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**Good practices regarding legal reforms in the area of violence against  
women in Latin America and the Caribbean**

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\* *The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.*

## 1. Contextual framework.

To be a woman and to be poor in Latin America constitute a life risk. If to these factors we add other ones as being young, indigenous or afro-descendant then the risk increases. The daily insecurity that women face because of their gender, and the high number of deaths due to this factor, have motivated that from the early 90s in the Latin American region, we refer to the term "femicide/feminicide".

By femicide/feminicide we identify all the violent deaths of women which implied intention in the execution of these acts. We include (i) serial sexual murders ;(ii) deaths due to domestic violence or family violence;(iii) deaths framed within the scope of actions of the organized crime, prostitution, drug trafficking , women trafficking, sexual exploitation of children.

The femicide crimes committed in Juárez City in Mexico, and Guatemala are known in the rest the world due to the horror of the murders and the impunity on behalf of the States. Nevertheless this flagellum is present in all the region, with greater emphasis in some countries more than in others. In the case of Mexico from the view of the state authorities there is a clear lack of serious consideration of the problem since the legal response in relation to these crimes is to consider 80% of them as cases related to domestic violence. The women who died due to family violence are also an evidence of the inefficiency of the system and the shared responsibility of the municipal, state and federal authorities who do not guarantee the right to a life free of violence, and to many other rights incorporated in the diverse national and international instruments which have been ratified by Mexico but ignored by its government officials.

On February 1st 2007, it was promulgated the General Law for the Access of Women to a Life Free of Violence where the definition of femicide was incorporated. Violence Against Women, VAW, in the region is also expressed under other forms of violence such as sexual violence in contexts of peace as well as in situations of armed conflict. Thus, the World Health Organization WHO, (2002) reports that the greater percentage of sexual aggressions where the victims are women and children, are perpetrated by men of different ages. The victims of "femicide" in Central America and Latin American countries also show evidence of sexual violence.<sup>1</sup>

The majority of the American States have ratified CEDAW and its Additional Protocol as well as the Interamerican Convention to prevent, sanction and eradicate violence against women, a situation that shows that the states in the

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<sup>1</sup> FIDH: " *Entre la impunidad y el dolor: las muertes violentas de mujeres en México y Guatemala.* " Misión de investigación sobre el femicidio en México y Guatemala. Presentada ante el Parlamento Europeo en abril de 2006./ "Between impunity and Pain: violent deaths of women in Mexico and Guatemala", Investigating Mission on Femicide in Mexico and Guatemala. Report presented before the European Parliament in April 2006.

region have finally realized that “violence against women constitutes a violation of human rights and fundamental freedoms (...)”<sup>2</sup> and that is why they committed themselves to prevent, to sanction and to eradicate it..

However the Special Rapporteur on Women Human Rights of the OAS explains that” the women victims of violence do not frequently have access to judicial resources which can effectively respond to denounce these acts, a situation that contributes to the perpetuation of impunity and therefore affect their rights as they continue to remain unprotected. The IHRC observes that the big majority of the cases of violence against women are shadowed by impunity which contributes to perpetuate these serious violation of human rights”<sup>3</sup>.

In March 2006 a group of networks and NGOs that work for women rights<sup>4</sup> and human rights presented before the Interamerican Commission of HRs the report “Femicide in Latin America ” as a result of a thematic meeting on the said topic. The report was elaborated based on the information obtained by NGOs of Bolivia, Colombia, Guatemala, México, Paraguay and Peru on: (i) violent deaths of women; (ii) conditions contributing to their vulnerability such as armed conflicts; (iii) data regarding access to justice; (iv) intervention in international spheres of protection of human rights; (v) responses of the governments in front of this problem.<sup>5</sup>

The human right of the American women to live a life free of violence has been incorporated in article 3rd of the Inter-American Convention to prevent, to sanction and to eradicate Violence Against Women, -known as the Convention do Belem do Para. This Convention constitutes the first and only legal instrument at universal level of a binding characteristic regarding violence against women. Its introduction affirms that “violence against women constitutes a violation of human rights and fundamental liberties which limits total or partially the possibility for women to fully enjoy and exercise them”.

