

The use of sexual violence against women as a weapon of war in the jurisprudence of the International Criminal Court*

O uso da violência sexual contra a mulher como arma de guerra na jurisprudência do Tribunal Penal Internacional

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Abstract

In the 21st century, gender violence against women continues to be a scourge of humanity. This situation is even worse during armed conflicts, in which sexual violence against women is often used as a weapon of war. In this context, this article aims to identify the contributions of the jurisprudence of the International Criminal Court (ICC) in combating this problem. To this end, bibliographic research was carried out on national and comparative doctrine, as well as documentary research on the jurisprudence and documents of the ICC. Thus, it was found that the first time the ICC convicted someone of sexual violence was only in 2019, in the Ntaganda case, after other cases in which the accused were acquitted for technical reasons. This change in the ICC's position can be attributed to the efforts of its Prosecutor's Office, which mobilized for the gender perspective to be included in the trials, starting to look at the pain and suffering of women, victims of the cruelest forms of violence, instead of the blind application of the norm, which ignores human vulnerabilities, products of historically constructed prejudices.

Keywords: Armed conflicts. Gender Discrimination. Violence against women. Sexual Violence. International Criminal Court.

Resumo

Em pleno século XXI, a violência de gênero contra a mulher continua sendo um flagelo da humanidade. Essa situação agrava-se ainda mais durante conflitos armados, nos quais a violência sexual contra a mulher é frequentemente usada como arma de guerra. Nesse contexto, o presente artigo objetiva identificar as contribuições da jurisprudência do Tribunal Penal Internacional (TPI) no combate a essa problemática. Para tal, realizou-se pesquisa bibliográfica na doutrina nacional e comparada, bem como pesquisa documental na jurisprudência e documentos do TPI. Desse modo, verificou-se que a primeira vez que o TPI condenou alguém por violência sexual foi somente em 2019, no caso Ntaganda, após outros casos nos quais os acusados foram absolvidos por questões técnicas. Essa mudança de posição do TPI pode ser atribuída aos esforços da sua Procuradoria, que se mobilizou para que a perspectiva de gênero fosse incluída nos julgamentos, passando a olhar a dor e o sofrimento das mulheres, vítimas das formas mais cruéis de violência, em lugar da aplicação cega da norma, que ignora as vulnerabilidades humanas produtos de preconceitos historicamente construídos.

Palavras-chave: Conflitos armados. Discriminação de Gênero. Violência contra Mulher. Violência Sexual. Tribunal Penal Internacional.

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1 Introduction

History shows that the use of sexual violence as a weapon of war is as old as humanity (Lopes; Lima, 2015). However, it was not until 1998 that a person was convicted of sexual crimes by an international court. It is the conviction of the former mayor of the Rwandan city of Taba, Jean-Paul Akayesu, by the International Criminal Tribunal for Rwanda (1998), created *on an ad hoc* basis to judge crimes committed during the civil war between Hutus and Tutsis, from 1990 to 1994. In the Nuremberg and Tokyo Tribunals trials for atrocities committed during World War II, no one was convicted of sexual violence.

Akayesu's conviction was an achievement of the feminist movements that fought, and still fight, for the "feminization of the Law", that is, for the inclusion of the gender perspective in the Law, in order to overcome the outdated conception of the existence of a neutral subject as a holder of rights, which does nothing more than ignore historically consolidated prejudices, that attribute hierarchical roles to people, making them vulnerable in relation to others, as in the case of women, whose violation of their human rights continues to be systematically made invisible.

This change in the conception of law present in the judgment of the Akayesu case influenced the drafting of the Rome Statute, approved by the United Nations (UN) in 1998, through which the International Criminal Court (ICC) was established¹. It is in Article 54(1)(b) of the Statute that the duty of the Prosecutor's Office to give special attention to crimes involving sexual and gender-based violence is established, which is something innovative in the context of the criminal prosecution of sexual crimes

In this context, the present work aims to identify the contributions of the ICC in combating the use of sexual violence against women as a weapon of war. This type of violence is used in order to hit the enemy harder, in order to cause more damage, fear and humiliation, in addition to, in the case of ethnic conflicts, to alter the rival ethnic composition, through violence that infertilizes or forcibly impregnates women.

The work was carried out through bibliographic research in national and comparative doctrine, as well as documentary research in the jurisprudence and documents of the ICC, whose results were analyzed using the deductive method, for bibliographic research, and the inductive, for documentary research.

¹ "In addition to the ICC and the aforementioned *ad hoc* tribunals for the former Yugoslavia and Rwanda, "internationalized" or "hybrid" or "mixed" criminal tribunals (for Sierra Leone, Timor-Leste, Kosovo, Bosnia-Herzegovina, Cambodia and Lebanon) have also operated in our days (Cançado Trindade, 2013, p. 36).

Thus, the text was divided into two parts. In the first, the jurisprudence of the ICC involving accusations of sexual crimes against women is critically analyzed, with the aim of identifying its successes and failures. In the second part, the relevant role of the ICC Prosecutor's Office in the inclusion of the gender perspective in ICC judgments is demonstrated, and how this contributed to this type of violence being finally addressed by this Court, starting to recognize women as full holders of human rights.

