

Ms. Michelle Bachelet  
U.N. High Commissioner for Human Rights  
Office of the United Nations High Commissioner for Human Rights (OHCHR)  
Palais des Nations  
8-14 Avenue de la Paix  
CH-1211 Geneva 10, Switzerland

Uberlândia/MG-Brazil, October 18<sup>th</sup>, 2021.

***Ref.:*** *Submission to provide inputs for the preparation of the Human Rights Council-mandated report on the contribution of transitional justice to sustaining peace and the realization of SDG 16.*

It is with great honor that the Study and Research Group in International Law (GEPDI/CNPq), affiliated to the 'Jacy de Assis Faculty of Law' of the Federal University of Uberlândia, Uberlândia/MG – Brazil, hereby, submit information regarding the list of issues presented by the U.N. Office of the High Commissioner for Human Rights, aiming at assisting the Commissioner on her report on the contribution of transitional justice to sustaining peace and the realization of SDG 16, as requested by the Human Rights Council through Resolution 42/17 of 26 September 2019.

It is our intention to provide input on a number of situations regarding gross violations and abuses of human right perpetrated during dictatorships taken to international tribunals. In this sense, we will address the situations of Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay, which were brought before the Inter-American Court of Human Rights; as well as the case of Libya, taken to the International Criminal Court.

In every situation addressed below we will describe (A) what happened in the country when the abuses were reported; (b) the case(s) before the international tribunal connected to the State in question; (C) the existence of domestic legislation hindering transitional justice<sup>1</sup>; and (D) the outcome of such circumstances in regard to the promotion of just, peaceful and inclusive societies.

---

<sup>1</sup> this is the case of amnesty laws. They are diversified acts, legislative or executive, internal or international, whose objective is to largely exclude the punishment of crimes to a group or category of people (JARDIM, Tarciso Dal Maso. A atuação dos tribunais internacionais frente ao tema da anistia e da comissão da verdade. **Revista da Faculdade de Direito da UFMG**, Número Especial: Jornadas Jurídicas Brasil-Canadá, pp. 275 - 298, 2013, p. 275).

## **1) THE CASE OF BOLIVIA**

### **A) BACKGROUND**

Between 1964 and 1982, Bolivia experienced a period of military dictatorship. Nevertheless, it was different from other dictatorial regimes that took place in Latin America, since there was no single military government, with a cohesive plan. In fact, each ruler imposed his project for the country.<sup>2</sup>

It all started in 1952, with the National Revolution (or Bolivian Revolution), when a *coup d'état* took place, bringing left parties to power. In this period, a series of measures took place, such as the nationalization of tin mines, educational reform, reduction of Bolivian army, and the empowerment of popular militias. Bolivia's economic situation worsened over time, making the military rise again, with the help of the United States. Still, in 1964, Victor Paz Estenssoro, a civilian politician, and René Barrientos, a commander of the Bolivian air force, were elected.

Nevertheless, with the emergence of the National Revolutionary Movement (MNR in the Spanish acronym) and the Authentic Revolutionary Party (PRA, in the Spanish acronym), radical extreme right parties, on November 4, 1964, Vice-President Barrientos, with a power-sharing agreement with Army General Alfredo Ovando, carried out a *coup d'état*, initiating the dictatorship in the country and putting an end to the period known as the Bolivian National Revolution.<sup>3</sup>

The dictatorship lasted for almost 18 years, until October 10, 1982.<sup>4</sup> In total 3 rulers were in power during the military dictatorship in Bolivia:<sup>5</sup> General René Barrientos (1964-1969); General Hugo Banzer (1971-1978) and Narco-military Luís García Meza (1980-1981). Many violations of human rights were reported during this period. There were three cases brought before the Inter-American Court of Human Rights against Bolivia for the abuses perpetrated therein: (I) *Trujillo Oroza vs. Bolívia*<sup>6</sup>; (II) *Ticona Estrada and others vs. Bolívia*<sup>7</sup>; and (III) *I.V. vs. Bolívia*<sup>8</sup>. The cases will be summarized below.

---

<sup>2</sup> USP - Memória e Resistência. **História da Ditadura Civil-Militar da Bolívia**. Disponível em: [http://www.usp.br/memoriaeresistencia/?page\\_id=281](http://www.usp.br/memoriaeresistencia/?page_id=281) Acessado em: 15.10.2021.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> CORTE IDH. **Trujillo Oroza vs. Bolívia**. Sentença de Reparações e Custos. San José, 27. fev. 2002. Available in: [https://corteidh.scjn.gob.mx/buscador/doc?doc=casos\\_sentencias/CasoTrujilloOrozavsBolivia\\_ReparacionesCostas.htm#CATRO\\_S2\\_PARR6](https://corteidh.scjn.gob.mx/buscador/doc?doc=casos_sentencias/CasoTrujilloOrozavsBolivia_ReparacionesCostas.htm#CATRO_S2_PARR6) . accessed in: 15 set. 2021.

<sup>7</sup> CORTE IDH. **Ticona Estrada et al. vs. Bolívia**. Sentença de Mérito, Reparações e Custos. San José, 1 jul. 2009. Available in: [https://corteidh.scjn.gob.mx/buscador/doc?doc=casos\\_sentencias/CasoTiconaEstradaOtrosvsBolivia\\_FondoReparacionesCostas.htm](https://corteidh.scjn.gob.mx/buscador/doc?doc=casos_sentencias/CasoTiconaEstradaOtrosvsBolivia_FondoReparacionesCostas.htm). Accessed in: 15 out. 2021

<sup>8</sup> CORTE IDH. **I.V. vs. Bolívia**. Sentencia 30 nov. 2016. Available in: <https://corteidh.scjn.gob.mx/buscador/doc?ficha=231.pdf> Accessed on: 11. out. 2021.

## *B) THE CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

### *- Case 1: Trujillo Oroza vs Bolivia (2002)*

In the case *Trujillo Oroza vs Bolivia* it was argued that the State of Bolivia violated Article 1 (Obligation to respect rights), Article 25 (Judicial Protection), Article 3 (Right to recognition of legal personality), Article 4 (Right to life), Article 5 (Right to personal integrity), Article 7 (Right to personal liberty) and Article 8 (Judicial Guarantees) of the ACHR.

The violations of this case happened in 1971, during the period of the military dictatorship in Bolivia, more specifically, the illegal detention on December 23, 1971 of José Carlos Trujillo Oroza, a philosophy student at the Universidad Mayor de San Andrés, and his subsequent disappearance. José Carlos Trujillo was last seen on February 2, 1972 in Santa Cruz, Bolivia, after enduring torture, being still missing until the date of issuance of the judgment by the Inter-American Court.

His family, specifically his mother, Gladys Oroza de Solón Romero, suffered from health conditions which originated a series of medical expenses. Gladys, as well as José Carlos Trujillo Oroza's adoptive father and brothers all suffered pecuniary and non-pecuniary damage due to the arrest, torture, forced disappearance and death, of José Carlos and due to the impunity, that subsists in this case.

On June 9, 1999, the Inter-American Commission filed the application of this case before the Court for it to decide whether the State violated the rights enshrined in Articles 3, 4, 5.1, 5.2, 7, 8.1 and 25 in relation to Article 1.1 of the American Convention. The hearing before the Inter-American Court took place on January 25<sup>th</sup>, 2000, in which Bolivia acknowledged the facts presented by the Commission. In the same way, the State acknowledged its international responsibility in the present case and accepted the legal consequences derived from the aforementioned facts.<sup>9</sup>

The court accepted the State's recognition of responsibility and proceeded with the reparations. It decided that the State must use all the necessary means to locate the mortal remains of the victim and deliver them to his next of kin, so that they can give him an adequate burial; the State must typify the crime of forced disappearance of persons in its domestic legal system; The State must investigate, identify, and punish those responsible for the harmful acts referred to in this case; The State must publish in the Official Journal the judgment on the merits issued on January 26, 2000; The State must adopt, in accordance with Article 2 of the Convention, the necessary measures for the protection of human rights that ensure the free and full exercise of the rights to life, liberty and personal integrity and

---

<sup>9</sup> CORTE IDH. **Trujillo Oroza vs Bolivia**. Sentença de Reparações e Custos. San José, 27. fev. 2002, par. 5. Available in: [https://corteidh.scjn.gob.mx/buscador/doc?doc=casos\\_sentencias/CasoTrujilloOrozavsBolivia\\_ReparacionesCostas.htm#CATRO\\_S2\\_PARR6](https://corteidh.scjn.gob.mx/buscador/doc?doc=casos_sentencias/CasoTrujilloOrozavsBolivia_ReparacionesCostas.htm#CATRO_S2_PARR6) . accessed in: 15 set. 2021.

the protection and judicial guarantees; The State must officially give the name of José Carlos Trujillo Oroza to an educational center in the city of Santa Cruz.

The State was also condemned to pay unmaterial damages of US\$180.000,00 to a Gladys Oroza de Solón Romero; US\$25.000,00 to be distributed equally between Gladys Oroza de Solón Romero, Pablo Erick Solón Romero Oroza and Walter Solón Romero Oroza; US\$20.000,00 for Pablo Erick Solón Romero Oroza, and US\$20.000,00 for Walter Solón Romero Oroza. In the matter of material damage the State was ordered to pay US\$153.000,00 to Gladys Oroza de Solón Romero for the expenses incurred in the search for the victim and medical expenses caused by the forced disappearance of her son.

- *Case 2: Ticona Estrada and others vs. Bolívia (2009)*

In the case *Ticona Estrada et al. vs. Bolívia* it was argued that the State of Bolivia violated Article 1 (Obligation to respect rights), Article 2 (Duty to adopt provisions of domestic law), Article 25 (Judicial Protection), Article 3 (Right to recognition of legal personality), Article 4 (Right to life) , Article 5 (Right to Humane Treatment), Article 7 (Right to personal liberty) and Article 8 (Judicial Guarantees) of the American Convention of Human Rights, as well as the Interamerican Convention on Forced Disappearance of People.

The violation of the rights found in the case in question happened in the context of the military government in Bolivia that rose to power through a *coup d'état*<sup>10</sup>. Once in power, the State deployed a series of intimidation policies against members of the National Left Movement and other opponents, using armed paramilitaries groups a practice of harassment and extermination were put into place.

In July 22th oh 1980 during the night a military patrol detained a 25 years old student and his older brother, Higor Ticona, near the Cala-Cala control post in Oruro, when they were going to Sacaca, Potosi. The State agents took away their belongings and proceeded to beat them. In that time the brothers were not informed about the accusations against them that would justify their prison, nor were they taken before a competent judicial authority.

The Ticona brothers suffered several hours of mistreatment by the State agents before they were transferred to the care of the Special Security Service. That was the last time that anyone had knowledge of the whereabouts of Renato Ticona. His relatives filled a series of appeals about his disappearance but none of them resulted in any form of investigation or accountability of those who carried out his disappearance.

The case was referred to the court in August 8, 2007, in the petition of the Interamerican Commission of Human Rights asked for the Inter-American Court to decide whether the State violated the rights enshrined in Articles 5, 8, and 25 of the American Convention, to the detriment of Renato Ticona's family. In the victim's petition it was also

---

<sup>10</sup> USP - Memória e Resistência. **História da Ditadura Civil-Militar da Bolívia**. Available in: [http://www.usp.br/memoriaeresistencia/?page\\_id=281](http://www.usp.br/memoriaeresistencia/?page_id=281) accessed in: 15.10.2021.

solicited to the Court to declare that the State had violated the articles 3, 4, 5, 7, 8 and 25 of the American Convention of Human Rights (ACHR), as well as the articles I, III y XI of the American Convention on Forced Disappearance of People. The audience before the Court took place on August, 13 2008.

The court was considered competent to judge the case despite the fact that the events happened before Bolivia´s ratification of the ACHR due to the fact of numerous occasions that the Court considered that it can exercise its competence *ratione temporis* to examine, without infringing the principle and non-retroactivity, those facts that constitute violations of a continuous or permanent nature, that is, those that took place before the date of recognition of the jurisdiction of the Court and persist even after that date.<sup>11</sup>

In the merits of the case, the court defined forced disappearance as:

*[...] la privación de la libertad a una o más personas, cualquiera que fuere su forma, cometida por agentes del Estado o por personas o grupos de personas que actúen con la autorización, el apoyo o la aquiescencia del Estado, seguida de la falta de información o de la negativa a reconocer dicha privación de libertad o de informar sobre el paradero de la persona, con lo cual se impide el ejercicio de los recursos legales y de las garantías procesales pertinentes[;] dicho delito será considerado como continuado o permanente mientras no se establezca el destino o paradero de la víctima".<sup>12</sup>*

In addition, it has also signed as concurrent and constitutive elements of forced disappearance (a) deprivation of liberty; (b) the direct intervention of state agents or their acquiescence, and (c) the refusal to acknowledge the arrest and to reveal the fate or whereabouts of the person concerned.<sup>13</sup>

The court affirmed that the right prescribed in article 7 of its Convention establishes that everyone has the right to personal liberty and that any restriction to this right must be given only under the conditions established in advance by the Political Constitutions or by the laws enacted pursuant to them (material aspect), and also, with strict subjection to the procedures objectively defined therein (formal aspect).<sup>14</sup>

Moreover, the Court stated that forced disappearance is a clear violation of article 5 of the Convention, violating the right of personal integrity in all of its dimensions. In this judgment it is affirmed that the nature of forced disappearance puts the victim in an aggravated situation of vulnerability and it can also violate article 4.1 of the ACHR, as is to guarantee to every person subject to its jurisdiction the inviolability of life and the right not to be arbitrarily deprived of it, which includes the reasonable prevention of situations that

---

<sup>11</sup> CORTE IDH. **Ticona Estrada e Outros vs. Bolívia**. Sentença de Mérito, Reparações e Custos. San José, 1 jul. 2009. par 29. Available in [https://corteidh.scjn.gob.mx/buscador/doc?doc=casos\\_sentencias/CasoTiconaEstradaOtrosvsBolivia\\_FondoReparacionesCostas.htm](https://corteidh.scjn.gob.mx/buscador/doc?doc=casos_sentencias/CasoTiconaEstradaOtrosvsBolivia_FondoReparacionesCostas.htm). Accessed in: 15 out. 2021

<sup>12</sup> ibdem, par. 54.

<sup>13</sup> ibdem, par 55.

<sup>14</sup> ibdem, par. 57.

may result in the suppression of that right.<sup>15</sup> Therefore the Court considered the State violated articles 7, 5.1, 5.2, 4.1 of the ACHR.

In respect of the articles 8.1 and 25.1 of the Convention, the Court stated that the duty to investigate in cases of enforced disappearance necessarily includes taking all necessary actions to determine the fate or whereabouts of the disappeared person and has indicated that only if all the circumstances regarding the violation are clarified, will the State have provided the victims and their next of kin an effective remedy and will have fulfilled its general obligation to investigate and eventually punish, allowing the relatives of the victim know the truth about what happened to the victim and his whereabouts.<sup>16</sup>

On the matter of the reasonable term for investigate and punish the responsibilities of committing the crimes, the Court stated that:

*En el presente caso, el Tribunal considera que el tiempo transcurrido sobrepasa excesivamente el plazo que pueda considerarse razonable para finalizar el procedimiento penal, el cual se inició hace más de veinticinco años y permaneció archivado por más de once años a partir del reconocimiento de la competencia contenciosa del Tribunal (...). Además, teniendo en cuenta que el proceso penal aún no ha concluido con una sentencia firme (...), siendo que al tiempo transcurrido habrá que sumar el que pase hasta que se constituya aquélla. Esta demora ha generado una evidente denegación de justicia, lo que constituye una violación al derecho de acceso a la justicia de los familiares de Renato Ticona.<sup>17</sup>*

Consequently, the Court concluded, in consideration of the State plan, that Bolivia was to be found responsible for the violation of the guarantees and judicial protection foreseen in articles 8.1 and 25.1 of the ACHR.<sup>18</sup>

Regarding article 5.1, the Court recognized that the family of the victims has endured psychological, moral and physical damage. Specifically, they said they had been emotionally affected and suffered a permanent anguish, mainly because they did not know what happened to Renato Ticona, thus, not being able to bury his mortal remains as a consequence of the forced disappearance, directly injuring Honoria Estrada de Ticona, César Ticona Olivares, Hugo Ticona Estrada, Betzy Ticona Estrada y Rodo Ticona Estrada.<sup>19</sup>

When it comes to article 2 of the Convention, the court affirmed that it is the State's responsibility to introduce in its domestic law the necessary modifications to assure the execution of the responsibilities that it has contracted by the ratification of an international convention, such as the ACHR<sup>20</sup>. More specifically, the Court has pointed that it was recommended to Bolivia to typify the crime of forced disappearance in its Penal Code.<sup>21</sup> Regarding such demand the Court found that the State effectively typified the crime of forced

---

<sup>15</sup> ibdem, par 60.

<sup>16</sup> ibdem, par 80.

<sup>17</sup> ibdem, par 85.

<sup>18</sup> ibidem.

<sup>19</sup> Ibidem, par 86, 87 and 88.

<sup>20</sup> ibdem, par 101.

<sup>21</sup> ibdem, par 102.

disappearance in Chapter X of the Penal Code, by Law No. 3326 issued on January 18, 2006.

Due to such findings, the court considered that the sentence on Merits, Reparations and Costs constituted, *per se*, a form of reparation. It also recommended the State to continue: (i) the processing of the criminal proceeding followed by the forced disappearance of Renato Ticona Estrada; (ii) the search of Renato Ticona Estrada in an effective and quick manner; (iii) publish in its Official Journal the sentence of Merits, Reparations and Costs implement the agreements for the provision of medical and psychological treatment required by Honoria Estrada de Ticona, César Ticona Olivares, Hugo Ticona Estrada, Betzy Ticona Estrada and Rodo Ticona Estrada; (iv) establish in one year the Interinstitutional Council for the Clarification of Forced Disappearances.

Moreover, it also considered that:

*143. La Comisión consideró como medida esencial de reparación en este caso "el llevar a término una investigación seria, completa y efectiva para determinar la responsabilidad intelectual y material de los autores de la detención y posterior desaparición forzada de Renato Ticona". Al respecto el representante solicitó que el Estado garantice que el proceso penal Comisión Nacional c/ René Veizaga y otros "surt[a] los efectos debidos; [se tramite] sin dilaciones; que no se recurr[a] a figuras tales como la amnistía, la prescripción, la extinción de la acción penal u otras semejantes; que se pers[iga] a los responsables materiales e intelectuales de la desaparición forzada de Renato Ticona; y que, de ser el caso, quienes fueran condenados cumpl[an] las sentencias que disponga la justicia boliviana". El Estado consideró que "ha cumplido con sancionar a los autores intelectuales de las innumerables violaciones a los derechos humanos, entre las que se encuentra la perpetración de la desaparición forzada del Sr. Ticona", en virtud de las sanciones que han sido impuestas a Luis García Meza y Luis Arce Gómez. Además, indicó que por medio de la Resolución No. 002/2008 de 8 de enero de 2008 se dictó sentencia condenatoria a los supuestos autores materiales de los hechos relacionados con la desaparición forzada de Renato Ticona.<sup>22</sup>*

- *Case 3: I.V. vs. Bolivia (2017)*

On July 1, 2000, Ms. I.V. underwent a cesarean section because of spontaneous rupture of the membrane at 38.5 weeks of pregnancy. During the surgical procedure, the child was born and the doctor performed a procedure called ligature of the fallopian tubes. Both surgical procedures were performed while the patient was under anesthesia. Mrs I.V. was not consulted in advance, free and informed about the sterilization. She only learned that she had lost her permanent reproductive capacity the following day when the doctor informed Mrs I.V.

