an instrument of torture; the family is a target of war and the institution of marriage between people of the same sex and gender is still recent. The power linked to violence is visualized as a masculine characteristic. The exercise of violence is possible because it has this social form of power in which masculinity is linked to force, money, and authority. Violence, moreover, is constituted as a strategy of greater empowerment. Therefore, sexually abused men avoid reporting what happened to the authorities, due to shame, stigma and fear of rejection (Castañeda-Torres, 2003).

According to some of the testimonies collected by the CEH (1999), women were forced to take pills or contraceptive injections. Furthermore, the rapes were carried out in an organized manner following a military structure in which first, the lieutenants acted and then, the soldiers. Massive and Public Rape Against Mayan Women were not mere acts of insubordination or excesses of the troops, but systematic acts part of strategic planning. The CEH documented the inclusion of the practice of rape in the soldier’s military training by using prostitutes (Gutierrez, 2014). Rape was used to strengthen the spirit of the troop through the stimulation of an omnipotence feeling. Due to the role that men still have in the main armies of the world, it is necessary to attack the perception of masculinity that one has on a certain group, hostile to national interests, a culture, interests, and a history. Meanwhile, the notion of internal masculinity is strengthened, to reinforce morale (Quintero). These indications were the result of the military-nature planning by the senior commands to be able to carry out the rapes, precisely for this reason the sexual acts responded to a military objective and not to collateral damage from the conflict. Sexual assaults in almost all wars are used as a symbol of power and of domination against those who consider themselves the enemies. According to Aída Hernández (2002) in her anthropological work on *“Fratricidal war or ethnocidal strategy? The case of women facing political violence in Chiapas”*, argues that *“from a patriarchal ideology, which continues to regard women as sexual objects and as custodians of family honour, rape, sexual torture and bodily mutilation are an attack on all the men of the enemy group”* (Hernández, 2002, p. 20). What at first were acts against community leaders’ women, ended up spreading as a general practice to all the women and girls of Sepur Zarco, including pregnant women (Carrera, 2014). Like sexual violence, the destruction of homes and crops were part of other events that marked the conflict, leaving women and their families homeless. Faced with the disappearance of husbands and

destruction from their homes, many of them were forced to flee to even more rural areas where some of them managed to survive in precarious conditions, others saw their children die of disease or had to go back to the community (Idem).

Once the conflict ended and after years of continuous suffering, the consequences for women were devastating. The physical aftermath of violations was, forced pregnancies, abortions, inability to conceive again, muscle aches, as well as the transmission of sexual diseases. The fact that indigenous women live in extreme conditions of poverty and without access to health services exacerbates the condition of vulnerability and the consequences of these abuses; those that could have been treated at the time if they had had access to a health centre in the community. Concerning the psychological consequences, women experience feelings of fear and anguish in daily life, especially about the possible repetition of abuse. They were forced to be silent for 25 years, having to deal with fear, trauma and shame (Bonifazi 2018). Another aggravating circumstance is the social stigmatization that victims of sexual violence commonly experience, not only in warlike contexts, but also in peace. This scourge affects women belonging to indigenous communities unequally, since due to the prevailing sexism within the communities they are blamed for what happened, claiming that they wanted to be abused or even enjoyed it. This ostracism at the community level resulted in deciding to remarry or find a partner, as a way to regain their value as human beings (Gutiérrez, 2014, p. 55); since, in a highly patriarchal environment, a woman only acquires meaning if she is related to a man, whether as a wife, mother or daughter.

### 3. THE JUDGEMENT

As an emblematic case, it addressed the crimes of sexual violence and sexual slavery in the internal armed conflict. While it is true that the denunciation of the events committed in Sepur Zarco had the underrepresentation of 11 active women in the process, this represented an advance in the protection and legal restoration of women's rights in cases of sexual violence. It was a final judgement and an example for universal justice, carried out by the High-Risk courts of Guatemala. After years of trial, they finally convicted Military Commissioner Heriberto Valdez and the Second Lieutenant Francisco Reyes, as perpetrators of the ordinary crimes of murder and forced disappearance, as well as international crime against humanity. Heriberto Valdez was convicted for the commission of crimes against humanity in its forms of rape, sexual slavery, domestic slavery, as well as humiliating and degrading treatment against Maya Q'eqchi' women, as well as the ordinary crime of forced disappearance of seven community leaders, -article 201ter of the Guatemalan Penal Code- because he participated in his arrest in a violent way and said people remain unaccounted for. Likewise, the Judgment indicates that according to the standards of IHL, during the military operation, civil society had the right to be treated with humanity and on the contrary, men were attacked and deprived of their