2 The ICC's successes and failures in combating sexual violence against women

The International Criminal Court (ICC) was created by the Rome Statute², which was approved on July 17, 1998, in response to demands from civil society and the coalition of NGOs for a permanent criminal court with a strong Public Prosecutor's Office, which did not need the authorization of the United Nations (UN) Security Council to act in the crimes of genocide, crimes against humanity, war crimes and crimes of aggression (Çakmak, 2017, p. 163).

The ICC, however, did not begin to function immediately after the approval of the Rome Statute, as the treaty entered into force only after the ratification of 60 countries, which occurred on July 1, 2002, and the Court was only established in 2003, after a complex process to ensure equal gender distribution. and legal systems among its members (Çakmak, 2017, p. 207).

According to Article 34 of the Rome Statute (Organización De Las Naciones Unidas, 1998), there are four main organs within the ICC: the Presidency, the Trial Sections, the Prosecutor's Office, and the Secretariat. The Trial Sections are also divided into: Instruction Section, First Instance Trial Section and Appeals Section, and are composed of 18 judges in total.

Since the beginning of its activities, the ICC has judged cases involving sexual crimes, however, it is still impregnated with values that disregarded the special situation of vulnerability of women during armed conflicts (Lopes; Lima, 2015), in the first trials no one was convicted of this type of violence. It was only in 2019, in the *Ntaganda case*, that someone was convicted of sexual crimes, thanks to the adoption of the gender perspective, as will be reported below.

2.1 In times of impunity: Thomas Lubanga, German Katanga and Jean-Pierre Bemba Gombo cases

² Brazil submitted to the jurisdiction of the ICC after the ratification of the Rome Statute, which took place through Decree No. 4,388 of September 25, 2002, gaining *constitutional status* with the enactment of Constitutional Amendment No. 45 of 2004 and the incorporation of § 4 into Article 5 of the Federal Constitution. (Brazil, 2002).

The first case judged by the ICC, which culminated in a conviction, was the *Lubanga case*. Thomas Lubanga, president of the armed group *Union des Patriotes Congolais* (UPC), was convicted of war crimes on 10 July 2012 relating to the recruitment and enlistment of children under the age of 15 between 1 September 2002 and 13 August 2003 during the armed conflict in the Democratic Republic of the Congo (DRC) (International Criminal Court, 2012).

Although Lubanga's conviction represents a major milestone for ICC jurisprudence, convictions for sex crimes were not included. Chappell (2014a, p. 187) reports that, during the investigative phase of the process, the NGO *Women's Initiatives for Gender Justice* (WIGJ) tried to question an *amicus curiae*³ to argue that the denunciations of the crimes committed by Lubanga should include sexual crimes. The ICC Prosecutor, Moreno Ocampo, had decided not to submit complaints of sexual violence due to the chosen persecution strategy.

Some academics and several NGOs, such as Amnesty International and *Human Rights Watch*, questioned the Prosecutor's decision, because they considered that there was sufficient evidence that sexual crimes had been committed by the Lubanga militia during the conflict in the DRC, as was also contained in official UN documents (Chappell, 2014b, p. 187).

In the conviction in the Lubanga case, the judges recognize the evidence of sexual violence in the DRC's armed conflict, especially sexual slavery, forced pregnancies and rape of women and girls, based on the testimony provided by several victims and witnesses. However, the judges of Trial Chamber I ruled that it was not possible to conclude whether the sexual violence committed against the girls and women recruited could be characterized as part of a "common plan" by Lubanga. In addition, the judges stated that the evidence did not make it clear beyond any doubt that Lubanga had encouraged the acts of sexual violence by his troops or that he was aware of such atrocities (International Criminal Court, 2012).

Judge Benito, a member of Trial Chamber I, issued a dissenting opinion on Lubanga's conviction, stating that sexual violence was an intrinsic element of the enlistment of girls and women for hostilities, since they were used as sex slaves and forced to become wives of the commanders and other members of the armed group (Chappell, 2014b, p. 189).

The Lubanga case shows the problems surrounding the interpretation of Article 25(3)(a) of the Rome Statute, on the co-authorship of crimes. Sá Couto, Sadat and Sellers (2019, p. 16) report that Trial Section I determined the possibility of having three different types of criminal

³The *amicus curiae* (in literal translation, friend of the Court) consists of an entity that is not a party to the dispute and that offers a given International Court its own perspective arguments or certain specialized knowledge, which may be useful in making the decision." (Ramos, 2015, p. 251).

liability provided for in this article: individual liability, direct liability for co-authorship, and indirect liability for co-authorship, and that, in the case of direct and indirect co-authorship, the essential element to establish the causal link should be the existence of a "common plan" and that the participation of the accused in this plan was fundamental for its execution. The conviction, in this sense, defines that:

The determination as to whether the particular contribution of the accused results in liability as a co-perpetrator is to be based on an analysis of the common plan and the role that was assigned to, or was assumed by the co-perpetrator, according to the division of tasks. In the view of the Majority what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential⁴. (International Criminal Court, 2012).

According to Sá Couto, Sadat and Sellers (2019, p. 17) criticize this definition, because it restricts the application of the article to only cases of direct co-authorship. Thus, cases of crimes committed by a group of people were restricted to Article 25(3)(a), a fact that gave rise to high rates of impunity for sexual crimes.

