

## ORIGINAL ARTICLE

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## SUMMARY

The central objective of this article is to analyze the International Responsibility of the Brazilian State in the case of violence against women, in particular, to the case that became emblematic in Brazil and outside it, which was the involvement of violence against Maria da Penha Maia Fernandes practiced by, today, her ex-husband. Here the reference is the case 12,051 (Maria da Penha Maia Fernandes v. Brazil), which was opened on August 20, 1998 by the Inter-American Commission on Human Rights of the Organization of American States (OAS). From the intersection between domestic violence committed against Maria da Penha Maia Fernandes and the Institute of International Responsibility, it was verified how the application of an international institute, through the Inter-American Commission on Human Rights of the Organization of American States (IACHR-OAS) influenced the creation of legislation that ensures women's rights in the Brazilian State.

Keywords: International Responsibility, OAS, Maria da Penha.

## 1. INTRODUCTION

The treatment of responsibilities or reparations in the area of human rights violations is relatively recent. This theme takes shape after the barbarism of World War II and other international or internal conflicts that occurred throughout the 20<sup>th</sup> century, in which they had terrible consequences. For the integrity of human beings, the birth and evolution of systems for the promotion and protection of human rights were promoted, citing as relevant examples the cases of the European Court of Human Rights and the Inter-American Court of Human Rights (ALEXANDRINO, 2017; BOTELHO; TABISZ, 2017; BOTELHO, 2005; RAMOS, 2005).

The protection of human rights is based on the idea of responsibility of states, understood as the obligation to ensure that these rights are not affected or harmed, and this is of particular concern when States may be perpetrators of violations of the law, the rights of their citizens and persons within their borders (Botelho, 2005; Ramos, 2005). In order to understand the defense of the fundamental rights of the person, it is necessary to clarify where the obligation of the State arises, that is, the international responsibility of the State.

In the same way, it is important to analyze the practice of international state responsibility, that is, from a specific case. This is the objective of this article, to analyze Brazil's international responsibility in the face of a case of human rights violations. Here the case is the violation of women's rights, in particular, committed against Maria da Penha Maia Fernandes. This case became well known both nationally and internationally, not because it is an individual appeal, but that this particular appeal was made and still made to a frequent practice in Brazil, namely: violence against women, that is, a constant violation of the human rights of the Brazilian female population.

Thus, the central objective of this article is to analyze the International Responsibility of the Brazilian State in the case of violence against women, in particular, to the case that became emblematic in Brazil and outside it, which was the involvement of violence against Maria da Penha Maia Fernandes practiced by, today, her ex-husband. Here the reference is the case 12,051 (Maria da Penha Maia Fernandes v. Brazil), which was opened on August 20, 1998 by

the Inter-American Commission on Human Rights of the Organization of American States (OAS).

To achieve this article, a qualitative analysis was used, in particular, when using the technique of bibliographic review on the theme of international responsibility, as well as about the case of Maria da Penha Maia Fernandes. Documents were also used, such as Draft articles on Responsibility of States for Internationally Wrongful Acts (UN, 2001) produced by the United Nations Commission on International Law, essential for the application of international state responsibility, as well as Report 54/01, case 12,051, Maria da Penha Fernandes v Brasil, of 04/16/2001 (OAS, 2001).

This article is divided into three parts, which are: a) aspects on the international responsibility of the State; b) brief report on the trajectory of the Maria da Penha Maia Fernandes case, and; c) correlation between international state responsibility and the Maria da Penha Maia Fernandes case.

### 2. ASPECTS ON THE INTERNATIONAL RESPONSIBILITY OF THE STATE

As an institution of international law, international responsibility has an origin in customary law and is related to the figure of the State as the only subject of public international law, on which it was initially based on the damage caused to nationals of one State in another. Subsequently, it was applied to armed conflicts between States and currently extends to all illegal acts of a State, without prejudice to the fact that the figure of international responsibility currently applies to other matters of international law, such as international organizations and individuals (ALEXANDRINO, 2017; BOTELHO; TABISZ, 2017; BOTELHO, 2005; RAMOS, 2005).

To explain the state's responsibility under international law, it is first necessary to refer to the types of responsibility that the State may incur. In addition, it is important to differentiate between areas where coding efforts are imperative. Contemporary international law distinguishes between the international liability generated by illegal acts attributable to states and liability which, without the existence of an illegal act, stems from the performance of activities that are not prohibited when they cause harm to third parties. Therefore, on the

basis of international law, States may incur international liability also when their legal acts cause cross-border harm to other States or their inhabitants (ALEXANDRINO, 2017; BOTELHO; TABISZ, 2017; BOTELHO, 2005; RAMOS, 2005).