The State, on the other hand, affirmed that Mrs I.V.'s consent was obtained during the transoperative period. However, Mrs IV denied that she had given consent. Following the claims and claims presented by Mrs. IV, three audits were carried out, the Court of Ethics of the Departmental Medical College of La Paz was denounced, an administrative procedure was carried out before the Legal Advisory Unit of the Departmental Health Service of La Paz and

---

<sup>22</sup> *ibidem*, par 122.

a criminal proceeding was carried out for the offense of injury, which ended with the extinction of the criminal action. Despite the various state actions as a result of the claims of Ms. I.V., no person has been declared responsible, disciplinary, administrative or criminally liable for the sterilization not allowed to the one submitted by Ms. I.V, who has been civilly repaired because of the decision that extinguished the penal action.

Therefore, the central controversy in this case consisted in determining whether the ligation of the fallopian tubes performed on Ms. I.V. on July 1, 2000 in Bolivia by a public official in a state hospital was contrary to the international obligations of the State. The cardinal aspect to be elucidated was, therefore, whether such procedure was carried out obtaining the informed consent of the patient, under the parameters established in international law for this type of medical act at the time of the events.

The Inter-American Court decided to hold Bolivia internationally responsible for violating the right to personal integrity, recognized in Articles 5.1 and 5.2 of the ACHR, in relation to the obligation to respect the content of Article 1.1 of the ACHR. Bolivia was also held responsible for the violation of judicial rights and guarantees and judicial protection, recognizing the articles 8.1 and 25.1 of the Convention, in relation to the obligations to respect and guarantee those rights and not to discriminate contained in Article 1.1 thereof, as well as for not complying with their obligations under Article 7(b)(c)(f)(g) of the Convention of Belém do Pará regarding the prohibition of violence against women.

The Court affirmed that the patient's informed consent is a *sine qua non condition* for medical practice, which is based on respect for their autonomy and their freedom to make their own decisions according to their plan of existence. The informed consent regarding the origin of a medical intervention with permanent consequences in the reproductive system, such as the ligation of the fallopian tubes, belongs to the autonomous sphere and of the private life of the woman, which may freely choose the life plans that you consider most appropriate. The rule of informed consent is related to the right of access to health information, because the patient can only consent in an informed manner if they have received and understood enough information to allow them to make a full decision.

From the point of view of international law, informed consent is an obligation that has been established in the development of the human rights of patients, which constitutes not only an ethical but also a legal obligation of health personnel, who must consider it as a constitutive element of expertise and good medical practice in order to guarantee accessible and acceptable health services. Characteristic elements of valid consent were already present in the field of medicine and human rights since the 1947 Nuremberg Code of Medical Ethics and have remained central in the development of bioethics and law.

In relation to the ligation of the fallopian tubes, the Court emphasized that this surgical intervention, the purpose of which is to prevent a future pregnancy, cannot be characterized as an urgent or emergency procedure of imminent damage, so that this exception is not applicable. In the Court's opinion, consent cannot be considered free if it is requested from the woman when she is not in a position to make a decision fully informed, for being in



situations of stress and vulnerability, inter alia, such as during or immediately after childbirth or a cesarean section. Full consent can only be obtained after having received adequate, complete, reliable, understandable and accessible information, and after having fully understood it.

Although there is no consensus at the international level or derived from the internal regulations of the States regarding whether consent should be granted verbally or in writing, the Court considered that the proof of its existence should be documented or be formally registered in an instrument. This, of course, will depend on each case and situation. In cases of female sterilization, due to the relevance and implications of the decision and for the purposes of greater legal certainty, consent should be granted in writing, as far as possible.

At the time of the occurrence of the facts in this case, there was an international obligation of the State to obtain, through its health personnel, the consent of the patients for medical and, especially, of women in the case of female sterilizations, which had to meet the characteristics of being prior, free, full and informed after an informed decision process.

The Court determined whether there was a clear regulation in the State of Bolivia in order to prevent the occurrence of female sterilizations without the prior, free, full and informed consent, since the State argued before the Court that the rules and regulations invoked by the Commission and the representative to support the alleged violations were not applicable in the case of Ms. IV.

Likewise, the Court decided whether the tubal ligation procedure performed on Mrs. I.V. configured a case of sterilization contrary to Bolivia's international obligations that are derived from the parameters previously developed regarding the obligation to guarantee the informed consent of the patient based on her autonomy and dignity, in such a way as to verify if the international responsibility of the State for the actions of its public officials, in this case, of its health personnel in a public hospital.

Despite the existence of general regulations regarding informed consent, the State of Bolivia did not adopt sufficient preventive measures for the health personnel to guarantee Ms. I.V. her right to make her own decisions about her reproductive health and the contraceptive methods that best fit her life project, in such a way that she would not be subjected to sterilization without her prior, free, full and informed consent. By virtue of this, the Court considered that the State did not adopt the necessary preventive regulatory measures that would clearly establish the medical obligation to obtain consent in cases such as that of Ms. I.V. and, therefore, it lacked its duty to act with due diligence to prevent non-consensual or involuntary sterilization from occurring.

Regarding the duty of respect and the alleged obtaining of consent, the Court held that, apart from the evidentiary debate on the factual circumstances, the legal consequence of both factual hypotheses is the same, that is, both in the assumption of non-existence consent, as in the case of obtaining verbal consent during the intraoperative of Ms. IV, the doctor breached his duty to obtain prior, free, full and informed consent as required by the American Convention.

The Court determined that the non-consensual or involuntary sterilization to which Ms. I.V. In a public hospital, under stress and without her informed consent, it caused her serious physical and psychological damage that implied the permanent loss of her reproductive capacity, constituting an act of violence and discrimination against her. Consequently, the Court concluded that the State failed to comply with its obligation to refrain from any action or practice of violence against women and to ensure that the authorities, their officials, staff and agents and institutions behave in accordance with this obligation.

Regarding the right of access to justice, the protection of women's rights through access to timely, adequate and effective remedies to remedy these violations in a comprehensive manner and avoid the recurrence of these facts in the future.

The Court established that his judgment constitutes per se a form of reparation. Similarly, it ordered Bolivia to:

- i) provide free, through its specialized health institutions, and immediately, adequately and effectively, medical treatment and, specifically in sexual and reproductive health, as well as psychological and / or psychiatric treatment, to Mrs. IV;
- ii) make the indicated publications;
- iii) hold a public act of acknowledgment of international responsibility for the facts of this case;
- iv) design a publication or booklet that develops in a synthetic, clear and accessible way the rights of women regarding their sexual and reproductive health, in which specific mention must be made of prior, free, full and informed consent;
- v) adopt permanent education and training programs aimed at medical students and medical professionals, as well as all personnel that make up the health and social security system, on issues of informed consent, discrimination based on gender and stereotypes, and violence of genre;
- vi) pay the amounts set for compensation for pecuniary and non-pecuniary damage, as well as the reimbursement of costs and expenses, and
- vii) reimburse to the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount paid during the processing of the present case.<sup>23</sup>

### *C) AMNESTY LAWS*

No amnesty laws were found in regard to Bolivia that would exempt those who committed crimes from justice. Nevertheless, according to Human Rights Watch's 2020 World Report<sup>24</sup>, only a few of the crimes committed during the Bolivian dictatorship (1964-1982) were prosecuted:

Bolivia held only a few of the authorities responsible for human rights violations committed under the authoritarian regime from 1964 to 1982, in part because the armed forces sometimes refused to share information about the fate of people who were forcibly killed or disappeared with the authorities. A "Truth Commission" established by the government in August 2017 to conduct non-

<sup>23</sup> CORTE IDH. **I.V. vs. Bolívia**. Sentencia 30 nov. 2016. p. 14. Available in: <https://corteidh.scjn.gob.mx/buscador/doc?ficha=231.pdf> Accessed on: 11. out. 2021.

<sup>24</sup> HUMAN RIGHTS WATCH. **World Report 2020: Bolívia**. Disponível em: <https://www.hrw.org/pt/world-report/2020/country-chapters/336399> Acessado em: 15.10.2021.

judicial investigations into serious human rights violations during that period is intended to provide information to prosecutors and judges for the prosecution of those responsible. The results had not yet been published at the time of writing this report. The Armed Forces have made limited progress in declassifying military files and disseminating information about victims of enforced disappearances.

#### *D) CONCLUSIONS IN REGARD TO BOLIVIA'S TRANSITIONAL JUSTICE*

According to the International Center for Transitional Justice (ICTJ), there are some initiatives related to transitional justice (memory, truth and justice) in Bolivia, namely: a) the possibility of holding those who perpetrated crimes responsible through criminal suits; b) the establishment of truth commissions; c) the establishment of reparation programs; d) the establishment of gender justice; e) institutional reform; f) remembrance initiatives.<sup>25</sup>

Hence, in terms of accountability for acts committed during the country's authoritarian regime, it is possible to state that transitional justice was implemented in Bolivia mainly through "truth commissions". It brought closure to the actions perpetrated. Moreover, for the reparation programs, we note that the reparation was the result of international decisions, what makes them also very important for the promotion of domestic peace and justice, especially when it comes to criminalize certain conducts, such as forced disappearance, and promote discussions regarding gender-violence.

## **2) THE CASE OF BRAZIL**

### *A) BACKGROUND*

From 1964 to 1985, Brazil experienced one of the most violent and repressive periods in its history within the context of the dictatorship. In this sense, the years preceding 1964 were marked by major upheavals in the political and cultural spheres, with the resignation of Jânio Quadros in 1961 and the rise of João Goulart, the then Vice-President, to the presidency, thus altering the Brazilian situation, since there was an attempt to prevent the tenure of Jango – as Goulart was known – by the military ministers. However, the reaction of the Congress and the Brazilian society to the military veto of Goulart's tenure was enormous, with strikes in several capitals demanding that the Constitution were complied with, which culminated in the change from presidential to parliamentary regime, allowing Jango's tenure, but with less power, in September 1961<sup>26</sup>.

In view of this, Jango's government can be defined as a period of intense politicization

---

<sup>25</sup> ICTJ - INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE. **Cuestiones de Justicia Transicional**. <https://www.ictj.org/es/our-work> Acessado em: 15.10.2021.

<sup>26</sup> ARAUJO, Maria Paula; SILVA, Izabel Pimentel da; SANTOS, Desirree dos Reis. (Orgs.) Ditadura Militar e Democracia no Brasil: História, Imagem e Testemunho. 1 ed. Rio de Janeiro: Ponteio, p. 11, 2013.

of the society, with a climate of confrontation, debate and political radicalization that allowed a broader civil participation in public discussions of proposals for reforms and changes, being, also, a time of intense political activity. In 1964, however, João Goulart's government was overthrown by a civil-military coup<sup>27</sup>, which was triggered by the March 13 rally, where Jango spoke about his commitment to carrying out an urgent agrarian reform, whose first step it would take place with the announcement of the decree of the Superintendence of Agrarian Reform Policy (SUPRA, in the Portuguese acronym), which would make it possible for lands on the banks of federal highways and railways to be expropriated. Such pronouncement generated a commotion in conservative sectors that wanted the overthrow of Jango from power, and, guided by the fear of the radicalization of these measures and a supposed "communist danger", thousands of people took to the streets in the "Family Marches with God for Freedom"<sup>28</sup>.

Finally, the last event that served as a pretext for the military rights to boost their plans to remove Goulart was the "Revolt of the Sailors", in which hundreds of sailors demanded recognition from the Association of Sailors and Marines, an entity considered illegal, in addition to the reformulation of the Navy's disciplinary regulations and the improvement of payment. The sailors in question received support from Jango, negotiated an end to the "rebellion" and were amnesty by the then president, which provoked the ire of the high officers, who accused the government of encouraging the breakdown of hierarchy in the Armed Forces and indiscipline<sup>29</sup>.

Once the coup was carried out, the military installed itself in power, which began a period of punishment and violence practiced by the State, with a surveillance and repression structure that collected information and removed from the country those considered "subversive" within the prism of the regime, in addition to the enactment of arbitrary Institutional Acts, which, at first, focused mainly on union leaders and communists linked to the fights for "basic reforms". Thus, the first Institutional Act (known as AI-1) was enacted on April 9, 1964, initiating a period of suspension of the political rights of the so-called "enemies of the revolution" and the revocation of parliamentary mandates, therefore marking the beginning of the military dictatorship, which would last for another twenty years in power<sup>30</sup>.

During this dictatorial period, there was the arrest of political and union leaders, the exile of political activists, the closing of existing parties and the creation of two new ones: the National Renewal Alliance (ARENA, in the Portuguese acronym) and the Brazilian Democratic Movement (MDB, in the Portuguese acronym). During the first years of this government, intellectuals, artists and students held demonstrations against the dictatorship, with marches in several cities across the country, in which they raised the flag "Down with

---

<sup>27</sup> Ibidem, p. 12.

<sup>28</sup> Ibidem, p. 15.

<sup>29</sup> Ibidem, p. 16.

<sup>30</sup> Ibidem, p. 17.

the military dictatorship", being the "Passeata dos Cem Mil", that took place in June 1968, considered a milestone of this moment. However, in December of that same year, the Institutional Act No. 05 was promulgated, responsible for several unconstitutional acts, such as the closing of the National Congress for an indefinite period; the removal of mandates of governors, senators, deputies and mayors and the political rights of opponents to the regime; the decree of the state of siege; the prohibition of holding any type of meeting; and the suspension of *habeas corpus* for political crimes<sup>31</sup>, meaning, for many, the "coup within the coup"<sup>32</sup>.

Between 1969 and the early 1970s, this period was known as the "years of lead", with the dictatorship silencing all its opponents, including the union movement, parties, students, artists and intellectuals. As a result, there were numerous urban and rural guerrilla attempts, with a violent repression of left-wing organizations and groups as the military regime's response, which culminated in the arrest, disappearance, death and exile of hundreds of people<sup>33</sup>. Accordingly, a new situation in Brazil began in 1974, when General Ernesto Geisel, the new president of the Republic, introduced a process of safe and gradual opening of politics, with the objective of promoting a slow transition to a more liberal regime, keeping excluded from power decisions, however, representatives of popular movements and more radical sectors of the opposition, and, consequently, having as their response a resistance struggle for democratic freedoms, unifying the left and countless sectors of society<sup>34</sup>.

It is observed, therefore, that between the 60s and 80s, those who opposed the military regime faced arbitrary arrests, murders, torture and banishments, weapons that became certain destinations for political militants who were involved in resistance movements to the dictatorship. Also, there were various forms of torture for those who had been arrested (including psychological torture, used to destabilize the political prisoner), in addition to threats, kidnappings, interrogations, difficulties for prisoners to communicate with lawyers and family members, among other violations of human rights<sup>35</sup>. Another destination to be recognized was the exile, in which thousands of Brazilians were forced to leave the country due to the dictatorial repressive policy, that, in general, was seen as a guarantee of survival and a way to escape persecution, being Chile, Cuba and Argentina, at first, the destinations of exiles, and, later, Europe<sup>36</sup>.

Inherent in the forms of violence and still in the 70s, the voices of the families of the dead and political disappeared were some of the first to rise up against the abuses committed by the dictatorship, mainly in view of the difficulty they had in obtaining information about their missing relatives, sometimes suffering threats from the repressive bodies to stop their

---

<sup>31</sup> Ibidem, p. 19.

<sup>32</sup> Ibidem, p. 20.

<sup>33</sup> Ibidem, p. 20.

<sup>34</sup> Ibidem, p. 21.

<sup>35</sup> Ibidem, p. 23.

<sup>36</sup> Ibidem, p. 24.

searches<sup>37</sup>. Thus, these families have become, over the last few decades, protagonists in the role of defending human rights and fighting for the right to truth and justice in the country. In line with the enactment of Law no. 6.683 of August 28, 1979, the so-called "Amnesty Law", a large part of exiles, ex-political prisoners and clandestine returned to Brazil, but many families did not even have access to death certificates, but to an "ignored certificate of whereabouts" or "presumed death" to the disappeared by the government, in an attempt to prevent investigations into the circumstances of the deaths and disappearances, which in no way impeded the continued struggle of family members for justice and truth<sup>38</sup>.

## *B) THE CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

### *- Case 1: Gomes Lund et al. vs Brazil (2010)*

In April 1964, with the coup d'état that overthrew the government of President João Goulart, the facts of the case that would become known as "Gomes Lund et al. ("Araguaia's Guerrilla") vs. Brazil" began. The aforementioned Guerrilla was a resistance movement to the military regime formed by some members of the Communist Party of Brazil (PCdoB, in the Portuguese acronym). With the objective of eradicating the Guerrilla, between 1972 and 1975, Brazilian Army operations were carried out, which culminated in the torture, arbitrary detention and forced disappearance of 70 people, including Guilherme Gomes Lund, a member of the PCdoB, in addition to the extrajudicial execution of Maria Lúcia Petit da Silva<sup>39</sup>

In this regard, on March 26, 2009, the Inter-American Commission on Human Rights submitted to the Court an application against Brazil, originated from the petition filed by the Center for Justice and International Law (CEJIL) and by Human Rights Watch/Americas on the 7th of August 1995, on behalf of the Guerilla's people who disappeared after Brazil did not carry out actions with the purpose of implementing the recommendations expressed in the Merits Report No. 91/08 within the stipulated period. Thus, given the unsatisfactory implementation of the recommendations by the Brazilian State, the Commission decided to submit the case to the jurisdiction of the Court, seeking the opportunity that such a situation represented to consolidate the inter-American jurisprudence on amnesty laws in relation to enforced disappearances, to extrajudicial execution and the state's obligation to provide the truth to society, in addition to investigating, prosecuting and punishing serious human rights violations<sup>40</sup>.

Moreover, according to the Commission, the application referred to the State's alleged

---

<sup>37</sup> Ibidem, p. 27.

<sup>38</sup> Ibidem, p. 28.

<sup>39</sup> CORTE IDH. **Caso Gomes Lund e Outros ("Guerrilha do Araguaia") vs. Brasil**. Sentença de 24 nov. 2010, par. 2. Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_por.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf). Acesso em: 15 out. 2021.