The determination of the authorship and co-authorship of crimes is essential in cases of sexual violence against women in armed conflicts, as it is a crime typically committed by groups. Thus, it is crucial that the ICC correctly establishes the criteria for determining authorship and co-authorship, in order to prevent crimes of sexual violence from going unpunished.

Another case that had allegations of sexual crimes was the Katanga case, also in the context of the armed conflict in the DRC. German Katanga was convicted in 2014 as an accomplice under Article 25(3)(d) of the indirect perpetration of crimes against humanity and war crimes, such as murder, destruction of property and looting against civilians during the DRC's attack on the village of Bogoro (International Criminal Court, 2014). In this case, the accused was also acquitted of the crimes of rape and sexual slavery, because Trial Chamber II concluded that, although crimes of rape and sexual slavery had been committed during the armed conflict, the Prosecutor's Office had not been able to satisfactorily establish the causal link between these crimes and the accused.

Another case in which charges of sexual offences were dropped was the *Bemba case*, which was tried in 2018 (International Criminal Court, 2018). The defendant, Jean-Pierre

⁴"The determination as to whether the accused's private contribution results in liability as a co-author must be based on an analysis of the common plan and the role assigned to it or assumed by the co-author, according to the division of tasks. In the opinion of the Majority, what is decisive is whether the co-author plays an essential role in accordance with the common plan, and it is in this sense that his contribution, with regard to the exercise of the role and the functions assigned to him, must be essential" (our translation).

Bemba Gombo was the commander of the paramilitary group *Mouvement de Libération du Congo*, having been charged with crimes against humanity and war crimes, including rape, committed by his troops in the Central African Republic, between October 26, 2002 and March 15, 2003.

Trial Chamber III handed down a judgment convicting Bemba of the sexual crime of rape in the context of war crimes and crimes against humanity, in the form of an indirect perpetrator, since he should be held responsible for the acts of his troops. However, on appeal, the Appellate Chamber concluded on June 8, 2018, that Trial Chamber III had wrongly convicted the defendant of crimes that were outside the scope of the case, thus deciding that proceedings in that case should be discontinued. In addition, the Appellate Chamber ruled that Bemba could not be criminally liable for acts related to Article 28 of the Rome Statute, as it had not been clearly proven that the defendant had not taken all the necessary measures to prevent the crimes from being committed, and should therefore be acquitted.

2.2 *The first convictions for sexual crimes: Bosco Ntaganda and Dominic Ongwen cases*

It was only in *the Ntaganda* case (International Criminal Court, 2019), judged on 8 July 2019, that the ICC convicted, for the first time, someone of sexual crimes. Bosco Ntaganda was the operations commander of the group *Forces Patriotiques pour la Libération du Congo* (Patriotic Forces for the Liberation of Congo), having been convicted of the crimes of rape and sexual slavery, considered crimes against humanity, and war crimes, in the form of a direct and indirect perpetrator, committed between 2002 and 2003, in the Ituri region of the DRC.

One of the main controversies faced by the ICC was whether the commission of sexual crimes against members of the same armed group could be considered war crimes under the Rome Statute. In this type of conflict, forced recruitment is very common, especially of girls and women to be used as sex slaves.

The defense argued that victims of war crimes should be on the list of persons protected by Article 3 common to the four Geneva Conventions. This Article lists persons protected by humanitarian law, such as persons not actively participating in hostilities, including members of armed groups who have surrendered due to illness, injury or other reasons.

Trial Chamber VI, however, stated that not all victims of war crimes, listed in Article 8(2)(e) of the Rome Statute, need to coincide with persons protected under the common Article 3 of the four Geneva Conventions, especially in cases of rape and sexual slavery, insofar as no

status is in the case of rape. of victim is explicitly mentioned as necessary for the configuration of the sexual offences listed in Article 8(2)(b)(xxii) and 8(2)(e)(vi). He added that limiting the scope of protection against sexual violence would be contrary to the logic of international humanitarian law, which is intended to mitigate the suffering caused by armed conflict.

Another argument, invoked by Trial Chamber VI, was that the prohibition of slavery, including sexual slavery, has the *status* of a *jus cogens*⁵ norm of international law, and therefore has a peremptory character. The character of *jus cogens norms* also applies to acts of torture and genocide. Moreover, the majority of the judges of Trial Chamber VI affirmed that the prohibition of the crime of rape, by itself, had already achieved the *status* of *jus cogens norms* in international law

In this regard, Trial Chamber VI concluded that, since the prohibition of the crimes of rape and sexual slavery are peremptory norms, such conduct is prohibited both in times of peace and in periods of armed conflict, in relation to any person, regardless of his or her legal *status*.

The Ntaganda case also brought new interpretations in relation to the sexual crimes of rape and sexual slavery in the form of war crimes and crimes against humanity.

First, it is important to mention that the elements of these crimes are explained in the document known as Elements of Crimes, one of the basic legal texts of the ICC (International Criminal Court, 2013). According to this document, the crime against humanity of rape, provided for in Article 7(1)(g) of the Rome Statute, is characterized when the following elements are present:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was 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, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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 population⁶. (International Criminal Court, 2013).

⁵*Jus cogens*: cogent and non-derogable right (Piovesan, 2007, p. 179).