According to Ramos (2005, p. 53),

[...] it is seen that the international responsibility of the State consists, for part of the doctrine, an international obligation of reparation in the face of prior violation of international norm. Responsibility is an essential characteristic of a legal system, as the international system of rules of conduct is intended, and its foundation of international law is based on the principle of sovereign equality between States. In fact, all States claim compliance with the agreements and treaties that benefit them and, consequently, cannot refuse to comply with the agreements and treaties, since they are all the same. Therefore, a State cannot claim for itself a legal condition that it does not recognize the other.

From the foregoing, it can be seen that an act committed by a State that is interpreted as an international illegal act may be subject to review by the International Courts. An illegal act is an act attributable to an international legal subject who, constituting a violation or violation of international law, damages the rights of other subjects of that system or even rights or interests to which the international community itself would be entitled, giving rise, among other possible consequences, to the responsibility of the author of the act (BOTELHO, 2005).

The international unlawful act is composed of two elements, namely: a subjective element and an objective element. When we speak of the subjective element, we refer to the behavior by which international regulations are not complied with and can be attributed to the State, considering that this subject of international law is a moral person who acts by his organs, individual or collective, which generates an event attributable to the State.

The objective element of the international illegal act is conduct which constitutes a breach of an international obligation of the State. According to Alexandrino (2017) and Botelho (2005), the violation of an international obligation consists in the lack of conformity between the behavior that this obligation requires of the State and the behavior that the State actually observes, that is, between the requirements of international law and the reality of the facts. It

should be noted that considering the unlawful act as a result of a breach of an obligation under international law will result in the inclusion of premises as obligations assumed by unilateral acts of states or by acts of international organizations.

The conduct that generates the unlawful act may consist of an action, or omission, or a combination of both. It may manifest itself, for example, with the promulgation of a specific internal rule in a specific case. According to Alexandrino (2017), Botelho and Tabisz (2017), Botelho (2005) and Ramos (2005), when describing the violation of an international obligation, the United Nations Commission on International Law distinguishes between international crimes and national crimes. The first concept would imply the violation of an international obligation so essential to safeguard the fundamental interests of the international community that its violation is recognized as a crime by this community as a whole.

This first category includes, among others, serious violations of international obligations of essential importance with regard to the maintenance of international peace and security, the right to self-determination of peoples, the safeguarding and protection of the human environment and serious violations. And on a large scale, an international obligation of essential importance for the protection of the human being, such as those prohibiting slavery, genocide and *apartheid*. An international crime and any internationally illegal act other than an international crime (ALEXANDRINO, 2017; BOTELHO; TABISZ, 2017; BOTELHO, 2005; RAMOS, 2005).

With regard to international human rights law, the responsibility of the State arises when a State violates the obligation to respect internationally recognized human rights. This obligation has its legal basis in international agreements, in particular international human rights treaties and, in particular, in the norms of customary international law that are mandatory (*jus cogens*). Thus, States have not only a duty to respect internationally recognised human rights, but also the duty to guarantee those rights, which may entail an obligation to ensure compliance with international obligations by private persons and the obligation to prevent violations. In the event that states do not apply due diligence in taking appropriate action or preventing structured human rights violations, governments assume responsibility both legally and morally. With regard to human rights, we can say that they are *erga omnes* obligations for states, that is, they are a set of universal and mandatory norms

which, as stated in the Charter of the United Nations, affirmed by the Universal Declaration of Human Rights and accepted by almost all States, are mandatory for all members of the international community. (ALEXANDRINO, 2017; BOTELHO; TABISZ, 2017; BOTELHO, 2005; RAMOS, 2005).

In the case of exceptionally serious illegal acts attributable to states, the international responsibility of the State is also aggravated and may manifest itself with exemplary or dissuasive sanctions. In addition, liability in such cases may entail an obligation to make internal legislative changes or even modify its fundamental rule, including obligations of third states, such as non-recognition of illegal conduct and the obligation not to cooperate. But it should be clarified that, in relation to its participation in the practice of international crimes, the State is not adequately criminalized, that is, it is not assigned criminal liability, but international responsibility and, consequently, the obligation to repair and grant guarantees of non-repetition (ALEXANDRINO, 2017; BOTELHO; TABISZ, 2017; BOTELHO, 2005; RAMOS, 2005; UN, 2001). Thus, according to Ramos (2005, p. 60), “the international community can use sanctions to coerce the State to respect human rights, now elevated to the status of international obligation.”