<sup>40</sup> Ibidem, par. 1.

responsibility for the aforementioned violations and the failure to carry out a criminal investigation whose purpose would be to try and punish those responsible. Thus, the Commission requested the Court to declare the State responsible for violating the rights established in Articles 3, 4, 5, 7, 8, 13 and 25 of the ACHR, in relation to the obligations set forth in Articles 1.1 and 2 of the same, in addition to the adoption of remedial measures<sup>41</sup>. Also, Rio de Janeiro's Torture Never Again Group, the Commission of Families of the Political Dead and Disappeared of the Institute for the Study of State Violence and the Center for Justice and International Law (referred to as "representatives") asked the Court to declare the State responsible, in addition to the articles already mentioned, for the violation of Articles 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture<sup>42</sup>.

On October 31, 2009, the State filed three preliminary objections, requesting that the Court (a) recognized the incompetence *ratione temporis* in examining the alleged violations that occurred in a period that preceded Brazil's recognition of the Court's contentious jurisdiction; (b) declared itself incompetent due to the lack of exhaustion of domestic remedies; and (c) immediately closed the case in question, due to the lack of procedural interest expressed by the representatives<sup>43</sup>. Later, the State added a fourth preliminary exception that referred to the "fourth instance rule" in relation to a fact that it qualified as supervening<sup>44</sup>.

With regard to the analysis of the merits of the case, it was examined the State's responsibility for violations of the aforementioned articles of the ACHR and the Inter-American Convention to Prevent and Punish Torture, concluding that, in relation to:

*i. The Right to Recognition of Legal Personality, Life, Integrity and Freedom People:* Due to what happened, the Court established that the State was responsible for the forced disappearance and, consequently, for the violation of the rights to recognition of legal personality, to life, to personal integrity and personal liberty, established, respectively, in Articles 3, 4, 5 and 7, in relation to Article 1(1) of the American Convention, to the detriment of 62 persons<sup>45</sup>.

*ii. The Right to Judicial Guarantees and Judicial Protection:* The Court concluded that, due to the interpretation and application of the Amnesty Law, which lacks legal effects regarding serious violations of human rights, Brazil failed to comply with its obligation to adapt its domestic law to the Convention, contained in article 2, in relation to articles 8.1, 25 and 1.1. In addition, due to the lack of investigation of the facts and the trial and punishment of those responsible, it was considered that the State violated the rights to judicial guarantees and judicial protection, provided for in Articles 8.1 and 25.1 of the Convention, to the detriment of the victims' relatives<sup>46</sup>.

---

<sup>41</sup> Ibidem, par. 2.

<sup>42</sup> Ibidem, par. 3.

<sup>43</sup> Ibidem, par. 4.

<sup>44</sup> Ibidem, par. 10.

<sup>45</sup> Ibidem, par. 125.

<sup>46</sup> Ibidem, par. 180.

*iii. The Right to Freedom of Thought and Expression, Judicial Guarantees and Judicial Protection:* It was concluded by the Court that Brazil violated the rights to judicial guarantees established in Article 8.1 of the ACHR, in relation to Articles 13 and 1.1 of the same Convention, to the detriment of the victims' relatives, because the Ordinary Action in the case in question exceeded the reasonable period<sup>47</sup>.

*iv. The Right to Personal Integrity:* The Court considered that there had been a violation by the State of the right to personal integrity, established in Article 5 of the ACHR, in relation to Article 1(1) of the same document, to the detriment of the victims' relatives<sup>48</sup>.

Regarding the reparations requested by the Court, all who have been declared victims of violation of any right enshrined in the American Convention, including family members who died after December 10, 1998, were considered as injured parties<sup>49</sup>. Thus, due to the State's obligation to investigate the facts, judge and, if necessary, punish those responsible, it is ordered to carry out a complete, effective and impartial judicial investigation into the enforced disappearances of the case and the execution of Mrs. Petit da Silva, in order to identify those responsible for these violations and penalize them criminally, and for this reason, Brazil must adopt the necessary measures to ensure that the Amnesty Law and confidentiality laws do not continue to represent an obstacle to criminal prosecution against serious violations of human rights. Furthermore, the publication of the results of this investigation was requested for the knowledge of Brazilian society in relation to this period of its history<sup>50</sup>.

Therefore, under the obligation to determine the whereabouts of the victims, the Commission and the representatives requested the Court to order Brazil to intensify, with financial and logistical resources, the efforts in the search, location, identification and burial of the missing victims, whose remains had not yet been found or identified<sup>51</sup>. As for the other measures of rehabilitation, satisfaction and guarantees of non-repetition, the State was ordered to adopt measures for the physical and psychological treatment of the relatives of the disappeared victims and of the executed person<sup>52</sup>, free of charge and immediate, through specialized public health institutions<sup>53</sup>; publish, within six months, the official summary of the judgment issued by the Court in a newspaper with wide national circulation, in addition to this Judgment in its entirety on the State's own website and in book format<sup>54</sup>; recognize its international responsibility, as well as the celebration of acts of symbolic importance, which ensured the non-repetition of the violations that occurred in the case<sup>55</sup>; designate a day as the "day of the political disappearance", during which activities would be carried out to

---

<sup>47</sup> Ibidem, par. 225.

<sup>48</sup> Ibidem, par. 253.

<sup>49</sup> Ibidem, par. 251.

<sup>50</sup> Ibidem, par. 253.

<sup>51</sup> Ibidem, par. 258.

<sup>52</sup> Ibidem, par. 264.

<sup>53</sup> Ibidem, par. 267.

<sup>54</sup> Ibidem, par. 273.

<sup>55</sup> Ibidem, par. 274.



remember people who disappeared during the military dictatorship, to help raise awareness of the seriousness of the events that occurred and to ensure that they do not happen again, including the construction of a memorial<sup>56</sup>; implement educational programs related to human rights within the Armed Forces<sup>57</sup>; carry out legal actions and modifications to systematize and make public all documents related to the military operations against the Guerrilla<sup>58</sup>; and create a Truth Commission that would comply with the international parameters of autonomy, independence and public consultation for its integration<sup>59</sup>.

With regard to compensation, costs and expenses, it was determined that the State must pay US\$3,000 (three thousand dollars) for each of the family members considered victims<sup>60</sup>; US\$45,000.00 (forty-five thousand US dollars) for each direct family member; US\$15,000.00 (fifteen thousand dollars) for each non-direct family member, considered victims in this case<sup>61</sup>; US\$5,000.00 (five thousand dollars) for the Torture Never More Group; US\$5,000.00 (five thousand dollars) for the Commission of Relatives of the Dead and Disappeared of São Paulo and US\$35,000.00 (thirty-five thousand dollars) for the Center for Justice and International Law, as costs and expenses<sup>62</sup>.

- *Case 2: Vladimir Herzog et al. vs Brazil (2018)*

With the military coup of 1964, the violence against opponents of the regime reached its peak between 1964 and 1968, accumulating the largest case of deaths and disappeared recognized by the government<sup>63</sup>, coinciding with the years of creation of the Defense Operations Centers Internal (CODI, in the Portuguese acronym) and the Internal Operations Departments (DOI, in the Portuguese acronym)<sup>64</sup>. Among those persecuted were, mostly, those affiliated to the Brazilian Communist Party (PCB, in the Portuguese acronym), which contemplated journalists who were persecuted, tortured and killed between 1974 and 1976<sup>65</sup>. It is estimated that 11 PCB leaders were murdered by "Operation Radar"<sup>66</sup> initiated in 1973 by the Army Information Center and the DOI/CODI<sup>67</sup>.

The DOI of the second army was considered the most violent political repression agency during the military dictatorship, especially during the period of Carlos Alberto Brilhante

---

<sup>56</sup> Ibidem, par. 278.

<sup>57</sup> Ibidem, par. 281.

<sup>58</sup> Ibidem, par. 288.

<sup>59</sup> Ibidem, par. 294.

<sup>60</sup> Ibidem, par. 304.

<sup>61</sup> Ibidem, par. 311.

<sup>62</sup> Ibidem, par. 318.

<sup>63</sup> CORTE IDH. **Caso Herzog e Outros vs. Brasil**. Sentença de 15 mar. 2018, par. 108. Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_353\\_por.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_353_por.pdf). Acesso em: 05 out. 2021.

<sup>64</sup> MINISTÉRIO PÚBLICO FEDERAL. **Crimes da Ditadura Militar**: Relatório sobre as atividades de persecução penal desenvolvidas pelo MPF em matéria de graves violações a DH cometidas por agentes do Estado durante o regime de exceção. Brasília, 2017, p. 86

<sup>65</sup> CORTE IDH. **Caso Herzog e Outros vs. Brasil**. Sentença de 15 mar. 2018, par. 109. Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_353\\_por.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_353_por.pdf). Acesso em: 05 out. 2021.

<sup>66</sup> Ibidem, par. 112.

<sup>67</sup> Ibidem, par. 116.

Ustra's command, recording the highest number of torture cases, summary execution and government opponents' disappearances<sup>68</sup>. It was in this context that Vladimir Herzog, a journalist married to Clarice Ribeiro Chaves, was captured and tortured by government agencies<sup>69</sup>.

On the morning of October 25, 1975, Vladimir Herzog presented himself at DOI/CODI headquarters and was deprived of his freedom, undergoing torture sessions in his interrogations<sup>70</sup>. On the same day Herzog was murdered and the members of the Command reported that the journalist had taken his own life with a strip of fabric from the clothing he was wearing<sup>71</sup>.

Herzog's murder caused a great commotion among Brazilian citizens and, even years after his death, the case generated controversies, trials and inquiries to resolve doubts. For many years Clarice fought for the Union to be held responsible for her husband's death, relying on the testimony of experts, doctors and colleagues who witnessed the tortures Herzog suffered<sup>72</sup>. Among the acknowledgments of the State's responsibilities, is the enactment of Law N<sup>o</sup>. 9,140/1995, which created the Special Commission on Political Deaths and Disappearances, giving Clarice the indemnity of R\$100,000.00 (one hundred thousand Reais) for the recognition of the torture and murder of Herzog by DOI/CODI<sup>73</sup>.

Furthermore, on November 18, 2011, Law N<sup>o</sup>. 12,528/2011 was enacted, creating the National Truth Commission (CNV, in the Portuguese acronym), which clarified, within the various cases of human rights violations, the death of Herzog, now considered a homicide by strangulation<sup>74</sup>.

The case "Herzog et al vs. Brazil" was submitted to the Court on April 22, 2016 by the Inter-American Commission on Human Rights regarding state responsibility for impunity regarding the arbitrary detention, torture and death of journalist Vladimir Herzog on October 25, 1975, year in which the Brazilian military dictatorship was in force<sup>75</sup>. For such submission, the Commission concluded that Brazil was responsible for the crimes of violation of Articles I, IV, VII, XVIII, XXII and XXV of the American Declaration, for violations of Articles 5(1), 8(1) and 25(1) of the ACHR (related to Articles 1.1 and 2 of the same Convention), and for the violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture<sup>76</sup>.

During the course of the proceedings within the Court, the State presented nine preliminary objections regarding<sup>77</sup>, being the most important the one that discussed the

---

<sup>68</sup> Ibidem, par. 117.

<sup>69</sup> Ibidem, par. 112.

<sup>70</sup> Ibidem, par. 122.

<sup>71</sup> Ibidem, par. 124.

<sup>72</sup> Ibidem, par. 131.

<sup>73</sup> Ibidem, par. 148.

<sup>74</sup> Ibidem, par. 164-167.

<sup>75</sup> Ibidem, par. 1-2.

<sup>76</sup> Ibidem, par. 2.

<sup>77</sup> Ibidem, par. 18.

(in)applicability of the Amnesty Law in regard to the six-month period rule to bring a case before the Inter-American System. In other words, the failure to comply with the deadline for filing the petition within the System with regard to violations of Articles 8.1 and 25 of the ACHR and Article 8 of the Inter-American Convention to Prevent and Punish Torture would make the case inadmissible.

The state argued that the enactment of the Brazilian Amnesty Law should not be regarded for the due counting of the reasonable period to bring the case before the System. Since the crimes and the sad improper investigation were committed before it was enacted, the relevant period to bring the case to the System should not be counted after the Law was in effect. After all, this would imply the exercise of the Court's contentious jurisdiction in abstract. Moreover, the State added that three decades had passed since the enactment of the Law, which, in any case, should be taken into account to disregard the possibility of addressing Herzog's death due to the limited timeframe of bringing cases before the System<sup>78</sup>.

On the other hand, the Commission observed that since the Amnesty Law was considered an obstacle to the prosecution and punishment of those responsible for the crimes perpetrated against Herzog, the petition would be admissible even after such a long time, since such Law restricted the protection of the rights prescribed under the ACHR even after it came into force<sup>79</sup>. The Court's findings corroborate to this view. It affirmed that the term would be inapplicable due to the State's acknowledgment of the inexistence of remedies for victims of violations under the Amnesty Law, thus, extinguishing any dispute between the parties. Hence, it was noted that the violations motivating the Commission's petition is the impunity of those involved in the torture and death of Herzog, considering that the circumstances influenced by the Amnesty Law in investigating and prosecuting his death could have changed the situation of impunity of those involved, makes the facts relevant to the Court's investigation. Thus, the Court considered such preliminary objection to be unfounded<sup>80</sup>.

With regard to the merits of the case, the Court found the State's responsibility to its international obligations arising from the ACHR and the Inter-American Convention to Prevent and Punish Torture, analyzing:

i) *The Rights to Judicial Guarantees and Judicial Protection, especially with regard to Crimes against humanity*: the Court considered the prohibition of crimes against humanity an imperative rule of international law, which is recognized by the international community and does not admit any different agreement<sup>81</sup>. Because of these standards, the Court found that Brazil was responsible for crimes against humanity<sup>82</sup> involving Mr. Herzog at the time of the Brazilian military dictatorship, configuring acts of detention, physical and psychological

---

<sup>78</sup> Ibidem, par. 56.

<sup>79</sup> Ibidem, par. 61.

<sup>80</sup> Ibidem, par. 71.

<sup>81</sup> Ibidem, par. 230.

<sup>82</sup> Ibidem, par. 211.

torture and murders as systematic and/or generalized like the definition of international law since at least 1945<sup>83</sup>. All of this culminated in the conclusion that Brazil violated Articles 8.1 and 25.1 of the ACHR, Articles 1.1 and 2 of the same document, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture<sup>84</sup>.

ii) *Right to know the truth*: The Court considered that Brazil sought to meet the victims' right to the truth, creating, for example, the National Truth Commission and the Special Commission on Political Deaths and Disappearances<sup>85</sup>; however, the Court also highlights the delay in disclosing the truth of the facts, causing the victims' families suffering and recurrent false judgments for so many years<sup>86</sup>, culminating even in the systematic denial of the existence of the DOI/CODI files. It was, therefore, up to the State to guarantee access to information in accordance with the principles of good faith and maximum disclosure<sup>87</sup>.

iii) *Right to Personal Integrity*: according to the Court, the State violated the right to psychological and moral integrity of all Herzog's family members for violations committed as a result, notably, of the omissions of the State authorities regarding the facts<sup>88</sup>. Furthermore, it is noteworthy that the lack of investigation into his death also caused a great psychological and moral strain and a frustration that lasts for decades<sup>89</sup>. This is, therefore, a violation of Articles 1(1) and 5(1) of the ACHR<sup>90</sup>.

Due to the obligation to investigate, the State was sentenced to conduct investigations of the case in order to clarify it and apply the sanctions and consequences provided for by law; the State must, therefore, restart the investigation and the criminal prosecution that is appropriate in the analysis of the fact that occurred in 1975, punishing those responsible for the torture and murder of Vladimir Herzog. In addition, the State was sentenced to carry out relevant investigations; determine the perpetrators of the journalist's torture and death; to ensure that the authorities carry out investigations and use all their resources to do so; ensure victims' access and ability to act at all stages of the investigation; and ensure that the investigation remains under the ordinary jurisdiction<sup>91</sup>.

Through the non-repetition measures, the Court considers that the Brazilian State was asked to adopt measures so that the actions resulting from crimes against humanity and international crimes are recognized, highlighting the Herzog's case<sup>92</sup>.

By the satisfaction measures, the Court assessed as necessary a public act of recognition by the State of its international responsibilities regarding the memory of Vladimir Herzog<sup>93</sup>. With regard to the reparations applied by the Court, all of Mr. Herzog's direct family

---

<sup>83</sup> Ibidem, par. 239-242.

<sup>84</sup> Ibidem, par. 312.

<sup>85</sup> Ibidem, par. 330.

<sup>86</sup> Ibidem, par. 335.

<sup>87</sup> Ibidem, par. 339.

<sup>88</sup> Ibidem, par. 351.

<sup>89</sup> Ibidem, par. 354.

<sup>90</sup> Ibidem, par. 358.

<sup>91</sup> Ibidem, par. 371-372.

<sup>92</sup> Ibidem, par. 376.

<sup>93</sup> Ibidem, par. 380.

members were considered injured parties, namely Clarice Herzog (wife), Ivo Herzog (son), André Herzog (son) and Zora Herzog (mother)<sup>94</sup>, and ordered Brazil to pay material damages of US\$ 20,000.00 directly to Clarice Herzog<sup>95</sup>, and with regard to immaterial damages, the Court ordered Brazil to pay US\$ 40,000.00 for each relative<sup>96</sup>. Moreover, it ordered the payment of US\$ 25.000,00 to CEJIL<sup>97</sup>, and the reimbursement of legal expenses, US\$ 4,260.95<sup>98</sup>.

### *C) AMNESTY LAWS*

Brazil has an Amnesty Law that was considered to be a necessary step in order for the transition towards democracy to be effective<sup>99</sup>. Nevertheless, it is indeed considered an obstacle to the investigation and punishment of those responsible for human rights violations during the dictatorship<sup>100</sup>.

The Amnesty Law was enacted in Brazil on August 28, 1979 by the then President of the Republic João Baptista Figueiredo<sup>101</sup>. Briefly, the law grants amnesty under the following terms:

Art. 1º Amnesty is granted to all those who, in the period between September 2, 1961 and August 15, 1979, committed political crimes or related to these, electoral crimes, those who had their political rights suspended and employees of Direct Administration and Indirect, from foundations linked to the public power to Servants of the Legislative and Judiciary Powers, to the Military and to union leaders and representatives, punished on the basis of Institutional and Complementary Acts.

§ 1º - Are considered connected, for the purpose of this article, crimes of any nature related to political crimes or practiced for political motivation.

§ 2º - Except themselves for the benefits of amnesty those condemned for the practice of terrorism, assault, kidnapping and personal attack.<sup>102</sup>

Thus, for many years it was this law that determined the way in which Brazil's historical past was treated, causing the Brazilian Transitional Justice to be considered backwards concerning the development and realization of fundamental rights<sup>103</sup>, since although it allowed the return of exiles and the release of political prisoners, it accepted the impunity of torturers and violators of rights<sup>104</sup>. This happened because the transition was negotiated by

---

<sup>94</sup> Ibidem, par. 363.