⁶ "1. The agent invaded a person's body by conduct that resulted in penetration, even slight, of any part of the victim's body, or the agent penetrated with his sexual organ the victim's anal or genital opening or used any other object or any other part of the victim's body. 2. The invasion was committed by force or by threat of the use of force or coercion, such as that provoked by fear of the use of violence, coercion, detention, psychological oppression or abuse of power, against the victim or another person or by taking advantage of a coercive environment; or the trespassing was committed against a person incapable of giving genuine consent. 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 4.

This legal document also lists the elements necessary for the characterization of the crime of rape as a war crime, under the terms of Article 8(2)(b)(xxii), namely:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict⁷. (International Criminal Court, 2013).

After citing the elements that make up the crime of rape as a crime against humanity and as a war crime, Trial Chamber VI stated that the concept of "invasion" of the victim's body must be interpreted broadly and with gender neutrality, and may therefore include same-sex penetration.

Regarding coercive circumstances, Trial Chamber VI stated that it is not necessary to have evidence of the use of physical force to constitute an act as coercible. Coercive acts may include, for example, threats, intimidation, extortion and other forms of inflicting fear and despair on victims, and there is a presumption of the environment being coercive in the case of an armed conflict. In addition, several factors can contribute to the creation of a coercive environment, such as the number of people involved in carrying out the crime, whether the crime was committed during or immediately after combat, or whether it was committed together with other crimes.

Accordingly, Trial Chamber VI classified the acts of rape perpetrated by Ntaganda's troops as crimes against humanity and as war crimes, because they occurred during and shortly after the invasion of several villages in the Ituri region, being part of a systematic attack in the context of a non-international armed conflict.

He also stated that the circumstances that prove the exercise of possession power in the context of sexual slavery must be analyzed according to each concrete case, which may include, for example: the control of the victim's movements, the nature of the physical environment;

"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." (our translation).

⁷ "1. The agent has exercised any or all of the powers inherent in the right of ownership over one or more persons, such as buying, selling, lending or exchanging one or more persons, imposing on them the deprivation of similar liberty." 2. The perpetrator has caused a person or more people to engage in one or more acts of a sexual nature. 3. The conduct took place in context and was associated with an international armed conflict. 4. "The perpetrator was aware of the factual circumstances that established the existence of an armed conflict." (our translation).

psychological control; the measures used to prevent or prevent the victim from escaping; the use of force or threat of the use of force and other forms of physical and mental coercion; the duration of tenure; the assertions of exclusivity about the victim; subjection to cruel treatment and other forms of abuse; the control of sexuality; the obligation to perform forced labor; and, the vulnerability of the victim.

However, regarding the characterization of the crime of sexual slavery, Trial Chamber VI decided that the exercise of power of possession over a person does not need to be conditioned to a commercial transaction. For the Section, an imposition of deprivation of liberty can take various forms and may be related to situations in which the victims may not have been physically confined, but who were somehow prevented from leaving, since they would have nowhere to go or escape would entail a risk to their lives.

These interpretations formulated by Trial Chamber VI throughout the Ntaganda case were essential to the development of sound international jurisprudence on sexual offences in armed conflict, complementing the existing jurisprudence of *the ad hoc criminal tribunals* for Rwanda and the former Yugoslavia.

Another case, which brought innovative and fundamental interpretations for the development of jurisprudence on sexual violence in international law, was that of *Ongwen* (International Criminal Court, 2021).

Dominic Ongwen was indicted in connection with the investigation of human rights violations that occurred in the context of Uganda's armed conflict between 1 July 2002 and 31 December 2005. Ongwen was one of the commanders of the Lord 's *Resistance Army* (LRA) armed group and was convicted of 61 crimes against humanity and war crimes. Such convictions include the sex crimes of forced marriage, torture, rape, sexual slavery and forced pregnancy.

This case is emblematic because it was the first time that the ICC convicted someone of the crimes of forced marriage and forced pregnancy. It should be noted that the crime of forced marriage is not provided for in the list of sexual crimes of the Rome Statute. However, as Jain (2008, p. 1016) explains, in the context of international criminal law, there were already decisions of the hybrid criminal courts of Sierra Leone and Cambodia condemning the practice of forced marriage as a type of crime against humanity, in the category of "other inhumane acts" in the Statute of both courts.

The author (Jain, 2008, p. 1021) explains that the Appellate Court of the Special Court for Sierra Leone based the decision on elements that are exclusive to the crime of forced

marriage, such as forced marital association and exclusivity, including the possibility of sanctions in case of non-compliance with the "agreement". These elements demonstrate that the crime of forced marriage, unlike the crime of sexual slavery, is not a predominantly sexual crime, thus leading the Court of Appeal to accept the argument that forced marriage could be classified as "another inhumane act".

Moving on to the analysis of the conviction of Dominic Ongwen, it is observed that Trial Chamber IX, following the line of argument of the Appellate Division of the Special Court for Sierra Leone, convicted Ongwen of the crime of forced marriage as a crime against humanity, in the category of "other inhuman acts", provided for in Article 7(1)(k) of the Rome Statute. The crime was perpetrated against seven women kidnapped by the LRA and "distributed" to Dominic Ongwen, as "wives", being forced to maintain exclusive marital relations with him, under threat of death if they tried to escape. It is worth noting that no traditional marriage ritual was performed with these women, but they came to identify themselves as wives at different times, such as when they were abducted, when they felt obliged to remain in Ongwen's domicile with the *status* of wives, or when they had their first forced sexual relations with the accused. In addition to being forced to have sex with Ongwen, they were subjected to forced labor, beatings, and forced pregnancies.

