

The Rome Statute's Sexual Related Crimes: an Appraisal under the Light of International Humanitarian Law

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“Violence against women is often used as a weapon of war, to punish or dehumanize the women and persecute the community to which they belong.” *Amnesty International*

Introduction to the Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court¹ (ICC) was adopted on July 17, 1998. Resulting from several years of intense negotiations, the International Criminal Court² embodies decades if not centuries of dreams and hard work of many in pursuing the fight against impunity and the strengthening of international justice. The ICC is a permanent institution having power to exercise its jurisdiction over individuals for the most egregious crimes of international concern.³

In its first Article, the Rome Statute provides the unique character of the world's permanent criminal court by stating its complementary character to national criminal jurisdictions.⁴ It establishes the seriousness of the crimes as another relevant threshold for exercising its

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1 Rome Statute of the International Criminal Court, July 17, 1998. Hereinafter the Rome Statute.

2 Hereinafter the ICC or the Court.

3 Rome Statute of the International Criminal Court, Preamble, par. 3. Consulted at: http://www.icccpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, February 10, 2005.

4 Article 1 of the Rome Statute provides an International Criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have the power to exercise its over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The provisions of this Statute shall govern the jurisdiction and functioning of the Court.

jurisdiction. The crimes covered by the Court should be of such gravity to “threaten the peace, security and well being of the world.”⁵ The selection of cases according to their gravity, amongst the most atrocious crimes committed is one of the most difficult tasks of the Court.

The aim to combat impunity and become a legal institution of last resort is stated clearly in paragraph four of the Preamble of the Rome Statute. It affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”⁶

To strengthen this statement, the Rome Statute recalls the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The adoption of implementing legislation at national level would make the exercise of national jurisdiction possible. This complementary character of the Court’s criminal jurisdiction and essential characteristic on the ICC differentiates it from the International Tribunals of the Former Yugoslavia and of Rwanda (ICTY).⁷ When these two *ad hoc* tribunals were created, the need to combat impunity as well as the non-existence of a permanent international body in charge of bringing individuals to justice shaped the *ad hoc* International Tribunals by giving them primary jurisdiction over serious crimes.

The current paper aims to study the evolution of the inclusion of sexual related crimes in the Rome Statute as well as to underline the efforts made in the Central America to include the new categories of crimes in the criminal codes of the region. In order to reach that goal

5 Rome Statute, Preamble, par. 3.

6 Rome Statute, Preamble, par. 4.

7 Security Council Resolution 827 established the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY). This resolution was passed on May 25, 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations. More information at <http://www.un.org/icty/>, February 10, 2005. The *ad hoc* International Criminal Tribunal for Rwanda (hereinafter ICTR), was created by Resolution 955 of 8 November 1994. The purpose of its creation was to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighboring States during the same period. See <http://www.icttr.org/>, February 10, 2005.

it is necessary to define sexual related crimes and gender violence. For mere practical reasons the present study will focus on sexual related crimes provided in the Statute, excluding an analysis of the crimes involving gender violence. One can define sexual violence as the violence which includes a sexual element, such as rape, enforced prostitution, sexual slavery or forced pregnancy. Gender violence, on the other hand, is “usually manifested in a form of sexual violence, but can also include non-sexual physical or psychological attacks on women, men or children.”⁸ However, it is worth noting that gender violence can also constitute an element of sexual violence. Besides the sexual element, violence could be based on the gender-defined roles of the victims. Women’s bodies, security or livelihood may be targeted because of their society-recognized role as guardians of cultural traditions and because of their reproductive capacity. Women are not exclusive victims of sexual violence. Men and boys may also be targeted as they could be identified as powerful or prominent, or as potential leaders or soldiers. They may also be raped to humiliate them, forcing them into the position of women and thereby rendering them weak or inferior according to the prevailing stereotypes.

The crimes within the jurisdiction of the Court are enumerated in the next section, followed by a study of the evolution of International Humanitarian Law (IHL)⁹ and its progressive specificity in sanctioning war crimes. This article contains also a reference to the impact of the main elements of the jurisprudence of the *ad hoc* International Tribunals of the former Yugoslavia and Rwanda at the moment of the formulation and adoption of the Rome Statute. An overview of the negotiation process and the analysis of the **new** sexual related crimes provided in the Rome Statute will follow. Finally, the efforts towards national implementation of the provisions of the Statute in the criminal codes of Central America will be object of study.

8 See <http://www.iccwomen.org/archive/resources/gender.htm>. The UN Declaration on the Elimination of Violence against Women states in Article 1 that “the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” See Declaration on the Elimination of Violence against Women, February 23, 1994 and Beijing Platform for Action adopted by the Fourth World Conference on Women, September 15, 1995.

9 Hereinafter IHL.

Crimes within the Jurisdiction of the ICC

The crimes within the jurisdiction of the ICC are: genocide; crimes against humanity; war crimes, and the crime of aggression.

The crime of genocide is defined as the commission of crimes “with the intent to destroy,” in whole or in part a national, ethnical, racial or religious group as such.¹⁰ The definition included in the Rome Statute contains no explicit reference to any sexual crime. This definition has a similar structure to the provisions of the Statutes of the ICTY and the ICTR in that all refer to “causing bodily or mental harm to members of the group” and “imposing measures intended to prevent births within the group,” which includes crimes that could be interpreted in a broader sense.¹¹

According to the Rome Statute, crimes against humanity are acts committed as part of a “widespread or systematic attack” directed against any civilian population.¹² The negotiation process as well as the unprecedented role of women’s organizations and worldwide NGOs in the successful result of the adoption of the provisions of the Statute will be subject of special study further on. It is worth underlining here the difficult negotiation process that preceded the incorporation of gender related crimes. Throughout the whole negotiation of the Rome Statute, numerous and diverse interest groups lobbied relentlessly to avoid the incorporation of certain crimes considered by them as putting at risk core values of society, ignoring leading and ground-breaking jurisprudence reached by the *ad hoc* International Tribunals and its role in the further development of the norms of international law.

Article 7 of the Rome Statute defines gender in its third paragraph as including the two sexes, male and female, within the context of society.¹³ This explicit reference to society allows the incorporation of sociological values, giving to the concept of gender a social and historical framework and context, both elements highly needed for

10 Article 6 of the Rome Statute.

11 The crime of genocide regulated in Article 4 of the ICTY’s Statute does not contemplate either any sexual crime explicitly. See Article 4(2) b and 4(2) d, respectively. The ICTR’s Statute regulates genocide in the same terms that the ICTY’s Statute and are envisaged in Article 2(2) b and 2(2) d.

12 Article 7 of the Rome Statute.

13 Article 7(3) of the Rome Statute states: 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.

an adequate interpretation of the provisions with universal perspective. Even if sexual orientation is not conceived as constituting one ground for persecution,¹⁴ it is foreseeable that in the near future the prohibition of discrimination based on sexual orientation would emerge in international law as a discriminatory ground for future interpretations of the crime of persecution.¹⁵

The crimes committed during armed conflicts are provided in Article 8 of the Rome Statute. According to this Article, the Court has jurisdiction in respect of war crimes, “in particular” when committed as part of a plan or policy, or as part of a large-scale commission of such crimes. The article contains provisions regarding gender crimes committed both in international and/or non-international armed conflicts and mentions explicitly in both cases the crimes of rape, sexual slavery, forced pregnancy, and enforced sterilization.

The provisions on serious violations of international humanitarian during international and non-international armed conflict¹⁶ finish with an open formula reflecting the different international regulations applying for each category of armed conflict. In the case of international armed conflict, Article 8(2) (b) (xxii) includes in the list of serious violations of the laws and customs of war “any other form of sexual violence also constituting a grave breach of the Geneva

14 Paul Hunt is a Special Reporter on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. He stated, in his Report to the 60th session of the Commission of Human Rights that “sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.” See Paul Hunt: *Report to the 60th session of the Commission of Human Rights*, E/CN.4/2004/49, February 16, 2004, par. 54.

15 According to Amnesty International, already discrimination on grounds of sexual orientation or gender identity is considered implicitly or explicitly an unlawful form of discrimination in many countries’ constitutions. See <http://web.amnesty.org/library/index/ENGAMR230402004>, consulted February 10, 2005.

