

SEXUAL CRIMES IN INTERNATIONAL CRIMINAL LAW

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I. THE CRIME OF RAPE – FROM THE PROTECTION OF FAMILY HONOUR TO THE CRIME AGAINST HUMANITY

A. Historically, sexual crimes had excited a reduced interest in the scope of the international criminal law¹ – there are few references to these crimes in both international rules and international criminal law studies and jurisprudence². Nevertheless, rape and other sexual violence in time of war have a long history³.

Although men and women can be victims of sexual abuses in war time, studies show that sexual crimes are committed essentially against women⁴. Traditionally, the raping of women was viewed as a normal consequence of war — the «right» to rape women was regarded as a reward due to soldiers of both sides for their effort

1 About the expression *international criminal law* see DIAS, Figueiredo, *Direito Penal. Parte Geral I*, Coimbra: Coimbra Editora, 2004, Chap. 2, § 1 and f., and Chap. 9, § 1, GIL GIL, Alicia, *Derecho Penal Internacional — Especial consideración del delito de genocidio*, Madrid: Tecnos, 1999, p. 23 and f., JESCHECK, Hans-Heinrich / WEIGEND, Thomas, *Tratado de Derecho Penal. Parte General*, ed. 5, Granada: Editorial Comares, S.L., 2002, § 14, I, II, and § 18, I.

2 See DANIELI, Ana, «La repressione dei crimini sessuali nel diritto penale internazionale», *Rivista Internazionale dei Diritti dell'Uomo*, 14 (2001), p. 844.

3 CHINKIN, Christine, «Rape and Sexual Abuse of Women in International Law», Symposium: The Yugoslav Crisis: new International Law Issues, *European Journal of International Law*, 5 (1994), p. 327 and f.

4 CHINKIN, Christine, «Rape and Sexual Abuse...», p. 326.

in combat⁵. Moreover, within the scope of an armed conflict, the violence against women constitutes a way to reach the social group which they belong — «to rape a woman is to humiliate her community»⁶.

B. In the modern Law of the war, the first expressed reference to the prohibition of the practical of rape was in *Lieber Code* (1863)⁷. This Code (that constitutes the first attempt to establish, for writing, a set of rules that impose the respect for the uses and customs of the war⁸) states the «sacredness character of domestic relations» (Article 37) and punishes rape with death penalty (Article 44).

At The Hague Conventions of 1899 and 1907 there is not any expressed reference to the sexual crimes, establishing only the duty of respect for «family honour and rights»⁹. However, some understand that the protection of the honour of the family includes, indirectly, the prohibition of sexual violence against women¹⁰.

In the four Geneva Conventions of 12 August 1949, the protection of women against sexual abuse could only be invoked by means of reference to the personal dignity, honour and modesty of the woman. The IV Geneva Convention relative to the Protection of Civilian People in Time of War, that emphasizes the necessity to protect the women in situation of armed conflict, expressly refers the rape, but it does not proceed to a true enumeration of the crimes of sexual nature¹¹. This Convention only establishes that «women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form

5 COTTIER, Michael, «War crimes — parag. 2 (b) (xxii)», in: *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1999, no. 201.

6 COOMARASWAMY, Radhika, *apud* CHINKIN, Christine, «Rape and Sexual Abuse...», p. 328.

7 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, available at <http://www.icrc.org>

8 See CARREIRA, José Silva, «O Direito Humanitário, as Regras de Empenhamento e a Condução das Operações Militares», *Cadernos Navais*, 11 (2004), p. 13.

9 Article 46 of the *Convention (IV) respecting the Laws and Customs of War on Land and its Annex: regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*, available at <http://www.icrc.org>

10 In this way, MAIDER ZORRILA, *La Corte Penal Internacional ante el crimen de violencia sexual, Cuadernos Deusto de Derechos Humanos 34*, Bilbao: Publicaciones de la Universidad de Deusto, 2005, p. 18. Defending that it is almost not possible to establish a linking between the norms of The Hague Conventions and sexual crimes, ESCARAMEIA, Paula, «Introdução da Perspectiva de Género no Estatuto de Roma do Tribunal Penal Internacional», in: *Direitos Humanos das Mulheres*, Coimbra: Coimbra Editora, 2005, p. 54.

11 See MARAVILLA, Christopher Scott, «Rape as a War Crime: the implications of the International Criminal Tribunal for the Former Yugoslavia's decision in *Prosecutor v. Kunarac, Kovac, & Vukovic* on International Humanitarian Law», *Florida Journal of International Law*, 13 (2001), p. 322.

of indecent assault» (Article 27)¹². Although this Convention is posterior to the Control Council Law No. 10, of 1945¹³, sexual crimes do not consist in the list of the grave breaches of the Convention, submitted to the universal jurisdiction (Articles 146 and 147 of the IV Geneva Convention)¹⁴.