The defense argued that forced marriage was not a crime under the jurisdiction of the ICC, as there is no provision in the Rome Statute. However, Trial Chamber IX understood that it would fall within the classification of "other inhuman acts" of Article 7(1)(k) of the Rome Statute because it meets the following elements: *"1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute."*⁸ (International Criminal Court, 2021).

The Chamber stated that Article 7(1)(k) was included in the Rome Statute because it would be impossible to exhaustively enumerate all the inhumane acts that could constitute a crime, with forced marriage being one of the cases that could be framed therein, due to the social, ethical and even religious impact it causes on the victim, affecting his physical and psychological well-being. She added that marriage is, in many cultures, considered a sacred rite, so being subjected to situations contrary to this rite can, in fact, cause serious damage to the victim's mental health. In addition, if forced marriage results in the birth of children, the

⁸ "1. The agent inflicted great suffering or serious injury to the body or to mental or physical health, through an inhumane act. 2. Such an act was of a similar nature to any other act referred to in Article 7(1) of the Staff Regulations." (our translation).

negative effects caused can be more complex psychologically and emotionally for the woman and her children, in addition to the possible difficulties in the development of pregnancy and childbirth.

Finally, Trial Chamber IX stated that the crime of forced marriage is a type of continuing crime, since it ceases only when the victim is freed from that condition.

In relation to forced pregnancy, the crime is provided for in the Rome Statute, both as a crime against humanity and as a war crime, in Articles 7(1)(g) and 8(2)(e)(vi), respectively.

Trial Chamber IX stated that the crime of forced pregnancy is based on women's rights in relation to reproductive autonomy and the freedom to build a family. It should be noted that this statement is of great importance for the expansion of jurisprudence on women's rights in international law. In addition, it is important to note that the crime of forced pregnancy is a criminal type that can only be committed against women.

For Trial Chamber IX, the Rome Statute adopted a narrow definition of the crime of forced pregnancy, largely because the inclusion of this crime in the Statute, and its consequent typification, was one of the most difficult and controversial points in the process of its drafting. According to the Section, the incorporation of the crime of forced pregnancy in the Statute was mainly motivated by the atrocities that occurred in the Bosnian conflict, in which Bosnian women were raped and illegally detained in order to change the ethnic composition of the group, by being forced to give birth to children born to Serbian parents.

Some States argued that the creation of this new criminal type was unnecessary, because the crimes of rape and unlawful detention already existed in the Statute, while others, such as the United States and Bosnia and Herzegovina, argued that the crimes of rape and unlawful detention did not cover all elements of the crime of forced pregnancy. The Holy See, for its part, believed that the crime of forced pregnancy could interfere with national laws on abortion.

The definition of the crime of forced pregnancy, consequently, was limited by specific requirements to constitute *mens rea*, i.e., criminal intent, namely: changing the ethnic composition of a population or committing another serious violation of international law. Also included was the requirement that the crime not affect, in any way, national laws on pregnancy.

Trial Chamber IX thus stated that the crime of forced pregnancy must be interpreted in such a way that it is a crime independent of other sexual and gender crimes provided for in the Rome Statute. Therefore, the Section applied the "*rule against surplusage*", the principle of the presumption of the legislator's intention in the context of the drafting of the Statute, in the sense of giving meaning to any and all words contained in the law, without considering it a

repetitive excess. The principle of *fair labelling* was also used, in relation to the recognition of the need to call a crime by the correct name, to enable due justice for the victims. Thus, forced pregnancy was included as a new type because it was understood that it could not be considered a simple combination of the crimes of rape and illegal detention, nor its inclusion in the generic formula "other type of sexual violence". Thus, the crime of forced pregnancy was characterized as:

The crime of forced pregnancy, whether as a crime against humanity or a war crime, is committed when the perpetrator 'confined one or more women forcibly made pregnant'. The forcible conception of the woman could occur prior to or during the unlawful confinement. The perpetrator need not have personally made the victim forcibly pregnant – confining a woman made forcibly pregnant by another is necessary and sufficient for the crime of forced pregnancy⁹. (International Criminal Court, 2021).

The material element can be divided into two parts, the first being illegal confinement, which means that the woman's physical movements must have been restricted, without the need to be absolutely or for a certain period of time. The second material element is that the woman was forcibly impregnated, that is, the sexual violence must have been directed to this purpose. The term forced implies the use of force or threat of force or coercion, which can be caused by fear of violence, detention, psychological pressure or abuse of power, against the victim or another person, or to take advantage of the coercive environment, or in the case of a person unable to consent to the act. The existence of coercive circumstances mischaracterizes a genuine and voluntary consent of the victim.

With regard to the mental elements, in the context of *mens rea*, Trial Chamber IX determined that not all forced confinement of a pregnant woman characterizes the crime of forced pregnancy, since the accused must have the intention to affect the ethnic composition of a population or have the intention to perpetrate another serious violation of international law, such as rape, sexual slavery or torture. There is no need for the two intentions to occur simultaneously, it is enough that one of the two can be proven. Thus, "*the crime of forced pregnancy consists in the confinement of a forcibly pregnant woman in order to carry out other*

⁹The crime of forced pregnancy, whether as a crime against humanity or a war crime, is committed when the perpetrator 'forcibly confines one or more impregnated women.' Forced conception of women can occur before or during unlawful confinement. The perpetrator does not need to have personally impregnated the victim – the confinement of a forcibly impregnated woman is necessary and sufficient for the crime of forced pregnancy." (our translation).