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<sup>2</sup> Preámbulo de la Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer”/Preamble of the Convention/. Belem do Pará, 1994.

<sup>3</sup> Informe “Acceso a la justicia para mujeres víctimas de violencia en las Américas”. Relatoria de derechos de la Mujer, CIDH,/ Report Access to justice for Women victims of violence in the Americas, ICHR/ 2007.

<sup>4</sup> El Informe fue preparado por/report elaborated by : la Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, A.C. (CMDPDH), el Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer (CLADEM), la Federación Internacional de Derechos Humanos (FIDH),el Centro por la Justicia y el Derecho Internacional (CEJIL), Kuña Aty (Paraguay), DEMUS (Perú), Católicas por el Derecho a Decidir México, Grupo de Mujeres de San Cristóbal de las Casas, A.C. (COLEM - México), el Centro de Promoción de la Mujer, Gregoria Apaza (Bolivia), la Red Nacional de Trabajadoras/es de la Información y Comunicación, RED ADA (Bolivia), el Centro para la Acción Legal en Derechos Humanos (CALDH - Guatemala), Sisma Mujer (Colombia), la Red de la No violencia contra las Mujeres de Guatemala y Washington Office on Latin America (WOLA)

<sup>5</sup> CLADEM, Investigación/CLADEM Report Femicidio. Monitoreo sobre femicidio/feminicidio en El Salvador, Guatemala, Honduras, México, Nicaragua y Panamá /Femicide Monitoring report in.../”<sup>5</sup>

Art. 1° defines violence against women as “any action or conduct, based on gender, that causes death, physical, sexual or psychological harm to a woman, in the public scope as well as in the private one”.

Art. 2° establishes that the violence against women includes the physical, sexual and psychological violence.

Art. 7° describes the obligations of the States parties with respect to the protection of those rights, among others.

## **2. Legislation on domestic, family or intra-family violence.**

Presently thirty two out of the thirty four Member States of the Organization of American States, OAS, have ratified this Convention. Of these, twenty-five countries have partially observed their commitments in relation to the Convention promulgating laws on domestic, family or intra-family violence hiding once again violence against women behind the figure of the family unit. This constitutes a partial fulfillment of their commitment since the Convention includes diverse spheres and political demands in order to prevent, to sanction and to eradicate violence against women which go beyond the mere approval of a law against domestic violence which comprehends different expressions of violence .

None of the 32 countries that ratified the Inter-American Convention of Belem do Para has exactly fulfilled its regulations. Most of the legislations on domestic violence incorporate physical and psychological violence, whereas some also contemplate sexual violence such as Bolivia , Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Puerto Rico, Venezuela and Uruguay. In four countries, Costa Rica, Guatemala, Honduras and Uruguay the patrimonial violence is considered in addition. These laws are of two types: (i) protectionists which only authorize the petition and formulation of protective measures and (II) of sanction natures, those which establish a process which ends in a sanction.

## **3. Sexual violence in the Interamerican System of Human Rights.**

As we know the treaties of human rights of the inter-American system generate obligations for the States parties in order to protect women against sexual violence. These obligations include the protection of the rights to life, integrity and personal freedom, as well as to equality and nondiscrimination. In addition the Inter-American system has a Convention against Torture<sup>6</sup>. However, the key piece of legislation regarding the state responsibility in the Inter-American system is the Convention of Belem do para where the States parties are committed to prevent, to sanction and to eradicate violence against women. The international treaties and documents, like the Declaration to eliminate

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<sup>6</sup> Convención Interamericana Para Prevenir y Sancionar la Tortura (Adoptada en Cartagena de Indias, Colombia, el 9 de Diciembre de 1985)

violence against women, Recommendation 19° of the Committee for the Elimination of all forms of Discrimination against Women, the Inter-American Convention to prevent, sanction and to eradicate all forms of violence against women, among others, establish that violence against women includes sexual violence but without considering its definition. Regarding this lack of definitions in the international law, the countries within their national legislation must define which acts constitute sexual violence. In any case the definition that is finally adopted by each country on the elements and type of sexual violence, including the access of the victims to justice, must be all in agreement with the principles of the international law on human rights