### 3. BRIEF REPORT ON THE TRAJECTORY OF THE MARIA DA PENHA MAIA FERNANDES CASE

In Brazil, in 1983, brazilian citizen Maria da Penha Maia Fernandes was the victim of a double murder attempt perpetrated by her husband, Marco Antônio Herredia Viveiros, who at the time was an economist and university professor. The first attempt occurred on May 29, when he shot her in the back while he was asleep, leaving her injured and paraplegic. While on June 6, on his second chance, he tried to electrocute her while bathing (BASTERD, 2011).

Maria da Penha Maia Fernandes was only one of several women who suffered domestic violence in Brazil. According to Santos and Izumino (2005), violence against women was not clearly codified. According to the authors, Brazil began collecting data on violence against women in the 1980s, and the data showed that there was a difference in the occurrence of violence between women and men. Throughout the 1980s, public and private institutions have engaged in important research that has helped map the situation in the country. It was also during this period that the literature on violence against women began to develop, with

the aim of giving visibility to this topic.

The Brazilian Institute of Geography and Statistics (IBGE) conducted the first national survey on this violence in 1988 and wrote the Justice and Victimization Supplement. According to the Supplement, women accounted for forty-four percent of the total number of victims of physical aggression in the country. This was the first national statistic disaggregated by sex in cases of physical injury and property crimes reported to the police (SANTOS; IZUMINO, 2005).

These data show that violence affects men and women in a different way. While for women, their homes can be dangerous places and their companions possible aggressors, men are attacked mainly by strangers on the streets. With the exception of sexual harassment, investigations into violence against women predominantly identify their husbands or partners as aggressors. Violence is one of the main problems of Brazilian society. Brazilian women face violent situations in two different scenarios: as women exposed to gender violence and as citizens exposed to different forms of violence that affect Brazilian society. Thus, these data reveal that violence against women, especially violence on the part of their marital partner, is a complex and serious phenomenon that requires the establishment of a systematic method to collect and produce data, as well as the adoption of specific legislation and state action to combat the problem (SANTOS; IZUMINO, 2005).

According to Santos and Izumino (2005, p. 158), in violence against women there is a power relationship between men and women, in his words:

We defend an approach to violence against women as a power relationship, understanding power not in an absolute and static way, exercised as a rule by man over women, as we want to make us believe the approach of patriarchal domination, if not in a dynamic and relational way, exercised both by men and women, even if unevenly.

This power relationship was verified in the case of violence against Maria da Penha Maia Fernandes. Even when he sought the state to criminalize the act of violence he suffered from his former partner, the state justice, instead of repairing the damage legally, chose not to fulfill its role, since the aggressor of Maria da Penha, even after the conviction, spent 15



years in freedom, that is, without conviction in practice. This occurs, according to Santos and Izumino (2005, p. 155) to “[...] preserve the traditional image of the family institution and marriage”. This demonstrates, according to the authors, that before the Maria da Penha Law, research demonstrated that, in practice, the judiciary aimed to seek a reconciliation of the couple and not to criminalize the aggressor.

As stated, although convicted by the local court and after fifteen years the aggressor of Maria da Penha still remained at liberty, abuse of successive procedural appeals against the jury’s sentencing decision. In the face of this fact, it is worth mentioning that Brazil, in 1994, undertook to protect and guarantee women’s rights, in particular, with regard to the violence constantly suffered by women, this by signing an International Agreement in the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, the “Convenção de Belém do Pará”.

It was from these findings that the case of Maria da Penha Maia Fernandes became not only a case of a single woman, but of Brazilian women who are constantly exposed to domestic violence. And from the brutal case of violence against Maria da Penha in 1998, the Inter-American Commission on Human Rights of the Organization of American States (IACHR-OAS) was provoked to analyze the International Responsibility of the Brazilian State.

#### 4. INTERNATIONAL RESPONSIBILITY IN THE CASE OF MARIA DA PENHA

In 1998, the impunity and ineffectiveness of the judicial system in the face of domestic violence against women in Brazil motivated the presentation of the case to the Inter-American Commission on Human Rights of the Organization of American States (IACHR-OAS), through a joint petition by CEJIL-Brazil entities that is the Center for Justice and International Law and CLADEM-Brazil, which is the Latin American and Caribbean Committee for the Defense of Women’s Rights (OAS , 2001).