C. In the Nuremberg Charter and in the Tokyo Charter¹⁵ there was no reference to rape — sexual crimes were not seen as crimes of international character in the Statutes of these Courts. However, despite sexual violence not being explicitly referred to as an international crime, it was possible for sexual crimes to be punished by invoking the «ill-treatment» or «other inhuman acts» clauses, explicitly referred to in the Charters, within the scope of war crimes and crimes against humanity, respectively¹⁶.

Despite testimonies during the Nuremberg trials having disclosed the existence of massive raping and other acts of sexual violence committed by German soldiers, the truth is that such testimonies were not taken into consideration and none of the accused was convicted of sexual crimes¹⁷. According to Laber, the crime of rape was not investigated by the Court of Nuremberg «not because Germans were not guilty of rape, but because the allied forces, especially Russians and the Moroccan forces under French control, were also guilty of many rapes»¹⁸.

12 Before the inoperativeness of the cited norm – that did not hinder the massive rape of women, for example, in the conflict of Bangladesh, in 1971 (see KRILL, Françoise, «La protection de la femme dans le droit international humanitaire», *Revue Internationale de la Croix-Rouge*, 756 (1985), p. 366) – the Additional Protocols to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977, reaffirmed in the Article 76, 1 of Protocol I, and in Article 4, 2 (e) of Protocol II, what it was already established in the Article 27 of the IV Geneva Convention.

13 We will mention this law *infra*, paragraph I. C.

14 It must be mentioned, however, that the International Red Cross Commission has already declared that the serious breach constituted by «wilfully causing great suffering or serious injury to body or health» (Article 147 of the IV Geneva Convention) encloses rape (see MERON, Theodor, «Rape as a Crime under International Humanitarian Law», *American Journal of International Law*, 87 (1993), p. 426).

15 The Court of Nuremberg was created by an Agreement of the Allies firmed in London, on 8 August 1945; the Court of Tokyo was a result of an unilateral decision of General MacArthur, American proconsul in Japan, on 19 January 1946 (see RÍQUITO, Ana Luísa, «Do pirata ao general: velhos e novos *hostes humani generis*. (Do Princípio da Jurisdição Universal, em Direito Internacional Penal)», *Boletim da Faculdade de Direito*, 76 (2000), p. 530 and f.

16 The Article 6 of the Statute of the Court of Nuremberg and the Article 5 of the Statute of the Court of Tokyo delimit the jurisdiction of the courts and distinguish crimes against peace, war crimes and crimes against humanity (see DANIELI, Ana, «La repressione...», p. 845, notes 5 and 7).

17 See MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 16-17.

18 LABER, *apud* CHINKIN, Christine, «Rape and Sexual Abuse...», p. 334.

On the other hand, the Tokyo Court issued convictions for the massive raping of Chinese women in the city of Nanking during the appalling episode which came to be known as the «rape of Nanking». The Court deemed the crime of rape to be covered by the expression «other inhuman acts»¹⁹.

The Control Council Law No. 10, adopted by the Allies on 20 December 1945, widening the list of crimes against humanity foreseen in the Nuremberg Charter, was the first law to explicitly include rape within the scope of crimes against humanity (article II, 1 (c))²⁰. Such inclusion expresses a clear breakthrough in international criminal law in terms of sexual crimes. Nonetheless, none of the accused was charged with rape²¹.

After the Control Council Law No. 10 was passed, the crime of rape was only referred to again in the Statutes of the International Criminal Tribunals for the Former Yugoslavia (1993) and for Rwanda (1994).

II. SEXUAL CRIMES IN THE STATUTES AND JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND FOR RWANDA

A. The International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR)²² marked the beginning of the end of impunity of sexual

19 See BOOT, Machteld, «Crimes against humanity — para. 1 (g)», in: *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1999, no. 41, GREPPI, Edoardo, *I Crimini di Guerra e Contro l'Umanità nel Diritto Internazionale — Liniamenti generali*, Torino: Utet, 2001, p. 191, and MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 17.

20 See BOOT, Machteld, «Crimes against humanity— para. 1 (g)»..., no. 42.

21 See BOOT, Machteld, «Crimes against humanity— para. 1 (g)»..., no. 42.

22 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was created by the Security Council through the Resolution no. 827, 25 May 1993 [Doc. NU S/RES/827 (1993)]. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, was created by the Security Council through the Resolution no. 955, 8 November 1994 [Doc. NU S/RES/955 (1994)]. The Statutes of these Tribunals are available at <http://www.gddc.pt>. About the problems related with the legitimation of ICTY and ICTR, see CAEIRO, Pedro, «Claros e escuros de um auto-retrato: breve anotação à jurisprudência dos Tribunais Penais Internacionais para a Antiga Jugoslávia e para o Ruanda sobre a própria legitimação», in: *Direito Penal Internacional — Para a Protecção dos Direitos Humanos. Simpósio da Faculdade de Direito da Universidade de Coimbra e Goethe-Institut de Lisboa*, Lisboa: Fim de Século, 2003, p. 209 and f. About the jurisdiction of these two courts, see CAEIRO, Pedro, «Tribunais Penais Internacionais: «etapas de um caminho» ou «astros em constelação»? (Uma visão político-jurídica do Estatuto de Roma)», *Revista Brasileira de Ciência Criminal*, 37 (2002), p. 102 and f.