*serious violations of international law, regardless of whether the accused specifically intended to keep the woman pregnant*¹⁰ (International Criminal Court, 2021).

Thus, it can be seen that the definition of the elements of each type of sexual crime, constructed jurisprudentially by the ICC in *the Ntaganda* and *Ongwen cases*, has been essential to identify and punish the different forms of sexual violence committed against women, safeguarding their human rights and putting an end to the process of invisibility to which they have been historically subjected.

3 Contributions of the ICC Prosecutor's Office: The Policy on Sexual and Gender Crimes

The Prosecutor's Office is of immense importance to the functioning of the ICC, as it is the body that initiates all criminal prosecutions, as provided for in Article 13 of the Rome Statute. It is worth noting that the term "Prosecutor's Office" is a translation of the Rome Statute, but the function and prerogatives of the Prosecutor's Office¹¹ are equivalent to those of the prosecutor's office in Brazilian law.

The Procuratorate, as determined by Article 42(1) of the Rome Statute, has functional independence. In this sense, it is up to it to determine whether there are reasonable indications of the occurrence of a crime within the jurisdiction of the ICC, deciding whether or not to open the investigation, as provided for in Article 53(1).

Thus, it is the responsibility of the Prosecutor's Office to carry out the so-called preliminary examinations, which constitute an innovation in international criminal procedural law, provided for by the Rome Statute in Article 15(6). The preliminary examinations are a kind of filter for the selection of cases that deserve investigation, in addition to determining compliance with the requirements for opening the investigation listed in Article 53(1) of the Rome Statute.

Preliminary examinations are not an investigation in themselves. During the first phase of these examinations, the Attorney General's Office makes a report with all complaints, communications, news and evidence related to the case and notifies the State that is being

¹⁰ "The crime of forced pregnancy consists of the confinement of a pregnant woman by force to commit other serious violations of international law, regardless of whether the accused specifically intends to keep the woman pregnant." (our translation).

¹¹Article 42(1) of the Statute establishes as the function of the Attorney General's Office: "[...] to collect communications and any other type of information, duly substantiated, on crimes within the competence of the Court, in order to examine and investigate them and to prosecute them before the Court" (Organización De Las Naciones Unidas, 1998).

reported, in order to verify whether it is already conducting any internal investigation into the case. As it is not yet an investigation, the Attorney General's Office is not yet exercising its jurisdiction in that case, but only investigating the information about what happened. In this phase, it is verified whether or not the State will collaborate with the work of the Attorney General's Office (Bensouda, 2020, p. 798).

It should be noted that preliminary examinations can be conducted confidentially. It is up to the Attorney General's Office to decide whether or not to disclose the conduct of the examination, which usually occurs when the case is already in the admissibility analysis phase. The Attorney General's Office has no deadline to complete the examination, and may open the investigation at any time, if it finds that there is sufficient evidence to do so.

With regard to crimes involving sexual and gender-based violence, the subject of this work, Article 54(1)(b) of the Rome Statute provides that the Prosecutor's Office must give them greater attention, which is something innovative in the context of the criminal prosecution of sexual crimes. In addition, Article 42(9) requires the Procuratorate to choose advisors who specialize in matters relating to these matters. These norms make explicit the intention of the drafters of the Rome Statute to try to prevent crimes of a sexual nature from continuing to be silenced or ignored, evidencing an unquestionable advance, a product of the adoption of the gender perspective.

3.1 The adoption of the gender perspective by the ICC Prosecutor's Office

The gender perspective or focus in Law is an achievement of feminist movements that fought for the recognition of legal discrimination against women and the consequent need to include this perspective in Law, traditionally elaborated and applied based on the understanding of the existence of a neutral subject as a holder of rights, which corresponds to the figure of an adult man, white, Christian, heterosexual, proprietary, and without physical, mental, or sensory disabilities. It is an understanding that ignores the specificities of the concrete human being and that, as a consequence of the prejudiced and excluding values that pervade society, place them in a situation of vulnerability, as in the case of women. Zelada and Ocampo Acuña (2012, p. 143-144) explain this understanding:

As is well known, at the beginning human rights treaties were adopted with the intention of protecting "neutrally" all individuals (both men and women) against public and private powers. However, in practice, human rights treaties present a "gender gap"¹⁹ for the protection of women who are close to violence: If these instruments formally protect the human rights of women (since generality), in reality they did not respond to the specific

violations that they suffered²⁰. For example, the tenor of the classic treatises on human rights, women are protected from torture; However, family violence and some forms of sexual violence were considered situations that, if they affect women, do not activate the application of human rights treaties or their supervisory bodies. In our vision, in the face of this "gender gap" between the abstract protection of rights and the reality of female victimization, international systems of human rights were becoming aware of the need to generate innovative responses for the protection of women [...]¹²element.

