IMAGE-BASED SEXUAL ABUSE: CHANGES IN THE PORTUGUESE CRIMINAL FRAMEWORK

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Abstract

As the concept of image-based sexual abuse is developed as a form of sexual violence against women that occurs growingly in the digital sphere, criminal law needs to be adapted in order to criminalise all the behaviours adopted by individuals that harm, particularly, women's sexual freedom. This article discusses some of the changes imposed or advised by the Directive 2024/1385 and the Istanbul Convention to the Portuguese criminal framework.

Keywords: Istanbul Convention, Directive 2024/1385, violence against women, cybercrime, image-based sexual abuse.

Resumo

Violência sexual baseada em imagens: alterações ao enquadramento jurídico-penal português.

À medida que o conceito de violência sexual com base em imagens se desenvolve como uma forma de violência sexual contra as mulheres, e que ocorre cada vez mais no espaço digital, a lei penal necessita de ser adaptada para criminalizar todos os comportamentos adotados por indivíduos que atentem, particularmente, contra a liberdade sexual das mulheres. Este artigo debate algumas das alterações impostas ou recomendadas pela Diretiva 2024/1385 e pela Convenção de Istambul ao ordenamento jurídico-penal português.

Palavras-chave: Convenção de Istambul, Diretiva 2024/1385, violência contra as mulheres, cibercriminalidade, violência sexual baseada em imagens.

Resumen

El abuso sexual basado en imágenes: reformas en el marco penal portugués.

A medida que se desarrolla el concepto de violencia sexual basada en imágenes como una forma de violencia sexual contra las mujeres, y que se manifiesta cada vez más en el ámbito digital, el derecho penal debe adaptarse para tipificar como delito todas las

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conductas adoptadas por individuos que vulneran, en particular, la libertad sexual de las mujeres. Este artículo debate algunas de las modificaciones impuestas o recomendadas por la Directiva 2024/1385 y por el Convenio de Estambul al marco jurídico-penal portugués.

Palabras clave: Convenio de Estambul, Directiva 2024/1385, violencia contra las mujeres, ciberdelincuencia, abuso sexual basado en imágenes.

1. Introduction

According to a survey performed by Plan International (2020), based on research conducted across 22 countries, more than half of the over 14,000 girls and young women reported having been harassed or abused online. In a Portuguese study, 66.9% of 517 young women, aged 18 to 25, from all the country's districts, responded affirmatively when asked if they had been victims of image-based sexual abuse (IBSA) (Faustino et al. 2022).

As recognised by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), violence against women perpetrated in the digital sphere is an increasingly widespread global problem with a severe impact on women's and girls' lives and human rights (GREVIO 2021). Digital violence not only adversely affects the physical and psychological well-being of women and girls but also fosters an online environment that is threatening to them, thereby gravely undermining their participatory rights.

Cyberviolence is not specifically addressed as a distinct issue by the Istanbul Convention (2011). However, GREVIO clarified any doubts that might have existed regarding the application of the provisions of the Istanbul Convention to digital violence, establishing that the Convention's drafters did not intend to distinguish between online and offline gender-based violence against women, "clearly positioning manifestations of violence against women and girls in the digital sphere as expressions of gender-based violence against women covered by the Istanbul Convention" (GREVIO 2021, 8).

The Directive 2024/1385 on combating violence against women and domestic violence (Directive) aims to complement the objectives of the Istanbul Convention within the European Union (EU) by setting a number of minimum standards regarding, namely, the criminalisation by Member-states of "non-consensual sharing of intimate or manipulated material" in its article 5.

In our doctrinal legal work, we explore some legislative changes that could be made to Portuguese law to implement the Istanbul Convention and transpose Directive 2024/1385, focusing on the criminalisation of IBSA against adults. We have interpreted both documents, analysed past and current Portuguese laws, and legal doctrine, drawing also on foreign European laws on IBSA to support our arguments and suggest amendments to the Portuguese Penal Code (PPC). Finally, we should note that this brief study does not address the crimes established by the Law on Cybercrime (no. 109/2009) like digital forgery (art. 3) or illegitimate

access to a computer system (art. 6), either because they are not applicable to the conducts of IBSA or because they are instrumental offenses.

We aim to advance the debate about the implementation of this Directive in line with the Istanbul Convention, which needs to happen before the transposition deadline of June 14, 2027.

