

Volume 7 – No. 1–2 – 2014

Inter-American  
and European  
Human Rights Journal  
Revista Interamericana  
y Europea  
de Derechos Humanos



Volume 7 No. 1–2 INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS JOURNAL



Protection of Human Rights in the Americas:

Selected Essays for the Inter-American Court of  
Human Rights' Anniversary

Clara BURBANO-HERRERA and  
Oswaldo RUIZ-CHIRIBOGA (eds.)



intersentia

REVISTA INTERAMERICANA Y EUROPEA DE DERECHOS HUMANOS

2014



### Mission Statement / Misión

The *Inter-American & European Human Rights Journal* / *Revista Interamericana & Europa de Derechos Humanos* aims to offer an international platform for research in the field of human rights of relevance for (Latin) America and Europe. Situated on the crossroads between both continents, the journal is well-placed to be a place of exchange of ideas and views between academic scholars and practitioners in the field of human rights from both European and (Latin) American universities, research institutes and non-governmental organisations. General topics on human rights will be considered for publication if relevant for the European and (Latin) American human rights context.

La *Revista Interamericana & Europa de Derechos Humanos* / *Inter-American & European Human Rights Journal* aspira ofrecer un espacio internacional para la investigación en el ámbito de los derechos humanos relevante para (Latino)América y Europa. Situada en el punto de encuentro entre ambos continentes, la revista busca convertirse en un lugar de intercambio de ideas y puntos de vista entre académicos y profesionales en el ámbito de los derechos humanos de universidades (latino)americanas y europeas, centros de investigación y organizaciones no gubernamentales. Temas generales de derechos humanos se tendrán en cuenta para publicación si son relevantes principalmente en el ámbito (latino)americano y europeo.

### Executive Editors / Editores ejecutivos

- Yves Haeck, Editor-in-Chief, Professor of Constitutional and International Human Rights Law, Human Rights Centre, Ghent University, Ghent, Belgium, Lecturer on Human Rights Law, Netherlands Institute of Human Rights, Utrecht University, the Netherlands
- Clara Burbano Herrera, Senior Research Fellow, Department of Constitutional Law and Human Rights Centre, Ghent University, Ghent, Belgium, Postdoctoral Research Fellow, Research Fund Flanders
- Claudia Martin, Professorial Lecturer in Residence, American University Washington College of Law, Co-Director, Academy on Human Rights and Humanitarian Law, Washington College of Law, Washington DC, USA
- Diego Rodríguez-Piñzon, Professorial Lecturer in Residence, American University Washington College of Law, Co-Director, Academy on Human Rights and Humanitarian Law, Washington College of Law, Washington DC, USA
- Oswaldo Ruiz-Chiriboga, Research Fellow, Human Rights Centre, Ghent University, Belgium, former Senior Staff Attorney Inter-American Court of Human Rights
- Kristien Van Ingelgem, Managing Editor, Department of Public Law, Ghent University, Belgium
- Leo Zwaak, Associate Professor on Human Rights Law, Netherlands Institute of Human Rights, Utrecht University, Utrecht, the Netherlands, Visiting Professor, American University Washington College of Law, Washington DC, USA

### Editorial Board / Comité editorial

- Victor E. Abramovich, Associate Professor of Human Rights, Universidad de Buenos Aires, Buenos Aires, Professor of Human Rights, Universidad Nacional de Lanús, Lanús, Argentina, former Member of the Inter-American Commission on Human Rights
- Gudmundur Alfredsson, Visiting Professor, University of Strasbourg, Strasbourg, France, former Director of the Raoul Wallenberg Institute for Human Rights and Humanitarian Law
- Juan Ayaala Castro, Professor of Human Rights Law, University for Peace, San José, Costa Rica, Postdoctoral Research Fellow, University of Amsterdam, Amsterdam, the Netherlands
- Claire Breen, Associate Professor, University of Waikato, Waikato, New Zealand
- António Cancado Trindade, Professor of International and Regional Human Rights Courts, Utrecht University, Utrecht, the Netherlands, Judge of the International Court of Justice, The Hague, the Netherlands, former President of the Inter-American Court on Human Rights
- Alicia Cebalada Romero, Professor of International Law, Universidad Carlos III de Madrid, Madrid, Spain
- Paul De Hert, Professor of Human Rights, Free University of Brussels, Belgium
- Francisco Eguiguren Pratih, Professor of Law, Director, Academic Department of Law and Coordinator of the Master in Constitutional Law, Pontificia Universidad Católica del Perú, Lima, Peru
- Felipe Gonzalez, Professor of International Human Rights and Constitutional Law, Universidad Diego Portales, Santiago, Chile, Lecturer, Universidad de Deusto, Spain, Member of the Inter-American Commission on Human Rights, Washington DC, USA
- Claudio Grossman, Dean American University Washington College of Law, Washington DC, USA, Vice-Chairperson of the UN Committee Against Torture, former President of the Inter-American Commission on Human Rights
- José Antonio Guevara, Deputy Director-General, Departamento de Derechos Humanos y Democracia of the Mexican Ministry of Foreign Affairs, Mexico City, Mexico
- Cecilia Medina Quiroga, Professor of International Human Rights Law, Co-Director, Centro de Derechos Humanos, Universidad de Chile, Santiago, Chile, former President of the Inter-American Court on Human Rights
- Manfred Nowak, Professor of Constitutional Law and Human Rights and Director, Ludwig Boltzmann Institute of Human Rights, Vienna University, Vienna, Austria, former UN Special Rapporteur on torture
- Alan Ross, Judge in the Court of Justice of the European Union, Luxembourg, former Director, Institute for Human Rights, Abo Akademi University
- Jeremy Sarkin, Chairperson of the UN Working Group on Enforced or Involuntary Disappearances, former Dean, Faculty of Law of the University of the Western Cape, Cape Town, South Africa
- William Schabas, Professor of Human Rights Law, Director, Irish Centre for Human Rights, National University of Ireland, Galway, Republic of Ireland, former Member of the Sierra Leone Truth and Reconciliation Commission
- Magdalena Sepúlveda Carmona, UN Independent Expert on the question of human rights and extreme poverty
- Françoise Tulenkens, Vice-President, European Court of Human Rights, Strasbourg, France, Extraordinary Professor of Law, University of Louvain-la-Neuve, Belgium
- Andy Van Pichtembke, Research Fellow, Human Rights Centre, Ghent University, Belgium, Lawyer, Kortrijk, Belgium
- Jinske Verhellen, Doctor-Assistant, Department of Private International Law, Ghent University, Ghent, Belgium
- John A.E. Vervaele, Professor of Economic and Financial Criminal Law, Utrecht University, Utrecht, the Netherlands, Professor of European Criminal Law, College of Europe, Bruges, Belgium
- José Zalaquett, Professor of Human Rights, Co-Director, Centro de Derechos Humanos, Universidad de Chile, Santiago, Chile, former First Vice-President of the Inter-American Commission on Human Rights, former Chairperson of Amnesty International's International Executive Committee