crimes in international law²³. In view of the magnitude and the reach of acts of sexual violence within the conflicts in the Former Yugoslavia and in Rwanda, the crime of rape was explicitly included in the statutes of these two tribunals as crime against humanity (Article 5 (g) of the ICTY Statute and Article 3 (g) of the ICTR Statute, respectively). While the Statute of the ICTR confers to the Court ability to judge violations of the Article 3, common to the Geneva Conventions and to the Additional Protocol, as «outrages upon personal dignity, in particular (...) rape, enforced prostitution and any form of indecent assault» (Article 4), the Statute of ICTY does not expressly foresee rape as a war crime. However, being consensual agreement that rape must not only be punished as a crime against humanity, ICTY, in many cases, condemned accused for rape and other forms of sexual violence, helping itself in other rules of the Statute, and affirmed that rape and other forms of sexual violence must be considered as a serious violation of the laws and costumes of war²⁴.

B. One of the great contributes of the Jurisprudence of the ICTY and ICTR was necessarily the consideration of rape as a war crime, a crime against humanity or a form of torture or genocide²⁵.

B.1. The *Tadic Case*²⁶ was the first case to be judged by ICTY. *Tadic* was a guard in a prison of Serbia and he was accused to commit a multiplicity of crimes against prisoners, in which, rapes of men and women. In the *Tadic Case* it was expected that the ICTY would be the first court in history to convict a defendant for rape as a war crime, independently of any other crime. However, in view of the weakness of the evidence provided by the witnesses, *Tadic* was not convicted for acts of sexual nature – it was not proved that *Tadic* was directly involved in those sexual crimes²⁷.

23 According to Kate Fitzgerald, the wide covering made by the *media* of the attacks in the Former Yugoslavia definitively placed the sexual violence in time of war in the international agenda (FITZGERALD, Kate, «Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law», *European Journal of International Law*, 8 (1997), p. 638).

24 In this sense, COTTIER, Michael, «War crimes — para. 2 (b) (xxii)»..., no. 203.

25 See RODRIGUES, Almiro, «Justiça Penal Internacional e TPIJ», *Boletim da Ordem dos Advogados*, 21 (2002), p. 9.

26 *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, 7 May 1997 (available at <http://www.un.org/icty>).

27 About the *Tadic Case*, see ASKIN, Kally D., «Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status», *American Journal of International Law*, 93 (1999), p. 100 and f., and MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 47.

B.2. The *Akayesu Case*²⁸, judged by ICTR, was the first case when an International Criminal Court convicted for genocide. *Akayesu* was a burgomaster of *Taba* commune, and he was involved in the *Tutsis* massacre, residents in that commune, stirring up to the undertaking of violence acts, including acts of sexual nature.

The ICTR considered that the raping of women constituted an act of genocide – the rapes aimed to prevent future births from taking place within the *Tutsi* ethnic group²⁹.

The Tribunal also considered that such as torture, rape is a violation of personal dignity, and in this way, rape can be considered as a way of torture when inflicted, instigated or consented by a public official or other person acting in an official capacity³⁰.

Moreover, the Tribunal considered that rape, as well as other forms of sexual violence, constituted in the case crimes against humanity, once they had been committed as part of a widespread or systematic attack, against the civilian population on national, political, ethnic, racial or religious grounds³¹.

The Tribunal described the crime of rape as a crime against humanity by adopting a broad concept of rape. By defining rape as «a physical invasion of a sexual nature, committed on a person under circumstances which are coercive», the tribunal considered that sexual violence, which includes rape, «is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact», such as, for example, forced nudity³². The Tribunal clarified that the coercion does not necessarily imply the use of force. The intimidation and the threats (always present in the scope of an armed conflict) can constitute coercion forms^{33/34}.

B.3. In the *Furundzija Case*³⁵, judged by ICTY, the commander of *Jokers*, *Furundzija*, was accused to have submitted the civilian population to acts of torture, sexual violence and other physical and mental abuses.

This case assumes particular relevance because differently from what happened in the *Akayesu Case*, in the *Furundzija Case*, the ICTY was concerned about defining

28 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998 (available at <http://www.un.org/icty>).

29 See *Akayesu Case*, § 733.

30 See *Akayesu Case*, § 597.

31 See *Akayesu Case*, § 598 and article 3 of the ICTR Statute.

32 See *Akayesu Case*, § 10A and § 688.

33 See *Akayesu Case*, § 688.

34 More developments about the *Akayesu Case* in ASKIN, Kally D., «Sexual Violence...», p. 105 and f., CAPELLÀ I ROIG, Margalida, *La tipificación internacional de los crímenes contra la humanidad*, Valencia: Tirant Lo Blanch, 2005, p. 259-60, and MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 56 and f.