#### **4. Amendments to the Penal Codes in relation to Sexual Violence.**

Several countries of our Region have modified their penal legislation to criminalize conducts against women, especially the ones concerning sexual violence. First it was Puerto Rico in 1979, which eliminated the provision which compelled giving evidence of the previous sexual conduct of the victim in case of rape<sup>7</sup>. Mexico incorporated amendments to the Penal Code in 1989, increasing sanctions for cases of rape. In the 90s, we add the cases of Peru (1991), Guatemala (1997), Colombia (1997), Dominican Republic (1997), Honduras (1997), Bolivia (1997), Ecuador (1998), El Salvador (1998) and Chile (1999). The normative framework in terms of sexual crimes improved, eliminating cultural concepts that operated to the detriment of the victim such as references to (i) the honour of the victim; (II) her previous conduct; (III) sanctions for these crimes were increased; and (IV) sexual crimes were typified, among them marital rape. These modifications in the criminal law have categorized sexual crimes not as crimes against the honor and moral conventions, but crimes against sexual integrity or sexual freedom. Despite of this, some countries maintain discriminatory terms referred to the honesty of the woman and persist on regulations that makes the aggressor to be exempted of sanction by marrying the victim or even considering marriage to a third party. (Brazil, Nicaragua, Panama, Guatemala). In 2006 Uruguay amended article 116° of its Penal Code which consecrated the exemption of sanctions<sup>8</sup>.

In the region violent sexual attacks have not been uniformly typified. In many countries, "... the sexual attack continues to be considered a crime against morality and not an aggression that violates the personal integrity of the victim. In some countries, the penalty in cases of marital rape is less than the one for violent sexual crimes<sup>9</sup>"

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<sup>7</sup> Ley 6, 1979.

<sup>8</sup> Mediante Ley N° 17.938 del 21/12/2005 se eliminó el artículo 116° del Código Penal Uruguayo que establecía la remisión de la pena al violador que se casara con la violada.

<sup>9</sup> Guerrero C, Elizabeth En Isis Internacional/UNIFEM. Violencia contra las mujeres en AL y el C. 1990-2000. Balance de una década.

Some countries have approved Protocols of attention to victims of sexual violence as part of an integral response regarding this violation of human rights. In the Region these countries are: Argentina, Brazil, Chile, Costa Rica, Guatemala, El Salvador, Nicaragua, Paraguay, Peru and Mexico<sup>10</sup>. The lack of concern in the rest of the countries gives an account of the relevance of the subject in the political agendas.

### **5. Trafficking of Latin-American women.**

In Latin America and the Caribbean, trafficking of women was originated during Colonization when the Spaniards treated women as booty prizes, in accordance with the military practices, originating the existence of sexual commerce and establishing places for it<sup>11</sup>. In our region we can categorize trafficking in two dimensions: (i) the internal traffic, within a country and (II) the external traffic where women are recruited in the region to cover the demands of the international market. The UN Special Rapporteur on the human rights of the victims of trafficking, especially women and children, Mrs Sigma Huda<sup>12</sup>, in her report of February 2006, condemned "the attitude of the countries of origin which close their eyes in front of this problem and that economic, political and cultural conditions prevailing in many places of the world affect women and children in a particular to the risk of becoming victims of trafficking..."<sup>13</sup>. The attitude of the countries of the region continues being the same.

Various data recollected by diverse Spanish institutions indicate that the majority of women come from Latin America, in 70%, and that 30% comes from East Europe. Unfortunately, the number of victims is increasing alarmingly essentially due to the conditions of economic and social poverty, marginalization, inequality, the lack of opportunities and the presence of violence against women. It is important also to recognize the work of many civil, religious Institutions and non-Governmental Organizations which work helping the victims of this flagellum.