2. Initial Remarks Concerning the Current Portuguese Criminal Framework on Image-Based Sexual Abuse

In this section, we analyse the provisions of the PPC encompassing the conducts of IBSA (against adults), concept that we adopt in our study, defined by Rigotti and McGlynn (2022, 454) as "all forms of the non-consensual creating, taking or sharing of intimate images or videos, including altered or manipulated media, and threats to distribute such material", and originally developed by McGlynn and Rackley (2017).

Article 152 of the PPC defines the crime of domestic violence, which, according to its paragraph 1, covers in the range of illicit conducts all physical or psychological abuse perpetrated against, namely, (a) the spouse or former spouse, (b) a person of another or of the same sex with whom the offender maintains or has maintained a dating relationship or a marriage-like relationship, even without cohabitation and (c) the parent of a common descendant in the 1st degree. Since 2000, the victim does not need to file a complaint in order to allow the Public Prosecutor's Office to start the criminal procedure. Domestic violence is considered a violation of the psychological and/or physical health of the victim, and the basic offense is punishable with a prison penalty that ranges from 1 to 5 years. Through Law no. 44/2018 an aggravating circumstance was added to article 152, no. 2, subparagraph b): the minimum penalty limit rises to 2 years if the perpetrator disseminates "through the Internet or other means of widespread public communication, personal data, namely images or sound, related to the private life of a victim, without their consent"[1].

Given the large scope of this article, as it encompasses all the different forms of violence perpetrated in intimate or family contexts, theoretically, all kinds of cyberviolence when perpetrated within these spheres, if they fit into the "abuse" concept, can amount to domestic violence. The addition made in 2018 aimed to reinforce the criminalisation of the dissemination of private contents through the Internet, trying to show the legislator's attention to the phenomenon of "revenge porn" (Grupo Parlamentar do Partido Socialista 2018). "Revenge porn" is a problematic terminology since it is not only reductive – because a former partner shar-

[1] Original text: "através da Internet ou de outros meios de difusão pública generalizada, dados pessoais, designadamente imagem ou som, relativos à intimidade da vida privada de uma das vítimas sem o seu consentimento."

ing intimate materials without consent is not the only criminally relevant form of image-based sexual abuse – but it is also victim-blaming and inaccurate (McGlynn & Rackley 2017, 3).

Article 192 of the PPC criminalises the conducts of whoever, without consent and with the intent to invade the privacy of others, particularly the intimacy of family or sexual life, captures, photographs, films, records, or discloses images of persons or of intimate objects or spaces, under the title "invasion of privacy". The same law that in 2018 increased the minimum penalty for the crime of domestic violence involving the public dissemination of content related to the victim's private life – Law No. 44/2018 – introduced a one-third aggravation to the minimum and maximum penalties for this crime (and for other privacy-related offenses) when intimate images are disseminated through the Internet or other widespread public channels, as specified in Article 197(b) of the PPC. Back then, the crime of invasion of privacy foreseen in article 192 was punishable by imprisonment of up to 1 year or a fine. Meanwhile, a new law – no. 26/2023 – altered the penalty for these conducts, raising its maximum limit to 3 years and eliminated the said aggravation. This same law altered article 193 and created the crime of invasion of privacy through mass media, the Internet, or other means of widespread public dissemination, with the following content:

> anyone who, without consent, disseminates or contributes to the dissemination, through mass media, the Internet, or other means of widespread public dissemination, of images, photographs, or recordings that invade individuals' private lives, particularly the intimacy of their family or sexual life, shall be punishable by imprisonment for up to 5 years.[2]

Simultaneously, it amended Article 197 on aggravating circumstances, retaining in paragraph 1 the increased penalty for invasion of privacy when committed to obtain compensation or enrichment for the offender or another person, or to cause harm to another person or to the State, while excepting article 193 from this possible aggravation. In paragraph 2, it limited the penalty aggravation for dissemination via public means to other privacy-related offenses, excluding Articles 192 and 193. Law no. 26/2023 also changed article 198, which started by establishing that the criminal proceedings for the crimes against privacy all depend on the complaint of the victim, except in the case of article 193, when the crime results in the suicide or death of the victim or when the interests of the victim so advise.