Adopting the gender perspective or focus in Law means recognizing that historical gender discrimination against women puts them at a disadvantage in relation to men, and it is the duty of the State to implement measures to reverse this situation of inequality. In this sense, in every law, public policy and judgment, the condition of women as human beings in a situation of vulnerability must be observed, moving away from the conception of Law as a neutral instrument for the application of norms, blind to the concrete inequalities in the living conditions of human beings, since this view only serves to maintain the *status quo* that favors man. Feminizing the Law, therefore, implies creating and applying the norms recognizing that their addressees are not neutral beings, devoid of any social conditioning, but are beings who carry prejudices, from which they assume the hierarchical roles that society imposes, provoking, in some cases, the denial of the full exercise of their rights and the invisibility of their problems.

In this line, the ICC Prosecutor's Office has adopted some measures to provide more efficient prosecution of sexual and gender crimes. One of the first measures was the choice of the Special *Adviser on Gender*. The first nominee for the position was Professor Catherine Mackinnon, succeeded by Brigid Inder, executive director of the NGO *Women's Initiative for Gender Justice*, chosen in 2012. In turn, in 2017, the new Advisor chosen was the jurist Patricia Viseur Sellers, who has extensive experience in the field of human rights, international criminal law and women's law (Bensouda, 2014, p. 539).

Another measure adopted by the Attorney General's Office, being the most significant and impactful since the beginning of its operations, was the creation of the *Policy Paper on Sexual and Gender Based Crimes*. Published in June 2014, this Policy confirms the

¹² "As is well known, human rights treaties were initially adopted with the intention of 'neutrally' protecting all individuals (both men and women) against public and private powers. However, in practice, human rights treaties presented a 'gender gap' for the protection of women from violence: while these instruments formally protected women's human rights (in general), in practice they did not address the specific violations they suffered. For example, in classical human rights treaties, women were already protected from torture; But family violence and some forms of sexual violence were considered situations that, although they affected women, did not trigger the application of human rights treaties or their monitoring bodies. In our view, in the face of this 'gender gap' between the abstract protection of rights and the reality of female victimization, international human rights systems have become aware of the need to generate innovative responses for the protection of women [...]" (our translation).

commitment of the Attorney General's Office to pay greater attention to the prosecution of sexual and gender-based crimes, in line with the provisions of the Rome Statute (International Criminal Court, 2014). Bensouda (2014, p. 540), Attorney General of the ICC, emphasizes the importance of prioritizing investigations involving sexual and gender crimes, stating that:

Gender crimes are prominent in the OTP's prosecutions because they are prominent in the contexts being prosecuted. They assume prominence against the backdrop of still-prevalent norms that deny and ignore their existence, shame victims or define them in ways that elude legal culpability. In other conflict settings it has been as if there was a tacit agreement to look the other way as women and children were sexually abused – minimizing, trivializing, denigrating and silencing the victims, destroying their credibility and further violating their dignity – so abusers could continue unimpeded. The body of the ICC's first cases, however, signals to the world that here, at least, this deal is off¹³.

Along these lines, Oosterveld (2018, p. 443-444) states that the creation of the Policy on Sexual and Gender Crimes is a major step forward in the scope of international criminal law, with the potential to change the way gender-based violence is punished in the context of genocide, mass atrocities, and wars. It also teaches that this Policy aims to ensure that the Attorney General's Office can systematically take sexual and gender crimes into account in its criminal investigations and prosecutions, especially through three important innovations:

- a) adoption of a more complete understanding of gender, in order to avoid confusion with the use of the terms *woman*, *sex* or *feminine*;
- b) delimitation of the meaning and application of the term "gender", since the Rome Statute provides a confusing definition;
- c) promotion of best practices for the investigation and prosecution of sexual and gender-based crimes.

Regarding the last innovation, Chappell (2016, p. 125) points out that the Policy has adopted new practices for collecting evidence, using innovative methods in order to avoid, for example, the loss of physical evidence, essential in cases of sexual crimes.

Another key contribution was the definition of sexual crimes:

"Sexual crimes" that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes ("Elements"). In relation to "rape", "enforced prostitution",

¹³ "Gender-based crimes stand out in the ICC Prosecutor's Office processes because they stand out in the contexts that are being processed. They assume relevance against the background of the norms that still predominate, which deny and ignore their existence, shaming the victims or defining them in such a way as to exclude the culpability of the accused. In other conflicts, it has been as if there was a tacit agreement to look the other way while women and children were sexually abused – minimizing, trivializing, denigrating and silencing the victims, destroying their credibility and further violating their dignity – so that the perpetrators could continue unimpeded. The set of the first ICC cases, however, signals to the world that here, at least, this vision is outdated." (our translation).

and "sexual violence", the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, 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, or by taking advantage of a coercive environment or a person's incapacity to give genuine consent. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact — for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element¹⁴. (International Criminal Court, 2014).

In this definition, several elements for the characterization of sexual crimes were brought, such as the non-need to use force or physical contact for the configuration of this type of crime, as in the case of forced nudity, with the absence of genuine consent being the decisive element.

It can thus be seen that the Policy on Sexual and Gender Crimes helped to overcome the difficulties that the Prosecutor's Office was facing in bringing several cases to trial. Oosterveld (2018, p. 445) reports that, between 2002 and 2014, the Prosecutor's Office took 57 complaints of sexual and gender-based violence in 20 different cases to the ICC for analysis. Of these accusations, 32 were taken to the confirmation phase of complaints, but only 20 of them were confirmed. However, at the trial stage, none of them resulted in a conviction.