16 Article 8(2) (b) (xxii) and 8(2) (e) (vi) respectively. Article 8(2) (b) (xxii) qualifies as serious violations of the laws and customs applicable in international armed conflict. Within the established framework of international law, any of the following acts: “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.” Concerning non-international armed conflict, Article 8(2) (e) (vi) defines as serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law acts such as: “[...] rape, sexual slavery, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions.”

Conventions.” In the case of international armed conflict, the acts considered as such are the ones that constitute a “serious violation of Article 3 common to the four Geneva Conventions.”¹⁷

The provision relating to crimes against humanity contain two gender-specific crimes additional to the ones of Article 8 on war crimes. The first is the crime of persecution against any identifiable group or collectivity on various grounds, including gender,¹⁸ and the second, is the crime of “enslavement”, defined as the exercise of any power attaching to the right of ownership over a person, including the trafficking in persons, in particular women and children.¹⁹

Article 5 of the Rome Statute includes the crime of aggression as falling within the jurisdiction of the Court. However, due to a lack of agreement among the States during the negotiation process, the Rome Statute provides that the States Parties must adopt a definition of aggression and set out the conditions under which the ICC could exercise its jurisdiction.²⁰ Following the provisions of Article 123(1), which require the period of seven years after the entry into force of the Rome Statute to consider any amendments, a review conference will be held in 2009, seven years from the date that the Rome Statute entered into force, during which the matter will be discussed.²¹

On the question of the applicable law as well as the sources of law, Article 21 provides that the Court shall apply, in the first place, the Rome Statute, the Elements of the Crimes and its Rules of Procedure and Evidence as source, leaving in a second place and only “when appropriate”, the applicable treaties and the principles and rules of international law, with the inclusion of the established

17 Article 8(2) (c) of the Rome Statute.

18 Article 7(1) (h) of the Rome Statute.

19 Article 7(1) (c) and 7(2) (c) of the Rome Statute.

20 Article 5(2) of the Rome Statute provides that: “the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

21 Article 123(1) of the Rome Statute foresees that “seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in Article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.”

principles of international law of armed conflict. In its third paragraph, Article 21 contains a highly relevant principle of interpretation according to which the application and interpretation of law must be consistent with internationally recognized human rights Law “without any adverse distinction” founded on grounds such as gender.²² This is the so-called “no-adverse-distinction clause” and is considered to have an immense value in the future work of the International Criminal Court.²³

The Evolution of International Humanitarian Law in Sanctioning Sexual related Crimes

1. Existing International Humanitarian Law Norms and the Concept of “Honour” and “Dignity”

As with other crimes, sexual related crimes have been committed since the beginning of mankind. Even if their sanction differs according to the cultures and historical contexts, the principles of humanity and dignity of the human being have brought many societies worldwide to condemn such outrageous crimes and sanction them accordingly.²⁴

An historical approach to sexual related crimes is needed to determine the enormous progress made in the last decades in the criminalization of these categories of crimes. From the beginning of warfare to the current times, more than 500 codes of conduct, covenants and other texts designed to regulate hostilities have been agreed upon.²⁵ Already in 1863, the Instructions for the Government

22 Age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status are also included in the provisions.

23 Steains, Cate, *Gender Issues, The International Criminal Court: The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 357.

24 According to Brown Miller, one of the earliest surviving norms regulating the uses of War was proclaimed by Richard II of England in 1385 and imposed “that none be so hardy as to [...] forced any woman, upon the pain of being hanged.” See Susan Brown Miller: *Against our Will: Men, Women and Rape*, New York, 1975, p. 34.

25 To deepen in the subject of humanitarian principles and norms present throughout history of mankind, see, among others, Draper, G.I.A.D., “The contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal in Warfare,” in *International Review of the Red Cross* (IRRC), International Committee of the Red Cross (ICRC), Geneva, 1995, n. 305, p.192-206. Ögren, Kenneth, “Humanitarian Law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden,” in *IRRC*, ICRC, Geneva, 1996, n. 313, p.438-442; Levie, Howard S., “History of the Law of War on Land,” *IRRC*, ICRC, Geneva, 2000, n. 838, p. 339-350; Mani, V. S.,

of Armies of the United States in the Field (Lieber Code)²⁶ qualified rape of the inhabitants as a severe offence that deserved a severe sanction, even the death penalty for the most serious cases.²⁷ The Lieber Code was the “first attempt to codify the existing laws and customs of war”, and the first to contain explicitly prohibitions against rape.²⁸ Even if its norms were not of an international character at that time, it could be possible to affirm that the humanitarian principles contained therein have reached the level of customary international law.²⁹

Later on, in 1874, the Project of an International Declaration concerning the Laws and Customs of War made the first reference to a concept that would last for some time in the formulation of provisions regarding sexual related crimes, namely, the honour. In this regard, Article 38 of the section on the military power with respect to private persons if “family, honour and rights, and the lives and property of persons, as well as their religious convictions and

“International Humanitarian Law: An Indo-Asian Perspective,” in *IRRC*, ICRC, Geneva, 2001, n. 841, p. 59-76; Xiaodong, He, “The Chinese Humanitarian Heritage and the Dissemination of an Education in International Humanitarian Law in the Chinese People’s Liberation Army,” in *IRRC*, ICRC, Geneva, 2001, n. 841, p. 141-153; Cockayne, James, “Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations,” in *IRRC*, ICRC, Geneva, 2002, n. 847, p. 597-626.

26 The application of the Lieber Code was designated solely for Union soldiers fighting in the American Civil War. See a reference of its historical value at the web site of the ICRC: <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList304/E71D51EB05EF6FB1C1256CF5003F72EA>, January 15, 2005.

27 Article 44 of the section II on Public and private property of the enemy — Protection of persons, and especially of women, of religion, the arts and sciences — Punishment of crimes against the inhabitants of hostile countries reads: “All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.” See Instructions for the Government of Armies of the United States in the Field (Lieber Code). April 24, 1863, <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/c4d7fab1d847570ec125641a00581c23?OpenDocument>, February 10, 2005.

28 Kuo, Peggy, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, Case W. Res. J. International Law, 2002, vol. 34, p. 308.

29 Qualified as such by De Preux, Jean, The Protocols additional to the Geneva Conventions, *IRRC*, ICRC, Geneva, n. 320, p.473-482. See at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/3CDB6A2F3EAA0EFFC1256B66005B01B2>. De Preux affirms that the principles enshrined in Article 3 are also in Lieber’s Instructions, and confirms their value as being “virtually all derived from customary law applicable in international armed conflicts.”

their practice, must be respected.”³⁰ This concept is reintroduced in subsequent national provisions.³¹ It is in international treaties such as the II Convention with Respect to the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land of 1899, as well as in the IV Convention respecting the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land of 1907.³²

The concept of honour is again included in the IV Geneva Convention of 1949 stating that women shall be protected against “any attack on their honour, in particular, rape, enforced prostitution, or any form of sexual assault.”³³ Even if there is still a reference to the concept of honour, there is a will to identify further and sanction these categories of horrendous crimes. Undoubtedly, the atrocities committed in Second World War had an important impact in the wording of Article 27 of the IV Geneva Convention, bringing the provisions of international humanitarian law to the first steps towards a more specific formulation of sexual crimes. This resulted in the inclusion of the criminal category of enforced prostitution and of an open-ended provision that condemned “any form of sexual assault.”³⁴ It is unfortunate, though, that these provisions exclude men as constituting possible victims of sexual violence.

30 Project of an International Declaration Concerning the Laws and Customs of War. Brussels, August, 1874, <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/a59f58bbf95aca8bc125641e003232af?OpenDocument>, January 17, 2005.

31 The Laws of War on Land. Oxford, September 9, 1880 in Schindler, D. and J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Alphen aan de Rijn-Geneva, Sijthoff and Noorhoff-Henry Dunant Institute, 1988.

32 Article 49 of the Laws of War on Land of Oxford of 1880 provided that: “Family honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected.” The same rights were protected in the following conventions: II The Hague Convention with Respect to the Laws and Customs of War on Land and its Annex, Regulations Concerning the Laws and Customs of War on Land, The Hague, July 29, 1899: “Art. 46. Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected;” IV The Hague Convention Respecting the Laws and Customs of War on Land and its Annex, Regulations concerning the Laws and Customs of War on Land, The Hague, October 18th, 1907: “Art. 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.” See Schindler and Toman: *The Laws of Armed Conflicts*...