This law was introduced to strengthen the protection of victims of non-consensual dissemination of intimate content. In the bill that preceded it (Grupo

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[2] Original text: "Quem, sem consentimento, disseminar ou contribuir para a disseminação, através de meio de comunicação social, da Internet ou de outros meios de difusão pública generalizada, de imagens, fotografias ou gravações que devassem a vida privada das pessoas, designadamente a intimidade da vida familiar ou sexual, é punido com pena de prisão até 5 anos."

Parlamentar do Partido Socialista 2022), it is acknowledged that, although the non-consensual disclosure of aspects of others' private lives is not a new issue, globalisation has undeniably expanded the audience for such content, increased the speed at which private information is spread, and introduced a certain irreversibility to the harm caused to victims, as the sharing of content can multiply by the second. This bill also recognises that "the damages that these conducts cause to victims are mainly associated to gender violence, harming mainly women"[3]. However, it excludes the possible framing of the crime of disseminating without consent photos or videos containing nudity or depicting sexual acts as a felony against sexual freedom, justifying this view on the grounds that the victim usually consents and participates in recording or capturing the images that are afterwards shared without their consent. And so, it is claimed, these are crimes against privacy and intimacy.

To threaten another person with the commission of a crime against life, physical integrity, personal freedom, sexual freedom and self-determination, or property of considerable value, in a manner likely to cause fear, distress, or impair their freedom of decision is a crime enshrined in article 153 of the PPC. It is punishable by imprisonment for up to one year or a fine and the criminal proceedings depend on a complaint by the victim. Coercion is criminalised in article 154 of the PPC and the felony consists in compelling another person to act or refrain from acting, or to endure an action, by means of violence or threats of serious harm. It is punishable by imprisonment for up to three years or a fine and if it occurs between spouses, ascendants and descendants, adoptive parents and adopted children, or between persons of the same or different sex, living in a marital-like relationship, criminal proceedings depend on a complaint.

3. The Relevant Provisions of the Istanbul Convention and of the Directive 2024/1385

GREVIO (2021, 17-18) clarified that the "digital dimension of violence against women encompasses a wide range of behaviour that falls under the definition of violence against women set out in Article 3a of the Istanbul Convention." The committee further explained that "many of the forms of violence against women perpetrated through digital means come within the remit of intentional behaviour, which States Parties to the Istanbul Convention are required to criminalise". It specifically encompassed in article 40 of the Istanbul Convention, which defines sexual harassment, conducts committed online or through digital means such as the following: non-consensual image or video sharing, non-consensual taking,

[3] Original text: "Os prejuízos que estas práticas causam às vítimas estão maioritariamente associados a uma violência de género que atinge sobretudo as mulheres."

producing or procuring of intimate images or videos and, related exploitation, coercion and threats. Regarding non-consensual sharing of images or videos, GREVIO stated that "non-consensual sharing of nude or sexual images (photos or videos) of a person or threats thereof include acts of image-based sexual abuse (also known as 'revenge pornography')". Taking photographs or videos without the other person's consent includes taking "creepshots" and acts of "upskirting", while producing intimate images or videos comprises "producing digitally altered imagery in which a person's face or body is superimposed or 'stitched into' a pornographic photo or video, known as 'fake pornography' (such as 'deepfakes', when synthetic images are created using artificial intelligence)" (GREVIO 2021, 18-19). In this regard, GREVIO refers to the conducts that fit the definition of IBSA as sexual offenses, specifically, sexual harassment. Moreover, the committee uses the terminology of "image-based sexual abuse" and "digitally altered imagery" in opposition to the more well-known terms of "revenge porn" and "fake pornography".

The Directive 2024/1385, in its recital 10, acknowledges that

> violence against women is a persisting manifestation of structural discrimination against women, resulting from historically unequal power relations between women and men. It is a form of gender-based violence inflicted primarily on women and girls by men. It is rooted in socially constructed roles, behaviour, activities and attributes that a given society considers appropriate for women and men. Consequently, a gender-sensitive perspective should be taken into account in the implementation of this Directive.

It is noticeable, then, the continuity between the Istanbul Convention and this Directive, clearly stated in the Proposal for the Directive: "this proposal aims to achieve the objectives of the Convention within the EU's remit by complementing the existing EU acquis and Member States' national legislation in the areas covered by the Convention" (European Commission 2022, 3).