<sup>95</sup> Ibidem, par. 392.

<sup>96</sup> Ibidem, par. 396-397.

<sup>97</sup> Ibidem, par. 403.

<sup>98</sup> Ibidem, par. 409.

<sup>99</sup> MCARTHUR, Fabiana Godinho. **Justiça de Transição: o caso brasileiro.** Anistia política e Justiça de Transição, Brasília: Ministério da Justiça, 2012, n. 7, p. 90-91.

<sup>100</sup> CORTE IDH. **Caso Herzog e Outros vs. Brasil.** Sentença de 15 mar. 2018, par. 277. Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_353\\_por.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_353_por.pdf). Acesso em: 05 out. 2021.

<sup>101</sup> Ibidem, par. 136.

<sup>102</sup> BRASIL. **Lei nº 6.683, de 28 de agosto de 1979.** Concede anistia e dá outras providências. Diário Oficial da República Federativa do Brasil. Brasília, DF. Disponível em: [http://www.planalto.gov.br/ccivil\\_03/leis/l6683.htm](http://www.planalto.gov.br/ccivil_03/leis/l6683.htm).

<sup>103</sup> MCARTHUR, op. cit., p. 85-86.

<sup>104</sup> PESQUISADORES alertam que Lei da Anistia ainda é um problema atual. **Câmara dos deputados**, Brasília, 30 ago. 2021. Disponível em: <https://www.camara.leg.br/noticias/801270-pesquisadores-alertam-que-lei-da-anistia->

the then military government that refuted specific models presented internationally<sup>105</sup>.

Both Inter-American Court of Human Rights decisions against Brazil regarding transitional justice highlighted the need for such law to be revoked<sup>106</sup>. However, Brazil has not yet done so, due to 'Action for Non-Compliance with a Fundamental Precept no. 153' brought before the Brazilian Supreme Court, which understood that Brazilian Amnesty Law to be in accordance with the Brazilian Constitution.<sup>107</sup>

It should be stressed that this decision was delivered before the 2010 Gomes Lund case before the Inter-American Court, and even though this international decision has demanded Brazil to prosecute those involved – thus indirectly demanding Brazil to revoke its Amnesty Law –, it did not fully comply with it. Because of this, PSOL (Portuguese acronym for the 'Socialism and Freedom Party') presented another 'Action for Non-Compliance with a Fundamental Precept', of no. 320<sup>108</sup>, questioning the Brazilian non-compliance to the Gomes Lund decision, asking for the Supreme Court, in light of the international precedent, to then consider the law to be unconstitutional. It has not yet been adjudged by the Supreme Court, being it considered a problem for a full transitional justice in the country.

Nevertheless, it shall be pointed that due to the Inter-American Court decisions, a number of civil suits have been brought against former military pleading for damages, which have been generally granted<sup>109</sup>. Besides, because of the works of the Truth Commissions, enacted by former President Dilma Rousseff – who suffered from political persecution and torture herself during the dictatorship – through Law 12.528 of November 18, 2011, many people that were persecuted and who suffered from various human rights violations have received damages from the State.<sup>110</sup>

From this perspective, if the Amnesty Law until today denies the possibility of one to be prosecuted by the state for its actions and abuses during the dictatorship, at least those who suffered from it have received damages from the State and from the torturers and their families themselves, allowing us to stress that the Truth Commissions, with the objective of

---

ainda-e-um-problema-atual/. Acesso em: 16 out. 2021

<sup>105</sup> Ibidem, p. 85.

<sup>106</sup> CORTE IDH. **Caso Gomes Lund e Outros ("Guerrilha do Araguaia") vs. Brasil**. Sentença de 24 nov. 2010, par. 172 and 174. Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_por.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf). Acesso em: 15 out. 2021; CORTE IDH. **Caso Herzog e Outros vs. Brasil**. Sentença de 15 mar. 2018, par. 174-176, 183, 187 and 289. Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_353\\_por.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_353_por.pdf). Acesso em: 05 out. 2021.

<sup>107</sup> SQUEFF, Tatiana Cardoso; FERNANDES, Carolina; ZANCHIN FILHO, Vicente; CRESTANI, Eduardo; GOMES, Tatiana. A (in) adequação brasileira ao conceito de justiça de transição: da ADPF n. 153 ao caso Gomes Lund. **REDES - Revista Eletrônica Direito e Sociedade**, v.4, n. 1, 2016. Disponível em: <https://revistas.unilasalle.edu.br/index.php/redes/article/view/2318-8081.16.18>. Acesso em: 16 out. 2021.

<sup>108</sup> PSOL. **Ação do PSOL que questiona a Lei da Anistia espera julgamento no STF há 5 anos**. s/l, 31 jul. 2019. Disponível em: <https://psol50.org.br/acao-do-psol-que-questiona-a-lei-da-anistia-espera-julgamento-no-stf-ha-5-anos/>. Acesso em: 16 out. 2021

<sup>109</sup> See, for example: SUPERIOR TRIBUNAL DE JUSTIÇA. **Primeira Turma condena União a pagar danos morais a ex-militares torturados durante a ditadura**. Brasília, 07 nov. 2019. Disponível em: <https://www.stj.jus.br/sites/porta/paginas/Comunicacao/Noticias/Primeira-Turma-condena-Uniao-a-pagar-danos-morais-a-ex-militares-torturados-durante-a-ditadura.aspx>. Acesso em: 20 out. 2021

<sup>110</sup> FONSECA, Bruno. Mais de 3 mil militares perseguidos na Ditadura recebem indenização. **Revista Exame**, 17 mar. 2019. Disponível em: <https://exame.com/brasil/mais-de-3-mil-militares-perseguidos-na-ditadura-recebem-indenizacao/>. Acesso em: 20 out. 2021

clarifying the violations committed in the years of Brazilian military dictatorship<sup>111</sup>, are considered a step-forward to Brazil's transitional justice. After all, it aimed at the enforcement of "the right to memory and historical truth, and [the] promot[ion] national reconciliation"<sup>112</sup>.

#### *D) CONCLUSIONS IN REGARD TO BRAZIL'S TRANSITIONAL JUSTICE*

It can be mentioned that the identification and punishment of the aggressors, the reparations of the victims and the search for the publication of the truth may be considered an important democratic institutional reform<sup>113</sup>. Thus, the effort for a greater systematization of transition cases and the development of International Law support transitional justice, as they are the ones who define the rights and duties to be applied.

As an advance in the "responsibility" of the State for the abuses committed in the past, Brazil has been seeking a responsible public administration. Other advances include the holding of direct elections in 1984 and the enactment of the 1988 Constitution, bringing a new democratic order to the country<sup>114</sup>, therefore, promoting justice and peace.

It is concluded, therefore, that even with failures in their implementation (which end up having considerable consequences, especially when it comes to prosecuting those who committed heinous acts in the past)<sup>115</sup>, the transitional justice and its mechanisms demonstrate advances in all spheres in relation to its validation and application, namely the highlighting the needs of victims; the promotion of the reconciliation between victims and the State; the reform of state institutions; and the restoration of the Rule of Law<sup>116</sup>.

### **3) THE CASE OF CHILE**

#### *A) BACKGROUND*

In Latin America, the second half of the 20th century was marked by an increase in industrialization and in the fights for human rights. Furthermore, internationally, the relation between the continent and the Global North revolved mainly around economic issues. The United States saw in the continent a way to exert its influence and dominance, and, for that,

---

<sup>111</sup> MCARTHUR, op. cit., p. 101.

<sup>112</sup> BRASIL. **Lei Federal n. 12.528**, de 18 de novembro de 2011, artigo 1º. Disponível em: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/l12528.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12528.htm); Acesso em: 20 out. 2021.

<sup>113</sup> MCARTHUR, op. cit., p. 82.

<sup>114</sup> Ibidem, p. 87.

<sup>115</sup> BECHARA, Gabriela Natacha; FRANZOI, Juliana Borinelli. Algumas considerações acerca do movimento pela lei de anistia e sua relação com a justiça de transição no Brasil. In: MEYER-PFLUG, Samantha Ribeiro; ANDREUCCI, Álvaro G. A.; CAPANO, Evandro Fabiani. (Org.). **Memória, Verdade e Justiça de Transição**. Florianópolis: FUNJAB, 2013, p. 254-272.

<sup>116</sup> Ibidem.

invested in free competition<sup>117</sup>, helped to train the military<sup>118</sup>, and spread anticommunist propaganda.

However, in Chile, the 60's represented the strengthening of leftist movements, motivated by the growing industrialization, urbanization, and the Cuban revolution<sup>119</sup>. This tendency lasted for the whole decade, in which Eduardo Frei's government started an agrarian reform, motivated the sindicalization of rural workers, and nationalized important elements of the Chilean economy, such as the copper commerce and mining. Moreover, the early 70's would strengthen the leftist ideology in the Chilean government, chiefly with the ascension of Salvador Allende, a member of the socialist party, to the presidency of the country in 1970.

These left-wing tendencies did not please the USA, whose Central Intelligence Agency (CIA) had been highly active in Latin America. In Chile alone, the agency spent three million dollars to influence the outcome of the 1964 presidential election, as well as eight million dollars during 1970 and 1973<sup>120</sup>. This money was used as means to cause political impacts, manipulate propaganda in the local press, fund political parties, and even foment a military *coup d'état*.

It should be noted that the media, heavily influenced by the USA's government, played a crucial role in the destitution of the democratic power in Chile. *El Mercurio*, the biggest newspaper company in the country at the time, received, approximately, one and a half million dollars at the time to produce and distribute criticisms on Allende's administration. It also was responsible for rooting the fear of communism in the Chilean population, stating that Allende's democratic project was, in fact, a way to create a totalitarian communist dictatorship<sup>121</sup>. Additionally, *El Mercurio* manipulated facts and distorted governmental politics as a way to delegitimize the president chosen by the people, as well as legitimize the ascension of the military forces to power. Furthermore, the CIA established strategic connections with members of the Socialist Party, and in the Cabinet level of the Chilean government. Beyond that, the agency's actions sought to influence specific areas of civil society, with the goal of manipulating Chilean political events.<sup>122</sup>

As mentioned above, the presence of the USA in the Chile's politics was intense even

---

<sup>117</sup> CERVO, A. L. **Relações Internacionais da América Latina**. São Paulo: ed. Saraiva, 2001.

<sup>118</sup> The School of America was a military institution that sought to eliminate "subversive" groups in Latin America. G. Weeks states that "the course on Military Intelligence included counter-espionage, counter-subversion, the study of Communist objectives in Latin America, and Soviet security and espionage agencies". (WEEKS, G. Fighting the enemy within: Terrorism, the school of the Americas, and the military in Latin America. **Human Rights Review**, v. 5, n. 1, p. 12-27, out. 2003, p. 16).

<sup>119</sup> MENDES, Ricardo A. S. 40 anos do 11 de setembro: o golpe militar no Chile. **Revista Estudos Políticos**, v. 4, n. 8, p. 172-190, 2013, p. 176. DOI: <https://doi.org/10.22409/rep.v4i8.38811>

<sup>120</sup> UNITED STATES. Congress. Senate. Select committee to study governmental operations with respect to intelligence activities. **Covert action in Chile, 1963-1973**: staff report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate. Washington D.C.: U.S. Govt. Print. Off., 1975.

<sup>121</sup> SANTOS, E. A imprensa chilena, o jornal El Mercurio e o golpe civil-militar de Pinochet (1973). **Revista de História da UEG**, v. 5, n. 2, p. 307-328, 15 dez. 2016.

<sup>122</sup> Ibidem.



before Allende's mandate. It influenced directly the 1964 presidential elections, in which the USA invested more than US\$ 2.5 million to help elect Eduardo Frei; the 1965 congressional elections, in which the CIA was able to prevent members of the leftist coalition from winning congressional seats; and the 1970 presidential election, in which the northern country tried to stop Allende's victory by investing on other parties' campaigns.

Even after the elections, the USA attempted to cause a military *coup* in order to stop Allende from assuming the presidency. The CIA was given direct orders by president Nixon to encourage military agents prone to rebel against the democratic institutions. However, this attempt failed, and Allende became the president of Chile.

Between 1970 and 1973, Allende intensified the agrarian reform; taxed mine owners and multinational incorporations; increased the quality of the educational system; and improved the life conditions of the working class<sup>123</sup>. On the other hand, these social changes were propelled by an aggressive expansion on government spending, which augmented the fiscal debts, and led to hyperinflation<sup>124</sup>.

The instability of the Chilean economy was also a result of the USA economic and political pressure. The USA took advantage of Chile's economic dependence to block investments, both private and public. It also used its international prominence to stop the Latin country from receiving loans from international organizations. It was later acknowledged by the US congress that the country's economic politics towards Chile were mainly political, instead of technical<sup>125</sup>.

Furthermore, recently declassified documents show that the USA was not the only foreign country to interfere in the Chilean political process. The Australian Secret Intelligence Service (ASIS) also conducted clandestine spy operations in Chile<sup>126</sup>. ASIS presence in the Latin country was used as means to support the US' intervention, and destabilize Allende's government. The Australian agency reported directly to CIA's headquarters in Langley, Virginia, and was mainly responsible for handling CIA recruited assets.

Moreover, the CIA also kept informants within the Chilean armed forces. The agency used its contacts not only to gather intelligence but also to transmit messages from the US government to the groups that could plot a successful coup. The CIA's knowledge of the rebellious military plans was so deep, that Washington knew exactly when the coup would happen<sup>127</sup>.

Even with the international interference, Allende was able to achieve some of his goals

---

<sup>123</sup> AMORÓS, M. **Chile: la herida abierta**. Madrid: CESOC, 2001. Disponível em: <https://rebellion.org/docs/5297.pdf>. Acesso em: oct. 18, 2021.

<sup>124</sup> APUTO, R.; SARAVIA, D. **The Monetary and Fiscal History of Chile: 1960-2016**. Working paper n. 2018-62. Chicago: Becker Friedmann Institute, 24 ago. 2018. Disponível em: <<https://papers.ssrn.com/abstract=3238188>>. Acesso em: 18 out. 2021. p. 11.

<sup>125</sup> UNITED STATES, op. cit., p. 35

<sup>126</sup> ORNBLUH, P. **Australian Spies Aided and Abetted CIA in Chile**. National Security Archive, 2021. Disponível em: <https://nsarchive.gwu.edu/briefing-book/chile/2021-09-10/australian-spies-aided-and-abetted-cia-chile>. Acesso em: 18 out 2021.

<sup>127</sup> AMORÓS, op. cit., p. 21.

throughout his mandate until 1973. As aforementioned, his government mainly focused on social aspects, such as the agrarian reform, the nationalization of industries, and increasing the presence of the working class in local politics. Between 1970 and 1973, every land property above 80 hectares was transferred to the peasantry, 35% of the land was taken from large landowners, 30% of the manufacture industries was transferred to workers from the self-managed operative system, 90% of the credit was under public control, and the exploitation, processing and commerce of natural resources were nationalized<sup>128</sup>.

This process caused an unrest among the Chilean elite, that was directly affected by the redistribution of wealth, industry, and land. Most of the affected people shared right wing ideals, and were supported by the majority of the congressmen, who leaned to the political right. Therefore, during the greater part of his mandate, Allende faced not only external interferences, but also domestic opposition. While the landowners and the industry owners reduced their productions, the congress tried to empty the public safes by approving economical legislation that could not be funded by the State.

However, the political and civil opposition acted within the constitutional limits. This way, the most concerning obstruction to Chile's democracy was the military, which did not keep the tradition of legalism that Allende expected. Since the 19th century, there was a gap between the military and civil societies in Chile, partially because the first one had access to a more technical education and, for that, felt superior, and partially because of the despise the military had against the parliament, and the socialist and worker movements<sup>129</sup>.

Thereby, the inflection point in Chile's history was the nomination of General Augusto Pinochet as the commander in chief of the army. Initially, the general promised to stay on the government's side. Nevertheless, the top officers of the three-armed forces, especially the Admiral José Toribio Merino, the general José Leigh, and the general Sergio Arellano Stark, were able to convince Pinochet to join their plans<sup>130</sup>. Consequently, in September 11th of 1973, the military took control over Chile without much resistance. On that day, while four airplanes bombarded the Palacio de la Moneda, the official residence of the Chilean president, Salvador Allende took his own life and, along with him, the country's democracy also died.

The government that followed, that is, Pinochet's dictatorship was responsible for the death and disappearance of thousands of people. The *junta* found in fear a way to control the population and maintain its power, and, for that end, tortured and executed those that represented a threat to the government, or did not agree with its ideals.

Nonetheless, political terrorism was not the only means used by the military to stay in power. They also used misinformation, taking advantage of a society that was already fed with lies and distorted news about the previous governments. In the "White Book of the Change of Government in Chile", the *junta* stated that Allende's government was not democratic, and exposed a secret, and false, plan that he had to seize control and impose a

---

<sup>128</sup> MENDES, op. cit.

<sup>129</sup> Idem, p. 180.

<sup>130</sup> AMOROS, op cit., p. 10.

“Proletariat Dictatorship”.<sup>131</sup> It is worth bearing in mind that this same technique, which is to claim that the previous government had undercover plans to create socialist dictatorships, was used all over Latin America as a way to justify and legitimize the seizing of control by the military.

It is hard to estimate how many people were killed, tortured and wrongfully arrested under the 17 years of Pinochet’s regime. The National Commission for Truth and Reconciliation Report, conducted in 1991, a year after Pinochet stepped down, recognized the death and disappearance of 899 victims out of 2,188 investigated reports. However, the National Commission on Political Imprisonment and Torture Report, conducted in 2003, acknowledged 27,255 victims, and the Advisory Commission on the Classification of Disappeared Detainees, Victims of Political Executions and Victims of Political Imprisonment and Torture, conducted in 2010, recognized more 9,800 victims. Another document, from 2011 lists more than 40,000 victims and 3,225 dead or missing.<sup>132</sup>

## *B) THE CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

### *- Case 1: Almonacid-Arellano et al vs. Chile (2006)*

Mr. Almonacid Arellano was a teacher, union leader, and activist in the Chilean Communist Party. He was perceived as a threat to the military regime installed by Augusto Pinochet and got arrested at his home in Rancagua on September 16, 1973. His captors shot him while he was walking to the police truck and he died in a hospital the next day. An investigation was initiated in the First Criminal Court of Rancagua; nevertheless, the case was dismissed on September 4, 1974.<sup>133</sup>

The dismissal was based on Decree n. 2,191 of 1978, which granted amnesty to the perpetrators of crimes that occurred between September 11, 1973 and March 10, 1978. More specifically, when Mr. Almonacid Arellano’s family requested the reopening of the case in 1992, the courts rejected it. This failure to investigate motivated the case before the Inter-American System of Human Rights.<sup>134</sup>

After the proceedings before the Inter-American Commission of Human Rights being unsuccessful, in 2005, it filed before the Court an application against the Republic of Chile. The Court was asked to decide whether the State violated Articles 8 (Judicial Guarantees) and 25 (Judicial Protection) of the ACHR, in relation to Article 1(1) (Obligation to Respect Rights). Moreover, the Commission requested the Court to declare that the State has violated

---

<sup>131</sup> CHILE. **Libro blanco del cambio de gobierno en Chile**: 11 de septiembre de 1973. Santiago: Lord Cochrane, 197, p. 57.