35 *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, 10 December 1998 (available at <http://www.un.org/icty>).

rape in detail, and established that rape consists in «(i) sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion, or force, or threat of force against the victim or a third person» (§ 185)³⁶.

B.4. The *Kunarac, Kovac and Vukovic Case*³⁷, judged by ICTY, assumes particular relevance because it was the first case of the history of judgment of international crimes where the accusations consist only of crimes of sexual nature.

The city of Foca was invaded, in April of 1994, by the Yugoslav army and the faction Serbian-Bosnian of the conflict. Women had been confined in a pavilion and had been victims of innumerable abuses, over all of sexual nature. Rapes and other acts of sexual nature had been of such magnitude that the Tribunal considered being about a generalized strategy of systematic and massive abuses of sexual character, being able to say itself, inclusively, of «ethnic cleanness». The defendants had been condemned by the acts of sexual violence as breach the laws or the customs of the war and as crimes against the humanity.

The Tribunal considered that the definition of rape adopted in the *Furundzija Case*, which established that there is rape only in the case of «coercion, or force, or threat of force», was too restrictive. The Tribunal analyzed the national legislation of diverse countries of different legal systems and concluded that the common denominator to all them in the scope of the sexual crimes consolidates in the idea of absence of consent of the victim. In this way, in the *Kunarac et al. Case*, the Tribunal established that one of the elements of the rape is expressed by the fact of the sexual penetration occur without the consent of the victim, being thus substituted the element «coercion, or force, or threat of force» (affirmed in the *Furundzija case*) by the element absence of consent³⁸.

This alteration is of utmost importance in the protection of the rights of the victims of sexual violence, since that it clarifies that instead of considering that all the sexual acts are consented, except if they are done by means of «coercion, or force, or threat of force», it considers that there may be situations in which despite the victim does not offered resistance (due to, for example, mental or physical illness

36 Kelly Askin considers that the definition of violation affirmed in the *Furundzija Case*, of being too much detailed (delimiting the acts and the reached parts of the body), constitutes a retrocession in relation to the notion most including affirmed in the *Akayesu Case* (ASKIN, Kally D., «Sexual Violence...», p. 113). More developments about the *Furundzija Case* in CAPELLÀ I ROIG, Margalida, *La tipificación internacional...*, p. 235-6, and MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 48-9.

37 *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23T, 22 February 2001 (available at <http://www.un.org/icty>).

38 See *Kunarac, Kovac and Vukovic Case*, § 460.

or the age of minority), the sexual act was not truly consented and, consequently, the conduct may constitute rape³⁹.

With the introduction of the element «consent» appeared new data in the scope of the sexual crimes as international crimes. Until the sentence of the *Kunarac et al. Case*, the jurisprudence of the ICTY and of the ICTR deemed the legal interests which the international community aimed to protect in the crime of rape to be the physical integrity and the human dignity⁴⁰. In the *Kunarac Case*, in which rape is viewed as a sexual act performed without the victim's consent, the victim's will appears as an essential element for the understanding of the legal interest which the international law aims to protect: sexual freedom⁴¹. Sexual freedom is thus regarded as a legal interest of mankind, as a supra-individual legal interest whose protection is crucial for the international community⁴².

Concomitantly, it becomes clear that rape in such a way can be committed against a woman as against a man^{43/44}.

39 See *Kunarac, Kovac and Vukovic Case*, § 452.

40 See *Akayesu Case*, § 687, and *Furundzija Case*, § 272.

41 See DANIELI, Ana, «La repressione...», p. 856. According with Martin Scheinin, «the woman's right to decide freely and individually about her sexual life is a human rights issue» (SCHEININ, Martin, «Sexual Rights as Human Rights — Protected under Existing Human Rights Treaties?», *Nordic Journal of International Law*, 67 (1998), p. 18).

42 The question of the determination of the protected legal interest in the crimes against peace, the humanity and in the war crimes has been object of doctrinal quarrel. Alicia Gil Gil and Leonor Assunção understand that the legal interests protected by the international criminal law are individual legal interests (GIL GIL, Alicia, *Derecho Penal Internacional...*, p. 29 and f.; ASSUNÇÃO, Maria Leonor, «Apontamento sobre o crime contra a Humanidade», in: *Estudos em Homenagem a Cunha Rodrigues*, I, 2001, p. 100 and f.). The generality of the authors (to which we agree) understands, however, that the protected legal interests are supra-individual legal interests: the international peace and the humanity (see, by all, DELMAS-MARTY, Mireille, «O Direito Penal como ética da mundialização», *Revista Portuguesa de Ciência Criminal*, 14 (2004), p. 287, BRITO, Wladimir, «Tribunal Penal Internacional: uma garantia jurisdicional para a protecção dos direitos da pessoa humana», *Boletim da Faculdade de Direito*, 74 (2000), p. 81 and f., and, specifically concerning the crimes against peace and humanity foreseen in the Articles 236 and subsequent ones of the Portuguese Criminal Code before the alterations introduced in 2004, ANTUNES, Maria João, in: *Comentário Conimbricense do Código Penal, Parte Especial*, directed by Jorge de Figueiredo Dias, t. II, Coimbra: Coimbra Editora, 1999, Nótula antes do art. 236.º, § 1). See, also, PALMA, Maria Fernanda, «Tribunal Penal Internacional e Constituição Penal», *Revista Portuguesa de Ciência Criminal*, 11 (2001), p. 9-10.