The Directive emphasizes the need for harmonized definitions of offenses and penalties for certain forms of cyberviolence that target mainly women, whose impact is amplified by the use of information and communication technologies. Article 5, under the title "Non-consensual sharing of intimate or manipulated material" states that Member States must criminalise the conducts of

> (a) making accessible to the public, by means of information and communication technologies ('ICT'), images, videos or similar material depicting sexually explicit activities or the intimate parts of a person, without that person's consent, where such conduct is likely to cause serious harm to that person; (b) producing, manipulating or altering and subsequently making accessible to the public, by means of ICT, images, videos or similar material making it appear as though a person is engaged in sexually explicit activities, without that person's consent, where such conduct is likely to cause

serious harm to that person; (c) threatening to engage in the conduct referred to in point (a) or (b) in order to coerce a person to do, acquiesce to or refrain from a certain act.

4. Discussion of the Current Portuguese Law and Article 5 of the Directive 2024/1385

Our reference for the analysis of Portuguese norms and the Directive, regarding the criminal conducts, is the definition of IBSA provided by Rigotti and McGlynn (2022, 454) – "all forms of the non-consensual creating, taking or sharing of intimate images or videos, including altered or manipulated media, and threats to distribute such material".

IBSA is broader than the terminology used in the Directive – encompassing, namely, the act of taking intimate images or videos, while the Directive does not –, and more accurate (European Women's Lobby 2024, 53; Rigotti, McGlynn, & Benning 2024, 11-15).

Regarding the materials in question and their content, the Directive refers to "images, videos or similar material depicting sexually explicit activities or the intimate parts of a person". Recital 19 of the Directive explains that this sentence covers "all types of such material, such as images, photographs and videos, including sexualised images, audio clips and video clips." Rigotti, McGlynn, and Benning (2024, 12-13) point out some doubts that this terminology might create. For the purpose of this article, materials fit into the concept of "intimate" when they depict sexual acts that the victim participates in – e.g., the ones defined in articles 163 and 164 of the PPC – or the victim's intimate body parts, such as the genital organs, the anus, breasts or buttocks, or intimate moments, when the victim is exposed, for example, in their underwear.

The capture of such images, videos, or similar materials, without the victim's consent, is currently criminalised in Portugal in the context of article 192, under invasion of privacy, punishable with imprisonment of up to 3 years or a fine, and criminal proceedings depend on the complaint of the victim. The non-consensual sharing of such materials, i.e., the acts described in letter (a), of article 5, paragraph 1, are covered by the recently altered article 193 of the PPC.

We believe it is not necessary to discuss the indetermined phrasing of "making accessible to the public, by means of information and communication technologies" used by the Directive, as Portuguese Law already encompasses these acts by criminalising the conducts of "disseminating or contributing to the dissemination, through mass media, the Internet, or other means of widespread public dissemination". Recital 18 of the Directive explains the meaning of this pre-requisite and what is at stake is the potential of reaching a number of people, as "ICT bears the risk of easy, fast and wide-spread amplification of certain forms of cyber violence

with the clear risk of creating or enhancing profound and long-lasting harm to the victim."

Regarding the materials shared, the scope of article 193 of the PPC is wide enough to include "images, videos or similar material depicting sexually explicit activities or the intimate parts of a person" as well as intimate or sexualised images.

Another undetermined phrasing used in articles 5, 6, 7 of the Directive refers to the likelihood of the conducts "to cause serious harm". This has been criticised as it "creates legal uncertainty for victims across and within countries leaving to judicial discretion the decision on whether these conducts are punishable" (European Women's Lobby 2024, 52). This requirement does not exist in any of the provisions of the PPC that protect the right to privacy, and it should not, with even greater reason, be required when the contents shared are of sexual or intimate nature. So, when transposing the Directive, the legislator should be aware that it "establishes a minimum legal framework in that regard, and Member States are free to adopt or maintain more stringent criminal rules" (recital 18 of the Directive).

The production, manipulation or alteration and dissemination of images, videos or similar material "making it appear as though a person is engaged in sexually explicit activities, without that person's consent, where such conduct is likely to cause serious harm to that person" is not covered by article 193 of the PPC. Recital 19 of the Directive explains that the offense described in article 5, paragraph 1(b), includes "image editing, including by means of artificial intelligence, of material that makes it appear as though a person is engaged in sexual activities, in so far as the material is subsequently made accessible to the public by means of ICT without the consent of that person."