33 Article 27 par. 2 of the IV Geneva Convention of August 12, 1949, relative to the Protection of Civilian Persons in Time of War.

34 Article 27 par. 2 of the IV Geneva Convention of 12 August, 1949, relative to the Protection of Civilian Persons in Time of War.

The unique article relating to armed conflicts of non-international character, common Article 3 to the Geneva Conventions, did not reflect the same level of wording specificity and categories of crimes than the ones provided in Article 27 of the IV Geneva Convention. Considered as matters of internal concern of States, and therefore falling under their national sovereignty, the provisions of common Article 3 contain a more general wording for sexual related crimes: it refers to the classic concept of prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment.”³⁵

This characterization of sexual violence as an attack against a woman’s honour or dignity could be the result of historical and socially based stereotype that the honour of a woman lies in the integrity of her body and that she should even experience ashamed of been a victim of rape. This society-oriented approach diminishes or ignores the great physical and emotional harm suffered resulting from the commission of sexual related crimes. This use of the concept of honour in relation to sexual violence could even risk failing to recognize the brutal nature of rape, referring instead to a “value” term associated to the interest to be protected rather than the interest of the woman herself, reminiscence of the paternalistic notion of women as property.³⁶

In our opinion, the reference to honour in the Geneva Conventions and preceding international humanitarian law instruments could also be interpreted in the light of the first documents relating to the protection of the fundamental rights as aiming at protecting the person and should not be interpreted as a **value** term or concept referring to a moral value. In this sense, Article 27 paragraph one of the III Part of the IV Geneva Convention on the “Status and Treatment of Protected Persons” recognizes the entitlement of

35 Article 3(1) (c) common to the Geneva Conventions of August 12, 1949. In its Commentary to the Geneva Conventions, Jean Pictet states that the flexible wording of paragraph c) of article 3 based in “the risk of being unable to catch up with the imagination of future torturers –and, at the same time, precise.” See Commentary of the II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, ICRC, 1960, p. 35.

36 See in this sense, Lindsey, Charlotte, “Women and war: An overview,” *IRRC*, ICRC, Geneva, 2000, n. 839, p. 561-579. On the same subject, Niarchos, Catherine N., “Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia,” *Human Rights Quarterly*, vol. 17, 1995, pp. 671-676, and Judith Gardam, “Women, Human Rights and International Humanitarian Law,” *IRRC*, ICRC, Geneva, n. 324, September 1998, pp. 421-432.

protected persons to have in all circumstances, respect for their persons and their honour. The reference to the honour of these protected persons should therefore be interpreted in a broader sense, not only relating to women but including men and women, adults and children encompassing all acts of violence and threats thereto.³⁷

As the United Nations Special Reporter on violence against women stated, “perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women.”³⁸

Almost thirty years later and after the commission of numerous horrendous sexual crimes in different armed conflicts and self-determination strives, the 1977 Additional Protocols to the Geneva Conventions continued the practice of subsuming these crimes under categories dealing with honour and dignity. In this sense, Article 75 (2)(b) still makes an explicit reference to the dignity in stating that the scope of its provisions is to protect civilians from “outrages upon personal dignity, in particular, humiliating and degrading treatment.”³⁹

An interesting development in separating honour and dignity from sexual related crimes committed against women is contained in Additional Protocol I, including some provisions specially dedicated to the protection of women with no mention of these two terms. According to Article 76, “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” There is also a further effort to specify some sexual crimes such as rape and force prostitution, using a similar wording as in Article 27(2) of the IV Geneva Convention.

37 Article 27 (1) provides, “Protected persons are entitled, in all circumstances, to respect for their persons, their *honour*, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”

38 See Radhika Coomaraswamy, UN Special *Rapporteur* on Violence Against Women, United Nations document E/CN.4/1998/54, Section I, par. 5. In this report, she also added, “sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation of the enemy group. It is a battle among men fought over the bodies of women.”

39 Article 75(2)(b) of the Additional Protocol I on Fundamental Guarantees provides the prohibition of violence to the life, health or physical or mental well-being of persons, in particular torture of all kinds, whether physical or mental and the prohibition “of outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault” or threats thereof.

A further innovation is made regarding non-international armed conflicts. Article 4(2)(f) of Additional Protocol II, like Article 76 of Additional Protocol I, prohibits rape, forced prostitution and any other forms of indecent assault but includes furthermore, slavery and slave trade as crimes punishable in all its forms. In doing so, this Article condemns slavery and slave trade, heinous crimes that have devastated human kind throughout the centuries.⁴⁰

2. The Role of Key Humanitarian Principles in the Adoption of Progressive Provisions on Sexual Related Crimes

The development and approval of legal provisions that criminalize explicitly sexual or gender violence have followed a long way. Rape, sexual assaults and sexual violence have existed since immemorial times. As long as nations have seen fit to go to war, there has been rape.⁴¹

Except for the reference to the concept of honour, a specific prohibition to sexual related crimes was absent either at the Hague Conventions of 1899 and of 1907 on the Laws and Customs of War.⁴² Decades afterwards, not reflecting the horrendous sexual related crimes committed during Second World War, *inter alia*, rape and sexual slavery, the Nuremberg Charter, contained in the Agreement for the Prosecution and Punishment of Major War Criminals, did not include any specific mention of sexual related crimes neither criminalize them specifically.⁴³

40 As a further development of this relevant effort, the Rome Statute in its Article 7(1) (g) regarding crimes against humanity and Article 8(2)(b)(xxii) related to war crimes sanction sexual slavery as a crime of concern to the international community.

41 See Ryan, Samantha, "From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crimes," *Pace University School of Law International Law Review*, autumn, 1999, vol. XI, n. II, 2002, p. 454. In explaining the role of rape in war, the author states that "rape has always been one of the most common denominators in warfare. Men have raped out of boredom, out of displaced animosity for the enemy, to subjugate, to displace, to destroy, to impress and to conquer. Women have always been the spoils of war. Until the last century, the entire world understood that the nature and necessity of war justified the cruelty of rape and other inhumane acts."

42 II The Hague Convention with Respect to the Laws and Customs of War on Land, July 29th, 1899 and the IV The Hague Convention Respecting the Laws and Customs of War on Land," October 18th, 1907. Schindler, D. and Toman, J., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Alphen aan de Rijn-Geneva, Sijthoff and Noorhoff-Henry Dunant Institute, 1988.

43 This phenomenon is recognized to be an *invisibilización* of women's suffering

Despite the absence of a specific mention of rape in the Charter of the International Military Tribunal of Nuremberg, on December of 1945, the four occupying powers adopted Control Council Law n. 10. This law included explicitly rape as a crime against humanity and is considered therefore as being one of the greatest contributors to the advancement in prohibiting crimes against humanity and sexual related crimes.

Contrary to the Nuremberg Military Tribunal, rape was prosecuted as a war crime in the International Military Tribunal for the Far East. Under this Tribunal, General Yamashita was charged with and convicted for war crimes such as torture and rape as well as of mass executions of very large numbers of women and children.⁴⁴

during wartime. See in this sense Odio Benito, Elizabeth, "De la violación y otras graves agresiones a la integridad sexual como crímenes sancionados por el derecho internacional humanitario: Aportes del Tribunal Penal Internacional para la Antigua Yugoslavia," in: *Ensayos en honour a Fernando Volio Jiménez*, San José, p. 271. On the Nuremberg Trials, see, "Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis," London, 8 UNTS 279, Annex, Charter of the International Military Tribunal, (Nuremberg Charter), August 8, 1945. The Agreement states in its Article 6 of the Section regarding jurisdiction and general principles its jurisdiction. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: "(a) 'Crimes against peace:' namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) 'War crimes:' namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) 'Crimes against humanity:' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

44 See Judgment for the International Military Tribunal for the Far East, Tokyo, 1948, B. Roling and C. Ruter, *The Tokyo Judgment*, vol. I, Amsterdam, Amsterdam University Press, 1977. See furthermore Samantha, "From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crimes," *Pace University School of Law International Law Review*, autumn, 1999, vol. XI, n. II, 2002, p. 458.