freedom, and women were subjected to sexual violence (Sepur Zarco's Judgement p.504-507). For those crimes, as well as for transgressing the IHL rules, Heriberto Valdez was sentenced to 240 years in prison. On the other hand, Francisco Reyes was also declared responsible, for crimes against humanity in its forms of sexual violence, degrading and humiliating treatment of eleven Maya Q'eqchi 'women, as well as for the commission of the crime ordinary murder of three people - article 132 of the Penal Code. During the trial it was found that he authorized and consented the events that occurred, therefore, the Court added that its role was decisive for the massacre, since with an order he could have stopped the events. For all this, he was sentenced to 120 years in prison.

Throughout the process, there were numerous advances. The witnesses were victims of sexual violence; women, underage girls, as well as sick women, all of whom did not know the duration of the process. It is for this reason that the testimonies of the victims were accepted for the first time as anticipated evidence, with the aim of avoiding the re-victimization of women and girls and reducing the psychological impact they suffer every time they relate the events. Regarding the evidence, in addition to the testimonies of victims and witnesses, who not only provided information about the crimes committed, but also helped to determine the detachment operation, various multidisciplinary expert opinions were presented in the criminal process, to illustrate the court on aspects such as the historical context, the counterinsurgency strategy of the Government, unequal power relations between men and women and dominant racism.

It is important to also note that in cases of sexual violence in which women and girls have to testify, the importance of security measures for them is unquestionable. In the case of Sepur Zarco, the Office of the Prosecutor, carried out protection measures to guarantee the physical integrity not only of women, but also from the organizations that supported them during the process. Within these measures, the plaintiffs were provided with a route and accompaniment during transfers to the hearings. On the other hand, the involvement of women's organizations was also decisive to ensure the protection of the victims since, to avoid the social rejection of the community, they moved to places far from Sepur Zarco. Regarding the psychosocial strategy carried out by the ECAP organization, the priority was supporting women throughout the criminal process to build trust and cope with difficult stages of the process, such as giving testimony. For it, ECAP made visits to the women's home, which is a safe and private area for them and gave them freedom to address the facts (Impunity Watch, 2017, p. 33). Likewise, help networks were created that provided a *“space to re-socialize the women, value the support they get from other women, distinguish the personal from the political, gain a sense of self-control and gain power”* (Burden, 1987, p.31.).

Since we live in a world dominated by the masculine - or better, by what is considered an attribute of the masculine and associated with men, law and rights reflect, reproduce, and legitimize that dominance, under the fiction of the neutrality and impartiality. At the same time, as Marx already pointed out when he interpreted modern law and rights as legitimizing the rule of the bourgeoisie, this fiction still has consequences, since it contributes to promoting and sustaining demands and struggles for their realization: that

is, when taken seriously, promises (in this case, of equality and justice) can be a powerful engine of transformation, as indeed they have been. However, the struggle of women at the level and through law and rights has brought to light precisely the deep and structurally masculine nature of both, and the lack of awareness of this distorts the analyses, often frustrates the (apparent) conquests and / or has perverse consequences (Pitch, 2010). Precisely for this reason, it is interesting to observe the treatment given to crimes of a sexual nature by the Guatemalan court, since despite encountering legal loopholes, unfavourable principles for women and rejection by some groups of society, the court managed to establish a legal way to judge such acts even without being expressly defined in the law.

The classification of the facts was a complicated task since Guatemalan criminal law did not expressly include acts of sexual violence and sexual slavery in conflict. Precisely for this reason, both the Prosecutor's Office and later the Court, resorted to the application of article 378 of the Penal Code<sup>13</sup>, which refers to crimes “*against humanity or any inhumane act against the civilian population*”, allowing them to classify and condemn the crimes of sexual nature such as rape, sexual and domestic slavery as crimes against humanity (Impunity Watch, 2017). In this regard, due to the lack of legislation on gender, the case was based mainly on international law instruments, based on article 46 of the Guatemalan Constitution, which expressly recognizes the pre-eminence of international human rights standards. This circumstance set the tone for the application of common Article 3 of the Geneva Conventions, which prohibits both attacks and degrading treatment of the civilian population.