43 See MARAVILLA, Christopher Scott, «Rape as a War Crime...», p. 340. More developments about the *Kunarac, Kovac and Vukovic Case* in BUSS, Doris, «Prosecuting mass rape: *Prosecutor v. Dragoljub Kunarac, Radomir Kovak and Zoran Vukovic*», *Feminist Legal Studies*, 10 (2002), p. 91, DANIELI, Ana, «La repressione...», p. 854 and f., and MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 49 and f.

44 For a consideration of sexual crimes as crimes against humanity in the special jurisdictions in Cambodia, Sierra Leone, Timor-east and Kosovo, see CAPELLÀ I ROIG, Margalida, *La tipificación internacional...*, p. 265 and f.; for a detailed analysis of the Jurisprudence of the Special Court for Sierra Leone concerning sexual crimes, see DAMGAARD, Ciara, «The Special Court for Sierra Leone: Chal-

C. The Statutes and Jurisprudence of the ICTY and of the ICTR constitute a decisive step in the persecution of sexual crimes as international crimes, not only at substantive level but at procedural level as well.

In the ICTY and ICTR, the victims are seen as mere witnesses⁴⁵. Nevertheless, the Rules of Procedure and Evidence of the ICTY⁴⁶ include a norm (Rule 96) which establishes the rules for the assessment of evidence regarding sexual crimes (*Evidence in Cases of Sexual Assault*). In accordance with this rule, in the case of sexual crimes no corroboration of the victim's testimony shall be required, the victim's consent shall not, as a rule, be allowed as a means of defence, and the victim's prior sexual conduct shall not be admitted in evidence. The victims of sexual crimes benefit of the protection and assistance of the Victims and Witnesses Unit and, moreover, they benefit, in general, of all the other rules of protection of victims and witnesses: they can benefit of anonymity, they can be followed in audience for a third person (psychologist, psychiatrist or a person of his confidence) and, in extreme cases, they can inclusively be reinstated in a new residence⁴⁷.

III. SEXUAL CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

A. The Rome Statute also constitutes a document of undeniable progress in terms of international criminal law and, in particular, within the scope of sexual crimes as international crimes. By finally separating sexual crimes from notions associated with the honour and dignity of the woman and her family, the Statute of the International Criminal Court (ICC) typifies a set of types of conduct which had never been typified in an international normative text, states special procedural rules

lenging the Tradition of Impunity for Gender-based Crimes?», *Nordic Journal of International Law*, 73 (2004), p. 485 and f.

45 About the paper conferred to the victims in some international criminal jurisdictions, see CASSESE, Antonio, «The Statute of the International Criminal Court: Some Preliminary Reflections», *European Journal of International Law*, 10 (1999), p. 167 and f.

46 International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force on 14 March 1994, amendments adopted on 8 January 1996 (available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html>).

47 See Rules 34, 69 and 75 of the Rules of Procedure and Evidence of ICTY. About this problem, RODRIGUES, Almiro, «O Tribunal Penal Internacional para a ex-Jugoslávia e seus contributos para o Direito (Penal) Internacional», *Revista Portuguesa de Ciência Criminal*, 11 (2001), p. 365-6. About the contribution of the ICTY for the evolution of the international criminal law, see VENTURA, Catarina «O significado do Tribunal Penal Internacional para a ex-Jugoslávia na edificação de um sistema de justiça penal internacional», in: *Direito Penal Internacional — Para a Protecção dos Direitos Humanos. Simpósio da Faculdade de Direito da Universidade de Coimbra e Goethe-Institut de Lisboa*, Lisboa: Fim de Século, 2003, p. 167 and f.

regarding sexual violence, and also establishes a set of rules for the protection of victims and witnesses of this type of crimes⁴⁸.

This advance in what concerns to the sexual crimes was due to a large extent to the work of the associations of women. Some NGOs that had followed the negotiations of the Statute of the ICC allied in an organization called «The Coalition for the International Criminal Court», created in 1995, and in its scope, in 1997, a special group was formed for the defence of the rights of the women: the «Women Caucus». The «Women Caucus» presented studies and clarification sessions and exercised politics pressure next to the commission agents of the States — we can say that «great part of what was consecrated in the Statute is due to “Women Caucus”»⁴⁹.

B. In the sequence of the established in the Article 9 of the ICC Statute, the Assembly of States Parties approved a document in which defined the elements of the crime of genocide, the crimes against the humanity and the war crimes⁵⁰.