A few years later, the 1949 Geneva Conventions would criminalize grave breaches to IHL, foreseeing them as crimes whose seriousness deemed to be the concern to the international community as a whole. Neither the provisions of the Geneva Conventions regulating international armed conflict⁴⁵ nor common Article 3, that lays out minimum protection standards during the course of a non-international armed conflict,⁴⁶ explicitly recognize sexual related crimes as constituting “grave breaches.”⁴⁷

Despite the lack of specific prohibition of sexual related crimes, earlier IHL treaties’ tools for interpretation made already reference to inspiring humanitarian principles that would lead, after half a century of evolving norms, to a broader legal interpretation and a more effective criminalization of sexual crimes. Both prefaces of *The Laws of War on Land of Oxford* at national level, and of the *II The Hague Convention with Respect to the Laws and Customs of*

45 See Article 50 of the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 [hereinafter I Geneva Convention]. Article 51 of the II Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 [hereinafter II Geneva Convention]. Article 130 of the III Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 [hereinafter III Geneva Convention]. Article 147 of the IV Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter IV Geneva Convention]. All reprinted in United Nations, *A Compilation of International Instruments*.

46 Considered as being a mini-convention, common Article 3 provides: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

47 All the above-mentioned articles prohibit, however, “inhumane treatment” as grave breach to international humanitarian law. In doing so, they set the basis for further interpretation that would allow decades after the sanction of sexual related crimes.

War on Land of 1899, refer to the need of a set of rules that would serve as guiding principles in the respect of the rights of humanity.⁴⁸

The II The Hague Convention with Respect to the Laws and Customs of War of 1899 would even foresee in its provisions the so known Martens Clause. Martens proposed in 1899, recognizing the center role of the human being in all efforts to regulate, limit and humanize the law of armed conflicts, the inclusion of the following clause: “until a more complete code of the laws of war is issued, the High Contracting Parties think it is right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”⁴⁹

International jurisprudence has also been a source of substantiation of the main principles contained in IHL provisions. In 1986, the International Court of Justice⁵⁰ states the principle of humanity in *Nicaragua vs. United States of America*. In this case, the ICJ affirms that the principles contained in common Article 3 to the Geneva Conventions constitute “elementary considerations of humanity”⁵¹ that should not be breached in armed conflict regardless of whether of an international or a national character.⁵²

48 In its preface, *The Laws of War on Land of Oxford* established: “[...] so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to endless accusations. A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts -which battle always awakens, as much as it awakens courage and manly virtues,- it strengthens the discipline that is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.”

49 Fyodor Fyodorovich Martens (1845-1909), was a Russian jurist, diplomat and publicist that, backed by D.A. Miliutin, the Defense Minister close to the Tsar, prepared a draft convention on the laws and customs of war that intended to establish universal rules of warfare for all belligerent States. This draft convention included regulations for the treatment of the civilian population and of non-combatants in general. These rules were designed to mitigate the horrors of war, in accordance with the legal awareness and humanism that were growing among the general public. See Vladimir Pustogarov, Vladimir, “Fyodor Fyodorovich Martens (1845-1909): A Humanist of Modern Times,” *IRRC*, ICRC, Geneva, 1996, n. 312, p. 300-314.

50 Hereinafter ICJ.

51 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua vs United States of America*), June 27, 1986, page 114, par.218, http://www.icj-cij.org/icjwww/icasas/inus/inus_ijudgment/inus_ijudgment_19860627.pdf visited February 3rd, 2005.

52 *Ibid.*, p. 115, par. 119.

The Preamble of the Additional Protocol II⁵³ contains again the principle of humanity. It recalls the States Parties that the humanitarian principles enshrined in common Article 3 to the Geneva Conventions constitute the foundation of respect for the human person in cases of armed conflict not of an international character, and that international instruments relating to human rights offer a basic protection to the human person. The Preamble emphasizes “the need to ensure a better protection for the victims of those armed conflicts and recalls that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.”⁵⁴

The principles of humanity and the dictates of the public conscience were considered at the time of the adoption of the Additional Protocol II as universal reference.⁵⁵ This universal character constitutes an essential source for a broader approach and protection, in case of need of interpreting and developing the existing international norms, allowing further improvement in the adoption of rules sanctioning in a more specific manner sexual related crimes.

It is not until 1977, after numerous and atrocious crimes committed in different parts of the globe, that Additional Protocol II to the Geneva Conventions⁵⁶ reflects a move forward in the public conscience and in the will of the international community to further the principle of humanity and use a more specific categorization of several of the most despicable crimes. Additional Protocol II to the Geneva Conventions,⁵⁷

53 The Preamble states: “The High Contracting Parties, Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of August 12, 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character, Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person, Emphasizing the need to ensure a better protection for the victims of those armed conflicts, Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.”

54 The third paragraph of the Preamble of Additional Protocol I mentions explicitly the final aim of international humanitarian law and the adequate interpretation of its norms as it states: “believing it is necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application”.

55 So qualified in ICRC, *Commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of 1949*, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, p. 1365.

56 I Protocol Additional II to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 [hereinafter Additional Protocol II].

57 Protocol Additional I to the Geneva Conventions of August 12, 1949, and

relating exclusively to non-international armed conflicts, contains a specific reference to violations of the fundamental guarantees of the human being in Article 4(2)(e).⁵⁸ This article lists explicitly, and for the first time, the outrageous crimes of rape and enforced prostitution.

The *alinéa* finalizes with a reference to “any form of indecent assault.” With this open-ended formulation of what constitutes a violation to the most fundamental guarantees, a reference to the very first norms of international humanitarian law and therefore, to international customary law is made, demonstrating that this formulation constitutes a valuable instrument for future interpretation and development of protective and repressive norms.⁵⁹

Already at the Diplomatic Conference of 1974-1977, the protection of women and children from different forms of sexual abuse originated special interest and attention of the international community.⁶⁰ This constitutes the very first sign of a special concern of the international community to protect vulnerable persons from sexual related crimes. This concern would culminate, several decades after, in the adoption of specific sanctions for sexual related crimes in the Rome Statute of the International Criminal Court.

3. Rape as a Grave Breach of IHL

Grave breaches are those crimes deemed to concern the international community as a whole. Differing from crimes against humanity, the only criterion requested by the Geneva Conventions regarding grave breaches or war crimes is that they must be committed against persons or property protected according to the

relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 [hereinafter Additional Protocol I] contains a section on repression of grave breaches of the Conventions and of Additional Protocol I, in which no mention to any sexual crime is made.

- 58 Additional Protocol II in its Article 4(2) (e) prohibits the following acts against persons hors de combat in non-international armed conflicts: outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.
- 59 Contrary to the Additional Protocol II, Article 85(5) of Additional Protocol I provide the sanction of grave breaches of the Geneva Conventions and the Additional Protocol I, qualifying them as war crimes. According to the provisions of this last instrument, States Parties and the Parties to the conflict have the obligation to repress grave breaches and take measures necessary to suppress all other breaches of the Conventions or of the Protocol, which result from a failure to act when under a duty to do so.
- 60 ICRC, *Commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of 1949*, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, p. 1400.

definition provided for in the Geneva Conventions.⁶¹ The threshold of evidence is much lower in the case of war crimes, allowing the prosecution of one single act instead of a pattern of conduct.⁶²

The Commentary of the Geneva Conventions recognizes the provisions of Article 27 of the IV Geneva Convention as being customary international law.⁶³ In this sense, the specific prohibition of rape and enforced prostitution stated in Article 27 is therefore codifying customary international law.

Even if Article 147 of the IV Geneva Convention contains no specific mention of the crime of rape in enumerating grave breaches of IHL,⁶⁴ an interpretation issued by the International Committee of the Red Cross in 1958 contains a much broader interpretation.⁶⁵ In its Commentary, the ICRC considered the grave breach of “inhuman treatment” contained in Article 147 as prohibiting rape.⁶⁶ Several decades later, in 1992, the ICRC considered that the grave breach of “willfully causing great suffering or serious injury to body or health” provided in Article 147 covered also the crime of rape.⁶⁷

As established in the *Tadic* Case, customary international law “imposes criminal liability for serious violations of common Article 3,

61 Article 3 common to the Geneva Conventions defines protected persons those “taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.”