### Editorial Office / Oficina editorial

Ghent University  
Faculty of Law  
Universiteitsstraat 4  
9000 Ghent  
Belgium  
Telephone: +32 9 264 68 21  
Téléfax: +32 9 264 69 95  
E-mail: iachr-journal@UGent.be

### Guidelines for authors / Directrices para autores

Manuscripts must be written in English (UK spelling) or Spanish and will be published in the language in which they are submitted. Articles should average between 5,000 and 15,000 words in length, including footnotes. However, shorter contributions will be welcomed and longer ones may be considered for publication.

For an exact manuscript format, please visit [www.iachr-journal.org](http://www.iachr-journal.org).

Los manuscritos deben ser escritos en español o inglés (ortografía Reino Unido) y serán publicados en la lengua en la que fueron entregados. Los artículos deben contener entre 5,000 y 15,000 palabras, incluido los pies de página. De todas maneras, contribuciones más cortas serán aceptadas y contribuciones que excedan el máximo de palabras pueden ser consideradas para publicación.

Para el formato exacto del manuscrito por favor visitar: [www.iachr-journal.org](http://www.iachr-journal.org).

Permission to photocopy must be obtained from the copyright owner / Autorización para reproducción debe ser dirigido al propietario de los derechos de autor.

Please apply to / Por favor dirigirse a: Intersentia, Groenstraat 31, 2640 Morsel, Belgium.

© 2014 Intersentia Cambridge – Antwerp  
[www.intersentia.com](http://www.intersentia.com)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publishers / Reservados todos los derechos. Ninguna parte de esta publicación puede ser reproducida, guardada en un sistema de recuperación, o transmitida en cualquier forma o por cualquier manera, electrónica, mecánica, por fotocopia, por grabación o de otra manera, sin autorización previa y por escrito del editorial.

### Citation / Citación

The journal may be cited as / La revista es citada como: *Int. Am. & Eur. Hum. Rts. J. / Rev. Int. Am. & Eur. D.H.*

The Inter-American & European Human Rights Journal is produced with financial assistance under the ALFA programme of the European Union (Latin America, Academic Training)

La Revista Interamericana & Europea de Derechos Humanos es producida con la asistencia financiera del programa ALFA de la Unión Europea (Formación académica, Latinoamérica)

ISSN 2030-7942

**PROTECTION OF HUMAN RIGHTS  
IN THE AMERICAS**  
SELECTED ESSAY FOR THE INTER-AMERICAN  
COURT OF HUMAN RIGHTS' ANIVERSARY

**CONTENTS / ÍNDICE**

I.	<b>AMNESTY LAWS AND ENFORCED DISAPPEARANCES</b>	
	<b>Resuscitating Justice: The Inter-American Court Confronts the Entrenched Impunity of National Amnesty Laws</b>	
	JEFFREY DAVIS	3
	<b>An Affront to the Conscience of Humanity: Enforced Disappearances in the Case Law of the Inter-American Court of Human Rights</b>	
	NIKOLAS KYRIAKOU	17
II.	<b>GROUPS IN VULNERABILITY</b>	
	<b>Contributions and Challenges for the Inter American Court of Human Rights for the Protection of Migrants' Rights: The Case of <i>Vélez Loor v. Panama</i></b>	
	GISELA DE LEÓN	39
	<b><i>Atala-Riffo and Daughters v. Chile</i>, the First Inter-American Case on Sexual Orientation: a Description and a Few Questions</b>	
	ÁLVARO PAÚL	54
	<b>Towards a uniform basis for the right to identity in the normative framework of the American Convention on Human Rights</b>	
	ROMINA I. SIJNENSKY AND N. ALEXANDER AIZENSTATD	75
III.	<b>THE INTER-AMERICAN COURT AND NATIONAL JUDGES AND TRIBUNALS</b>	
	<b>Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights</b>	
	LAURENS LAVRYSEN	94
	<b>The Independence and Impartiality in the Inter-American Court's Jurisprudence: the Specific Case of Judges' Arbitral Removal</b>	
	GAETANO D'AVINO, DANIELA FANCIULLO, ANNA IERMANO, ANGELA MARTONE AND ROSSANA PALLADINO	116
	Intersentia	1

<b>The Inter-American Court of Human Rights' <i>Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil Judgment</i> and the Brazilian Federal Supreme Court Judgment on the constitutionality and conventionality of the 1979 Amnesty Law</b>	141
LEANDRO AYRES FRANÇA	
<b>IV. THE INTER-AMERICAN COURT AND INTERNATIONAL CRIMINAL COURT</b>	
<b>Perspectives on the Interplay between the Inter-American Court of Human Rights and the International Criminal Court</b>	159
NICCOLÒ PONS AND DRAŽAN ĐUKIĆ	
<b>the Identification of Victims before the Inter-American Court of Human Rights and the International Criminal Court and its Impact on Participation and Reparation: A Domino effect?</b>	174
DIANA CONTRERAS-GARDUÑO AND JULIE FRASER	
<b>V. PROCEDURAL ASPECTS</b>	
<b>The Territorial Scope of the American Convention on Human Rights</b>	204
HELENA DE VYLDER	
<b>Member States Compliance with the Inter-American Court of Human Rights' Judgments and Orders Requiring Non-Pecuniary Reparations</b>	225
SABRINA VANNUCCINI	
<b>The Inauguration of the Inter-American Defenders' Era: Reflections after the <i>Furlan Case</i></b>	245
VALESKA DAVID	

ISBN 978-1-78068-235-8

NUR 828

# THE INTER-AMERICAN COURT OF HUMAN RIGHTS' GOMES LUND ET AL. (GUERRILHA DO ARAGUAIA) V. BRAZIL JUDGMENT AND THE BRAZILIAN FEDERAL SUPREME COURT JUDGMENT ON THE CONSTITUTIONALITY AND CONVENTIONALITY OF THE 1979 AMNESTY LAW