In the document on the Elements of Crimes, it was established that a similar behaviour can fill different types of crime, according to the circumstances. In this way, in accordance with the ICC Statute, sexual crimes will be able to constitute a crime of genocide, a war crime or a crime against humanity, according to the circumstances⁵¹.

B.1 The crime of genocide, such as it comes typified in the Article 6 of the ICC Statute, integrally reproduces the established in the Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. In this norm there is not any reference to the crimes of sexual nature. However, in the document on the Elements of Crimes, in the reference to the genocide through serious bodily or mental harm to one or more persons of the group (Article 6 (b) of the ICC Statute), a note was introduced that clarifies that the behaviour that has caused serious bodily or mental harm to one or more persons «may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment». In this way, genocide can be practised through rape or other acts of sexual violence since practised «with intent to destroy, in whole

48 See MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 65.

49 ESCARAMEIA, Paula, «Introdução da Perspectiva de Género...», p. 53. About the persistence of «Women Caucus» in the defence of the rights of the women while the negotiations of the Statute of the ICC, see also, MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 27 and f.

50 Elements of Crimes, Adopted by the Assembly of States Parties, New York, 3-10 September 2002, ICC-ASP/1/3.

51 In this sense, COTTIER, Michael, «War crimes — para. 2 (b) (xxii)»..., no. 205.

or in part, a national, ethnical, racial or religious group» (Article 6 of the ICC Statute). This idea denotes the influence of the Jurisprudence of the Courts *ad hoc* in the characterization of the sexual crimes as international crimes⁵².

However, some criticize this linking of the acts of sexual violence to the genocide crime. The advantage to see certain sexual acts as genocide acts was that, in the history of the international criminal law, the genocide has always been seen as one of the most serious crimes against international humanitarian law and, therefore, more seriously punished. However, the consideration of the acts of sexual violence as genocide acts still denotes, in a certain way, an attachment to the traditional conception of the function of the woman in the patriarchal society⁵³.

B.2. Sexual crimes also appear in the ICC Statute as war crimes. The Article 8 of the Statute (war crimes) establishes, for remission for the foreseen in the Article 7 (g) of the Statute (crimes against humanity), that sexual crimes can assume the nature of war crimes, as in the scope of an international armed conflict (Article 8, 2 (b) (xxii)), as in the scope of armed conflicts not of an international character (Article 8, 2 (e) (vi)). In the document on the Elements of Crimes it is clarified that an act of sexual violence constitutes a war crime when the conduct took place in the context of and was associated with an international/national armed conflict and the perpetrator was aware of the factual circumstances that established the existence of the armed conflict (Article 8, 2 (b) (xxii) – 6, and Article 8, 2 (e) (vi) – 1).

Sexual crimes as war crimes are separately typified from the outrages upon personal dignity (related in the Article 8, 2 (b) (xxi) and (c) (ii)) what manifests the clear autonomy of the sexual crimes in relation to the crimes against the honour and the personal dignity. On the other hand, sexual crimes are considered by the Statute as grave breaches of the Conventions of Geneva, «what put them in a maximum level of gravity»⁵⁴.

52 See BOOT, Machteld, «Crimes against humanity — para. 1 (g)»..., no. 54, and ESCARAMEIA, Paula, «Introdução da Perspectiva de Género...», p. 52-3, and *supra*, II, B. 2.

53 In this sense, DIXON, Rosalind, «Rape as a Crime in International Humanitarian Law: Where to from Here?», *European Journal of International Law*, 13 (2002), p. 703-4.

54 ESCARAMEIA, Paula, «Introdução da Perspectiva de Género...», p. 55. More developments about sexual crimes as war crimes in DÖRMANN, Knut, «Crímenes de Guerra en los «Elementos de los Crímenes»», in: *La nueva justicia penal supranacional. Desarrollos post-Roma*, Valencia: Tirant lo Blanch, 2002, p. 146 and f.

B.3. It is within the scope of crimes against humanity⁵⁵ that the Rome Statute explicitly regulates sexual crimes. Under Article 7, 1 (g), «rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity» constitute crimes against humanity, when committed «as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack».

In the crimes against the humanity «it is important to detach its “complex” nature (Michel Massé) or “collective ground” (Mireille Delmas-Marty). It is the expression «widespread» or «systematic» attack (...) that distinguishes the “crimes against the Humanity” from the “other crimes”»⁵⁶. This «element of context» or «international element» distinguishes the common crimes, under the internal law, from the international crimes, that are crimes under the international criminal law, still when the national laws do not foresee them⁵⁷.

a. As far as rape is concerned, the Statute of the ICC had the jurisprudence of the *Furundzija* and the *Akayesu* cases to rely on. In the document on the Elements of Crimes it was established that in order for rape to occur it is required that «the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body» (Article 7, 1 (g) — 1). It is further required that «the invasion was committed by force or by threat of force or coercion, such as that caused by fear or violence, duress, detention, psychological oppression or abuse of power against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent» (Article 7, 1 (g) — 1).