62 See Cleiren, C. and Tijssen, M., “Rape and other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues,” in Clark, R. and Sann, M., *The Prosecution of International Crimes*, Transaction Publishers, 1996, p. 279.

63 Article 3(1) (c) common to the Geneva Conventions of August 12, 1949. In its Commentary to the Geneva Conventions by Jean Pictet p. 199-201.

64 Article 147 states: “[...] grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

65 Hereinafter ICRC.

66 See Commentary on the Geneva Conventions of August 12, 1949, Geneva Convention relative to the Protection of Civilian Persons in time of War, Uhler, Oscar and Coursier, Henri Eds., 1958.

67 ICRC, Aide-Mémoire, December 3, 1992 quoted by Meron, Theodor, “Rape as a Crime under International Humanitarian Law,” *American Journal of International Law*, N. 87, p. 426, 1993.

as supplemented by other general principles and rules on the protection of victims of internal armed conflict.”⁶⁸

On the value of customary international law in the crystallization of new norms, just some weeks ago, the Head of the ICRC’s project on customary international humanitarian law edited a two-volume work entitled “Study on Customary International Law.”⁶⁹ An introductory article published on March 2005 at the International Review of the Red Cross follows the publication and gives the historical and methodological framework as well as mentions the main results of the study.⁷⁰ As annex, the article includes a list of customary rules of IHL. On sexual related crimes, Rule 93 in the section related to fundamental guarantees in the treatment of civilians and persons hors de combat states clearly that “rape and other forms of sexual violence are prohibited,” both in international and non-international armed conflicts.⁷¹ This assertion just confirms the crystallization, at the time of the negotiations of the Rome Statute, of sexual related crimes as being acts prohibited by customary norms.

The recognition by different sources of the specific category of crime of rape as part of customary international law and as being a grave breach of IHL constitutes a valuable precedent for further developments of the international community in enlargement of a more detailed list of the sexual related crimes’ categories.

Several Examples of the Jurisprudence of *ad hoc* International Tribunals of the Former Yugoslavia and Rwanda Regarding Sexual Related Crimes

Through their jurisprudence, international courts can contribute substantially to the emergence of rules of customary international law by influencing the subsequent practice of States and international organizations. The value of their decisions is of significant importance. Undoubtedly, a finding by an international

68 See Prosecutor vs. DuskoTadic a/k/a/ “DULE,” Appeals Chamber Decision, par. 134.

69 Henckaerts, Jean-Marie and Louise Doswald-Beck, *Customary International Humanitarian Law*, II Volumes, vol I. Rules, vol II. Practice, Cambridge University Press, 2005.

70 Henckaerts, Jean-Marie, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,” *IRRC*, ICRC, Geneva, vol 87, n. 857, March 2005, pp. 1-38.

71 Henckaerts, Jean-Marie, “Study on Customary International Humanitarian Law...”, p. 32.

court that a rule of customary international law exists constitutes persuasive evidence.⁷²

The jurisprudence of the ad hoc international tribunals of the Former Yugoslavia and Rwanda regarding sexual related crimes are no exception. Even if the Statutes of the two *ad hoc* international tribunals criminalize the crime of rape as a crime against humanity, but not as being a grave breach of the Geneva Conventions, nor as a violation of the laws or customs of war, the first steps towards the criminalization and recognition of the special character of the sexual related crimes were done by both international courts. In the field of psychological damage, amongst others, the *Tadic* Case was groundbreaking. In this case, the ICTY made express recognition of rape and sexual assaults as having particular devastating consequences for the victims, underlining the possible damage of a permanent character that these types of crimes could cause.

As being an indictment based solely on sexual related counts, the *Foca* indictment⁷³ is the first of its sort. This case contains twenty-one counts related to the sexual violence committed directly by *Kunarac* or by soldiers under his authority, under which several counts of rape as crimes against humanity⁷⁴ and as violations of the laws and customs of war.⁷⁵ Rape and sexual assaults are the central counts of the indictment. In this case, many of the detained women were subjected to humiliating and degrading conditions of life, to brutal beatings and to sexual assaults, including rapes. The soldiers took the women to houses, apartments or hotels for the purpose of sexual assault and rape.⁷⁶ Some decades afterwards, these facts could fall under the special crime category of sexual slavery, specifically provided under the Rome Statute.

On the relevance of sexual related crimes in international justice, the *Furundzija* Judgement must to be mentioned. In this judgement,

72 This is called by Henckaerts "the *precedential* value" of the decisions of international tribunals. See Jean-Marie Henckaerts and Louise Doswald-Beck: *Customary International Humanitarian Law*, II Volumes, vol. I (Rules) y vol. II (Practice), Cambridge University Press, 2005, p. 5.

73 See The Prosecutor vs. Dragoljub Kunarac, Case N. IT-96-23-I, Amended Indictment, July 23, 1998, (known as *Foca* Indictment), par 5.1 to 10.4.

74 Par. 5.6, explicitly charges the accused with acts of torture under Article 5(f) and rape under Article 5(g) of the Statute of ICTY.

75 The indictment charges the accused for rape and torture under Article 3 of the ICTY Statute.

76 See The Prosecutor vs. Dragoljub Kunarac, Case N. IT-96-23-I, Amended Indictment, July 23, 1998, (known as *Foca* Indictment), paragraphs 5.1 to 10.4.

the tribunal appeals claimed that the general question of bringing to justice the perpetrators of crimes such as rape was one of the reasons that the Security Council established the Tribunal.⁷⁷

The conviction of Paul Akayesu on September 2, 1998 by ICTR constitutes the first time that a defendant is convicted under international law of sexual assaults as crimes against humanity and genocide.⁷⁸ In this case, the tribunal defined the question of consent very progressively, including in the definition objective elements such as the state of detention, the exercise of psychological pressure or any other condition in which no true consent was possible.⁷⁹

As illustrated by some of the jurisprudence adopted by the ICTY and ICTR, customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law of the *ad hoc* international tribunals has made a paramount contribution.⁸⁰

The Negotiation Process and the New Sexual related Crimes provided in the Rome Statute

1. Precedent Efforts to Create Awareness amongst the International Community

Relevant precedents of the **new** sexual related crimes are to be found in the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace and Political Participation, in which the human body is declared as inviolable and its respect is considered as a fundamental part of human dignity and freedom.⁸¹ Furthermore, the 1993 Vienna Declaration and Programme for Action adopted by the World Conference on Human

77 See Furundzija Judgement, ICTY, N. IT-17/1A at par. 201.

78 See The Prosecutor vs. Jean Paul Akayesu, Case n. ICTR 96-4-T, Chamber I, Decision of September 2, 1998.

79 See Kuo, Peggy, "Prosecuting Crimes of Sexual Violence in an International Tribunal," *Case W. Res. J. International Law*, 2002, vol. 34, p. 319.

80 Greppi, E., "The Evolution of Individual Criminal Liability under International Law," *IRRC*, ICRC, Geneva, n. 835, 1999, p. 541.

81 UN Doc. E/Conf.66/34.

Rights,⁸² qualified gender based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice, as being incompatible with dignity and worth of the human person and advocated for its eradication. One year later, the Preamble of the Declaration on the Elimination of Violence Against Women, expressed vividly the concern of the special vulnerable situation of women in situations of armed conflict and declared its conviction of the need for a commitment by States and the international community in respecting their responsibilities to and commitments to the elimination of violence against women.⁸³

On sexual related crimes, the Vienna Declaration and Programme of Action condemns strongly massive violations of human rights especially in the form of genocide, **ethnic cleansing** and systematic rape of women in war situations, and reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.⁸⁴ It recalls, moreover, that all these are violations of the fundamental principles of international human rights and IHL including, specifically, the crimes of murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.⁸⁵

Two more important and parallel facts occurred in 1995. On one side, the General Assembly of the United Nations sets up a Preparatory Committee to prepare draft text of a treaty to create a permanent international criminal court and in October the Fourth World Conference on Women in Beijing takes place. Continuing with the recognition of nominating specifically these **new** crimes, the Platform of Action of the Beijing's Fourth World Conference on Women⁸⁶ condemns again all violations of this kind, including in particular murder, rape, including systematic rape, sexual slavery and forced pregnancy.⁸⁷

82 Vienna Declaration and Programme for Action adopted by the World Conference on Human Rights, Vienna, June, 1993, UN Doc. A/Conf.157/23 (1993). Hereinafter the Vienna Declaration and Programme for Action.