LEANDRO AYRES FRANÇA\*

## *Abstract*

*In the year 1972, the Communist Party of Brazil (PCdoB) gathered around 90 people in the region of São João do Araguaia, Pará, to fight the Brazilian military dictatorship (1964–1985). The military government decided to react, and between April of that year and January 1975 sent troops to occupy the territory and decimate the resistance. In 1973, the Guerrilla repression was intensified and the official order turned to eliminate all captured. This struggle became known as the Guerrilha do Araguaia. From the 62 people known as victims in those conflicts, the remains of only two of them were found and identified. Only after decades and an indefatigable effort from researchers, journalists and relatives of the missing dissidents, the Guerrilla was brought to public knowledge. This article analyses the Brazilian Federal Supreme Court's (FSC) Non-compliance Action of Fundamental Principle No. 153 Judgment on the constitutionality and conventionality of the 1979 Amnesty Law. And, by confronting the complaint dismissing decision (and the*

\* Leandro Ayres França holds a Master in Criminal Sciences from the Pontifícia Universidade Católica do Rio Grande do Sul (Porto Alegre, Brazil). He is a researcher of the Grupo de Pesquisa Modernas Tendências do Sistema Criminal and author of several papers and books, including *Ensaio de uma Vida Bandida* (Curitiba, Juruá 2007), *Tipo: Inimigo* (Curitiba, FAE Centro Universitário 2011) and *Inimigo ou a Inconveniência de Existir* (Rio de Janeiro, Lumen Juris 2012), <www.ayresfranca.com>, <leandro@ayresfranca.com>.

*reasons presented by the judges) with the Inter-American Court of Human Rights' (IACtHR) Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil judgment, it is possible to point that the first FSC decision on the 1979 Amnesty Law might have been mistaken, and to evidence the important role that the IACtHR has played in the Inter-American System: the IACtHR has reached a state of art that remedies some states' "politics of forgetting" by giving back to the victims their (once stolen) juridical and qualified status.*

## 1. INTRODUCTION

From the extinct indigenous Tupian language, *Araguaya* means Valley of Parrots River.<sup>1</sup> The Araguaia River has its source in the city of Mineiros (Goiás), flows calmly more than 2,000 kilometres north, making the natural borders of the states of Goiás, Tocantins and Pará, and debouches in the Tocantins River, forming a curved and pointed vertex whose shape suggests a parrot's beak – the reason why this area is called *Bico do Papagaio*. If one drew a 150-kilometre circle from the river's mouth, it would be possible to identify a land – at the river's left bank – of historical violence and massacres: Perdidos' insurrection (1976), Priests' struggle (1980), Prospectors' insurrection (1985), Teresona's massacre (1985), São Bonifácio's massacre or Bridge's war (1987), agitation to knock down Belinho's Wall (1996), Eldorado dos Carajás massacre (1996) and the most grievous of them, the one that took place earlier and became known as the *Guerrilha do Araguaia* (1972–1975, henceforth referred to as Guerrilla).<sup>2</sup> Even before these late 20<sup>th</sup> century insurgencies, the Coluna Prestes – a political and military movement headed by Miguel Costa and Luís Carlos Prestes and linked to the Lieutenants' revolts – walked through the region in the year of 1925. A rebel tradition had been attributed to this area – and this proper attribute was one of the factors that inspired João Amazonas and Pedro Pomar, leaders of the Communist Party of Brazil (PCdoB), to settle a guerrilla at the Down Araguaia zone, in the state of Pará.<sup>3</sup> The Guerrilla marked the Brazilian history by the up until then unheard of violent strength used by military government repression.

## 2. THE ARAGUAIA'S GUERRILLA

The armed battle was the option chosen by some left-wing organizations to fight the military dictatorship that ruled the country from 31 March 1964 to 15 March 1985.

<sup>1</sup> T. Sampaio, *O Tupi na geographia nacional: memoria lida no Instituto Historico e Geographico de S. Paulo* (São Paulo, Casa Eclectica 1901), p. 112.

<sup>2</sup> L. Nossa, *Mata!: o Major Curió e as guerrilhas no Araguaia* (São Paulo, Companhia das Letras 2012), p. 7.

<sup>3</sup> Nossa, *supra* n. 2, p. 47.

The PCdoB believed there were circumstances to radically transform the Brazilian status quo through these tactics: the capitalism contradictions in a semi-industrial country, the conflicts caused by social and economic inequalities, and the military government abuses gave support to their proposal of using violence as a political weapon.<sup>4</sup> The PCdoB leaders were encouraged by victorious revolutionary enterprises in Russia (1917), China (1949) and Cuba (1959).<sup>5</sup> The party gathered around 90 people from communists that had been waiting for an armed struggle for decades, dreamy youngsters (70% of them), and spouses resolute to follow their mates, people with totalitarian will, students who needed to take a break until the repression in big cities cooled down and even some inhabitants of Down Araguaia.<sup>6</sup>

## 2.1. THE SILENCED STRUGGLE

The Guerrilla had been announced earlier: at the time of the United States Ambassador Charles Burke Elbrick's kidnapping, in September 1969, the partisan Franklin Martins, member of the Revolutionary Movement October 8<sup>th</sup> (MR-8), left the following message: "The ambassador's kidnapping is merely one more act of the revolutionary war, which goes forward each day and that will start its rural guerrilla's stage, yet this year."<sup>7</sup> During the Guerrilla years, graffiti denounced the conflict on capital cities' walls. Nevertheless, only two newspaper articles mentioned it. On 24 September 1972, *O Estado de São Paulo* breached the censorship and published a half-page text entitled "At Xambioá, the struggle is against partisans and privation"; no authorship was mentioned, but an unidentifiable "from the special envoy".<sup>8</sup> The article cited that about five thousand men were involved in a partisans' hunt in the Down Araguaia area, and it named the commanders of the operation: General officers Olavo Vianna Moog and Antônio Bandeira. It also introduced to readers the "terrorists" Paulo, Dr Juca, Antônio, Daniel, Dina, Osvaldo and Lúcia, summarizing their biographies and describing some of their stratagems to win Araguaia's residents' sympathy. Two days later, *The New York Times* revealed the Guerrilla to the world: "Brazil's armed forces have begun a combined drive to flush guerrillas out of a remote Amazon jungle region. At least one soldier has been

<sup>4</sup> T. Morais and E. Silva, *Operação Araguaia: os arquivos secretos da guerrilha* (São Paulo, Geração Editorial 2012, 5<sup>th</sup> ed.), pp. 28–29; H. Studart, *A lei da selva* (São Paulo, Geração Editorial 2006), pp. 13–14.

<sup>5</sup> Morais, *supra* n. 4, p. 20.