55 About the historical evolution that lead to the autonomy of the crimes against humanity in relation to the war crimes, see, among others, AMBOS, Kai, *Impunidad y Derecho Penal Internacional*, Buenos Aires: Ad-Hoc, 1999, p. 95 and f., BASSIOUNI, M. Cherif, «Crimes Against Humanity», in: *International Criminal Law*, New York: Traditional Publishers, Inc., 1999, p. 521 and f., GIL GIL, Alicia, «Los crímenes contra la humanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de «Los Elementos de los Crímenes»», in: *La nueva justicia penal supranacional. Desarrollos post-Roma*, Valencia: Tirant lo Blach, 2002, p. 68 and f., GREPPI, Edoardo, *I Crimini di Guerra...*, p. 23 and f., RUEDA FERNÁNDEZ, Casilda, *Delitos de Derecho Internacional — Tipificación y Represión Internacional*, Barcelona: Editorial Bosch, 2001, p. 135 and f.

56 RODRIGUES, Anabela Miranda, «Princípio da jurisdição penal universal e Tribunal Penal Internacional. Exclusão ou complementaridade?», in: *Direito Penal Internacional para a Protecção dos Direitos Humanos. Simpósio da Faculdade de Direito da Universidade de Coimbra e Goethe-Institut de Lisboa*, Lisboa: Fim de Século, 2003, p. 61.

57 AMBOS, Kai / WIRTH, Steffen, «El Derecho Actual sobre Crímenes en Contra de la Humanidad», in: *Temas de Derecho Penal Internacional y Europeo*, Madrid: Marcial Pons, 2006, p. 180.

b. The reference to the general clause «any other form of sexual violence of comparable gravity» is particularly interesting — that includes all the behaviours of sexual nature committed with coercion, that imply or not physical contact, whenever they are of similar gravity to the related ones express in paragraph (g).

C. The Statute was also innovative in relation to the organs of the Tribunal, revealing, also in this headquarters, special attention to the sexual crimes⁵⁸. Article 36, 8 (b) decree «the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children». Article 42, 9 establishes that in the office of the prosecutor there must be «advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children». According to the Article, 43, 6, the Statute instituted a Victims and Witnesses Unit in the Tribunal Registry.

D. In what concerns the procedure, the Statute of the ICC also dedicated special attention to the sexual crimes. The Article 54, 1 (b) refers that in the investigations, the prosecutor takes into account «the interests and personal circumstances of victims and witnesses, including age, gender (...), the nature of the crime, in particular where it involves sexual violence». In the Article 68, 2 it is expressly foreseen as an exception to the principle of public audiences (established in the Article 67), that the Chambers of the Court may «conduct any part of the proceedings *in camera*». This measure shall be implemented namely, «in the case of a victim of sexual violence (...), unless otherwise ordered by the Court, having regard to all circumstances, particularly the views of the victim (...)».

In what concerns the evidence assessment, similarly to what is stipulated in the Rules of Procedure and Evidence of the ICTY, the Rules of Procedure and Evidence of the ICC⁵⁹ also lay down special rules for the assessment of evidence in the case of sexual crimes. The Rule 70 stipulates a set of circumstances in which the victim's consent is irrelevant, and clarifies that «credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness»⁶⁰.

58 See ESCARAMEIA, Paula, «Introdução da Perspectiva de Género...», p. 56 and f.

59 International Criminal Court, Rules of Procedure and Evidence, U.N.Doc.PCNICC/2000/1/Add.1 (2000), available at <http://www.icls.de>

60 About these procedural norms of the ICC in what concerns to the sexual crimes, see ESCARAMEIA, Paula, «Introdução da Perspectiva de Género...», p. 58-9 and, for more developments, MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 96 and f.

IV. SEXUAL CRIMES IN THE PORTUGUESE PENAL LAW ON VIOLATIONS TO THE INTERNATIONAL HUMANITARIAN LAW (LAW NO. 31/2004, 22 JULY)

A. Until 2004, the Portuguese Criminal Code dedicated the III Title of the II Book (Special Part) to the crimes against peace and humanity (Article 236 and subsequent ones). The Criminal Code foresaw the crime of genocide (Article 239) as well as crimes of war against civilians (Article 241), but did not give autonomy to the crimes against humanity. In this III Title, the Criminal Code did not make any reference to the sexual crimes, and the Portuguese doctrine criticized the fact of the crime of rape — «one of most common, suffered and feared for the women in war situations»⁶¹ – not being related as a war crime⁶².