83 G.A. Res. 104, UN GAOR, 48th Sess., UN Doc A/Res/48/104 (1994).

84 Part II, point 3, Vienna Declaration and Programme for Action, Section on the Equal Status and Human Rights of Women, Vienna Declaration and Programme of Action of the World Conference on Human Rights, par. 28.

85 Part II, point 3, Vienna Declaration and Programme..., par.38.

86 Fourth World Conference on Women, The Beijing Declaration and Platform of Action, DPCS, 1995.

87 The Beijing Platform for Action, Section on Women and Armed Conflict, [hereinafter the Beijing Platform for Action], par. 132.

The Beijing Platform for Action qualifies rape during armed conflict a war crime. The strategic objective to promote non-violent forms of conflict resolution and reduce the incidence of human rights abuse in conflict situations requires Governments and international and regional organizations “to reaffirm that rape in the conduct of armed conflict constitutes a war crime and under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide.” Moreover, it requests the same actors to take all measures required for the protection of women and children from such acts and strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.⁸⁸

The approach of incorporating multiple references to the sexual related crimes in the declaration and plan of action and formulating specific demands regarding these **new** categories of crimes had a progressive and notorious impact on the international community. There was an increasing conviction of the need to firmly prohibit these acts and fight for their eradication.

2. The Negotiation Process and the Role of NGO's

The negotiation process of the Rome Statute was a highly challenging and enlightening process. The International non-governmental organizations,⁸⁹ as well as the non-governmental organizations,⁹⁰ whether regional or national, played a paramount role in sensitizing the States delegations of the need to adopt a more specific approach to the categories of crimes to be included in the Rome Statute and in doing so, filling the gaps of the International Law Commission's Draft.

The fundamental role of NGO's in building awareness in the punishment of sexual related crimes was even acknowledged in the Akayesu's judgment in which International Criminal Tribunal for Rwanda Chamber takes note of the interest shown in this issue by

88 The strategic objective “Reduce excessive military expenditures and control the availability of armaments, “demands governments to take action to investigate and punish members of the police, security and armed forces and others who perpetrate acts of violence against women, violations of international humanitarian law and violations of the human rights of women in situations of armed conflict.” The Beijing Platform for Action, Strategic Objective 143.c.

89 Hereinafter INGO's.

90 Hereinafter NGO's.

non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The Chamber concludes that investigation and presentation of evidence relating to sexual violence is in the interest of justice.⁹¹

The first few drafts of the Rome Statute replicated the *lacunae* and lack of specificity of the traditional treatment of sexual related crimes under international law. The ICC draft statutes in 1996 continued to link rape to outrages upon personal dignity under war crimes, ignored crimes other than rape, and failed to recognize them as grave breaches of the laws and customs of war. Neither Article 20(c) of the International Law Commission's Draft Statute⁹² on Violations of the Laws of Customs of War⁹³ nor the relevant provision of the Draft Code of Crimes against the Peace and Security of Mankind⁹⁴ included any specific category of sexual related crimes.⁹⁵

91 Prosecutor vs. Jean-Paul Akayesu, N. ICTR-96-4 at par. 417.

92 See Draft Statute for an International Criminal Court prepared by the International Law Commission, Report of the International Law Commission on its Forty-sixth Session, May 2-22nd, July 1994, UN GA Official Records, Forty-ninth Session, Supplement n. 10, A/49/10, 1994.

93 Article 20 (c)(c) of the International Law Commission [hereinafter ILC] stated: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property."

94 Article 22 of the Draft Code on Exceptionally serious war crimes provided the following: "1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to...]; 2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts: a. Acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [in particular, willful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment]; b. Establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory; c. Use of unlawful weapons; d. Employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment; e. Large scale destruction of civilian property; f. Willful attacks on property of exceptional religious, historical or cultural value."

95 Article 18(j) of the 1996 Draft Code was the first instrument to include enforced prostitution and other sexual crimes in addition to rape as crimes against

Having as precedent the world conferences held in Vienna and Beijing, the issue of sexual violence in war had already received much attention by the time of the Rome Diplomatic Conference. Departing from this reality, a group of women's human rights activists⁹⁶ began lobbying government delegations at the February 1997 Preparatory Commission (PrepCOM) meeting.⁹⁷

In December's 1997 PrepCOM, as very important result of the lobbying efforts, the sexual related crimes were **de-linked** from outrages upon personal dignity under war crimes and it was decided to create a category for rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and any other form of sexual violence.⁹⁸

The category of enforced pregnancy constituted a source of debate and polarization during the negotiation process. Even if the Vienna Declaration and Platform for Action and the Beijing Platform for Action had specifically mentioned and condemned forced pregnancy, during the negotiations of the Rome Statute⁹⁹ several countries argued this category of crime was already covered by rape

humanity. See ILC Draft Code of Crimes Against the Peace and Security of Mankind (1996 Draft Code), Report of the International Law Commission on the Work of its Forty-Eighth Session, May 6-July 26, 1996. U.N. GA 51 Session, Supp. 10, UN Doc. A/51/10, p. 76.

96 These activists subsequently founded the Women's Caucus for Gender Justice in the ICC2 with the objective of ensuring a gender perspective throughout the Statute. The Women's Caucus rapidly expanded its base of support to include, by the time of the Rome Diplomatic Conference, approximately two hundred women's organizations from all regions of the world. Women's Caucus members were active lobbying in their countries' capitals and participating in the Prep COM and the Rome Diplomatic Conference. See Bedont, Barbara and Katherine Hall Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court," *The Brown Journal of World Affairs*, vol. VI, Issue 1, pp. 65-85.

97 See Bedont, Barbara and Katherine Hall Martinez, "Ending Impunity for Gender Crimes...", pp. 65-85.

98 See Steains, Cate, *Gender Issues, The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 365.

99 States that indicated their support during the Opening Plenary for including provisions in the statute to enable the Court to prosecute sexual violence crimes included: Australia, Austria, Bangladesh, Bosnia and Herzegovina, Botswana, Canada, Costa Rica, Cyprus, Denmark, European Union (gender crimes), Finland, Georgia, Ghana, Israel (gender crimes), Korea (gender-related violence), Kuwait, Lithuania, Luxembourg, Mexico, New Zealand, Norway, Philippines, Portugal, Russian Federation, Samoa, Slovenia (gender-related crimes), South Africa (for SADC), Spain, Sweden (gender-related crimes), Trinidad and Tobago, Uganda, USA, and Zambia. See Bedont, Barbara and Katherine Hall Martinez, "Ending Impunity for Gender Crimes...", p. 366.

and unlawful detention.¹⁰⁰ The Holy See proposed to replace the words **enforced pregnancy** by **forcible impregnation**, a concept that does not capture all the elements of enforced pregnancy that included the fact of **keeping** the woman pregnant and therefore, restricting the freedom of movement.¹⁰¹

Nevertheless, there was a consensus¹⁰² that in drafting the Rome Statute a process of codifying the state of international law was taking place. The endless and invaluable work, lobby and efforts culminated in the final adoption of the first provision sanctioning forced pregnancy, sexual slavery and enforced sterilization. In 2000 the UN High Commissioner for Human Rights paid tribute to the women of the Women's Caucus for Gender Justice. In that occasion, Mrs. Robinson underlined the efforts made by this NGO, taking the experiences of women in war, identifying strategies for dealing with violations and, ensuring that rape, sexual slavery, forced pregnancy and other forms of gender-based and sexual violence were included in the Statute of the ICC.¹⁰³ This statement was made recognizing the efforts of the Women's Caucus "in overcoming intense opposition from many representatives at the International Criminal Court negotiations."¹⁰⁴

3. The New Sexual Related Crimes Provided in the Rome Statute

The Crime of Genocide and the Absence of a Specific Mention of Sexual Related Categories of Crime

The new categories of sexual related crimes of the Rome Statute are provided in Articles 7 and 8 regarding, respectively, crimes

100The specific category of crime was already recognized in the paragraph 38 of the Vienna Declaration and Platform for Action and paragraphs 114, 132 and 135 of the Beijing Platform for Action.