<sup>132</sup> ANGELO, Tiago. Os caminhos opostos de Chile e Brasil para punir crimes cometidos durante a ditadura. **Brasil de Fato**, São Paulo, 16 jan. 2019. Disponível em: <https://www.brasildefato.com.br/2019/01/16/os-caminhos-opostos-de-chile-e-brasil-para-punir-crimes-cometidos-durante-ditadura>. Acesso em: 20 out. 2021.

<sup>133</sup> CORTE IDH. **Almonacid Arellano et al. v. Chile**. Sentence of 26 set. 2006. Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_154\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf). Acesso em: 18 out. 2021

<sup>134</sup> *ibidem*

Article 2 (Obligation to Adopt Domestic Legal Remedies) of the ACHR and to order the State, under Article 63(1) of the Convention, to take measures of reparation. Furthermore, the Commission requested the Court to order the State to pay the costs and expenses both from the domestic and the Inter-American legal proceedings.<sup>135</sup>

As it is in the Report, the Commission found that the actions of State authorities contributed to a lack of prosecution, capture, and conviction of those responsible for the murder of Mr. Almonacid Arellano. Thus, the Commission recommended that the State should conduct an impartial investigation in order to find the responsible for the murder of Mr. Almonacid Arellano. The repealing of Decree Law No. 2.191 was also recommended, as well as that the State should ensure the adequacy of domestic protections and legal mechanisms for victims' rights, specifically for the period between September 1973 and March 1990 and grant full compensation to Mr. Almonacid Arellano's relatives.<sup>136</sup>

In September 2006, the Court found – unanimously – that the State violated Articles 8 and 25 in relation to Articles 1(1) and 2 of the Convention, since the State invoked domestic law (Decree Law No. 2,191 – Amnesty Law) to exonerate itself from responsibility<sup>137</sup>, completely disregarding the impossibility of doing so, not only in accordance to its international obligations (and thus the conventional control), but also because of article 27 of the Vienna Convention on the Law of Treaties of 1969 that does allow states to abide to national legislation if it directly conflicts with international law.

Hence, the Court ruled unanimously that the State had the obligation to set aside domestic decisions and investigate, prosecute and punish those responsible for the murder of Mr. Arellano. Besides, it ruled that the state should invalidate its Amnesty Law as it is in violation of the ACHR. In addition, the Court decided that the State must guarantee Mr. Arellano's relatives full access to all stages of the investigation and complete capacity to act, pursuant to State law as well as the provision of the Convention, being fully transparent when it comes to it.<sup>138</sup>

It was also decided that the State must publish the "Operative Paragraphs" and "Proven Facts" of the Judgement in the Official Gazette and another nationally circulated newspaper as a way of satisfaction. As for compensation, even though the Court did not award any compensation for immaterial damages due to the fact that the sentence itself was considered a form of reparation, it awarded Mr. Arellano's wife and her children US\$ 98,000, plus educational benefits amounting to approximately US\$12,180. She was also awarded \$10,000 to compensate for the costs and expenses of the proceedings.<sup>139</sup> On the whole, the total compensation, including costs and expenses, was of US\$120,180.

When it comes to implementation, although the State complied with the payment, the Court found that Chile only partially complied with its obligation to investigate and punish

---

<sup>135</sup> Ibidem.

<sup>136</sup> Ibidem.

<sup>137</sup> Ibidem.

<sup>138</sup> Ibidem.

<sup>139</sup> Ibidem.

those responsible for Mr. Arellano's death. It was only in October 2007 that the judicial investigation of the case was reopened and a special judge was appointed by the Rancagua Appellate Court to hear the case. In December 2008, he held that the preliminary criminal investigation should be conducted in a civil court, and then nullified the January 1997 Resolution of the Second Military Court of Santiago that acquitted two suspects. Finally, in 2010, the State identified the officer who drove Mr. Arellano to the hospital.

- *Case 2: García Lucero et al v. Chile (2013)*

During the Chilean dictatorship, Mr. Leopoldo Garcia Lucero was arbitrarily arrested and tortured by the Chilean authorities in September 1973. In December 1973, Mr. Garcia was transferred to a concentration camp at Ritoque and from there to Tres Alamos. Due to the Decree Law No. 81, he was expelled from Chile to the United Kingdom in 1975.<sup>140</sup>

In order to be recognized as a Person Dismissed for Political Reasons under Law No. 19,234, Mr. García Lucero sent a letter to the Program for the Recognition of those Dismissed from their Employment for Political Reasons in Chile. In the letter, he mentioned the torture he suffered and the illegal detention. In 1998, his petition to be qualified as someone dismissed for political reasons was approved and he was granted a monthly compensation for life under Law No. 19,234. It is important to mention that in 2004 the Supreme Decree No. 1,040 was made public and listed 27,153 prisoners and victims of torture, including Mr. García Lucero.<sup>141</sup>

Nevertheless, the lack of investigation regarding Mr. García Lucero's torture are to be considered a violation both of the ACHR and the Inter-American Convention to Prevent and Punish Torture. Due to that, in 2002, the Organization Seeking Reparation for Torture Survivors (known as 'REDRESS') filed the petition No. 350/02 before the Inter-American Commission on Human Rights on the behalf of Mr. García Lucero.<sup>142</sup>

The State argued that the case should be considered inadmissible because Chile became a democracy after Mr. Lucero's arrest. It is worth mentioning that the State had already ratified human rights treaties at this point. The admissibility was also questioned under the fact that the facts being discussed on the claim happened before Chile's ratification of the ACHR. However, the Commission declared the admissibility of the case in 2005.<sup>143</sup>

The Report on Merits issued by the Commission pointed out that the State violated Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal), Article 25(1) (Right of Recourse Before a Competent Court), and Article 5(1) (Right to Physical, Mental, and Moral Integrity), all in relation to Article 1(1) (Obligation of Non-Discrimination) and Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the

---

<sup>140</sup> CORTE IDH. **García Lucero et al v. Chile**. Sentence of 28 ago. 2013. Available at: [www.concernedhistorians.org/content\\_files/file/le/326.pdf](http://www.concernedhistorians.org/content_files/file/le/326.pdf). Access on: 18 oct. 2021.

<sup>141</sup> Ibidem.

<sup>142</sup> Ibidem.

<sup>143</sup> Ibidem.

ACHR.<sup>144</sup>

The Commission recommended that the State compensated Mr. Lucero and his relatives, considering his disabilities and exile to the United Kingdom. It was also recommended that Mr. García Lucero and his relatives to receive medical and psychiatric treatment. As it happened in Mr. Almonacid Arellano's case, the Commission recommended the Decree Law No. 2191 to be revoked, due to its incompatibility with the ACHR. Finally, it also demanded the State to investigate and punish those responsible for the violations.<sup>145</sup>

In 2011, the State failed to adopt the Commission's recommendations and the case was submitted to the Court, denouncing the Chilean violations of articles 5(1), 8(1), 25(1), all in relation to Articles 1(1) and 2 of the ACHR. The representatives of the victims also alleged violations of Articles 6 (Obligation to Take Effective Measures and Punish Torture and Cruel, Inhumane, and Degrading Treatment), 8 (Obligation to Investigate and Prosecute) and 9 (Right to Compensation for Victims) of the Inter-American Convention to Prevent and Punish Torture.<sup>146</sup>

In 2013, the Court issued its Judgment on Preliminary Objects, Merits, and Reparations and found unanimously that the State had violated some of those prescriptions. After all, the State waited over 16 years to investigate Mr. García Lucero's arrest and torture, even though it was already aware of the situation because of the letter sent by him, thus, violating article 8 of the Inter-American Convention to Prevent and Punish Torture. Besides, it was clear that the State failed to take the measures to prevent the treatment under Article 6 of the Inter-American Convention to Prevent and Punish Torture.<sup>147</sup>

Because of that, the Court decided that the State must continue and conclude the investigation on the facts between September 16, 1973, and June 12, 1975, regarding Mr. Lucero, demanding Chile to revoke Decree Law No. 2,191 as it constitutes an obstacle for the implementation of the investigation.<sup>148</sup>

However, it understood that Article 9 of the Inter-American Convention to Prevent and Punish Torture, in relation to the possibilities of claiming measures of reparation, was not violated by Chile. Even though, the Court ruled that Chile not only should publish the sentence, being it a form of reparation, but that it should also pay the amount of US\$30,924 to Mr. Lucero for the non-pecuniary damages because of the violations he suffered by state officials.<sup>149</sup>

Regarding implementation, the Court oversaw the payment provided by the State as it demanded, and the circulation of the sentence. Still, it also prescribed the State only partially complied with its obligation to pursue the investigation of Mr. Lucero's case once the complaint remained in the indictment stage of the criminal proceedings. Only one of the

---

<sup>144</sup> Ibidem.

<sup>145</sup> ibidem

<sup>146</sup> Ibidem.

<sup>147</sup> Ibidem.

<sup>148</sup> Ibidem, paras. 220-223.

<sup>149</sup> Ibidem.

alleged perpetrators has been investigated. Due to this, it asked Chile to provide for new information on the development of the investigation to be included in the subsequent compliance reports.

### C) AMNESTY LAWS

Despite the violations of human rights and even the commitment of crimes against humanity during in Chile, the *junta* approved, in 1978, a law that granted amnesty to all those who perpetrated crimes between 1973 and 1978. Law no. 2,191 thus allowed torturers and murderers to go unpunished until 1998, when the Chilean Supreme Court understood that such Amnesty Law could not be applied to human rights violations, understating that it was not compatible with the international treaties and conventions signed by Chile<sup>150</sup>, such as the American Convention and other Inter-American treaties.

*Agregó la Corte Suprema, que estos Convenios en razón de su naturaleza y fines, tienen aplicación preeminente conforme lo dispuesto en el artículo 5 de la Carta Fundamental, de modo que no considerarlos u omitir su aplicación importa un error de derecho, constituyendo un deber del derecho interno adecuarse a la normativa internacional que persigue garantizar los derechos esenciales que emanan de la naturaleza humana.<sup>151</sup>*

However, as it can be seen from both Almonacid Arellano and García Lucero cases against Chile before the Inter-American System, such Supreme Court decision was not fully implemented by the State, triggering the regional human rights system to address the issue and order the state to revoke the Amnesty Law so that it does not obstruct any investigation, as it is seen as a way to make peace and justice. After all, the jurisprudence of the Inter-American Court rejects amnesty laws as a way of preventing investigation and punishment of those responsible for human rights violations, considering them to be incompatible with ACHR.<sup>152</sup>

### D) CONCLUSIONS IN REGARD TO CHILE'S TRANSITIONAL JUSTICE

Although the Chilean Amnesty Law formally remains within the legal system<sup>153</sup>, indeed, after the first case brought before the Inter-American Court against Chile, the

<sup>150</sup> CHILE. Corte Suprema (Segunda Fiscalía Militar). **Autos rol N° 895-96**. Sentencia de 09 set 1998. Disponível em: [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/883D9745593118A94125671A00380CA9/CASE\\_TEXT/Pedro%20Poblete%20C%C3%B3rdova%20case%20-%20Decision%20of%20September%201998.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/883D9745593118A94125671A00380CA9/CASE_TEXT/Pedro%20Poblete%20C%C3%B3rdova%20case%20-%20Decision%20of%20September%201998.pdf). Acesso em: 18 out 2021

<sup>151</sup> NEIRA, Karinna Fernandez. Breve análisis de la jurisprudencia Chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar. **Estudios Constitucionales**, a. 8, n. 1, pp. 467-488, 2010, p. 473

<sup>152</sup> DE GONZAGA CAMILO, Guilherme Vitor. O papel do Sistema Interamericano de Direitos Humanos em face das leis de anistia. **Conjuntura Global**, v. 5, n. 3, 2017. <http://dx.doi.org/10.5380/cg.v5i3.50550>.

<sup>153</sup> BLANK, Dionis M.; FACHINI NETO, Eugênio. O Poder Judiciário e as leis de anistia latino-americanas: As experiências da Argentina, Chile e Brasil. **RIL**, Brasília, a. 56, n. 224, p. 11-36, out./dez. 2019, p. 29.

country's Supreme Court has made adjustments in order for it not to bar investigations and criminal prosecutions of those involved with crimes. For instance, in 2006, the Chilean Supreme Court understood in the case of Diana Frida Arón Svigilsky that the permanent crimes perpetrated under Pinochet's dictatorship were not prescriptible, and, in the same year, in the decision of the case of Hugo Vásquez Martínez and Mario Superby Jelders it also understood that crimes against humanity also shared such characteristic.<sup>154</sup> Because of this, "currently, there are no obstacles in Chile to punish human rights violations, except those related to procedural aspects".<sup>155</sup> Consequently, it can be said that international courts are very important for the implementation of peace and justice.

Besides, it should be mentioned that Chile also taken another important step towards the achievement of such goals, which is the erection of "*Museo de La Memoria y Los Derechos Humanos*", inaugurated in 2010 in Santiago, Chile's Capital. It reminds much the "*Yad Vashem Museum*" in Jerusalem dedicated to the Holocaust, as it not only highlights the truth of the facts of the dictatorship period, but it also keeps the memory alive with its exhibits regarding the violations of human rights perpetrated by the State.<sup>156</sup> Hence, it can be said that truth/memory promotion also plays an important role towards the implementation of peaceful societies.

#### **4) THE CASE OF PARAGUAY**

##### **A) BACKGROUND**

During the second half of the 20th century, Latin American states experienced institutional ruptures, authoritarian regimes and serious violations of human rights<sup>157</sup>. It also includes Paraguay, with the rise to power of General Alfredo Stroessner, who ruled the country for 35 years. The issue of violence in Paraguay is relevant, since the brutality that permeates the Stroessner dictatorship permeates the 1960s and 1970s, until its overthrow in the late 1980s (more specifically, in 1989).<sup>158</sup>

The context of General Alfredo Stroessner's dictatorship began with a *coup d'état* in the year of 1954. It was characterized by a climate of insecurity and fear, ostensibly violating the respect for human rights, especially regarding internal opponents and inside rivals<sup>159</sup>. The

---

<sup>154</sup> Ibidem, p. 478-479.

<sup>155</sup> ANGELO, op. cit., p. 4.

<sup>156</sup> CARVALHO, Bruno Leal Pastor de. Museu no Chile é referência em Direitos Humanos na América Latina. (Notícia). In: **Café História – história feita com cliques**. Disponível em: <https://www.cafehistoria.com.br/chile-memoria-e-direitos-humanos/>. Publicado em: 16 fev. 2011. Acesso em: 20 out. 2021.

<sup>157</sup> MARTINS CASAGRANDE, Melissa; CONTIN KOSIAK, Ana Carolina. Reparação jurídica e direito à memória: o papel das sentenças condenatórias internacionais e estrangeiras sobre desaparecimentos forçados. **História: Questões & Debates**, [S.l.], v. 68, n. 1, p. 135-170, dez. 2019. doi:<http://dx.doi.org/10.5380/his.v68i1.68863>.

<sup>158</sup> QUEIRÓZ, Fabio José Cavalcanti de. As inúmeras faces da violência ditatorial na América latina nos anos 1960 e 1970. **Revista Dialectus, Fortaleza**, ano 2, n. 7, p. 109, set./dez. 2015.

<sup>159</sup> ibidem.



guarantees of due process were also violated, as there were no judicial remedies for individuals in the face of the President's oppressive powers. The institutions during the dictatorship were inefficient as well, perpetuating impunity for human rights violations<sup>160</sup>

Much of these violent acts were uncovered in 1992 when documents of the Paraguayan police – later called “terror archives” – were found. These files prove the existence of Operation Condor, an articulation of dictatorial governments to fight their opponents using extreme violence<sup>161</sup>. These files contained details of the fate of thousands of people kidnapped, tortured or murdered by military dictatorships, confirming the existence of a conspiracy between the intelligence services of the Southern Cone nations<sup>162</sup>.

Most dictatorial governments in the Southern Cone took power or were in power during the 1970s, which allowed the repression against people known as “subversive elements” in the interstate sphere. The ideological support of all these regimes was the “doctrine of national security”, through which they identified left-wing movements and other groups such as “common enemies”, regardless of their nationality. Thousands of Southern Cone citizens sought to escape the repression of their countries of origin, taking refuge in bordering countries or even in Europe. Considering this, the dictatorships created a common “defense” strategy<sup>163</sup>. This operation was established by some countries to allow their repressive agencies to act without obstacles and in cooperation, with exchanges of information so that their objectives could be achieved<sup>164</sup>.

The archives also demonstrate the complicity of the Paraguayan police and government with the brutal repression carried out by the dictatorships of the member countries of the operation<sup>165</sup>. In the case of Paraguay, the Department of Military Intelligence was in control for the operational coordination of Operation Condor, whose responsibility was of then Colonel Benito Guanes Serrano. The police intelligence services supported the orders received from this department, with the operational function being entrusted to the Chief of Police Investigations, Pastor Milciades Coronel. Data collection was performed by police officers infiltrated in political, social and trade union organizations, student centers and all kinds of public or private organizations<sup>166</sup>.

In the case of *Goiburú and others vs. Paraguay*, the Inter-American Court of Human Rights established that the information services of several countries in the Southern Cone

---

<sup>160</sup> CORTE IDH. **Goiburú y otros vs. Paraguay**. Sentença de 22 de setembro de 2006. Série C, n. 153. Para. 61.1 to 61.4. Disponível em: <https://www.cnj.jus.br/wp-content/uploads/2016/04/15934c4d6d9ca1cf602e165fc5afa3cf.pdf>.

<sup>161</sup> QUEIROZ, op. cit.

<sup>162</sup> DE SOUZA, Fabiano Farias. Operação Condor: Terrorismo de Estado no Cone Sul das Américas. **Revista Aedos**, v. 3, n. 8, 2011. Disponível em: <https://seer.ufrgs.br/aedos/article/view/12769> Acesso em: 11 out. 2021.

<sup>163</sup> CORTE IDH. **Goiburú y otros vs. Paraguay**. Sentença de 22 de setembro de 2006. Série C, n. 153. Para. 61.5. Disponível em: <https://www.cnj.jus.br/wp-content/uploads/2016/04/15934c4d6d9ca1cf602e165fc5afa3cf.pdf>.

<sup>164</sup> SILVA, V. M. da; SANTOS, A. T. dos. Justiça de transição na América Latina e a proteção judicial: uma análise a partir de alguns casos da Corte Interamericana de Direitos Humanos. **Revista de Direito**, [S. l.], v. 13, n. 01, p. 01-32, 2021. DOI: 10.32361/2021130111323.