Article 5 (b) of the Directive is limited as it only encompasses material where the person appears to be "engaged in sexual activities", excluding the photos and videos where the person depicted is naked or wearing underwear, "leaving out of the scope a large part of sexual digital forgeries" (European Women's Lobby 2024, 53; also Rigotti, McGlynn, & Benning 2024, 13). We do not contemplate any reason for the nature of the manipulated material to be different from that of the real contents.

Article 152 of the PPC defines domestic violence and, as previously explained, it has a large scope regarding the conducts it criminalises. In 2018 the aggravating circumstance added to article 152, paragraph 2 b) clarified that it encompasses the non-consensual dissemination through the Internet or other means of public dissemination of intimate contents, when it happens between people that share the relationships established in the norm. The Portuguese legislator concluded, and rightly so, that this type of conduct can happen between people who are not connected by those specific relations and there was a need to criminalise them autonomously, and so, in 2023, article 193 was amended. The question we raise here is whether the crime of domestic violence encompasses the creation and dissemination of fake contents, as it does real ones. From the letter of the law, as long

as those acts are considered as abuse taking place between people who share those relationships or former relationships, we would say it does.

However, article 193 does not encompass, as mentioned, the creation and dissemination of manipulated material. Creating fake images or videos depicting naked or partially naked people or people engaging in sexual activities, as previously defined, and sharing them, outside the scope of domestic abuse and child pornography, has to be criminalised. We tend to support the idea that, unlike what is demanded by the Directive, the mere creation or manipulation of images should be criminalised, even if the contents are not subsequently disseminated (see Rigotti, McGlynn, & Benning 2024, 13). Taking real intimate images without consent is an offense against the right to privacy, under article 192 of the PPC. The creation of intimate digital forgeries that appear real seems to have criminal value as well, regardless of their dissemination.

The threats to commit the acts mentioned in article 5, subparagraphs (a) and (b), "in order to coerce a person to do, acquiesce to or refrain from a certain act", mentioned in (c) of said article, are covered by the crime of coercion, established by article 154 of the PPC.

The European Women's Lobby (2024, 53) criticizes, in our view with good reason, the exclusion from 5(c) of the threats that are not meant to coerce but to cause distress to the victim (see also Rigotti, McGlynn, & Benning 2024, 13). The crime of threats, defined in article 153 of the PPC, encompasses the act of threatening another person with the commission of a crime against life, physical integrity, personal freedom, sexual freedom and self-determination, or property of considerable value, in a manner likely to cause fear, distress, or impair their freedom of decision. If the crime of dissemination of intimate contents remains a crime against privacy, then the threat to commit this crime is not encompassed by article 153. If, otherwise, it is criminalised as a sexual offense, the threat to commit it is already encompassed by the crime of threats. However, this crime is punishable by imprisonment for up to one year or a fine, and the criminal proceedings for this crime depend on a complaint by the victim.

5. Ideas on a New Sexual Offense of IBSA

Taking, creating or sharing intimate images or videos, including altered or manipulated media, without consent, and threatening to distribute such material, constitute sexual and gender violence, predominantly aimed at women and girls and perpetrated because of their gender (Rigotti, McGlynn & Benning 2024, 4).

Gender violence and violence against women need a response from States that minds their specificities, and this is demanded by both the Istanbul Convention and the Directive (although pervasive throughout the legal instruments – see, namely, article 6 of the Istanbul Convention and recitals 5 and 10 of the Directive).

We believe that this means, namely, that Criminal Law should define and treat differently, for example, the act of filming a sexual act through a computer camera or filming a conversation, or of taking a photograph with a smartphone of a person sitting in the park, or up a skirt of a girl or woman in the same situation.

Criminalising sexual offenses as such, gives them the framework within violence against women that is needed, not only for general prevention of these crimes (raising society's awareness to the particularly reprehensible character of these acts, both from the point of view of possible offenders and of possible victims) and to allow for a statistically precise notion of their occurrence, but to be able to provide the victims with the protection measures directed at especially vulnerable victims, like those of gender-based violence and sexual violence, in accordance to the Istanbul Convention, the Directive and the Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. As outlined above, GREVIO encompasses these conducts in article 40, regarding sexual harassment.