<sup>6</sup> Nossa, *supra* n. 2, p. 76.

<sup>7</sup> *Ibid.*, p. 75. This and the following quotes were translated by the author.

<sup>8</sup> "Em Xambioá, a luta é contra guerrilheiros e atraso", *O Estado de São Paulo*, 24 September 1972, p. 27. Years later, Morais, Silva and Nossa acknowledged that the journalist Henrique Goulart Gonzaga Júnior was the articles' author; Gaspari asserts that Fernando Portela was the author. E. Gaspari, *A ditadura escancarada*, (São Paulo, Companhia das Letras 2002), p. 428; Morais, *supra* n. 4, pp. 274–275, 285–286; Nossa, *supra* n. 2, p. 134.



reported killed in clashes between the rebels and 5,000 army, air force and navy troops.”<sup>9</sup>

Araguaia was full of sound and fury. For years, however, it was heard no more. The silence had a reason: the Brazilian military dictatorship. As political guidelines, the military regime adopted nationalism, economic development and opposition to communism; and, through the years, the government enacted restrictive laws (Constitution of 1967, Amendment of 1969 and Institutional Acts) and stifled freedom of speech and political opposition. Operationally, the regime was responsible for media censorship, dissidents’ banishment (a famous slogan suggested “Brazil: love it or leave it”) and a violent restraint of citizens through heinous practices of torturing, killings and enforced disappearances. The authoritarian nature of these rules brought forth resistance movements among some social groups, especially among students, artists and left-wing collectives, and it is not erroneous to affirm that the harder the government practices got, the stronger became the opposition: the Institutional Act Number Five (1968), for example, provided the Guerrilla with a group of hunted political opponents who were unable to remain in big cities.<sup>10</sup> Then, it took decades and an indefatigable effort from researchers, journalists and relatives of missing dissidents to bring the Guerrilla to public knowledge.

## 2.2. THE MILITARY OPERATIONS

The military government restraint to the Guerrilla had four distinct phases, in tune with each current operation. After some inquiries and minor operations from the military intelligence, which started in 1969, the government started a great military manoeuvre in the Araguaia, at the ratio of 45–67 soldiers to one partisan, known as the Parrot Operation (April 1972). The mission lasted six months.<sup>11</sup>

The Sucuri Operation (April 1973) was a mission that consisted in the infiltration of military and agents in the area, who worked undercover to get information. As the name of the mission suggested (Sucuri, a.k.a. Anaconda), and to avoid the miscarriage of the previous manoeuvres, the military had to work in silence to get to know the enemy before a new hunt; those selected for the operation dressed as civilians, used codenames and were forbidden to fulfil any offensive action against the partisans. Inspired by the German *Jagdkommandos*, it was an unprecedented espionage scheme in the Brazilian repression history; although, it’s necessary to say, its authors copied, to a large extent, the tactics of approaching inhabitants used by the communists.<sup>12</sup> The military were putting into practice what was learned from guerrilla techniques.

<sup>9</sup> Associated Press, “Brazil battling rebels in jungle; 5,000 Troops Reported Sent to Remote Amazon Region”, *The New York Times*, 26 September 1972.

<sup>10</sup> Gaspari, *supra* n. 8, p. 409; Nossa, *supra* n. 2, p. 76.

<sup>11</sup> Initially, 3,200 militaries were sent to Down Araguaia; in August 1972, 1,500 soldiers joined the Parrot Operation. Gaspari, *supra* n. 8, p. 400; Studart, *supra* n. 4, pp. 41, 126, 133, 166.

<sup>12</sup> Gaspari, *supra* n. 8, p. 434; Morais, *supra* n. 4, pp. 403–404; Studart, *supra* n. 4, pp. 14–15.



Previously scheduled to last sixty days, the Sucuri Operation, after some extensions, took five months to be accomplished.<sup>13</sup>

The next stage led the Army's Airborne Brigade, the Jungle Infantry and the Special Forces Battalion to the Down Araguaia area. It was the beginning of the Marajoara Operation (October 1973), with less combatants than the previous manoeuvres, but with qualified personnel.<sup>14</sup> After reading a large military dossier on the Guerrilla, the journalist and historian Hugo Studart inferred that "the Third Campaign wasn't merely a jungle warfare phase, but a precise surgical operation, previously planned, that resulted in the partisans' eradication."<sup>15</sup> As time went by, the decency of the hunt methods diminished: the communist movement should be eradicated to set an example and to discourage other armed enterprises against the regime.<sup>16</sup> The accountancy of the two-year repression unveiled 26 partisans killed in combat, nine murdered in the jungle, 32 slaughtered after having been arrested and tortured; one partisan was executed by the revolutionary movement, 20 of them survived the Guerrilla (at the very start of the movement; however, some were killed soon after it) and at least 10 militaries died in the operations.<sup>17</sup> Some of the dead bodies of the partisans were buried in the jungle, some were left unburied – the military repeated, then, the same practice of the communists, who had killed a corporal on 5 May 1972 (the first death of the Guerrilla) and obstructed the rescue of the body for a week.<sup>18</sup>

Alleging the Guerrilla could still emerge, the Army returned to the combat zone for the Cleaning Operation (January 1975). Buried bodies were exhumed, transferred, destroyed and concealed.<sup>19</sup> Twenty years later, the Air Force Colonel Pedro Corrêa Cabral confessed he was the pilot of the helicopter that shipped those bodies to the Serra das Andorinhas, where they were burned with old tyres and gasoline.<sup>20</sup> These events are so obscure that recently a military who participated in this Operation asserted that the majority of the exhumed bodies were dissolved in acid and that most

<sup>13</sup> Nossa, *supra* n. 2, p. 152.

<sup>14</sup> Gaspari, *supra* n. 8, p. 436; Studart, *supra* n. 4, pp. 224–227.

<sup>15</sup> Studart, *supra* n. 4, p. 163.

<sup>16</sup> Morais, *supra* n. 4, p. 397.

<sup>17</sup> Gaspari, *supra* n. 8, p. 453; R. Gama, "O fim da guerra no fim do mundo: um coronel da Aeronáutica revela como foram terríveis e sangrentos os últimos dias da guerrilha do Araguaia", *Veja*, 13 October 1993, pp. 16–28. Studart computes 85 partisans and peasants killed (64 partisans, in any situation; 18 "disappeared" inhabitants; two suicidal; one partisan killed by the Guerrilla) and six militaries killed in combat. Among the partisans, Studart identified also 15 survivors and seven deserters. Studart, *supra* n. 4, pp. 33, 186.