<sup>165</sup> DE SOUZA, op. cit.

<sup>166</sup> CORTE IDH. **Goiburú y otros vs. Paraguay**. Sentença de 22 de setembro de 2006. Série C, n. 153. Disponível em: <https://www.cnj.jus.br/wp-content/uploads/2016/04/15934c4d6d9ca1cf602e165fc5afa3cf.pdf>.

formed on the American continent, during the 1970s, an interstate organization intricately articulated with criminal purposes, whose content is still being revealed nowadays.<sup>167</sup>

## *B) THE CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

### *- Case: Goiburú et al. vs Paraguay (2006)*

The case refers to the alleged illegal and arbitrary detention, torture and forced disappearance of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro and of the siblings Rodolfo Feliciano and Benjamin de Jesús Ramirez Villalba, supposedly carried out by state agents between 1974 and 1977.<sup>168</sup>

Hence, the Inter-American Commission on Human Rights submitted a case to the Court against Paraguay in June 2005, requesting it to declare that the country violated the rights of personal freedom (article 7), personal integrity (article 5), and also the right to life (article 4) of Agustín Goiburú Gimenez, Carlos José Mancuello Bareiro and the siblings Rodolfo and Benjamin Villalba, all prescribed by the ACHR.<sup>169</sup> Moreover, it requested the Court to declare that Paraguay continuously violated judicial guarantees and judicial protection prescribed under articles 8 and 25 of the Convention, also in connection article 1(1).<sup>170</sup>

According to the case facts, doctor Agustín Goiburú Giménez was a Paraguayan physician, affiliated to the Colorado Party, and founder of a politician group opposed to Stroessner. The doctor had presented public reports about tortures, cruel and degrading treatments against Paraguayan citizens by the regime in his workplace, the Police Hospital "Rigoberto Caballero". Due to it, he was persecuted, being it the reason why he had to leave Paraguay<sup>171</sup>. Nevertheless, he was arbitrarily detained in Argentina by Paraguayan state agents; then he was taken to the Police Research Department, where he was kept uncommunicated, tortured and, thereafter forcedly disappeared.<sup>172</sup>

The disappearance of doctor Goiburú is a case that shows a coordinated action between the Paraguayan and Argentinian security forces, inside the Condor Operation. His disappearance fits the *modus operandi* through which Paraguayans disappeared in Argentina, during the military dictatorship in that country.<sup>173</sup> A similar case that showed such connection was of Mr. Carlos José Mancuello Bareiro, a Paraguayan citizen studying electromechanical engineering<sup>174</sup> that was detained at Paraguayan customs as he entered the country from

<sup>167</sup> PEREIRA, Vanuza Nunes. Verdade e Justiça entre Oposição e Complementariedade: apontamentos sobre as diferenças no tratamento da Operação Condor pela Justiça de Transição no Brasil e na Argentina. **Revista Sul-Americana de Ciência Política**, v. 5, n. 1, p. 89, 2019.

<sup>168</sup> *ibidem*. Para.2.

<sup>169</sup> CORTE IDH. **Goiburú y otros vs. Paraguay**. Sentença de 22 de setembro de 2006. Série C, n. 153. 1st par. Disponível em: <https://www.cnj.jus.br/wp-content/uploads/2016/04/15934c4d6d9ca1cf602e165fc5afa3cf.pdf>.

<sup>170</sup> *ibidem*. Para.1.

<sup>171</sup> *ibidem*. Para.61.15.

<sup>172</sup> *ibidem*. Para.2

<sup>173</sup> *ibidem*. Para.61.28.

<sup>174</sup> *ibidem*. Para.61.30.

Argentina with his wife and his eight-month-old daughter<sup>175</sup>. Another situation that highlights such operations is the case of Benjamín and Rodolfo Ramírez Villalba. They were also detained: the first entering the Paraguayan border from Argentina, and the second in the city of Asunción<sup>176</sup>.

Mr. Mancuello and the Ramírez Villalba brothers were accused of belonging "to a terrorist group preparing an attack on Stroessner", allegedly led by Dr. Goiburú<sup>177</sup>, were detained in the Department of Investigations, among other facilities. The alleged victims were detained for 22 months, and were subjected to torture during that period, being kept without communication, and later they were forcibly disappeared. According to the Commission, these events took place within a context "in which agents of the Paraguayan State illegally detained, held in a situation of uncommunication, tortured, killed and then concealed the remains of people whose political activities faced and opposed the regimen of Stroessner".<sup>178</sup>

In June 7th, 2005, after evaluating the petitioners' position, the Inter-American Commission decided to submit the present case to the jurisdiction of the Court, "in view of the State's failure to comply with the recommendations" included in Report No. 75/04.<sup>179</sup> However, surprisingly, in the present case, the State acknowledged its international responsibility both to the Commission and to the Court<sup>180</sup>. Due to this, the sentence rendered by the Court constitutes a way of contributing to the preservation of the historical memory of the region, and to the reparation to the victims' relatives regarding the truth of what happened in that specific time in history<sup>181</sup>. Besides, the State's acceptance of its responsibility boosts the consolidation of a comprehensive perspective of the gravity and of the continuous/permanent and autonomous character of the crime of forced disappearance.<sup>182</sup>

Specifically, the Court considered that the preparation and execution of the detention and subsequent torture and disappearance of the victims occurred because the State agents not only seriously failed in their duties to prevent and protect the rights of the alleged victims, but used their official investiture and resources granted by the State to perpetrate the said violations<sup>183</sup>. Moreover, the widespread impunity for the violations committed also instigated more violations from state-agents<sup>184</sup>. Hence, it found that the State was the main contributor to the perpetration of such crimes, representing a clear situation of "State terrorism"<sup>185</sup>.

The statements made by the alleged victims' relatives were useful in terms of the merits and reparations, as they provided more information on the consequences of the

---

<sup>175</sup> *ibidem*. Para.61.31.

<sup>176</sup> *ibidem*. Para.61.46.

<sup>177</sup> *ibidem*. Para.61.33 and 61.47.

<sup>178</sup> *ibidem*. Para. 3

<sup>179</sup> *ibidem*. Para. 12.

<sup>180</sup> *ibidem*. Para. 39and 40.

<sup>181</sup> *ibidem*. Para. 53.

<sup>182</sup> *ibidem*. Para. 81.

<sup>183</sup> *ibidem*. Para. 66.

<sup>184</sup> *ibidem*. Para. 88.

<sup>185</sup> *ibidem*. Para. 67.

violations they suffered.<sup>186</sup> The Court found that the victim's family members and heirs listed in the process<sup>187</sup> to be entitled to damages, fixing them in terms of equity and loss of income<sup>188</sup> as the records did not contain adequate evidence to accurately determine the income that the victims received at the time of the facts. Moreover, compensation for non-pecuniary damage was determined in accordance with the principle of equity too.<sup>189</sup>

Besides this, the Court demanded Paraguay to investigate the facts that led to the violations of human rights in this case, and to identify, prosecute and punish those responsible, including the promotion, by all means at its disposal, extradition requests that comply with the pertinent internal rules or international law.<sup>190</sup> Not only that, it also demanded Paraguay to search and burial of the remains of Mr. Giménez, Mr. Bareiro and the Villalba brothers, as it constitutes a measure of reparation and, therefore, an expectation that the State must present to the victims' relatives.<sup>191</sup> Relating to this, Paraguay was ordered to pay for any treatment that seeks to reduce the physical and psychological suffering of family members too.<sup>192</sup>

Another measure prescribed by the Court to Paraguay was to publicly acknowledge its responsibility as a measure to preserve the victims' memory as well as to serve as a guarantee of non-repetition<sup>193</sup>. Besides, it was order to publish the sentence in the Official Gazette and in another newspaper with wide national circulation<sup>194</sup>. Another important measure prescribed by the Court was for Paraguay to build a monument in memory of the missing victims<sup>195</sup>, and to promote human rights education within the Paraguayan police forces at all hierarchical levels<sup>196</sup>. Finally, the last measure prescribed by the Court was for Paraguay to adapt its domestic legislation to international standards, more precisely, to define the crimes of torture and forced disappearance of persons in its Penal Code (what was later included in Articles 236 and 309 of the current Penal Code<sup>197</sup>).

### *C) AMNESTY LAWS*

The 20th century in Latin America was marked by intense periods of authoritarianism and armed conflicts, which promoted or did not act against various human rights violations<sup>198</sup>. Paraguay was not different: arbitrary detentions, tortures, disappearances and executions

---

<sup>186</sup> *ibidem*. Para. 59

<sup>187</sup> *ibidem*. Para. 139 and 145 to 147.

<sup>188</sup> *ibidem*. Para. 150 and 155.

<sup>189</sup> *ibidem*. Para. 156 and 160.

<sup>190</sup> *ibidem*. Para. 123 and 132 and 164 to 166.

<sup>191</sup> *ibidem*. Para. 172.

<sup>192</sup> *ibidem*. Para. 176.

<sup>193</sup> *ibidem*. Para. 173.

<sup>194</sup> *ibidem*. Para. 175.

<sup>195</sup> *ibidem* Para. 3 and 177.

<sup>196</sup> *ibidem*. Para. 178.

<sup>197</sup> *ibidem*. Para. 179.

<sup>198</sup> SILVA; SANTOS, *op. cit.*

are examples of actions seen during Stroessner dictatorship.<sup>199</sup>

Nevertheless, no Amnesty Law was created in Paraguay hindering reparations for such atrocities. Paraguay refrained from approving amnesty laws and recognized, in its own National Constitution of 1992, the non-application of prescription to crimes against humanity.<sup>200</sup>

Hence, in the country, in order for reparations to be effective, publicity and public access to documents as well as a broad and significant policy of memory and access to the truth were highlighted and have been taken up, mainly, from court decisions.<sup>201</sup> Besides, in 1996, the Legislative Branch of Paraguay enacted the Law no. 838/96 in order to compensate victims of human rights violations for political or ideological reasons that occurred during the dictatorship<sup>202</sup>. Moreover, in 2006, Law no. 2225/06 was enacted "through which the Truth and Justice Commission was created", to "investigate facts that constitute or may constitute human rights violations committed by state or parastatal agents between May 1954 until the enactment of the Law and recommend the adoption of measures to prevent them from recurring, to consolidate a democratic and social state of law with full respect for human rights and to foster a culture of peace, solidarity and agreement among Paraguayans"<sup>203</sup>.

Such measures demonstrate the State's recognition of serious human rights violations and a willingness to investigate and redress certain consequences.

The transparency and the institution of truths by the State itself are important aspects of political life and *that need to be observed and guaranteed in a project to rebuild an inclusive society when an authoritarian regime is replaced by a democratic one*. Also, according to the author, an ideal transition to democracy must be open, transparent, and true, and offer people who suffered under the guard of repressive states answers to their many questions about the conduct of the regime.<sup>204</sup> (emphasis added)

Hence, it may be said that Paraguay though its transitional justice has promoted justice, peace and inclusive society.

#### *D) CONCLUSIONS IN REGARD TO PARAGUAY'S TRANSITIONAL JUSTICE*

Some countries that through political transition to democracy require transitional justice processes in order to face past violations.<sup>205</sup> Among the set of measures and

<sup>199</sup> CORTE IDH. **Goiburú y otros vs. Paraguay**. Sentença de 22 de setembro de 2006. Série C, n. 153. Paragraph 62. Disponível em: <https://www.cnj.jus.br/wp-content/uploads/2016/04/15934c4d6d9ca1cf602e165fc5afa3cf.pdf>.

<sup>200</sup> Ibidem. Para. 68.

<sup>201</sup> MARTINS CASAGRANDE; CONTIN KOSIAK, op. cit.

<sup>202</sup> CORTE IDH . **Goiburú y otros vs. Paraguay**. Sentença de 22 de setembro de 2006. Série C, n. 153. Par 61.123. Disponível em: <https://www.cnj.jus.br/wp-content/uploads/2016/04/15934c4d6d9ca1cf602e165fc5afa3cf.pdf>.

<sup>203</sup> ibidem. Para. 61.124.

<sup>204</sup> MALAMUD GOTI, Jaime. Dignity, Vengeance, and Fostering Democracy. University of Miami Inter-American Law Review, v.29, n.3, p. 417-449, 1998 apud PEREIRA, Vanuza Nunes. Verdade e Justiça entre Oposição e Complementariedade: apontamentos sobre as diferenças no tratamento da Operação Condor pela Justiça de Transição no Brasil e na Argentina. **Revista Sul-Americana de Ciência Política**, v. 5, n. 1, p. 90, 2019.

<sup>205</sup> SILVA; SANTOS, op cit.

mechanisms established by the transitional justice, the following stand out: the right to memory and the truth; institutional reforms (removals from the public service); reparations to victims and justice/criminal accountability (for example, individual trials for crimes against humanity committed in the authoritarian period).<sup>206</sup> The Inter-American Court encourages them.<sup>207</sup>

In the case of *Goiburú et al. v. Paraguay*, the Court encouraged the judgment verdict as a way of contributing to the preservation of historical memory, reparation for the victims' families, and as a reinforcement to prevent similar events from happening again.<sup>208</sup> It also ordered Paraguay to carry out a public act recognizing its responsibility as part of the reparation for the preservation of memory and the guarantee of non-repetition, "[...] revealing to the victims, their families and society everything that can be reliably established about these events".<sup>209</sup>

The institutional search for truth is weakened when it is not considered as part of the recognition of the State's responsibility and its duty of comprehensive reparation, but it can be enhanced as a measure of collective memory reconstruction when associated with criminal justice.<sup>210</sup> In this way, the right to the truth may be the "necessary investigation so that the circumstances of serious human rights violations, occurring amid situations of massive violence in society, [...] can be clarified and known, as well as the authors and victims of such atrocities".<sup>211</sup>

In this way, it is noticeable how the Inter-American Human Rights System has been essential in the context of transitional justice in South America, allowing the assessment through judgments of those responsible for human rights violations as a way of bringing about justice and peace.

## **5) THE CASE OF PERU**

### **A) BACKGROUND**

Peru also went through a period of military dictatorship in the second half of the 20<sup>th</sup> century, more precisely between 1968-1980. However, the Peruvian's experience at this

---

<sup>206</sup> PEREIRA, op cit., p. 90.

<sup>207</sup> DE GONZAGA CAMILO, Guilherme Vitor. O papel do Sistema Interamericano de Direitos Humanos em face das leis de anistia. **Conjuntura Global**, v. 5, n. 3, 2017. <http://dx.doi.org/10.5380/cg.v5i3.50550>

<sup>208</sup> MARTINS CASAGRANDE; CONTIN KOSIAK, op cit, p. 162.

<sup>209</sup> MÉNDEZ, Juan. Accountability for past abuses. The Helen Kellogg Institute for International Studies. **Working Paper n. 233**, sept. 1996. Disponível em: <http://kellogg.nd.edu/publications/workingpapers/WPS/233.pdf>. Acesso em: 18 abr. 2019 apud PEREIRA, op cit., p. 90.

<sup>210</sup> JARDIM, Tarciso Dal Maso. A atuação dos tribunais internacionais frente ao tema da anistia e da comissão da verdade. **Revista da Faculdade de Direito da UFMG**, Número Especial: Jornadas Jurídicas Brasil-Canadá, pp. 275 - 298, 2013, p. 297.

<sup>211</sup> SILVA FILHO, José Carlos M. **Justiça de Transição**: da ditadura civil-militar ao debate justransicional: direito à memória e à verdade e os caminhos da reparação e da anistia do Brasil. Porto Alegre: Livraria do Advogado Editora, 2015.

period was distinct, because of two different governmental plans imposed by the rulers. The first one, led by general Juan Valesco Alvarado (1968-1975), who promised the promotion of capitalist development; and the second, after Alvarado's deposition, led by Francisco Morales Bermúdez (1975-1980), who implemented an austerity economic policy.

Beyond the economic and political problems imposed by the dictatorial regimes, subversive groups emerged during the military government, being *Sendero Luminoso* the most famous one. As a group with Maoist's orientation, *Sendero Luminoso* was characterized for extensive use of violence<sup>212</sup> and considered as a terrorist party that threatened the country's stability. Therefore, in an exercise to maintain internal security, the State used of legislative acts to attempt contain terrorist acts. For instance, through the Decree-Law N° 25.418 on April 6, 1992, it was instituted the "*Gobierno de Emergencia y Reconstrucción Nacional*"<sup>213</sup> and modified the Peruvian Constitution in an endeavor to curb terrorism. Nevertheless, it allowed for human rights violations<sup>214</sup>, being it no different than the other authoritarian regimes of neighboring states.

## *B) THE CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

### *- Case 1: Pollo Rivera et al. vs Peru (2016)*

The Case Pollo Rivera and Others vs. Peru was motivated by the allegations of rights violations suffered by Mr. Pollo Rivera due to the State conduct in the period of "*Gobierno de Emergencia y Reconstrucción Nacional*" for the conditions of his arrest, the judicial process, the state responsibility towards his health, and the consequences of these actions in regard to his relatives.<sup>215</sup> The State was judged by the Inter-American Court regarding the violations of the rights prescribed under articles 5, 7, 8, 9, 11 and 25 of the ACHR, and the articles 1, 6 and 8 of the Interamerican Convention to Prevent and Punish Torture.

Luis Willians Pollo Rivera was a surgeon with traumatology and orthoepy specialization. So, in regard to his profession, he was supposed to provide medical care for everyone. Although, on November 4<sup>th</sup>, 1992, he was arrested by DINCOTE<sup>216</sup> officers during his work at his office with the accusation of collaborating with terrorism and treason as he attended *Sendero Luminoso* members. This act was the first of a series rights violations

<sup>212</sup> BERTONHA, J. F. Sendero Luminoso: ascensão e queda de um grupo guerrilheiro. Revista Espaço Acadêmico, v. 1, n. 03, 21 out. 2017

<sup>213</sup> "Art. 1 - The Constitutional President of the Republic, temporarily institutes the Government of Emergency and National Reconstruction, the same one that is governed in accordance with the scope of this Decree Law. The grounds that support this decision are specified in the Manifesto to the Nation of April 5, 1992, a document that is part of this regulation" (PERU. **Decree-Law n° 25,418**. Lima, 6 de abril de 1992, p. 501-504, 6 abr. 1992. Disponível em: <https://archivos.juridicas.unam.mx/www/bjv/libros/5/2205/48.pdf>. Access: 13 oct. 2021).

<sup>214</sup> Ibidem, Art 6.

<sup>215</sup> CORTE IDH. **Pollo Rivera y Otros Vs. Perú**. Sentencia 21 oct. 2016 (Fondo, Reparaciones y Costas), 2016. Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_319\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_319_esp.pdf). Access on: 10/01/2021.