We argue, then, that the taking or sharing of intimate materials, real or manipulated, and the threats to commit them, should be criminalised specifically as sexual offenses.

Cláudia Cruz Santos (2024, 229-231) mentions the trend of the majority of civil law countries to subsume the non-consensual dissemination of intimate contents in the sections of crimes against privacy and, as examples, refers to Germany, France and Spain. The author states that the non-consensual sharing of photographs or videos that show nudity or sexual acts does not contend primarily with the freedom to decide how, when or with whom to relate sexually. Even more so, because the dissemination of the contents usually follows choices regarding sexual conducts made freely.

There are, indeed, as also explained by the author, many contexts in which these conducts take place. One of them, fairly common, is the context of a relationship (that does not need to be stable) between two individuals. If one of them freely sends a picture showing nudity or a video performing a sexual act, that person is engaging in sexual conduct with the other consensually. It is not a coincidence that these conducts are designated as "sexting" or "virtual sex". If that person consents to that sexual conduct but does not consent to the sharing of the "results" of such acts, their sexual consent is being violated. The same can be said about the act of filming or photographing a sexual act or a person's private parts without consent, because even if the sexual act or nudity were consented, their capturing was not. At this point, it is important to recall that, according to article 36 of the Convention, it is the absence of consent to the sexual activity that determines its criminal character.

What if the person that shares the contents is not the one who violated the sexual consent? In that case, we still believe this to be a sexual offense if the con-

tents are sexual. Sexual freedom is not only the right to conform one's own sexual relations but also one's own sexual life. A naked picture of a woman or a girl, or a picture of their breasts, genitals, anus or buttocks is a piece of their sexuality. The dissemination of such materials violates their right to choose who receives that part of their intimacy, for sure, but mainly of their sexuality, because of the harm that it causes and the way that it is exploited, whether it is for profit, for sexual satisfaction or to cause harm. Sharing a work e-mail or a nude picture of someone, even though both can cause severe harm, has to be differentiated since the latter is sexual. As women's sexuality and its exposure are weaponised against them as a form of gender violence, which States like Portugal are obliged to prevent and combat, we believe the differentiation has to be made. The Istanbul Convention and the Directive mean to treat victims of this type of violence in specially defined protective terms for a good reason.

When comparing the old crime of violation of privacy to the current criminal needs, Santos (2024, 220-224) emphasizes that sharing intimate sexual contents is not a novelty, but the means used to do so are. It is easier via information and communication technologies (ICT) to capture or obtain these contents, share them with an undefined number of people and it is extremely difficult to eliminate them, hence exacerbating the damages caused to victims. We argue that another "new" aspect to consider when defining the penal provisions regarding these conducts is the international obligation that States have to combat violence against women.

In what concerns foreign law, Anglo-Saxon countries tend to criminalise these conducts as sexual offenses. In the United Kingdom, the Online Safety Act 2023, through its articles 187 and 188, inserted in section 66B of the Sexual Offenses Act 2003 the offense of "sharing or threatening to share intimate photograph or film". But, for example, also in Belgium, these conducts are criminalised by article 417/9 of the Criminal Code, titled "La diffusion non consentie de contenus à caractère sexuel", as part of the chapter regarding "Des infractions portant atteinte à l'intégrité sexuelle, au droit à l'autodétermination sexuelle et aux bonnes mœurs".

Regarding the creation and sharing of manipulated content – sexual digital forgeries – it is not the privacy of the victim that is invaded. We would say instead that the value in question is precisely sexual freedom, understood as encompassing not only the right of the victims to conform their sexual lives, but also their right for their sexuality not to be exploited and used to harm them. It is the same sexual freedom protected by the criminalisation of the sharing of real sexual contents by someone other than the person they were consensually directed to.

As sexual offenses, one has to ponder if the proceedings should be independent of the victim's complaint. We raise this question particularly regarding the sharing of intimate contents. Portugal has to ensure that the criminal investigation or prosecution for the crimes of sexual coercion and rape established in articles 163 and 164 of PCC, which criminalise the conducts described in article 36 of the Istanbul Convention, regarding sexual violence, "shall not be wholly dependent

upon a report or complaint filed by a victim […] and that the proceedings may continue even if the victim withdraws her or his statement or complaint", according to article 55, paragraph 1 of the Istanbul Convention. This idea has been reinforced by GREVIO (2019, 61). The Directive, in its recital 37, reiterates the need for this amendment.