Unlike international cases, the Sepur Zarco case was presented as a multidisciplinary strategic litigation, through which different expert opinions, both anthropological, military and sociological, were taken into consideration in order to provide women with protection and adequate resolution. The trial did not focus exclusively on the prosecution of those responsible, but through this procedure, visibility was given to the role that women play during the conflict and how gender relations affect these contexts. During the trial, the anthropological gender expertise took into account that women were not violated as collateral damage, but that it was for the purpose of desecrating their bodies, materializing in both physical and moral destruction, since under the indigenous worldview women's bodies represent the social body. The court accepted what was established in the expert opinion, in which the destruction of the position of indigenous women was a military objective as punishment for the detainees. It was intended to harm the community through sexual violence. (Women's Link Worldwide). Their ethnic origin, their phenotypic traits produce hatred or rejection in the perpetrators who exercise double and triple violence, because they are women, because they are indigenous and because they are subversive, but the damage is not only physical, but also cultural and territorial. Indigenous women are continuation of their peoples. With rape, an attempt is made to

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<sup>13</sup> GUATEMALAN CONGRESS: Guatemalan Penal Code. DECREE No. 17-73 Art. 8 “*Anyone who violates or infringes humanitarian duties, laws or agreements with respect to prisoners or hostages of war, wounded during military actions, or who commits any inhuman act against the civilian population, or against hospitals or places destined for the wounded will be punished with a prison term of twenty to thirty years*”

destroy the group, since it considers that it is difficult for women to conceive children from the practice of war, so this constitutes a sexual ethnocidal message. This would be a kind of inscription feminicide on the body of women whose message is directed to the men of the community (Trejo, 2016). It can be seen from the Court that it was not exclusively limited to prosecuting the crimes committed, but also gained value and made visible from an interdisciplinary point of view, not only the impact and consequences suffered by women for being women, but also for being part of an indigenous community, valuing the influence of these acts according to their cosmovision.

At the same time, the Chamber was inspired by court rulings among which stand out those of the ICTR and the ICTY for the classification of crimes of sexual nature. In addition, it was based on the definitions provided in the Rome Statute on the crime the crime against humanity and its forms. They alluded to the American Convention on Human Rights, the Universal Declaration of Human Rights, CEDAW, as well as Resolution 1325 on women, peace and security that recognizes sexual violence as a weapon of war. It should also be added that, when imposing the penalty, due to the nature of the crime against humanity and its structure -which considers the civilian population as subject- was impossible for the Tribunal to divide the crime and multiply it by the number of victims. However, the Court recognized that women victims of sexual violence, sexual slavery, and degrading treatment in the community of Sepur Zarco, *“constitute an individuality because each person has an intrinsic value in himself, which we value and respect”*.

Finally, the Court concluded considering that the humiliating treatment and the attacks constitute crimes against humanity. The recognition of the truth is what truly helps to heal the ideas of the past, and the application of justice is a right that assists the victims, underlining the non-repetition of the facts, for this reason, the Court recognizes, through the final decision, the respect that the victims of Sepur Zarco deserve, who, by overcoming the stigmatization exerted on them, have been able to make public the violations to which they were subjected. For this reason, the second part of the sentence focuses exclusively on the reparations.

#### 4. REPARATIONS

The last step of the Court and the most important, were the reparations to the victims, directed to the reconstruction of the social fabric of the community. At the reparation hearing, the Chamber issues numerous measures to compensate material, physical and moral damages, all of them based on human rights treaties and conventions referred to previously, as well as in the Constitution and Guatemalan Penal Code. In relation to individual reparation for victims of sexual violence, as well as the relatives of the murdered and disappeared, the Court set an economic amount for each one of the victims.

The Court implicated the executive body, local authorities, other organizations, and those convicted in the repairs. One of the actions entrusted to the Government was to redefine the Sepur Zarco community with the improvement of the educational system and the health system.

Regarding the first, the Court ordered the Ministry of Education to install bilingual systems for women and girls, guaranteeing the right to education, the granting of scholarships for the three educational levels to all the women of Sepur Zarco, in addition to including the case in every textbook. The approach was based on a feminist epistemology articulated with Mayan's worldview from a decolonial perspective, which implied putting in the centre of the research voices and experiences silenced by anthropocentric vision and racist in the world (Fulchiron, 2016, p. 393). The Chamber considered the development of cultural projects for community women crucial, as well as the translation of the Judgment into the 24 Mayan languages, in order to eradicate discrimination. Alternative healing activities were created involving use of arts, such as painting, theatre, photography, and drawing. Inside them and how common thread, a critical analysis of the prevailing power structures was carried out - racism, sexism, and classism - to create an understanding about the context and causes of war in general and sexual violence in particular (Bonifazi 2018). The objective was to *“resignify the experience of rape and war, heal the body memory between women and create conditions of no / repetition; as a tool for transforming women's lives”* (Fulchiron, 2016, p. 393). From this reparation infers not only a purpose to break the silence about sexual violence, but also to initiate a process of overcoming the trauma and lay the political and social foundations in which women could develop as active subjects of their own life and aware of the injustices around them. On the other hand, addressed to the Ministry of Public Health, the Court indicated the importance of the construction of a health centre in Sepur Zarco with all medicines and necessary machinery.