<sup>216</sup> Article 1. "*La Dirección Nacional Contra el Terrorismo* (DINCOTE) is the systemic body in charge of prevent, investigate, denounce and combat terrorism activities and treason against fatherland provided for Decree-Law 25659. It is in charge of a General Officer of PNP" (PERU. **Decree-Law n° 25,744**. Lima, 21 de setembro de 1992).

against Mr. Pollo Rivera. The second one was that the arrest of Mr. Pollo Rivera at his office happened without a court order or due to flagrant criminal conduct, not being appropriately notified of the reason of his arrest either. Besides, he was kept arrested for a period longer than 15 days that the general law prescribed due to the accusations of terrorism and treason presented against him. In addition to it, the third violation concerned a search and seizure conducted by DINCOTE officers at his house and office on the same day he was arrested, but without a search warrant, due to the suspension of his individual rights. Due to the fact that this action was carried out in front of his relatives, they were included in the suit as victims.<sup>217</sup>

The Court considered that the general rule must be the freedom of the accused during the criminal process, so, inasmuch as the State keep him arrested without a court order that expressed the necessity for the preventive prison, incurred in a violation of article 7 (Right to Personal Liberty) of the ACHR, for what Peru was declared held responsible. Concerning the illegal entrance in his house and office, the Court determined that the State violated article 11(2) of the ACHR regarding private life, even though the state presented a justification for it.<sup>218</sup>

The conditions of Mr. Pollo Rivera's arrest also consisted of a wide violation of human rights, beginning by the incommunicability imposed by the Decree-Law 25,454 and Decree-Law 25,744 towards suspects of terrorism and treason. The Court claimed the State behavior toward the prisoner to be a degrading and inhumane condition. Secondly, during the preventive arrest, Mr. Pollo Rivera was a victim of torture by DINCOTE officers, causing posttraumatic disturbance on his back. Such actions were perpetrated by DINCOTE agents in an attempt to obtain information on *Sendero Luminoso* since he was considered to be one of its members, what, in fact, also violated the ACHR in the opinion of the Court as there was no the presumption of innocence.<sup>219</sup>

Although in November 1994 the *Juzgado Especializado en Casos de Terrorismo de la Corte Superior de Justicia de Lima*, rendered an acquittal to the benefit of Mr. Pollo Rivera and determined his release, the information obtained was used before the Peruvian Military Court to convict him to a life sentence, what was considered illegal by the Inter-American Court as no one is obligated to produce proof against oneself, especially through torture. Hence, Peru was declared responsible for these violations to the personal integrity recognized by articles 5.1 and 5.2 of the ACHR, and articles 1, 6 and, 8 of Interamerican Convention to Prevent and Punish Torture.<sup>220</sup>

It should be noted that Mr. Pollo Rivera was judged through "*jueces sin rostro*" – a practice to preserve the identity of the judges of cases of terrorism and treason. The Inter-American Court considered this to be controversial, precisely because of articles 8(1), 8(2)(b)

---

<sup>217</sup> CORTE IDH. **Pollo Rivera y Otros Vs. Perú**. Sentencia 21 oct. 2016 (Fondo, Reparaciones y Costas), 2016. Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_319\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_319_esp.pdf). Access on: 10/01/2021.

<sup>218</sup> Ibidem.

<sup>219</sup> Ibidem.

<sup>220</sup> Ibidem.



(f)(g) and 8(5) of the ACHR concerning fair trial due to the unknowledge of the judges' identity, and due process as the procedure violated the presumption of innocence, fair hearing, and transparency. Moreover, articles 7(1) and 7(6) of the ACHR were also considered to be violated since there was no possibility to filing *habeas corpus* on his behalf.<sup>221</sup>

The sentenced was partially served at *Dos de Mayo* Hospital due to his health conditions. He was a beneficiary of *Seguro Integral de Salud* (SIS), the State attributed the costs of his treatments to his family. Hence, his relatives alleged that the violations suffered by him affected all the family in material and immaterial aspects: the former relates to the costs of the hospital bills, and the latter relates to deprivation of his sons of family living during their childhood.<sup>222</sup>

Therefore, when it comes to reparation, the State was ordered to pay US\$ 305.000.000 to the family. Besides, the Court asked Peru to continue the investigations in course concerning the acts of torture, inhuman and degrading treatment suffered by Mr. Pollo Rivera, and to carry out the proper procedure and punish those responsible.<sup>223</sup>

- *Case 2: Terrones Silva et al. vs Peru (2018)*

The case *Terrones Silva and others vs Peru* relates to five situations that were brought before the Inter-American Court of Human Rights between August 1992 and June 2003. More precisely, it regards the disappearance of five people: Santiago Antezana Cuento, Néstor Rojas Medina, Teresa Días Aparicio, Wilfredo Terrones Silva and Clory Clodolia Tenicela Tello.<sup>224</sup>

All of them went missing between 1984 and 1992. In this period of time, Peru was under a dictatorial regime, which had a strict policy against the 'terrorists' from *Sendero Luminoso*. This policy consisted in the generalized and systematic torture and forced disappearances of people who had connections with or were sympathetic towards the that group, or other terrorists' groups as such considered by the Peruvian State, like the Revolutionary Movement Tupac Amaru. According to the Court, the practices had three main objectives: (1) to gather information on suspects for the State; (2) to eliminate the suspects and assuring State impunity; and (3) to intimidate the population, forcing them to support the government.<sup>225</sup>

The Commission asked the Court to declare Peru responsible for delaying the investigations that aimed to find Cuento, Medina, Aparicio, Silva and Tello, and for torturing Cuento, thus, also and violating his personal integrity, judicial guarantees and the availability

---

<sup>221</sup> Ibidem.

<sup>222</sup> Ibidem

<sup>223</sup> Ibidem.

<sup>224</sup> CORTE IDH. **Terrones Silva et al. vs Peru**. Sentença de 26 set. 2018 (exceções preliminares, Mérito, Reparações e Custas). Disponível em: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_360\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_360_esp.pdf). Acesso em: 18 out. 2021

<sup>225</sup> Ibidem, pág. 17, para. 14.

of an effective judicial remedy. Moreover, it demanded the conviction of Peru regarding articles 1 and 3 of the Inter-American Convention on Forced Disappearance of Persons and regarding articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.<sup>226</sup>

Even though Peru argued the cases had not exhausted all the local remedies as it is demanded by the ACHR for petitioning to the System, the Court understood that it was clear that the State was delaying the investigations by not making the necessary effort for its resolution. In addition, based on the evidence gathered, the Court found that the State was hiding or making it difficult to access the information requested by the relatives of the victims thus showing no due process or transparency.<sup>227</sup>

Besides, the Court also highlighted the permanent/continuous character of the crimes of forced disappearance, dismissing the non-exhaustion clause allegation, after all, the corpses had not yet been located. Mr. Silva, lawyer, went missing in 26 August 1992; Ms. Aparicio, sociology professor, went missing on 19 August 1992; Ms. Tello, student of Chemical Engineering, went missing in 1992; Mr. Medina, student of radio broadcasting, went missing in 1991; and Mr. Cuento, merchant in Lima, went missing in 1984. No information regarding their remains were made available by the State through either *habeas corpus* (considering the inexistence of a proper remedy) or through formal complains made to the Prosecutor's Office specialized in forced disappearances. Therefore, the Court found Peru responsible for violating the rights of juridical personality (article 3), life (article 4), personal integrity (article 5) and freedom (article 7) of the 5 victims in this case. In addition, it understood Peru also violated article 1(a) of the Inter-American Convention on Forced Disappearance of Persons.<sup>228</sup>

As a consequence, it demanded Peru to bring closure to the cases that are still open by thoroughly investigating them, since the relatives of the victims have the right to know the truth about what happened to their loved ones. And concerning this, the Court also understood Peru violated the right of personal integrity of the family members of the victims (article 5.1 and 1.1 of the ACHR). In regard to reparation, the determined the State to give all relatives proper psychological treatment to deal with the suffering inflicted by the forced disappearance of their loved ones.<sup>229</sup>

And when it comes to the perpetration of torture of Mr. Cuento, the Court understood that, although Peru was not a party to the Inter-American Convention to Prevent and Punish Torture at the time of the events, consequently hindering its analysis by the Court, the lack of investigation over the fact was clear, being Peru found also responsible for not providing due process and transparent information, as demanded by articles 8(1) and 25(1) of the ACHR and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. Nevertheless, it should be highlighted, as did the Court, that the main suspect of perpetrating

---

<sup>226</sup> Ibidem

<sup>227</sup> Ibidem

<sup>228</sup> Ibidem

<sup>229</sup> Ibidem

such acts was convicted in 2013 in Peru, being sentenced to 14 years in prison, albeit he escaped and his current whereabouts remains unknown. However, because of this, it also demanded Peru to find the necessary means to execute the sentence against Mr. Cuento torturer.<sup>230</sup>

Besides having to pay damages to the relatives of the victims regarding material and immaterial damages and to pay punitive damages to the Victims Legal Assistance Funds, the State was demanded to publicly recognize its crimes, offering ceremonies in honor of the victims with the participation of their relatives. Particularly to Ms. Aparicio, the State was ordered to inaugurate a memory stone or plaque in her honor at the *Universidad Nacional Mayor de San Marcos*.<sup>231</sup>

### C) AMNESTY LAWS

In Peru, two Amnesty Laws were implemented. The first one, Law no. 26,479 dated of 16 June 1995 prescribed that all military, police officers and civilians that were being prosecuted or investigated due to or as a consequence of the fight against terrorism since May 1980 were to be amnestied.

In applying this law, the few public officials charged with enforcing the law who had been convicted of torture, enforced disappearances and extrajudicial executions were set free. The Commission considers that, precisely, a serious and impartial investigation is the most effective means to establish the innocence of people who may have been wrongly accused.<sup>232</sup>

This law was the center of the debate of another prestigious case brought before the Inter-American Court of Human Rights against Peru: *Barrios Altos*, whose sentence is dated of March 14<sup>th</sup> 2001.<sup>233</sup> During the domestic proceedings regarding the facts of this case that led to the petition before the Inter-American System, judge Antonia Saquicuray, taking into consideration the Peruvian constitutional prescriptions that they cannot apply any law that is deemed to violate it, decided that such amnesty law could not be applicable to criminal proceedings regarding the massacre of *Barrios Altos*.<sup>234</sup>

Nevertheless, because of her determination towards justice, the Peruvian Congress approved a second Amnesty Law, Law no. 26,492, on June 14<sup>th</sup> 1995 (it became effective the following day, after the presidential sanction), without public debate prescribing that these laws could not go through any judicial review. "The effect of that law was to determine the definitive filing of judicial investigations and thus avoid the criminal responsibility of the

---

<sup>230</sup> Ibidem

<sup>231</sup> Ibidem

<sup>232</sup> CIDH. **Annual Report - part V**: the development of human rights in the region. Washington D.C.: OAS, 1996. Available at: <https://cidh.oas.org/annualrep/96port/96portcap5.4.htm>. Access on: 20 oct. 2021

<sup>233</sup> CORTE IDH. **Barrios Altos Vs. Peru**. Sentença de 14 de março de 2001 (Mérito). Disponível em: <https://www.cnj.jus.br/wp-content/uploads/2016/04/092b2fec1ad5039b26ab5f98c3f92118.pdf>. Acesso em: 20 out. 2021

<sup>234</sup> Ibidem, p. 4.

responsible for the massacre".<sup>235</sup> The case was then archived on June 30<sup>th</sup> 1995, leading not only to the release of the accused who were imprisoned as well as to the submission of such case before the System.

It is important to mention that in that case, Peru, in 2001, admitted its international accountability, leading to the cessation of the controversy among the parties, but not without first affirming that "it is unquestionable that the surviving victims, their relatives and relatives of the victims who died were *prevented from knowing the truth* about the facts that occurred in Barrios Altos" (emphasis added)<sup>236</sup>, and that:

As a result of the manifest incompatibility between the laws of self-amnesty and the American Convention on Human Rights, *the aforementioned laws lack legal effects and cannot represent an obstacle to the investigation of the facts of this case*, nor for the identification and punishment of the responsible, nor can they have the same or similar impact in other cases that occurred in the Peru concerning the violation of rights enshrined in the American Convention.<sup>237</sup> (emphasis added)

This was a very important decision that led to the invalidity of such laws in Peru, and paved the way for justice and peace within the country.

#### *D) CONCLUSIONS IN REGARD TO PERU'S TRANSITIONAL JUSTICE*

Transitional justice can be defined as the legal apparatus in which the State judges and punishes the violations of the human rights perpetrated in a previous dictatorial regime or internal armed conflict.<sup>238</sup> To the implementation and function of this kind of apparatus many different factors are needed. In Peru, some of them were erected in a quite unique way, leading to a wide and generalized change in various levels of power.

Augusto Fujimore only resigned in 2000, when he fled the country. This was what made it possible for Peru to establish a democratic regime and promote a series of transitional actios. Among them, is the creation of the Commission for Truth and Reconciliation, introduced by the new president, Valentín Paniagua. The main objective of this Commission was to study the reason why these violations happened, contribute to the investigations regarding the victims of the regime, and recommend changes in order to prevent violations of the same nature.<sup>239</sup>

Furthermore, considering that during the 1980's and 1990's, Peru was under authoritarian regime that perpetrated a variety of crimes against humanity, as per forced disappearance, murder and torture, and that the judiciary was an accomplice of these crimes,

---

<sup>235</sup> Idem.

<sup>236</sup> Ibidem, p. 16, para. 47

<sup>237</sup> Ibidem, p. 15, para. 44

<sup>238</sup> BERNARDI, B. B. O Sistema Interamericano de Direitos Humanos e a Justiça de Transição no Peru. **Revista de Sociologia e Política**, v. 23, n. 54, p. 43-68, jun. 2015

<sup>239</sup> PERU. **Comisión de la Verdad y Reconciliación**: objetivos. s/d. Disponible en: <<https://www.cverdad.org.pe/lacomision/nlabor/objetivos.php>>. Acesso em : 15 de Out. 2021

as many of them went unpunished (as it was shown, for instance, in the aforementioned 2018 case against Peru before the Inter-American Court), thus, encouraging the continuity of violence and repression, a major renovation in the judiciary branch was deemed imperative. And it took place with a strict evaluation of the judges who had turned a blind eye to the human rights violations that happened during the 80's and 90's, and the removal of those who defended the previous government.

Besides, with the support of the jurisprudence of the Inter-American Court against Peru, several lawsuits were opened and many trials were held. Between 2005 and 2012, 46 sentences were issued, leading to 26 acquittals, 9 convictions and 11 with both acquittals and convictions. This, in fact, is deemed to be a very important fact for the transitional justice in Peru, especially because, perhaps, if it were not the Barrios Altos case of 2001, the Amnesty Laws could still be in effect.

## **6) THE CASE OF URUGUAY**

### **A) BACKGROUND**

For a long time, Uruguay experienced a conflicting scenario in its domestic policy. Until 1972, this conflict was raised by the State forces and the guerrilla group called "*Movimiento de Libertación Nacional – Tupamaros*" (MLN-T), that was created by Raúl Sendic during the 1960's. With an economic policy crisis, to the point of demanding the help of the International Monetary Fund, as well as visits by US leaders, followed by Cuban leaders, the guerrillas reached their target audience and the anti-imperialist movement grew, establishing a scenario of political, social, and economic crisis.<sup>240</sup>

Then, in June of 1973 the Uruguayan civil-military dictatorship began, promoted by the president elected at that time, Juan María Bordaberry.<sup>241</sup> Ten days after ascending to power, Bordaberry created the "*Consejo de Seguridad Nacional*" (COSENA) integrating the government into the military command. In that same year, the president closed the legislative palace and extinguished the Chambers of Representatives.

Therefore, the Armed Forces were responsible for public services, and the "Council of State" was created to assume legislative duties.<sup>242</sup> The rise of military power was only a result of a long process related to the growth of authoritarian leaders, who felt pressured by the changes demanded by the people, which they couldn't find good solutions to. Therefore, the

---

<sup>240</sup> USP. **Histórico da Ditadura Civil-Militar do Uruguai**. Memória e Resistência. Disponível em: <[http://www.usp.br/memoriaeresistencia/?page\\_id=294](http://www.usp.br/memoriaeresistencia/?page_id=294)>. Acesso em: 10 Oct. 2021.

<sup>241</sup> PADRÓS, Enrique Serra. **Como el Uruguay no hay... Terror de Estado Nacional Uruguai (1968-1985): do Pachecato à Ditadura Civil-Militar**. Tomo 1. Porto Alegre, p. 376, 2005.

<sup>242</sup> USP. **Histórico da Ditadura Civil-Militar do Uruguai**. Memória e Resistência. Disponível em: <[http://www.usp.br/memoriaeresistencia/?page\\_id=294](http://www.usp.br/memoriaeresistencia/?page_id=294)>. Acesso em: 10 Oct. 2021.

new regime had a large influence from the Armed Forces, taking place from 1973 to 1984.<sup>243</sup>

The Uruguayan dictatorship can be separated into three different periods. The first one is described as being when the coup was done and years after, in 1976, Bordaberry was removed from the presidency by the Armed Forces. This moment is distinguished by its implementation of the disciplinary order. Then, the second period is when the new regime had absolute power over the changes being made in the country, which allows the military to control the social and political aspects from new political structures. In 1980, we could see the last period of the dictatorship, characterized as the moment of transition and political negotiations. This last moment, which started four years before the end of the military *coup*, was a turning point that allowed the re-democratization of the country.<sup>244</sup>

Years later, the Uruguayan people can still feel the results of the dictatorship, since a lot of people who suffered directly and indirectly from the violations perpetrated by the authoritarian regime have never had justice.

## *B) THE CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

### *- Case: Gelman vs. Uruguay (2011)*

On January 21<sup>st</sup> of 2010, the Inter-American Commission of Human Rights received a petition against Uruguay related to the case of Gelman.<sup>245</sup> This matter was associated with Gilman's family suffering due to the disappearance of María Claudia García Iruretagoyena de Gelman after being arrested in 1976, while pregnant. Supposedly, she was taken to Uruguay and had given birth to her baby; however, nobody had seen her until the present day.<sup>246</sup>

Consequently, the Commission requested the Court to declare Uruguay responsible for the human rights violations in the context of Ms. Gelman disappearance. They were:

[...] the right to judicial guarantees and judicial protection; rights to legal personality, life, personal integrity, personal freedom and the obligation to sanction these violations seriously and effectively; of the right to personal integrity; rights to recognition of legal personality, protection of honor and dignity, name, special measures for the protection of children and nationality; of the right to the protection of the family.<sup>247</sup>

Therefore, the Commission asked the Court for the following remedial measures: the declaration that the State failed to protect Ms. Gelman as well as to prevent and investigate the violence she have suffered; and also, the claim that Ms. Gelman, her family and the Uruguayan people underwent violation of the right to the truth. These requests were based

---

<sup>243</sup> PADRÓS, op. cit, p. 376.