<sup>18</sup> The partisans' attitude, enunciated by Osvaldão, in prohibiting the rescue of Corporal Odílio Cruz Rosa's body evokes the mythological conflicts of Creon and Antigone about Polynices' body (in Sophocles' tragedy) and of Achilles and Priam about Hector's body (Homer's *Iliad*). For the Araguaian conflict, see Morais, *supra* n. 4, pp. 65–166; Studart, *supra* n. 4, pp. 113–114, 237–238.

<sup>19</sup> Nossa, *supra* n. 2, p. 400.

<sup>20</sup> Gama, *supra* n. 17, p. XX.

of the pyres were only counter-information: where there was supposedly nothing but old tyres burning, the local population was witnessing partisans turning into ashes.<sup>21</sup>

### 2.3. TWO FACTORS THAT STIMULATED THE FRATRICIDE: MILITARY INAPTITUDE AND EXTREMISM

It is possible to notice a numerical discrepancy between combatant sides: the military government sent 7,200 soldiers and agents to fight no more than a hundred people. Unlike the partisans, who had been familiarized with the jungle situation and perfectly knew trails of the forest, the military forces were faced with several obstacles: the covered canopy protected the partisans from artillery; the Araguaia River restrained the passage of regular troops; dense tree crowns and intertwined lianas precluded armoured warfare and reduced visibility from above and on the ground; the nearby cities could not provide shelter and food for large military manoeuvres; machine-guns and rifles were too heavy for long walks; hand grenades moistened; soldiers were unaccustomed to riding horses and donkeys; the use of denim regimentals, short sleeve uniforms and buskins were not appropriate for tropical moisture; the military ration was too heavy (so the soldiers had to count on eating in residents' homes or to learn how to find food in the forest); the soldiers were noisy and left traces, etc. The military were also afraid: the commanders feared an eventual support of the international revolutionary movement (from 1964 to 1968, China had assisted Brazilian communists by training at least seven of them);<sup>22</sup> the soldiers dreaded the myths of Dr Juca, Dina and Osvaldão: Osvaldão, for example, was Osvaldo Orlando da Costa, a 1.98-meter-high black man, boxing champion, undergraduate in Prague; the legends attributed to him an aura of invulnerability, the killings of four people (a sergeant, a civilian and two partisans) and the power of transfiguration (some believed he could not be caught, for in the jungle, he was transformed in a tree stump, mosquito, dog or butterfly).<sup>23</sup> Thus, the military fought in terror. If one wanted to figure the struggle that has been held in Araguaia, the Vietnam War records would help, at least to evidence the ideological, operational and technological disparity cognizable in both combats – it is therefore not surprising to discover, from a 1972 document, that the Brazilian military used napalm bombs in three different Araguaian areas.<sup>24</sup>

The extremism of both sides also stimulated the fratricide struggle.<sup>25</sup> The journalist Elio Gaspari wrote: “What happened in Araguaia was the paroxysm of ideological

<sup>21</sup> Studart, *supra* n. 4, p. 282.

<sup>22</sup> Gaspari, *supra* n. 8, pp. 408–409.

<sup>23</sup> Gaspari, *supra* n. 8, p. 405. About Dina's invulnerability and transfiguration legends, see Studart, *supra* n. 4, p. 55.

<sup>24</sup> This document was signed by Lieutenant Colonel Flarys Guedes Henriques de Araújo and complemented the General Officers Moog and Bandeira's reports (Manoeuvre Araguaia 72), from that same year. Gaspari, *supra* n. 8, pp. 425–426; Morais, *supra* n. 4, p. 351.

<sup>25</sup> Nossa, *supra* n. 2, p. 13.

radicalisms' shock that, with their fears and fantasies, influenced the Brazilian political life for almost a decade."<sup>26</sup> Commanders on both sides should be held accountable: the head of the military ignored international treaties and authorized the merciless killings, turning the dreamed epic war into a slaughter; the PCdoB's leaders set up a guerrilla with rusty weapons, little financial resource, poor provision routes and never ordered a safe retreat to avoid the massacre. The head belligerents accepted that lives mattered least,<sup>27</sup> and so did the combatants.

The communists believed they were on the way to revolution and were indoctrinated to give their lives for it. This was not madness, nor irrationality; actually, the partisans were acting under the revolutionary imaginary they shared and that converted them in combatants – that explains, for example, the performing behaviour of the partisan Dina who chose to kill and to die looking in the opponents' eyes.<sup>28</sup> Nevertheless, their fanaticism was so delusional that, even after losing the Guerrilla with nearly 70 dead partisans, leaders of the PCdoB published articles transferring to the Araguaia combats the historical materialism's fantasies, praising the popular heroism (“[The partisans] have many weapons, know the forest as the palm of their hands and, mostly, they have gathered many people”, November 1974; “Warm greetings to the intrepid partisans of Araguaia”, April 1975) and denying the extermination in a grievous disconnection with reality, while auto-glorifying the party (“Long live the Araguaia Guerrilla Forces!”, September 1975; “The political balance, from the point of view of our people's struggle and the party's role, as regards to accomplishments in Araguaia, is highly positive”, April 1976).<sup>29</sup>

The military came to believe that the socialist revolution was on its way; their role, however, was a lot more complex: they were not blindly committed to a political ideology (i.e. capitalism) and their posterior attempt to blame it on the jungle's horror (“an atmosphere of emotional and physical exhaustion, hatred and rancour, feelings exacerbated by the luxuriant vegetation”)<sup>30</sup> was an untrue and fragile version of those events. The military generation that fought the Guerrilla succeeded the one that, although in a supporting role, took part of the major military struggle in Brazilian history: the *pracinhas*, soldiers who fought the Second World War. The new generation was willing to repeat their achievements, now against the communists; on the other hand, these young officials had to live with that oppressive expectation: “Our generation [...] joined the career after the Second War; it was a burden to succeed

<sup>26</sup> Gaspari, *supra* n. 8, p. 406.

<sup>27</sup> Luís Mir *apud* Studart, *supra* n. 4.

<sup>28</sup> Narratives report Dina (Dinalva Conceição Oliveira Teixeira) looked in the eyes of the comrade executed by her (Rosalindo Cruz Souza, a.k.a. Mundico, who had been Dina's roommate years before, was “punished” as a revolution traitor for having an affair with a married partisan woman, in August 1973) and that she demanded to be shot facing her executioner (Sergeant Joaquim Artur Lopes de Souza, a.k.a. Ivan, in July 1974). Nossa, *supra* n. 2, pp. 146–147; Studart, *supra* n. 4, pp. 55–69.