Likewise, the Court forced the Ministry of Défense to incorporate courses on the rights of women in military formations, as well as prevention legislation of Violence against Women. At the same time, it ordered the Public Ministry to continue with the investigation to determine the whereabouts of the people who disappeared during the conflict, with the collaboration of the victims' families.

According to the report of the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Greiff (2014), symbolic reparation measures *“derive their great potential from the fact that they carry meaning and can, therefore, help victims in particular and society in general. to understand the painful events of the past.”* (p. 10.). Therefore, the Court ordered to recognize February 26 as the Day of the Victims of Sexual Violence, Sexual Slavery and Domestic, the responsibility of the complainant organizations; In addition, it was ordered to build a monument that represents the search for justice of the women of Sepur Zarco, in charge of the Municipality of El Estor, Izabal (Bonifazi, 2018).

The conviction and the inclusion of comprehensive reparation measures for victims and communities represented a triumph, from the holding of training workshops

for women to break the silence on sexual violence, to the holding of an Awareness Court of Justice-Tribunal de Conciencia- and the development of strategic litigation. The Sentence in the Sepur Zarco case represented an official validation of the truth of women survivors, while “*returning to women the recognition of their voice, of their history and dignity in front of the community.*” (Impunity Watch, 2017, p. 64.). At the social level, it represented the recognition of a scourge that is still present in Guatemalan society and with which many women of all social strata and ethnic groups can identify: sexual violence as a demonstration of the unequal relations between genders, where men exercise power over women's bodies and minds. Likewise, the ethnic discrimination that continues to be rooted against indigenous peoples and the way in which it particularly affects women was made visible.

## CHAPTER VI: FINAL CONCLUSIONS

To conclude, it can be seen how sexual violence against women and girls has been constant in armed conflicts. In the post-World War II era, both the IHL and IPR were characterized by their androcentric and patriarchal character with instruments such as the Geneva Conventions, which exclusively included “the right to family honour”. The posture adopted by the Nuremberg and Tokyo courts perpetuated the invisibility of both sexual violence, like the humiliating treatment suffered by Jewish women in concentration camps, as well as the sex slaves of the Japanese army. It was not until the creation of ad hoc tribunals that began to reflect on the importance of the role of women in the conflict and the use of their bodies as a weapon of war.

It is evident that the development of international tribunals is a fundamental factor in post-conflict situations and transitional justice, as they drive the debate about the importance to work for the reconciliation of a country, facing the need for justice for the victims of the violations. But, at this point, the debate centres on whether justice has really been done for victims of sexual violence in international courts. Definitely, the jurisprudential advances obtained by ad hoc tribunals regarding the integration of gender perspective are undeniable, from the reflections on the definition of sexual violence in the case *Akayesu* and, later, in the *Furundzija* case, until the criminalization of crimes of a sexual nature as war crimes, crimes against humanity and genocide. As a continuation of these, the constitution of The ICC was an important step to classify and convict crimes of a sexual nature.

Despite the international development both normative and jurisprudential on gender, its effectiveness was questionable. In Rwanda, although the definition of violence was collected for the first time and sexual violence and the acts of a sexual nature were classified as genocide, many of the victims did not testify due to possible retaliation from the community or future assaults. In the case of Yugoslavia, while acts of sexual violence were recognized as war crimes, currently, there are still women victims of sexual violence who live with their aggressors. Considering that, according to the Statutes of each Court, they lacked jurisdiction to deal with reparations, the presidents of both courts proposed the creation of a compensation fund for victims, however, this proposal never was materialized. Regarding the ICC, although there were indeed advances such as those mentioned above, *Lubanga's* case demonstrated that the Court, even hearing evidence about crimes of a sexual nature committed by the accused, decided to ignore them and focus exclusively on the crimes of recruitment and isolation.

Having analysed the jurisprudential and normative advances from the Nuremberg tribunals and Tokyo, until the reparations of the Court of Guatemala, it is important to note that all of them have found inspiration in each other, and continue to do so, in the achievements and failures of the previous ones. As I have mentioned, the invisibility by the Nuremberg and Tokyo courts of the crimes during the conflict, promoted the codification of more favourable IHL provisions to the protection of women's rights. Among these are Article 7 of the IV Geneva Convention and Article 76.1 of Additional Protocol I, both established a framework of protection for women victims of rape. Then, in 1977, with the Additional Protocol II, the prohibition of acts of rape, forced prostitution

and any form of indecent assault in relation to internal armed conflicts were collected for the first time.