<sup>244</sup> *ibidem*, p. 377.

<sup>245</sup> CORTE IDH. **Gelman vs. Uruguai**. Sentença de 24 fev. 2011. Disponível em: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_221\\_por.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_por.doc)>. Acesso em: 10 Oct. 2021. Parágrafo 1.

<sup>246</sup> *ibidem*. Para. 2.

<sup>247</sup> *ibidem*. Para. 3.

on Article 7(b) of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, besides Articles 1.1, 13, 8 and 25 of the ACHR.<sup>248</sup>

In August 2010, however, Uruguay recognized the human rights violation regarding Ms. Gelman and María Macarena de Gelman García during the dictatorship.<sup>249</sup> It also recognized that Juan Gelman was another victim affected by the crimes that occurred in that period.<sup>250</sup> Nevertheless, the State made sure to reassure its sovereignty, reminding the Court that its internal law would determine the accuracy of the facts as well as the recognition of these crimes.<sup>251</sup>

In the end, the Court considered Ms. Gelman, María Macarena Gelman, and Juan Gelman as the injured party in this case. In chapter VII (“Reparations”) of the sentence, it was determined that the Uruguayan State had the obligation to investigate the facts and identify, judge, and punish those responsible for the crime while adapting internal legislation to reach justice.<sup>252</sup> Besides, the Court urged the State to find the whereabouts of the victim (Ms. Gelman), giving the family the proper moment of grief, where they could bury her and say their goodbyes according to their beliefs.<sup>253</sup> Because of its Amnesty Law, considered valid in Uruguay, the Court ordered the State to prevent this law from interfering in the investigation, being responsible to lead the most effective search possible.<sup>254</sup>

Concerning the financial indemnity, the Court awarded U\$5,000 to de María Macarena Gelman for her expenses while looking for her mother.<sup>255</sup> As for Ms. Gelman, it was decided that the State should give an amount of U\$300.000 to her family, since she, according to what was estimated, was supposed to live for over the age of 72 years old, while receiving payment based on her work and academic formation.<sup>256</sup> Moreover, an amount of U\$250.000 was awarded specifically to María Macarena Gelman, heir of María Claudia.<sup>257</sup>

### *C) AMNESTY LAWS*

Uruguay has an Amnesty Law, which is closely related to transitional justice in the country. This law established the prescription of the exercise of punitive claims made by the State in cases related to crimes committed during the dictatorship (1976 to 1985). After this law had been enacted, many victims sought justice against the actions of the State during that period of the military government, looking for economic compensation. A lot of these victims were kidnapped, tortured, or had their family members gone missing or killed. They

---

<sup>248</sup> *ibidem*. Para. 4.

<sup>249</sup> *ibidem*. Para. 5.

<sup>250</sup> *Ibidem*. Para. 19.

<sup>251</sup> *Ibidem*. Para. 21.

<sup>252</sup> *Ibidem*. Para. 249.

<sup>253</sup> *Ibidem*. Para. 257.

<sup>254</sup> *Ibidem*. Para. 253.

<sup>255</sup> *Ibidem*. Para. 291.

<sup>256</sup> *Ibidem*. Para. 292 e 293.

<sup>257</sup> *Ibidem*. Para. 295.

claimed that the Law violated the ACHR and when the State failed to revoke this law, it raised a lot of criticism coming from the society and, especially, the human rights activists.<sup>258</sup>

But different from the other presidents, Tabaré Vázquez allowed justice to be made on over 25 cases related to the military period, and, in 2006, six military officers and two police officers were prosecuted due to eight missing Uruguayans. However, there were still problems connected to prosecuting military people, and the people with the human rights defenders called out for changes and a review of the Amnesty Law.<sup>259</sup>

In 2009, the Supreme Court of Justice changed the system, by saying that articles 1, 3, and 4 of the said Amnesty Law were unconstitutional. They violated not only the Constitution but also many international treaties and human laws Uruguay was part of. Then, two years later, in February 2011, the Court decided that laws such as the Amnesty Law (*Ley de Caducidad*) go against the Inter-American Court of Human Rights precedents, and because of that, the country should punish its perpetrators.<sup>260</sup>

#### *D) CONCLUSIONS IN REGARD TO URUGUAY'S TRANSITIONAL JUSTICE*

The Amnesty Law is a symbol of the remaining power of the military government and the failure to seek justice for the people that suffered during the years of dictatorship. The greatest problem in Uruguay was that this law was passed under a democratic-president ruling, making it difficult to believe that this administration was against the actions perpetrated under the authoritarian regime, thus, directly influencing the mindset of the people.<sup>261</sup>

Hence, the 2009 and 2011 changes promoted by the Uruguayan Judiciary should be seen as a step forward to peace and justice. Moreover, once more the influence of the Inter-American Court shall be highlighted since its decisions were at the basis of the arguments put forward by the Supreme Court of Justice in order to say that legal proceedings shall be initiated against human rights violations perpetrators.

### **7) THE CASE OF LIBYA**

#### *A) BACKGROUND*

On 26 February 2011, the United Nations Security Council (UNSC) referred the situation in Libya to the International Criminal Court through Resolution 1970 (2011), giving

---

<sup>258</sup> AFP. Entenda a polêmica lei de anistia da ditadura uruguaia, recém-revogada. **G1**, 27 out. 2011. Disponível em: <<http://g1.globo.com/mundo/noticia/2011/10/a-polemica-lei-de-anistia-que-evitou-julgamentos-por-dh-em-ditadura-uruguaia.html>>. Acesso em: 10 Oct. 2021.

<sup>259</sup> *ibidem*.

<sup>260</sup> *ibidem*.

<sup>261</sup> *ibidem*.



the Court jurisdiction to entertain the situation and alleged crimes that happened there.<sup>262</sup> Accordingly, the UNSC did so “condemning the violence and use of force against civilians, deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government”.<sup>263</sup>

The decision was made bearing in mind the widespread and systematic attacks against the civilian population that amounted to crimes against humanity, and expressing concern at the plight of refugees forced to flee the violence and at the reports of shortages of medical supplies to treat the wounded.<sup>264</sup>

When assessing the situation, the Pre-Trial Chamber I found there were reasonable grounds to believe that an armed conflict not of an international character (NIAC) was happening on the territory of Libya from at least early March 2011, amid the Arab Spring, between governmental forces and different organized armed groups, or among various such armed groups.<sup>265</sup> During that period, Libya was headed by Colonel Muammar Gaddafi, who had reigned over the country for over forty years. His death, on 20 October 2011, marked the end of the 17 February Revolution and the international intervention, which had started nine months earlier.<sup>266</sup>

## *B) AMNTESTY LAW*

On 20 November 2011, his son Al-Saif Gaddafi (hereinafter ‘Mr. Gaddafi’), who had sided with his father during the conflict, was captured by rebels, who kept him in Zintan.<sup>267</sup> In 2015, Mr. Gaddafi was tried *in absentia* by a Tripoli’s Court of Assize and convicted to death. According to the United Nations, the criminal proceedings failed to meet international fair trial standards and others affirmed that the trial was undermined by serious due process violations.<sup>268</sup>

In 2016, the Interim Government of Libya ordered Mr. Gaddafi’s release based on Libya’s Amnesty Law (Law No. 6 of 2015), which was followed by an online statement on 10 June 2017, announcing that he was released due to the said Law.<sup>269</sup> On 6 June 2018, Mr. Gaddafi’s defense challenged the admissibility of the case involving him upon the ICC, arguing that he had already been tried by the Tripoli Criminal Court for substantially the same conduct

---

<sup>262</sup> UNSC. **Resolution 1970 (2011)**. Available at: [https://www.undocs.org/S/RES/1970%20\(2011\)](https://www.undocs.org/S/RES/1970%20(2011)). Access on: 13 oct. 2021.

<sup>263</sup> Ibidem.

<sup>264</sup> ICC. **Situation in Libya**. The Hague, s/d. Available at: <https://www.icc-cpi.int/libya>. Access on: oct. 13 2021

<sup>265</sup> Ibidem.

<sup>266</sup> KERSTEN, Mark. Justice After the War: The ICC and Post-Gaddafi Libya. In: FISHER, Kirsten; STEWART, Robert. **Transitional Justice and the Arab Spring**. London: Routledge, 1.ed, Part 2, Chapter 10, 2015. p. 2

<sup>267</sup> Idem. p. 7-8

<sup>268</sup> HUMAN RIGHTS WATCH. **Libya**: Surrender Saif al-Islam Gaddafi to ICC. 15 Jun. 2017. Available at: <https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc>. Access on: oct. 13 2021

<sup>269</sup> Ibidem.

as alleged in the proceedings before the Court and that, consequently, to trial him again would violate the *ne bis in idem* principle enshrined in articles 17.1.c and 20 of the Rome Statute. Alternatively, that the amnesty conceded to him under Law No. 6 of 2015 (Libya's Amnesty Law) could also trigger the *ne bis in idem* principle.<sup>270</sup> From now on, we analyze this admissibility challenge.

### C) THE CASE BEFORE THE INTERNATIONAL CRIMINAL COURT

Regarding Mr. Gaddafi's first contention, which is based on the principle of *ne bis in idem*, reflected by article 17(1)(c) of the Rome Statute, the Pre-Trial Chamber agreed with the defense that a 4 elements methodology should be applied, meaning that the case against him would be inadmissible if the following criteria were met<sup>271</sup>:

- i. that Dr. Gaddafi has already been tried by the Libyan national courts [...];
- ii. that the national trial was with respect "to the same conduct" as that alleged in this case [...];
- iii. national proceedings were not for the purpose of shielding within the meaning of Article 20(3)(a) [...]; and
- iv. national proceedings were not otherwise lacking in sufficient independence or impartiality, nor did they involve egregious due process violations, to the extent that the proceedings were incapable of providing genuine justice within the meaning of Article 20(3)(b) [...].

Nonetheless, the chamber affirmed that failing to satisfy any of the elements would be sufficient to reject the Admissibility Challenge.<sup>272</sup> In this sense, it was sufficient for the Pre-Trial Chamber to visualize that the first element was not present. In the Court's opinion, the first element required a final judgement that had acquired a *res judicata* effect.<sup>273</sup> Considering that in Mr. Gaddafi's situation the Tripoli Court was only the first instance, and in principle, the judgement should still be subject to appeal before the Court of Cassation, and that the judgement was rendered *in absentia*, the Court found that it was not a final judgement of conviction, thus not fulfilling the first criteria established above.<sup>274</sup>

When it comes to the defense's second argument, to the effect that by passing Law No. 6 of 2015 "any further criminal proceedings against Mr. Gaddafi are conditionally 'dropped' and sentence effectively suspended", and that consequently the case upon the ICC would be inadmissible, the Trial Chamber supported itself in other International Court's jurisprudence on amnesties to issue its finding. The Court stated that it "believes that there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to

---

<sup>270</sup> ICC. The Prosecutor v. Saif Al-Islam Gaddafi. **Pre-Trial Chamber**. Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'. 5 Apr. 2019. Available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-01/11-662>. Access on: oct. 13 2021. para. 5.

<sup>271</sup> *Idem*. para. 26-31.

<sup>272</sup> *Idem*. para. 31.

<sup>273</sup> *Idem*. para. 36-47.

<sup>274</sup> *Idem*. para. 48.

amnesties or pardons under international law.”<sup>275</sup>

After highlighting that the ICC shall apply and interpret the Statute consistently with internationally recognized human rights - as stated in article 21.3 - the Pre-Trial Chamber went on to quote several Inter-American Court of Human Rights<sup>276</sup>, European Court of Human Rights<sup>277</sup>, African Commission on Human and Peoples Rights<sup>278</sup> cases. Besides, the chamber pointed out, at an “universal level”, to the Human Rights Committee<sup>279</sup> and International Criminal Tribunal for the Former Yugoslavia<sup>280</sup> jurisprudence. Hence, the Pre-Trial Chamber concluded that:

[...] granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States’ positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate.<sup>281</sup>

In this sense, the Pre-Trial Chamber rejected Mr. Gaddafi’s admissibility challenge based on Libya’s Amnesty Law and asserted that applying it to him would be “equally incompatible with international law, including internationally recognized human rights”<sup>282</sup>. Not satisfied with the Trial Chamber’s decision, Mr. Gaddafi’s defense appealed to the Appeals Chamber, who issued its decision recently on 9 March 2020. The Appeals Chamber took an easier approach to the question of amnesties. It affirmed that the findings of the Pre-Trial Chamber were correct because the crimes attributable to Mr. Gaddafi were excluded from the application of the Amnesty Law’s provision.

However, it made sure to do so, while also affirming that this finding was “without prejudice to the question as to whether an Amnesty May have any impact on decisions on the admissibility of a case under article 17(1)(c) of the Statute, in particular on whether it can change the fact that a person has or has not been tried for the purposes of article 17(1)(c) of the Statute [...]”.<sup>283</sup>

---

<sup>275</sup> Idem. para. 61.

<sup>276</sup> Case of the Massacres of El Mozote and Nearby Places v. El Salvador (Merits, reparations and costs), Judgment of 25 October 2012; Gomes Lund et al. (“Guerrilha Do Araguaia”) v. Brazil (Preliminary Objections, Merits, Reparations, and Costs), Judgment of 24 November 2010; Case of Almonacid-Arellano et al v. Chile (Preliminary Objections, Merits, Reparations and Costs), Judgment of 26 September 2006; Case of Barrios Altos (Merits), Judgment of 14 March 2001; Caso Barrios Altos y Caso La Cantuta vs. Perú, Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar, Resolución del 30 de mayo de 2018.

<sup>277</sup> Margaš v. Croatia (Application no. 4455/10), Judgment of 13 November 2012; Abdülsamet Yaman v. Turkey, (Application no. 32446/96), Judgment of 2 November 2004;; Okkali v. Turkey, (Application no 52067/99), Judgment of 17 October 2006; and Yeşil and Sevim v. Turkey, (Application no. 34738/04), Judgment of 5 June 2007.

<sup>278</sup> Mouvement Ivoirien des Droits Humains (MIDH) v Cote d’Ivoire, Communication No. 246/02, Decision, 29 July 2009; Mouvement Ivoirien des Droits Humains (MIDH) v Cote d’Ivoire, Communication No. 246/02, Decision, 29 July 2009; Zimbabwe Human rights NGO Forum, Communication No. 245/2002, Decision, 15 May 2006.

<sup>279</sup> Hugo Rodríguez v. Uruguay, Communication No. 322/1988, 9 August 1994, UN Doc. CCPR/C/51/D/322/1988.

<sup>280</sup> Prosecutor v. Erdemovic, Sentencing Judgment, 29 November 1996, IT-96-22-T; Prosecutor v. Furundžija, Judgment. 10 December 1998, IT-95-17/1-T.

<sup>281</sup> Supra note 9, para. 77.

<sup>282</sup> Supra note 9, para. 78.

<sup>283</sup> ICC. The Prosecutor v. Saif Al-Islam Gaddafi. **Appeals Chamber**. Public Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’ of 5 April 2019. Available at:

Moreover, the Appeals Chamber stated in the end of its decision that it considered that the Pre-Trial Chamber's holdings on Law No. 6's compatibility with international law were *obiter dicta*<sup>284</sup>, thus meaning that they were not necessary for decision's *ratio decidendi*. In addition, it is noteworthy the *dictum* inserted by the Court that:

For present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties. The Pre-Trial Chamber appears to have accepted this: rather than determining that this question was settled, it found 'a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law' In these circumstances, the Appeals Chamber will not dwell on the matter further.<sup>285</sup>

When read together with the Pre-Trial Chamber's decision, it seems that with this paragraph the Appeals Chamber demonstrated that it was not ready yet to completely close the door for the amnesty debate on the ICC.

#### *D) CONCLUSIONS IN REGARD TO LIBYA'S TRANSITIONAL JUSTICE*

The ICC missed a unique opportunity to express that amnesty laws cannot be used as a way to escape justice when committing crimes against humanity. The central logic of the argument raised by the Pre-Trial Chamber was that, due to the nature of the crimes committed in light of the growing international jurisprudence on the subject, the person who has been amnestied in a judicial proceeding in the domestic jurisdiction could not use the *ne bis in idem* principle to evade international justice.

In fact, because the ICC is a complementary jurisdiction, it would only act when the State could not do so or when it had no intention of doing so, being an exception the possibility of retrying the defendant when domestic jurisdiction was used with the aim of assisting that person to flee from justice. This is precisely the aim of an amnesty law: to make those who have committed crimes escape justice. And it cannot be accepted if transitional justice is at stake.

In this sense, it is important to pay attention to Judge Luz del Carmen Ibáñez Carranza's Concurring Opinion, where she disagreed with the majority's findings by stating that the Pre-Trial Chamber was correct in its assertion that granting amnesties would be incompatible with internationally recognized human rights, and that the Pre-Trial Chamber's determination on amnesties' incompatibility with international law was part of the *ratio decidendi* that Law No. 6 was not valid in its application.<sup>286</sup>

---

<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-01/11-695>. Access on: oct. 13 2021. para. 88.

<sup>284</sup> Idem. para. 96

<sup>285</sup> Ibidem.

<sup>286</sup> ICC. The Prosecutor v. Saif Al-Islam Gaddafi. **Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza**. Public Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c),

In light of the inputs provided, we hope to have helped the U.N High Commissioner for Human Rights with enough information to ponder over the contribution of transitional justice to sustaining peace and the realization of SDG 16, aiming at presenting a comprehensive report over the matter to the Human Rights Council.

*Grupo de Estudos e Pesquisa em Direito Internacional – GEPDI/CNPq/UFU*

Prof. Dr. Tatiana Cardoso Squeff (UFU/Brazil)  
*Leading Researcher*

Talita de Jesus Correia, LL.M. candidate (Must University/United States)  
*Junior Researcher*

Ana Elisa Silva Mageste, J.D. candidate (UFU/Brazil)  
Augusto Guimarães Carrijo, J.D. candidate (UFU/Brazil)  
João Gabriel de Paula, B.A. in International Relations candidate (UFU/Brazil)  
Luiza Ranuzzi, B.A. in International Relations candidate (UFU/Brazil)  
Maria Amélia Carvalho Campos, J.D. candidate (UFMS/Brazil – Porto University/Portugal)  
Natália Ignácio, B.A. in International Relations candidate (UFU/Brazil)  
Pedro Lucchetti Silva, J.D. candidate (UFU/Brazil)  
Vitória Magri, B.A. in International Relations candidate (UFU/Brazil)  
Vinícius Serra de Lima Moraes, J.D. candidate (UFMS/Brazil)  
Vitória Rio Lima, J.D. candidate (UFU/Brazil)  
*Research Assistants*

---

19 and 20(3) of the Rome Statute” of 5 April 2019. Available at: [https://www.icc-cpi.int/RelatedRecords/CR2020\\_01670.PDF](https://www.icc-cpi.int/RelatedRecords/CR2020_01670.PDF). Access on: oct. 13 2021.