<sup>29</sup> Gaspari, *supra* n. 8, pp. 461–462; Studart, *supra* n. 4, p. 35.

<sup>30</sup> Nossa, *supra* n. 2, p. 212.

those guys”, accounted a Colonel, who served the Comando Militar do Planalto (Brasília). But, there was something particular to this new generation: the new military were distinct from the ones who graduated in the beginning of the 20<sup>th</sup> century’s academies; during the President Getúlio Vargas’ administration, and in consonance with racist ideas, the military schools began to reject the sons of Jews, Islamic and “coloured” people, who were ordinarily turned down in the selection processes. It was an attempt to forge a Brazilian military elite. This white and catholic generation of soldiers reached the officialdom in the military dictatorship.<sup>31</sup> The political dissidents’ annihilation was an expected and a rational scheme arranged by some of those men in their offices and executed by other military that hunted partisans – and usually asked to “finish the job”, after catching their target.<sup>32</sup>

As Gaspari has written: “The Army never told how it had prevailed, and the PCdoB never admitted the military defeat of its political enterprise. They acted like this because each had a piece of the history to hide.”<sup>33</sup>

### 3. CONVENTIONALITY AND CONSTITUTIONALITY OF THE 1979 AMNESTY LAW

On 28 August 1979, the Amnesty Law was sanctioned:

“Article 1. Amnesty is granted to all those who, in the term between 02 September 1961 and 15 August 1979, committed political crimes or related to these, electoral crimes, to those who had their political rights suspended and to servants of direct and indirect Administration, of foundations linked to the government, of Legislative and Judiciary, to the Military and to Union’s leaders and representatives, punished on the basis of Institutional Acts and their complementary.

Para. 1. Are considered related, for the purposes of this article, the crimes of any nature related to political crimes or committed by political motivation.

Para. 2. Those who have been convicted for committing crimes of terrorism, robbery, kidnapping and personal assault are except from the amnesty’s benefits.”<sup>34</sup>

At that moment, the very start of the feverish re-democratization movement, the promulgation of the Amnesty Law generated a false feeling that everyone was being rewarded: chased people could walk freely and exiled opponents were able to return home safely. Nevertheless, the Law proved to be deficient, once those who had been condemned for specific crimes (paragraph 2) while fighting the military regime were excluded from the amnesty; and, as time went by, the Law proved to be elusive and

<sup>31</sup> Nossa, *supra* n. 2, pp. 32–33.

<sup>32</sup> Nossa, *supra* n. 2, p. 211.

<sup>33</sup> Gaspari, *supra* n. 8, p. 462.

<sup>34</sup> Law No. 6.683 of 28 August 1979.

guileful: government agents who had committed crimes against political dissidents were also granted amnesty.

Acquiescing with the Amnesty Law, the Brazilian government never investigated the Guerrilla events, never judged nor punished agents that committed crimes. This allowed, for instance, that for the next decades, the remains of only two of the people known as victims in the Araguaia conflicts were found and identified. In the midst of a three-decade muteness, some bruit was heard while a censored song echoed: "All this silence stuns me / Stunned, I remain tuned / In the grandstand, so to, at anytime, / See the monster emerge from the lagoon."<sup>35</sup>

### 3.1. BRAZILIAN FEDERAL SUPREME COURT'S NON-COMPLIANCE ACTION OF FUNDAMENTAL PRINCIPLE NO. 153 JUDGMENT

On 29 April 2010, the former Judge Rapporteur Eros Grau subscribed that the judges of the Brazilian Federal Supreme Court (FSC) agreed, by majority, on dismissing the complaint of the Non-compliance Action of Fundamental Principle No. 153 (*Arguição de Descumprimento de Preceito Fundamental*, henceforth referred to as ADPF 153), which questioned the content of the Amnesty Law Article 1(§1), that extended the amnesty to several public officials responsible, among other inhumane acts, for homicide, enforced disappearance, torture and sexual abuses against political opponents.<sup>36</sup>

The ADPF is a sort of action that evokes the abstract and concentrated constitutional jurisdiction of the FSC to avoid or to repair a violation of a Fundamental Principle by a government's act.<sup>37</sup> The claimant, the Order of Attorneys in Brazil (OAB), argued that the traditional interpretation of paragraph 1's amnesty extension was a violation to several Constitutional Fundamental Principles, such as: democratic and republican principles; dignity of the human person; equality; the right to receive information of private interest to such persons, or of collective or general interest.<sup>38</sup> Therefore, the OAB claimed "an interpretation according to the Constitution, in order to declare, lighted by its fundamental principles, that the amnesty granted by the referred law to political crimes or to crimes related to these cannot be extended to ordinary crimes committed by the repression's agents against political opponents, during the military regime (1964/1985)."<sup>39</sup>

<sup>35</sup> C. Buarque and G. Gil, "Cálice", in C. Buarque, *Chico Buarque* (Rio de Janeiro, Phonogram 1973).

<sup>36</sup> Federal Supreme Court. *Non-compliance Action of Fundamental Principle No. 153*. Claimant: Order of Attorneys in Brazil. Claimed: President of the Republic and National Congress. Judge Rapporteur: originally, Judge Eros Grau; currently, Judge Luiz Fux. Brasília (2008).

<sup>37</sup> Article 102 (§1) Constitution of the Federal Republic of Brazil of 1988; Article 1, Law No. 9.882 of 3 December 1999.

<sup>38</sup> Preamble, Article 1(III), Article 5 (XXXIII, XXXIX), Constitution of the Federal Republic of Brazil of 1988.

<sup>39</sup> Federal Supreme Court (Petition). *Non-compliance Action of Fundamental Principle No. 153*, Claimant: Order of Attorneys in Brazil. Claimed: President of the Republic and National Congress. Judge Rapporteur: originally, Judge Eros Grau; currently, Judge Luiz Fux. Brasília (2008), p. 29.

The option for the ADPF was not free of criticism. The final judgment in this kind of action has *erga omnes* and binding effects: inspired by the Latin maxim *stare decisis et non quieta movere* (to stand by decisions and not disturb the undisturbed), the binding effect establishes that, once the FSC announces the ADPF decision, other judgments are obliged to respect the precedent steadied by the prior decision. In other words, if the FSC decides to dismiss the claim, the judgment will be autonomous from particular cases and arguments, and it may have an effect on the Justice Ministry's Amnesty Committee's administrative procedures and legal liability actions, for instance.<sup>40</sup> It has been properly argued that the choice for the ADPF should have considered the claim's fallibility and its risk of halting the debate in lower courts.<sup>41</sup> However, it is important to acknowledge that the claim presented by OAB supplemented a historical default from other public or private major institutions, as the Federal Public Ministry, which has presented few but substantial claims.