Undoubtedly, the main instrument that deals with this is the Protocol to prevent, to sanction and eradicate trafficking, especially that which affects women and children, instrument that has not yet been ratified by the majority of the States of the Region. This Convention represents a step forward in the recognition and protection of the rights of women victims of trafficking. Nevertheless it is necessary to emphasize the imbalance that exists regarding the articles; one article concerning the penalty of the crime (Art. 5°); three

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<sup>10</sup> Galimberti, Diana: Análisis comparativos de los protocolos de atención a la violencia sexual en Reunión de [expert@s](mailto:expert@s) "Alternativas de atención en el sector salud para mujeres sobrevivientes de violencia sexual". OPS, Washington D.C. Agosto, 2005.

<sup>11</sup> Citado por Chiarotti, Susana, en: CEPAL ECLAC: "La trata de mujeres: sus conexiones y desconexiones con la migración y los derechos humanos". Santiago de Chile, 2003

<sup>12</sup> Documento E/CN.4/2006/62 del 20 de febrero de 2006 del Consejo Económico y Social de las NNUU. "Integración de los derechos humanos de la mujer y la perspectiva de género

<sup>13</sup> Idem

articles in relation to victims (Arts. 6°, 7° and 8°, 8° dedicated to the repatriation of the victims); one article in relation to the prevention (Art. 9°); and four on exchange of information and qualification of civil servants who work in the areas of migration, border areas, security and control of documents, and on legitimacy and validity of documents (Arts. 10°, 11°, 12° and 13°). The migratory control seems the main aim of the protocol and prevention and eradication are not given proper attention as it is consecrated on article 2°. It is important to distinguish between migrant and women victims of trafficking, since all migrants are not victims of it and all the victims of trafficking do not end in prostitution. Not to mention this, would be to somehow justify the restrictive laws of immigration and discrimination that some countries are applying under the justification of combating trafficking. The women victims of trafficking are victims and not non-legal immigrants as they are considered after being located by the authorities. This categorization is of serious concern because the victim ends suffering repatriation or imprisonment as expressed by Mrs Huda in her 2006 report.

Repatriation means to ignore the causes that originated the exit from their country and to make them to come back to that same situation of vulnerability without considering its human right to dignity. The victim of trafficking is stereotyped as delinquent, as attempting to enter "illegally" the country and re-victimized by the authorities of the country of destiny since there is a transfer of responsibilities and she is the one that finishes being investigated and scrutinized regarding her sexual life instead of investigating and condemning the perpetrators.

## **6. Difficulties referred to the implementation of the legal reforms :**

To eradicate gender based violence is a process which requires cultural changes that must be socially accepted<sup>14</sup> and integral public policies. There are advances in the American legislation to improve the situation of women but they are not fully implemented due to the following reasons:

- a. Absence of economic and material resources for the effective implementation of the legal reforms on Violence against women.
- b. Ignorance and/or resistance on behalf of the judges to apply the international law of human rights generally and specifically referred to the human rights of women.
- c. Lack of sensitization and qualification of social operators, especially the legal operators (judges, public prosecutors, defenders, academics) with respect to the reforms that are done by the States.

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<sup>14</sup> As argued by Professor H. Nogueira, the establishment of new formal elements that are de facto not fully implemented, does not guarantee a real cultural change..

d. Re-victimization, prejudiced and discriminatory treatment to the victims of violence by government officials blaming them for the aggression they have suffered.

e. The lack of material and human resources for a suitable attention to the victims. For example the forensic examinations are done generally without considering the rights of the victims.

f. The ignorance of the women in relation to their rights. Violence against women continues to be internalized as a "natural and invisible" practice in our societies.