101The opposition consisted of an alliance between some anti-choice groups, mostly from the US. and Canada, and a few delegations representing states where religion is used to justify discriminatory treatment of women. These delegations included the Vatican, and countries that followed its lead on certain issues, along with a core group of Islamic states. See Bedont, Barbara and Katherine Hall Martinez, "Ending Impunity for Gender Crimes...", pp. 65-85. The records of the negotiations can be consulted at A/AC.249/1998/DP.13, April 1, 1998. See furthermore, Steains, Cate, *Gender Issues, The International Criminal Court: The Making of...*, p. 365.

102See in this sense, Bourdon, William, *La Cour Pénale Internationale: Le Statut de Rome*, Paris, 2000, p. 53.

103Robinson, Mary, UN High Commissioner for Human Rights on the occasion of International Women's Day, March 8, 2000. See web site *Women's Caucus for Gender Justice* at the following address: <http://www.iccwomen.org/archive/index.html>.

104Robinson, UN High Commissioner for Human Rights...

against humanity and war crimes. In defining genocide, Article 6 of the Rome Statute does not include any specific reference to sexual violence or any other sexual related category of crime. This lack results from the strong reluctance of several delegations during the PrepCOM negotiations to alter the definition of genocide contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, considered as being part of customary international law.¹⁰⁵ The *travaux préparatoires* of this Convention served as the main source for interpretation of the definition.

The imposition of measures intended to prevent births within the group is one of the categories of crimes included in the definition of genocide. Even though is the role of the judges of the ICC to interpret the dimension that this specific category of crime has in a certain context and moment, an enlightening reference to the steps made by the jurisprudence of international tribunals has to be made. In the Akayesu's case, the *ad hoc* International Tribunal of Rwanda states that in patriarchal societies, the membership of a group is determined by the identity of the father. The Tribunal considers that an example of a measure intended to prevent births within a group could be where, as a consequence of rape, a woman is impregnated by a man of another group "with the intent to have her give birth to a child who will consequently not belong to its mother's group."¹⁰⁶

"New" Categories of Crimes against Humanity¹⁰⁷

As stated in the Elements of the Crimes, the crimes against humanity as defined in Article 7 are among the most serious crimes of concern to the international community as a whole, "warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world."¹⁰⁸

105 See Sok Kim, Young, *The International Criminal Court: A Commentary of the Rome Statute*, Wisdom House, England, 2003, p. 66.

106 Prosecutor vs. Jean-Paul Akayesu, N. ICTR-96-4 at par. 507.

107 The crimes against humanity of forced pregnancy, enforced sterilization and the open-ended category of "any other form of sexual violence of comparable gravity" are not the object of this study. To deepen in these categories of sexual related crimes see Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden, 1999, p. 144-146.

108 Elements of the Crimes, ICC-ASP/1/3 (Part II-B), Adopted and entered into force on September 9, 2002. See http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf.

As reflecting the threshold of the crimes against humanity, the elements of all the crimes against humanity require the conduct to be committed as part of a widespread or systematic attack directed against a civilian population and that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The **new** crimes foreseen in Article 7 embody a wider categorization of sexual related crimes that any other similar convention in international law.¹⁰⁹ These **new** crimes against humanity are stated in Article 7(1) (g) and 7(1) (h). Under Article 7(1) (g) the crimes of rape, sexual slavery, enforced prostitution and forced pregnancy are criminalized. The category of crimes of **enforced sterilization** has several precedents of punishment in history in the context of medical or biological experimentation, especially the ones conducted in concentration camps during the Second World War. In the case of the open-ended category of crime of “any other form of sexual violence of comparable gravity,” already the Nuremberg Charter foresaw, under crimes against humanity “other inhumane acts committed against any civilian population.” The specific prohibition of enforced sterilization and of “any other form of sexual violence of comparable gravity” as categories of crimes in prior international instruments, even if in a wider form and context, brings the author to exclude them from being object of study of this section.

Even if the crime of rape has been criminalized as a crime against humanity since the Second World War and was already a category of crime in both the Statutes of the ICTR and ICTY¹¹⁰, a reference will be made to this category of crime. As the case of other sexual related crimes, the absence of a definition of the crime of rape in international humanitarian law or in the international law of human rights, the “Elements of Crimes” acquires a significant value and encompasses a key role in contributing to the determination of the

109The Draft Statute criminalized only the categories of “rape or other sexual abuse [of comparable gravity] or enforced prostitution”.

110Article 3 of the ICTR’s Statute provides that “[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: [...] (g) rape.” The Statute of ICTY, in its Article 5 reads “[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (g) rape.”

commission of a certain category of crime.¹¹¹ According to the elements of the crime of rape, the invasion of the body is foreseen as being one on the main elements of this crime, namely, that the perpetrator invades any part of the body of a person by conduct that results in penetration, even if this would be of a slight character. The reference to the term **invasion** was intended to be gender neutral.

As a requirement for the commission of the crime, the invasion has to be committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment. On the capacity of the person, one of the elements of this particular crime provides the invasion to be committed against a person incapable of giving genuine consent, foreseen as incapable of giving genuine consent a person affected by natural, induced or age-related incapacity.

Sexual Slavery

According to Article 7(2) (c), enslavement means the exercise of any or all of the powers attached to the “right of ownership” over a person. It comprises the repeated violation or sexual abuse or forcing the victim to provide sexual services as well as the rape by the captors. This crime has the character of a continuing offence.¹¹²

The term sexual slavery is preferable to enslavement because it includes the sexual aspect of the crime of slavery, while also highlighting the coercive element involved where women are forced to provide sexual services.¹¹³ The Rome Statute also established a new definition for enslavement, including situations where women and girls are forced to domestic servitude, **marriages** or any other

111 It is worth to note that due to the will of the delegations to the compromise reached regarding sexual related war crimes, the elements for sexual related crimes against humanity are based on the elements of corresponding war crimes. See in this regard, Sok Kim, Young, *The International Criminal Court: A Commentary of the Rome Statute*, Wisdom House, England, 2003, p. 90.

112 See in this sense, Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International...*, p. 144.

113 On the crime of slavery see, furthermore, Article 1 of the Slavery Convention, September, 1926, United Nations, A Compilation of International Instruments, vol. 1, First Part, 1993, p. 201; Articles 1 and 6(2) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, ECOSOC Res. 608, April 1956 and Articles 2 and 25 of the Convention of the International Labor Organization concerning Forced Labour. See also Article 4 of the Universal Declaration of Human Rights, <http://www.un.org/Overview/rights.html>.

forced labor involving sexual activity,¹¹⁴ with the important addition of the crime of trafficking in persons, in particular women and children. As a result, the crime of trafficking in persons has been brought within the jurisdiction of the Court. The crime against humanity of sexual slavery encompasses practices such as the detention of women, during WWII, in camps or comfort stations and any other similar practices.

This is the case of the “comfort women”, estimated by historians as ranging between 100.000 to 200.000 women made to serve as such for the Japanese forces.¹¹⁵ Life at these comfort stations was living hell for the women. They were beaten and tortured in addition to being raped by fifteen, twenty or even thirty soldiers a day -and officers by night-, day after day, for periods ranging from 3 weeks to 8 years. Their living conditions were deplorable; and the lives of those who had to follow troops around at battlefronts were put at risk, day after day. Food was usually of poor quality and in short supply. Although medical check-ups by army doctors sometimes took place, many women were afflicted by sexually transmitted diseases. The conditions of poverty they were living in, as well as their social framework, made these girls and women extremely vulnerable to force, fraud, deceit, coercion and abduction.¹¹⁶

Enforced Prostitution

The crime of “enforced prostitution” was retained in the Rome Statute to capture those situations that lack slavery-like conditions. The term “prostitution” suggests on one hand, that the sexual services are provided as part of an exchange, under of course, coerced circumstances and on the other, that the sexual activity is initiated by the victims instead of by the offender.¹¹⁷

114See Triffterer, *Commentary on the Rome...*, p. 142.