B. Portugal ratified the Rome Statute of the International Criminal Court by the Decree of the President of the Republic no. 2/2002, 18 January. In this Decree «Portugal manifested its intention to exercise its jurisdiction power in people found in national territory, accused for the crimes foreseen in the Article 5, 1 of the Statute, with observance of its criminal tradition, in accordance with its constitutional rules and other internal criminal legislation» (Article 2, 1). To fulfil the ratification decree, it became necessary to proceed to the revision of the Portuguese criminal legislation, in order to proceed to its adaptation to the Statute of the International Criminal Court⁶³. It was, then, published the Law no. 31/2004, 22 July, that typify the behaviours that constitute crimes of violation of the international humanitarian law (and the correspondent norms of the Criminal Code were revoked)⁶⁴.

61 BELEZA, Teresa Pizarro, «Sem Sombra de Pecado – O Repensar dos Crimes Sexuais na Revisão do Código Penal», in: *Jornadas de Direito Criminal – Revisão do Código Penal I*, Lisboa: CEJ, 1996, p. 179.

62 See also ANTUNES, Maria João, in: *Comentário Conimbricense*, artigo 241.º, § 3. However, we should notice that in Portugal sexual crimes are expressly foreseen as war crimes against people, since 2003, in the Article 41, 1 (g) of the Code of Military Justice (Law no. 100/2003, 15 November).

63 About the need of conformation of the criminal and procedural criminal Portuguese law to the Rome Statute, see ASSUNÇÃO, Maria Leonor, «TPI e Lei Penal e Processual Penal Portuguesa», in: *O Tribunal Penal Internacional e a Ordem Jurídica Portuguesa*, Coimbra: Coimbra Editora, 2004, p. 55 and f.

64 Also in what concerns to the crimes related to the terrorism and the terrorist organizations, the Portuguese legislator had already determined to dislocate them for sundry legislation (cf. DIAS, Figueiredo / CAEIRO, Pedro, «A Lei de Combate ao Terrorismo (Lei n.º 52/2003, de 22 de Agosto)», *Revista de Legislação e de Jurisprudência*, 3935 (2005), p. 70).

C. Law no. 31/2004, 22 July, now foresees the crime of genocide (Article 8), crimes against humanity (Article 9) and crimes of war against people (Article 10). As we saw to occur in the Statute of Rome, also the Portuguese law expressly refers sexual crimes either in the scope of crimes against humanity (Article 9 (g)), or in the scope of war crimes (Article 10, 1 (g)). It is in the scope of the crimes against humanity that the Portuguese law proceeds to the description of sexual crimes, relating a set of behaviours, to a large extent coincident with the established either in the Article 7, 1 (g) of the Statute of the ICC, or in the document on the Elements of Crimes⁶⁵.

Therefore, the Portuguese legislator recognised sexual freedom to be a fundamental right which should be projected on and materialised as a supra-individual legal interest⁶⁶, protected within the scope of crimes against humanity and war crimes.

V. CONCLUSION — THE END OF THE «INVISIBLE WEAPON»

In the international criminal law, the evolution was in the direction of the gradual autonomy of the sexual crimes in relation to the crimes against the honour and the dignity of the woman and the family.

For this evolution it decisively contributed the Jurisprudence of International Criminal Courts for the Former Yugoslavia and for Ruanda.

The characterization of sexual crimes in the Statute of the ICC as crimes against the humanity and as war crimes constitutes one more important step in the direction of the awareness of the necessity of persecution of sexual crimes as international crimes.

Also Portugal, that until 2004 did not expressly foresee sexual crimes in the scope of crimes against peace and humanity, proceeded to an alteration of criminal legislation in order to adapt it to the Statute of the ICC. Since 2004, the Portuguese

65 The Article 9 establishes that «who, as a part of a widespread or systematic attack directed against any civilian population (...) (g) By force, threat of force or another form of coercion, or using to advantage a coercion situation or the incapacity of self-determination of the victim: (i) Causes the penetration, however slight, of any part of the body of the victim or of the perpetrator, by any part of the body of the perpetrator, the victim or of a third person, or by any object; (ii) Embarrasses a person reduced to the slavery to practise acts of sexual nature; (iii) Embarrasses a person to prostitute himself; (iv) Forces the pregnancy of a woman with the intention of modifying the ethnic composition of a population; (v) Deprives a person of the biological capacity to reproduce; (vi) Causes any other form of sexual violence of comparable gravity (...) is punished with imprisonment from 12 to 25 years».

66 See COSTA, José de Faria, «Tribunal Penal Internacional: um fio de esperança?», *Boletim da Ordem dos Advogados*, Lisboa, 21 (2002), p. 12.

law on violations to the international humanitarian law foresees sexual crimes as crimes against humanity and as war crimes.

A long path has been trodden. However, longer will be the path to tread until sexual violence no longer constitutes an «invisible weapon»⁶⁷.

67 The expression is of BASSIOUNI, Cherif / McCORMICK, Marcia, «Sexual Violence. An invisible weapon of war in the former Yugoslavia», *Occasional Paper no. 1, International Human Rights Law Institute. The Paul University College of Law*, 1996, *apud* MAIDER ZORRILA, *La Corte Penal Internacional...*, p. 50.