## 7. Good Practices within the Inter-American System

Case M.M versus Peru. "*Maybe I had a Right*"<sup>15</sup>

- a. The facts: On January 25th 1996, M.M. went to the Carlos Medrano Monge Hospital of the city of Juliaca, Puno, Peru, due to strong headaches that she was suffering as a result of a traffic accident that happened three months back. She was assisted by Doctor Gerardo Salmon Horna who with lies took her to his private surgery and using anesthesia proceeded to put her in state of unconsciousness, raping her<sup>16</sup>. M.M denounced Dr. Gerardo Salmon Horna accusing him of rape. "It was an aberrant judgment, all the process was a scandal"<sup>17</sup>, were some of the comments of those who followed the case in Peru. The magistrates acted with bias, prejudice and inequity.
- b. On March 6 th 2000 an Agreement between the petitioners and the Peruvian State was signed, with the acceptance of the victim. In the Agreement, the Peruvian State "deplores all what happened and indicates its intention to contribute to the solution of this case and of preventing the occurrence of with similar cases, as well as not tolerating threats or acts of violence against women that could be committed by civil servants, or third parties, sanctioning them according to law"<sup>18</sup>. The Peruvian State, accepts to repair the moral and material damage caused to M.M, and expresses commitment: (i) To sanction the aggressor; (II) To repair the victim; e (III) To implement specialized services of attention to victims of sexual violence in all the country.

This case, like others which reached to this instance and have been solved by agreements of this kind, are important for the victims, their relatives and for all the women of the region because:

- (i) Justice for M.M as for the other victims was granted regarding cases which were taken to the Inter-American System;
- (ii) They revealed the systematic patterns of violence against women, denouncing and establishing the responsibility of the State at international level,

<sup>15</sup> "Tal vez yo tenía derecho": Un caso de violación sexual ante la Comisión Interamericana de Derechos Humanos. CRLP.CLADEM y CEJIL, Lima, 2000

<sup>16</sup> Idem

<sup>17</sup> Idem

<sup>18</sup> Acuerdo de solución Amistosa. Caso CIDH 12.041 (MM). Disponible en el sitio arriba mencionado



- (iii) They allowed that the Inter-American Commission of Human rights, ICHR to create "international jurisprudence" with respect to the human rights of women; and
- (iv) They demonstrated the effectiveness in the use of the international mechanisms of human rights as a guarantee to prevent, to sanction and to repair the violations of the human rights that occur at a national level.

Nevertheless it is important to indicate that at the moment the Peruvian State is failing to fulfill the signed agreement done in the year 2000, therefore we must remember that we must be vigilant on the "impunity tolerated by the State in the cases of violence against women, and its lack of giving the due diligence which is consecrated in the international treaties that have been subscribed"<sup>19</sup>.

Mr. Salmón H. continues working in an administrative position in the department of Statistic of the same Hospital in Juliaca. He has been acquitted in the cases of rape of RM in 2003 and in June of 2007 this time an offense against a minor of initials AUAS which was denounced again as rape indicating that she was a victim when searching for medical attention in that hospital<sup>20</sup>. For this reason, the petitioners in the subscribed Agreement with the Peruvian State in the case of M.M., asked for a working meeting before the ICHR where they expressed the gravity of the situation. This meeting was carried out on 11 th March. The Peruvian State was represented, as well as the petitioners.

Commissioner Paolo Carozza, representative of the ICHR, indicated the concern on behalf of all the Commission, since "this is a serious situation where there is a need to intervene regarding the Agreement as in this case there are already other obligations, added to the previous ones of the Peruvian State (...) the obligation adopted by the State to protect women regarding violence and sexual abuses (...) it seems impossible to contemplate as this man Gerardo Salmon) continues to stay, and it must not matter if he is a member of the medical or administrative profession (...) it is not only the lack to fulfill obligations to repair the victim but to tolerate a situation of rape and permanent violations and therefore it becomes urgent to look for a solution by the Peruvian State".<sup>21</sup>

The ICHR is a body of the Organization of American States, OAS, that has the mission of watching the fulfillment of Treaties. When the Peruvian State, like the other states parties that integrate the OAS, signed agreements of this kind-amicable solution- it assumed the moral and legal obligation to fulfill it by virtue of the Convention of Vienna on the Law of treaties.

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<sup>19</sup> Nota de prensa presentada por las peticionarias el pasado 25 de marzo de 2008.

<sup>20</sup> Idem

<sup>21</sup> Idem