The author (Oosterveld, 2018, p. 446) states that the accusations of sexual and gender-based violence were fragile, due to the erroneous conceptions of gender adopted by the Prosecutor's Office at the time, in addition to inadequate investigations and evidence collection, weak procedural strategies, and derisory evidence. The ICC judges also contributed to the high rate of prosecution failures of the Prosecutor's Office, since they decided not to apply the jurisprudence already established in the field of international criminal law on sexual and gender-based violence, not allowing, for example, cumulative accusations of rape and torture.

Based on this Policy, the Attorney General's Office began to investigate cases of sexual and gender-based violence in their early stages, through witness statements, expert evidence, documents, and circumstantial evidence. The Prosecutor's Office even started to use techniques such as conflict mapping, statistical analysis, and databases created to identify relevant patterns of crime, as well as to verify the involvement of criminal organizations (Oosterveld, 2018, p. 454).

¹⁴ "The 'sexual offences' that fall within the jurisdiction of the ICC are listed in Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the Statute, and described in the Elements of Offences ('Elements'). In relation to 'rape', 'forced prostitution' and 'sexual violence', the Elements require that the perpetrator has committed an act of a sexual nature against one person, or has caused another to commit such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, coercion, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment or a person's inability to give genuine consent. An act of a sexual nature is not limited to physical violence and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover physical and non-physical acts with a sexual character." (our translation).

These prosecuting innovations can also serve as a guide for national jurisdictions in cases of sexual and gender-based violence, as provided for in the Policy on Sexual and Gender Crimes itself:

The Office encourages various initiatives and actions — most notably those by States Parties — to address sexual and gender-based crimes. These include efforts towards universal ratification and domestic implementation of the Statute, and cooperation with the Court; the adoption of domestic legislation which incorporates the conduct proscribed under the Statute, and procedures which would protect the interests of victims and facilitate the effective investigation and prosecution of such cases; support for domestic investigations and prosecutions for these crimes; enhancement of cooperation for the execution of ICC arrest warrants; and strengthening political support to end impunity and to prevent the recurrence of such crimes. These contributions are important to establish and reinforce the normative framework of the Statute for the accountability of sexual and gender-based crimes¹⁵.

It is noted that the Office of the Attorney General aims to expand the scope of its Policy, as a way to assist the States Parties to the ICC to conduct internal investigations into sexual and gender-based crimes. In this regard, Oosterveld (2018, p. 445) understands that the Policy could help even in common sexual assault processes, in addition to providing structure for national bodies to be able to investigate sexual and gender crimes in the context of crimes against humanity, genocide, and war crimes. In fact, the domestic legal systems of several countries, such as Brazil, are not properly prepared to investigate crimes of sexual violence in the context of crimes under the jurisdiction of the ICC, firstly because there is no specific domestic legislation providing for crimes against humanity and war crimes, which may refer to internal armed conflicts; and, second, by the scant experience in the investigation of crimes of this kind.

In the same perspective, D'Aoust (2016, p. 6) states that, according to the logic of the ICC's principle of subsidiarity, the application of international standards at the domestic level implies the change of domestic legislation. For the author, the ratification of the Rome Statute has generated gaps in national legal systems, and in order to comply with the principle of subsidiarity, States need to adopt domestic measures that enable legitimate criminal prosecutions, including investigations into gender crimes.

¹⁵ "The Office encourages various initiatives and actions — particularly those of States Parties — to address sexual and gender-based crimes. These include efforts for universal ratification and internal implementation of the Statute and cooperation with the Court; the adoption of domestic legislation that incorporates the conduct prohibited by the Statute and procedures that protect the interests of victims and facilitate the effective investigation and prosecution of such cases; support for investigations and internal prosecutions of these crimes; strengthening cooperation for the execution of ICC arrest warrants; and strengthening political support to end impunity and prevent the recurrence of such crimes. These contributions are important to establish and reinforce the normative framework of the Statute for the accountability of sexual and gender crimes." (our translation).

4 Conclusion

Sexual violence against women as a weapon of war is a very serious problem that must be urgently addressed and harshly condemned, as it reflects a great contempt for women's human rights.

It is a violence derived from a coldly planned act, whose objective is to use a woman's suffering as a means to hit the enemy more, in a clear demonstration of gender discrimination against women by society, which persists in objectifying her, denying her quality as a subject full of rights and, even worse, her dignity.

This type of crime continues to be committed as a result of the impunity that still reigns in the world. It was only in 2019, in the Natganda case, that the International Criminal Court (ICC), whose effective action began in 2003, convicted someone of this type of crime, after other cases, in which the accused were acquitted for technical reasons, which disqualified the validity of the evidence obtained during the investigations and trial, showing a clear disregard for the victims and their human rights.

The change in the ICC's position was due to the efforts of its Prosecutor's Office, which, in 2014, approved the Policy on Sexual and Gender Crimes, following the demands of feminist movements in favor of the "feminization of the Law", that is, the inclusion of the gender perspective in the elaboration and application of the Law, historically used to maintain the *status quo of a clearly hierarchical world. in which the violation of women's dignity was and continues to be made invisible.*

It is time for a change. Thus, it is hoped that the present work will contribute to this end, disseminating this problem and promoting new research aimed at improving the Law and, especially, overcoming the historical objectification of women.

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