Subsequently, ad hoc tribunals contributed progressive jurisprudence that set a precedent both nationally and internationally. The ICTR, in the Akayesu Judgment, for the first time defined the concept of “rape,” a term that until now had been invisible in the rest of international instruments. The Court considered violation any act that represented an invasion physical of a sexual nature. In addition, it analysed in depth, based on international jurisprudence, as well as in the Convention against Torture, that any act of rape carried out with the purpose of humiliating and denigrating women under coercive circumstances would constitute torture. This reflection later served the ICTY in the Celebici case, since despite being accused of serious violations of the Geneva Conventions and not of crimes of genocide and crimes against humanity like Akayesu, it facilitated the Court's consideration of the violation as a constitutive act of torture. Akayesu's influence on Celebici was key, as it allowed the ICTY to deepen in the definition of rape, emphasizing the importance of considering the psychological damage of victims of sexual violence. On the other hand, thanks to the interpretation of rape as a constitutive act of torture, the ICTY in Celebici, condemned sexual violence as grave violations of the Geneva Conventions of 1949, despite the fact that the article was not expressly included. A similar case was that of Furundzija, in which they condemned the crimes of sexual violence as violations of IHL. However, in this Judgment, the Court once again relied on Akayesu's definition for interpreting the term rape. In this case, the Court highlighted the importance of narrowing down the definition, so that he listed the body parts and objects required to qualify as the crime of rape.

The influence of the judgments of international tribunals was not limited to these since their advances served as the basis for the Guatemalan national court. Therefore, in the Sepur Zarco case where both, Francisco Reyes and Heriberto Valdez were convicted of crimes against humanity by the acts of rape and degrading treatment of women in the community, the Court was inspired by the definition provided by the ICTR in the Akayesu judgment on the concept of rape. What is more, the classification of rape as crimes against humanity in the Rome Statute, helped the Prosecutor's Office in the accusation of those responsible. Besides, from the structural historical analysis on the genesis, etymology, reproduction and validity of racism, genocide and femicide in Guatemala and its different logics, social practices and demonstrations, as well as the main actors (power elites, army, landowners, commissioners, Maya, Ladinos, etc.), we can deduce several aspects of violence and rape against women in the Municipality of Izabal, Sepur Zarco detachment and neighbouring farms. The role played by the racist state and its repressive and ideological apparatus cannot fail to be evident during the war, nor the collaboration of certain sectors of the oligarchy. This can be seen in the case of the Sepur detachment Zarco and neighbouring farms. However, despite the racist, authoritarian and exclusivist system that prevailed at the time of the trial, the Court managed to be independent, to move away from patriarchal and colonial patterns of behaviour in order to offer fair treatment to the victims.

Therefore, it should be noted that despite the influence of the courts and international instruments, the Guatemalan Court was a forerunner in worthy reparations to the victims, since it knew how to find mechanisms that would guarantee and allow the

visibility and restitution of the damage. It should be recognized that the Sepur Zarco case was emblematic from a transitional justice perspective. First, it represented the construction of the truth from a woman's point of view. In addition, by concluding not only in a conviction sentence but in the acknowledgement of the responsibility of the Guatemalan army in the commission of sexual violence in a systematic and generalized way, justice and a series of comprehensive reparations for women survivors was achieved. However, for this transitional justice process to be comprehensive, it is necessary to complement it with guarantees that ensure the non-repetition of these crimes and more specifically the transformation of oppressive behaviour patterns that are still dominant in the law. Likewise, it authentically recognized the victims and repaired them not only economically, but psychologically, through initiatives that favour the visibility of the community and its integration. Therefore, the Court of Guatemala was an example for both national and international courts, which must take it as a reference based on future changes and improvements.

Given these reflections, it should be considered to what extent the international courts compensated the victims or made sure they were repaired and if perhaps should reform the ICC, adopting, if not all, some of the reparation's initiatives imposed by the Court of Guatemala. In short, the Nuremberg and Tokyo tribunals, the ad hoc and subsequently the ICC, have been shaping the normative development on gender matters, however, Comparison with the case of Guatemala allows us to consider that there is still a long way to go to raise awareness in the international community about the importance of legislating and judge with a gender perspective.



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