The arguments justifying the option of maintaining this type of criminality semi-public are mainly related to the victim's right to choose not to expose a part of their life that is intimate and private – which prevails over the community's interest to see those conducts prosecuted by the State – and to their protection from the secondary victimization caused by the criminal proceedings (Caeiro 2019, 668-671; Santos 2024, 233 f.). As the authors' arguments are not connected to the less severe nature of the crime – even though the dependence on a complaint can "send the wrong message" to the public, as it does not know why the legislator made this option and is used to associate the need for the victim's intervention to less serious offenses – we can try to compare these sexual offenses with other severe crimes that are investigated *ex officio*. In those cases, the State's interest in exerting its punitive power outweighs the victim's prerogative to protect the sphere of her personal relations from public intrusions. The obvious comparable case is the crime of domestic violence, established under article 152 of the PPC, whose proceedings ceased to depend on a complaint made by the victim in 2000. The arguments against this amendment were the same that are now wielded against the *ex officio* nature of the crimes of rape, sexual coercion, and specifically, public dissemination of intimate contents, but still the alteration happened to avoid the lack of autonomy of the abused victim to impede the crime to cease.[4]

Domestic violence is, then, such a severe attack to human rights, that the interest of the State to prosecute the offenders prevails over that of the victims to conform to their will the State's response to the crime. The same applies to sexual offenses, not only because of the severity of the violation of rights involved, but also because these victims are often constrained, not only by the offenders, but by societal stigma against women who are sexually assaulted. This stigma discourages victims from filing complaints and obstructs the prosecution of offenders, who thus remain unpunished. One of the ways gender violence against women has managed to occur throughout the centuries without serious consequences to the aggressors is the State's refusal to intervene in private contexts and the society's claim that such violence is a cause of shame for the woman victim. Crimes like illicit medical or surgical interventions and treatments (150, paragraph 2) or human trafficking (160) also make victims particularly vulnerable and contend with their private lives, and yet are prosecuted *ex officio*. We do not find any reasons why it should be different with sexual offenses. Returning to Santos's and

4 The legislative process that led to this alteration is available here: https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheDiplomaAprovado.aspx?BID=3487

Caeiro's arguments, we do not agree that the conflict in question is between the interest of the State to prosecute the crime and the protection of the specific victim. We believe instead that the State must ensure protection to the community and to the specific victim by intervening whenever someone is victimised by a severe criminal offense. Moreover, the State must protect victims from secondary victimization during criminal proceedings, according, specifically, to articles 18 to 24 of the Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.

6. Conclusion

If the Portuguese legislator autonomized as sexual offenses the nonconsensual acts of taking and/or sharing photographs, videos or similar materials of a person involved in sexual activities or of naked/exposed parts of a person's body, as well as the creation and/or sharing of sexual digitally manipulated contents depicting the person in the same situations, and the threats to commit such acts, this would ensure that all forms of IBSA are covered. These conducts, which GREVIO (2021) includes in the definition of sexual harassment, would be criminalised with attention to their specificities and with penalties proportionate to their seriousness. If these conducts occurred within the context of the relationships mentioned in article 152, they could fall under its scope. As the pressing necessity to properly criminalise these actions is connected to the means used nowadays to perpetrate them, this new offense would include as a requisite that it happened through ICT or other means of public dissemination. We suggest that such a future norm should establish an attenuated penalty if the means used for the dissemination of the contents were not ICT, the media or other means of public dissemination.

Besides incorporating the aggravating circumstances outlined in article 46 of the Convention and article 11 of the Directive that a thorough analysis of the PPC (that is out of the object of our work) would prove necessary, we believe the penalty should be increased when the acts are committed for profit. Moreover, when the threat is meant to "coerce a person to do, acquiesce to or refrain from a certain act", that should be considered an aggravating circumstance as well.

The conducts regarding non-sexual contents would still fall under article 192 and when committed through means of public dissemination, like ICT, they would be more severely punished under article 193 or, if the aggravation for cases involving public dissemination under 197, no. 2, is altered to cover article 192, article 193 will become largely obsolete.

Conflict of interests

The author has no conflicts of interest to declare.

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