The FSC Judgment accounted seven votes for the action's dismissal (Judges Eros Grau, Marco Aurélio, Celso de Mello, Cármen Lúcia, Ellen Gracie, Cezar Peluso and Gilmar Mendes) against two votes in favour of the claim (Judges Ricardo Lewandowski and Ayres Britto).<sup>42</sup> More important than the votes' accountability, however, is the necessity to analyse the reasons presented by the judges, which, in spite of manifesting repudiation to the crimes practiced by state agents during the military government, proved to be mistaken or technically unsatisfying.<sup>43</sup>

### *The Reasoning of the Brazilian Federal Supreme Court's ruling*

The plea for the existence of a state/society bilateral pact on a broad and unrestricted grant of amnesty was the motive presented by the votes of the seven judges who decided for the ADPF's dismissal. According to them, the 1979 Amnesty Law should be interpreted from the moment it was granted, a moment of a gradual and pacific transition. That's a questionable and perverse reading of historical facts, though. First, opposite to the government's amnesty project, a substitutive proposition was drawn

<sup>40</sup> Law No. 10.559 of 13 November 2002.

<sup>41</sup> E.P.N. Meyer, *Ditadura e Responsabilização: elementos para uma justiça de transição no Brasil*, (Belo Horizonte, Arraes 2012), pp. 13–49.

<sup>42</sup> Judge Joaquim Barbosa was exempt; judge Dias Toffoli was prevented to the case because he had approved the information provided by the Office of the Solicitor-General of the Union to ADPF 153's pre-trial when he still was Solicitor-General of the Union (February 2009).

<sup>43</sup> For this judgment's argumentative deconstruction, see L.A. França and R.C. de Oliveira, "Quando o dia raiou sem pedir licença: a responsabilização internacional do Estado brasileiro pelos atos cometidos contra seus inimigos na Guerrilha do Araguaia (1972–1975)", in L.A. França (ed.), *Tipo: Inimigo* (Curitiba, FAE Centro Universitário / Grupo de Pesquisa Modernas Tendências do Sistema Criminal 2011), p. 259–300; J.C.M. da Silva Filho, "O julgamento da ADPF 153 pelo Supremo Tribunal Federal e a inacabada transição democrática brasileira", in W. Ramos Filho (ed.), *Trabalho e Regulação: as lutas sociais e as condições materiais da democracia* (Belo Horizonte, Fórum 2012, v. 1), pp. 129–177; Meyer, *supra* n. 41.



and was defeated by 209 votes against 194.<sup>44</sup> Yet some events from that period prove that, as the opposition gained headway, the military government reacted violently: fires at newsstands, the Guerrilla repression, the murder of Vladimir Herzog, Lapa's Massacre (when three PCdoB leaders were slaughtered), Condor Operation's kidnappings, bombs at OAB and at Riocentro, etc. The judges also agreed that the amnesty derived from the will of Brazilian society. This was not completely true: the amnesty expressed the interest of the military regime. Besides the obvious gain of the self-forgiveness, the analysis of the political and economic conjuncture from that time shows the depletion of the military administration in governing the country; "this fat, the pig no longer walks; this worn, the knife no longer cuts", sang that same censored song.<sup>45</sup> Another factor that undermined the military was the lack of international support for the regime: after the moral defeat of the American society by internal (Watergate) and external (Vietnam) political tragedies, and with a new administration (Carter), American congressmen reformed the politics of sponsoring friendly countries; official reports revealed severe discrepancy between Brazilian government practices and international demands of promotion and defence of human rights.<sup>46</sup>

Six of the seven judges that voted for the ADPF 153's dismissal also alleged that the amnesty has a broad and general nature. The terminology used and repeated by them reproduces a fallacious extension that grants amnesty to the acts of who offers it; this interpretation enables the self-forgiveness. The hazardous widening also grants amnesty to all kinds of crimes, including crimes against humanity. This equivalence attitude brings about two issues: the equivalence of crimes of torture, enforced disappearance and genocide to ordinary crimes; and the disregard about the use of violence's ideological motivation from each side (authoritarianism v. resistance) and about the weapons' imparity, i.e., the offensive potentiality's distinction (institutionalized and bureaucratic v. diffuse and spontaneous).

As for the hermeneutical approach, criticisms have condemned the antiquated interpretation of the FSC judges on the case.<sup>47</sup> The tracks chosen by them – subjective/historical (*voluntas legislatoris* or *voluntas legis*) or objective/normative (literal meaning) – ignored the linguistic revolution that took place in philosophical hermeneutics and its repercussions in legal interpretivism. Only the former Judge Rapporteur Eros Grau chose a better path: inspired by Hans-Georg Gadamer, the judge evoked the *applicatio* thesis, which implies that the normative text acquires its concrete and effective dimensions at the moment of interpretation and by the presuppositions that operate in that instant, i.e. the interpretation is constitutive, not declarative nor reproductive. Paradoxically, Judge Grau classified the 1979 Amnesty

<sup>44</sup> The substitutive project was presented by the Brazilian Democratic Movement party (MDB). See Meyer, *supra* n. 41, p. 107; Silva Filho, *supra* n. 43.

<sup>45</sup> Buarque and Gil, *supra* n. 35.

<sup>46</sup> "Uma diplomacia de golpes e contragolpes", *Veja*, 16 March 1977, pp. 26–27.

<sup>47</sup> For all, Meyer, *supra* n. 41; also Silva Filho, *supra* n. 43.

Law as a *measure-law* (from Ernst Forsthoff's *maßnahmegesetze*): according to this concept, the measure-laws consubstantiate in special administrative acts; they are immediate and concrete (the opposite kind of laws focus on abstract regulation), are temporary (edited with a previously established term of effectiveness or with a time limit that comes with the achievement of the purposes of the law) and regulate directly determinate interests (laws aim several receivers). Therefore, the Amnesty Law, he reasoned, must be interpreted from the reality of the moment in which it was created; this conclusion denied his previous reasoning and also denied to hermeneutics its own role.<sup>48</sup>

Another interesting debate that emerged was on the FSC's role: is it possible for the Court to "overrun" the constitutional jurisdiction of the legislature? Foremost, it is imperative to note that the OAB petition expressly claimed for the FSC to maintain the text of Article 1(§1) in the legal system, but to withdraw normative hypothesis contrary to the Constitution, i.e. interpretations that could relate the crimes committed by state agents to the amnesty granted. Disregarding this, some judges expressed the opinion that any legal revision should be subjected to legislative proceedings;<sup>49</sup> Judge Celso de Mello subscribed that, while performing an abstract normative control, the FSC can only act as a "negative legislator", being prohibited from innovating law in any way.<sup>50</sup> Contradictorily, these assertions do not corroborate the recent FSC's decisions: for instance, the year before (in 2011), the Court had decided an electoral law would not apply to the year it was sanctioned<sup>51</sup> and it had recognized same-sex unions as familial entities.<sup>52</sup> The alleged functional circumscription appears to be a

<sup>48</sup> Meyer, *supra* n. 41, pp. 68–75.