The petitioners claimed to the International Court that the Brazilian government forgave, for years the marital cohabitation, the domestic violence perpetrated in the city of Fortaleza, in the state of Ceará, by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha, with whom he had three daughters, culminating in two assassination attempts at his



home and more assaults in May and June 1983.

In the legal field, the omission of the Brazilian State was in the face of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women – the “Convenção de Belém do Pará” – ratified by Brazil in 1995. Thus, the Brazilian state has a duty to implement public policies aimed at the prevention, punishment and eradication of violence against women, in accordance with international and constitutional parameters, causing a rupture in the perverse cycle of violence that, trivialized and legitimized, kills many lives within the Brazilian population. Such omission led to the conviction suffered by Brazil in the case of Maria da Penha.

From a synthetic sequence of the events of international accountability of the Brazilian State, it can be observed that the case was presented to the Inter-American Commission on Human Rights only on August 20, 1998, where the agency admitted a domestic violence crime petition (case 12,051), for the first time. Brazil received the complaint with the documents gathered by the Petitioner on October 19 of the same year. After three notifications to provide information and exercise the adversary, on October 19, 1998, August 4, 1999 and August 7, 2000, the Brazilian State fell silent, which is why article 42 of the Commission Regulation was applied, that is, to have the facts narrated as true” (CORREA; CARNEIRO, 2010).

It should be noted that at no point in the procedure was there a manifestation of the Brazilian State, being interpreted as if there was no acceptance of any amiable solution, as requested by the Commission Regulations. On November 1, 2000, with the finalization and transmission of the case report, again, the state remained inert, without manifesting or meeting the recommendation made by the Commission (OAS, 2001)

In 2001, in an unprecedented decision, the Inter-American Commission condemned the Brazilian State for negligence and omission in relation to domestic violence, recommending to the State, among other measures, according to Report 54/01, case 12,051, Maria da Penha Fernandes v. Brazil, 16/04/01, “to continue and intensify the reform process in order to break with state tolerance and discriminatory treatment with respect to domestic violence against women in Brazil”. Also, according to Report 54/01, the Inter-American Commission added that

this tolerance by the organs of the State is not exclusive to this case, but is systematic. It is a tolerance of the whole system, which only perpetuates the roots and psychological, social and historical factors that maintain and feed violence against women (OAS, 2001).

Shortly after the decision of the Inter-American Commission in October 2002, Marco Antônio Viveiros was finally arrested. In addition, the media began to transmit information on several cases of violence committed against women in Brazil and interviews with Maria da Penha, contributing to the awareness of the problem and encouraging women to denounce the domestic violence that was committed against them. It is important to highlight that Brazil, even slowly, was establishing in its legal system some legal changes that equated women with men.

Brazil's new civil code, enacted in 2002, repealed the old civil code and gave equal treatment to men and women in all spheres. The Brazilian Civil Code of 1916 treated men and women unequally. For example, codes define marriage differently. A woman's home was the same as her husband's. A man had ten days to file a petition to annul his marriage if his wife was previously deflowered. He was the "boss" of the home and the woman was his companion. In this sense, the new civil code revoked expressions such as "head of conjugal society". These initiatives aimed to promote the principle of equality between men and women guaranteed in the Brazilian Constitution and international human rights treaties (BRASIL, 2002).

In this context, it is salutary to highlight that, in seventeen countries in Latin America, Brazil until 2006 did not have specific legislation on violence against women. Even though the Brazilian state was convicted in 2001, only on August 7, 2006, and through the international liability process, Brazil approved, as a consequence of its conviction in the International Court, Law N°. 11,340, popularly known as the "Maria da Penha Law".

### 5. FINAL CONSIDERATIONS

From the intersection between domestic violence committed against Maria da Penha Maia Fernandes and the Institute of International Responsibility, it was verified how the application of an international institute, through the Inter-American Commission on Human Rights of the

Organization of American States (IACHR-OAS) influenced the creation of legislation that ensures women's rights in the Brazilian State. The conviction of the Brazilian State generated the responsibility of the state to repair the case of violence, which occurred with the arrest of maria da Penha's former partner, as well as to create specific legislation for the protection of women's rights, which occurred with the changes registered in the New Civil Code and the promulgation of Law No. 11,340/06, popularly known as "Maria da Penha Law".

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