115These numbers seem to be consistent with the large number of Japanese troops stationed throughout the Asia-Pacific region. To illustrate the gravity of the crimes committed, a study on the subject states that “the vast scale on which these atrocities were perpetrated is truly appalling. Although women were not treated equally in any society at this point in time, they had never been humiliated to this degree. in such vast numbers, for so long.” See Dolgopol, Ustinia and Snehal Paranjape, *Comfort Women: An Unfinished Ordeal*, Report of a Mission, International Commission of Jurists, Geneva, Switzerland, pp. 199 and following, at <http://www.comfort-women.org/Unfinished.htm>.

116See Dolgopol and Paranjape, *Comfort Women...*, pp. 199.

117See Otto Triffterer, *Commentary on the Rome...*, p. 144.

The prohibition of enforced prostitution is already contained in Additional Protocol II.¹¹⁸ This specific prohibition plays an important role in cases where the objective legal requirements of the crime of rape are not present but neither the facts constitute a case of slavery or enslavement. This would be the case when the person is compelled to perform sexual acts to obtain something fundamental for survival or to avoid further harm.¹¹⁹ The crime of enforced prostitution can have the character of a continuing offence or can constitute a separate criminal act.¹²⁰

Forced Pregnancy

This crime is constituted by two elements, namely, the rape or sexual abuse with the intent or effect of making the woman pregnant and the unlawful confinement of the woman to force her to give birth. The document “Elements of the Crime” entails a higher threshold of *mens rea*. The first element of the crime requires the perpetrator to confine one or more women forcibly made pregnant, with the “intent of affecting the ethnic composition of any population” or carrying out other grave violations of international law.¹²¹

Forced pregnancy was the most controversial crime during the negotiation process, since some delegations feared its adoption would be interpreted as affecting the existing rules on abortion and motherhood. As a solution, a last phrase was included in paragraph f of Article 7(2) stating clearly that this definition shall not in any way be interpreted as affecting national laws relating to pregnancy. In fact, this crime inflicts incomparable harm on the victims by occupying a woman’s body and forcing her to bear her rapist’s child.¹²²

The intent of affecting the ethnic composition differs from the crime of genocide, as this last one requires the higher intent “to destroy, in whole or in part” a national, ethnical, racial or religious group as such.

118 Additional Protocol II in its Article 4(2) (e) prohibits the following acts against persons *hors de combat* in non-international armed conflicts, amongst which, enforced prostitution.

119 Additional Protocol II in its Article 4(2) (e).

120 See Triffterer, *Commentary on the Rome...*, p. 143.

121 See http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf.

122 During the Second World War, Jewish women were forcibly made pregnant so that they and their fetuses could be used for medical experiments. This situation originated the prohibition of in the Geneva Conventions of conducting biological experiments.

New Categories of War Crimes

The two common elements of the crimes listed are applicable for all and each one of the war crimes. These are, first, the no requirement of a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international and, second, the no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict and that the conduct “took place in the context of and was associated with” an armed conflict.¹²³ As of tools for interpretation, the elements of the crimes provide that Article 8 of the Statute “shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.”¹²⁴

A *mutatis mutandis* reference can be made between the definition and acts constituting the crimes contained in Article 8(2) (b) (xxi) and 8(2) (b) (xxiii) and the identical crimes contained in Article 7 regarding sexual related crimes.¹²⁵ However, it is a *sine qua non* condition for this reference to take into account the lower threshold required by a war crime, namely, the single commission of one of the crimes prohibited might already constitute a war crime.¹²⁶ The residual crime contained in 8(2)(b)(xxiii) “any other forms of sexual violence” that constitutes a grave breach of the Geneva Conventions differs from the same formula contained in Article 7 for crimes against humanity in the threshold established, namely, requiring these crimes against humanity to be of a “comparable gravity”. In the case of non-international armed conflicts, this open-ended formula refers to serious violation of common Article 3 to the four Geneva Conventions”.

Article 8 criminalizes war crimes. As **new** war crimes committed in international and non-international armed conflicts, Article 8(2)

123See note 122.

124See Elements of the crimes at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf.

125See Triffterer, *Commentary on the Rome...*, p. 253.

126Other war crimes of a non-sexual nature are contained in Article 8 (2) (b) (xxi) which prohibits the war crime of outrages upon personal dignity. For this crime to be committed, the elements of the crimes require the outrages upon personal dignity committed to one of more persons as been generally recognized as such. See Elements of the crimes at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf.

(b)(xxii) e 8(2) (e) (vi) provides the commission of rape, sexual slavery, enforced prostitution, forced pregnancy as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions. It is interesting to note that the separation of acts between Article 8(2) (b) (xxi), outrages upon personal dignity, and 8(2) (b) (xxii), sexual related crimes, could be interpreted as a deliberate attempt to remove any connotation of the harm inflicted by sexual violence and focus more on shame, loss of honour and moral of the victim and the family.

An atrocious and recent example of enforced prostitution is contained in the Human Rights Watch Report on Democratic Republic of Congo issued beginning March 2005, in which it is stated that in mid-2003, in RDC-Goma training camp, some girls were coerced into having sexual relations out of fear, or in an effort to ensure the means necessary to survive.¹²⁷ As an example of the war crime of sexual slavery, this very recent report denounces, moreover, the case of combatants living in the forest that abducted women and girls and kept them, sometimes for months at a time, in their camps to provide sexual and other services traditionally considered “women’s work” –cooking, cleaning, and fetching water or wood.¹²⁸

Conclusions

The criminalization of sexual related crimes in the Rome Statute as major crimes constitutes a milestone in international justice. Throughout the history of mankind, women have suffered different forms of sexual and gender violence without the adequate sanction from the international community of these horrendous crimes. The qualification of these crimes as “crimes against humanity” and as “war crimes” constitutes an outstanding step towards the permanent fight against impunity and the attainment of global justice.

Thanks to the jurisprudence of the *ad hoc* international tribunals for the former Yugoslavia and Rwanda, rape and other sexual related crimes were progressively considered as being serious violations of

127 See Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, vol. 17, n. 1(A), March, 2005. http://hrw.org/reports/2005/drc0305/4.htm#_Toc96844249.

128 As clarified in the report, abductions for such purposes are a form of gender-based violence, i.e. violence based on the victim’s (perceived) gender role in society. See Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence...*, http://hrw.org/reports/2005/drc0305/4.htm#_Toc96844249.

IHL.¹²⁹ Recently, the step forward in international justice was again confirmed by a study on customary IHL, which clearly states that serious violations of IHL constitute war crimes in international as well as non-international armed conflict.¹³⁰ In conclusion, by the criminalization of sexual related crimes, the Rome Statute codified pre-existing customary international law that had crystallized into customary international law applicable in both international and non-international armed conflicts.

The role played by NGO's in the incorporation of these new categories crimes into the Rome Statute was unprecedented. The efforts deployed by INGO's and NGO's as early as 1993 during World Conference on Human Rights and the calls for international justice as well as for the need to adopt a more specific list of crimes in the agenda to combat impunity have to be highlighted.

Still several *lacunae* in the provisions of the Rome Statute regarding sexual related crimes are worth of mention. On the one hand, it is unfortunate that Article 6 on genocide does not criminalize explicitly sexual related crimes. On the other, the Rome Statute does not sexual persecution as a war crime, only as a crime against humanity. In our opinion, the role of the judges in filling up these gaps would be of paramount importance.

Finally, the effective prosecution of the international crimes provided for in the Rome Statute will greatly depend of national implementation measures. The complementary character of the ICC requires implementation efforts towards the criminalization of the most serious crimes at national level. This implies that the effective persecution and sanction of international crimes provided in the Rome Statute will highly depend on an adequate national legislation and on the existence of a reliable legal and judiciary system. The incorporation and criminalization of sexual related crimes provided for in the Rome Statute are very components of making the complementarity a true principle and goal in the fight against impunity. The continuation of the efforts towards this attainable and pivotal goal is essential and highly aimed at.

129Odio Benito, Elizabeth, "De la violación y otras graves agresiones a la integridad sexual como crímenes sancionados por el derecho internacional humanitario: Aportes del Tribunal Penal Internacional para la Antigua Yugoslavia," in *Ensayos en honor a Fernando Volio Jiménez*, San José, Costa Rica, p. 290.

130Henckaerts and Doswald-Beck, *Customary International Humanitarian...*, p. 37.