<sup>49</sup> Federal Supreme Court (Judgment). *Non-compliance Action of Fundamental Principle No. 153*. Claimant: Order of Attorneys in Brazil. Claimed: President of the Republic and National Congress. Judge Rapporteur: originally, Judge Eros Grau; currently, Judge Luiz Fux. Brasília (2008), pp. 38–42, 92–94. Votes of Judges Eros Grau and Cármen Lúcia.

<sup>50</sup> Federal Supreme Court (Judgment). *Non-compliance Action of Fundamental Principle No. 153*. Claimant: Order of Attorneys in Brazil. Claimed: President of the Republic and National Congress. Judge Rapporteur: originally, Judge Eros Grau; currently, Judge Luiz Fux. Brasília (2008), pp. 64–65.

<sup>51</sup> Federal Supreme Court. *Extraordinary Appeal No. 633.703-MG*. Claimant: Leonídio Henrique Correa Bouças. Claimed: Electoral Prosecutor's Office. Judge Rapporteur: Gilmar Mendes. (2011). The Court decided that the "Clean Record" Law (Complementary Law No. 135/2010), would not apply to the 2010 elections.

<sup>52</sup> Federal Supreme Court. *Unconstitutionality Direct Action No. 4.277*. Claimant: General Prosecutor. Claimed: President of the Republic and National Congress. Judge Rapporteur: Ayres Britto. (2011); Federal Supreme Court. *Non-compliance Action of Fundamental Principle No. 132*. Claimant: Rio de Janeiro State Governor. Claimed: Rio de Janeiro State Governor et al. Judge Rapporteur: Ayres Britto. (2011). The Court decided that the Civil Code's Article 1.723, which recognized as familiar entity the cohabitation between a man and a woman, also covered the union of two persons of the same gender identity; in his vote, Judge Celso de Mello asserted: "Judicial activism practices, although moderately performed by Supreme Court in exceptional moments, become an institutional need, when government agencies omit or retard, exceedingly, the fulfilment of obligations to which they are subject, even more if one bears in mind that the Judiciary, facing government actions that affront the Constitution, cannot diminish itself to a pure passive posture." (p. 868).

trump plea that enables both normative making and jurisdictional omission justifications.

Only three judges brought up the 1979 Amnesty Law's conventional conformity issue. Judge Celso de Mello acknowledged the relevance of the international documents signed by the Brazilian government and of the Inter-American Court of Human Rights' (IACtHR) precedents; nevertheless, he admitted, these commitments were subordinated to the "Parliament Reservation" principle, by which the Constitution imposes the participation of Congress, through legislative deliberations, when resolving this kind of issues.<sup>53</sup> Judge Cezar Peluso explained that the amnesty "derived from an agreement, as many others celebrated in the world", which could not be censored by international courts.<sup>54</sup> Solely Judge Ricardo Lewandowski (one of the two votes for the ADPF's admission) reminded that the United Nations Human Rights Council and the IACtHR have settled that any state that has ratified the International Covenant on Civil and Political Rights and the American Convention on Human Rights (ACHR), respectively, has the obligation to investigate, judge and punish those responsible for grievous violations of the human rights protected by these treaties.<sup>55</sup>

Among others justifications (the past OAB opinion in favour of the Amnesty Law, its constitutional reception, the ADPF's inadequacy, the Brazilian "cordiality"), the Court majority ruled for the ADPF's dismissal. By questioning the reasons that grounded the first FSC decision on the 1979 Amnesty Law, it becomes clear that the judges might have been mistaken: some of the judges' votes were based on deformed historical interpretations of the political transition; they also gave amnesty an unsustainable amplitude, introducing the legal possibility of self-forgiveness; and, most disturbing, the majority of votes completely ignored the commitments and the submission of Brazil to international conventions and treaties already internalized, which demand effective protection of the human rights and accountability for those who violate them. The FSC decision has not become final, though, for the claimant filed a Motion for Clarification (13 August 2010) and presented a relevant new fact (23 March 2011): the judgment pronounced by the IACtHR.

<sup>53</sup> Federal Supreme Court (Judgment). *Non-compliance Action of Fundamental Principle No. 153*, Claimant: Order of Attorneys in Brazil. Claimed: President of the Republic and National Congress. Judge Rapporteur: originally, Judge Eros Grau; currently, Judge Luiz Fux. Brasília (2008), pp. 183–184, 191–192.

<sup>54</sup> Federal Supreme Court (Judgment). *Non-compliance Action of Fundamental Principle No. 153*, Claimant: Order of Attorneys in Brazil. Claimed: President of the Republic and National Congress. Judge Rapporteur: originally, Judge Eros Grau; currently, Judge Luiz Fux. Brasília (2008), p. 210.

<sup>55</sup> Federal Supreme Court (Judgment). *Non-compliance Action of Fundamental Principle No. 153*, Claimant: Order of Attorneys in Brazil. Claimed: President of the Republic and National Congress. Judge Rapporteur: originally, Judge Eros Grau; currently, Judge Luiz Fux. Brasília (2008), pp. 128–129.

### 3.2. THE INTER-AMERICAN COURT OF HUMAN RIGHTS' *GOMES LUND ET AL. (GUERRILHA DO ARAGUAIA) V. BRAZIL* JUDGMENT

For some, the IACtHR's *Gomes Lund et. al. v. Brazil* judgment may have seemed a *deus ex machina* in response to FSC's decision in ADPF 153. It was not that. Due to the slowness of the Brazilian authorities' investigation in search of the bodies at Araguaia, on 7 August 1995, the Centre for Justice and International Law, together with Human Rights Watch, Americas, presented a petition to the Inter-American Commission on Human Rights (IACmHR) in the name of the disappeared persons and their next of kin. This lawsuit sought to establish whether the state had violated specific international obligations enshrined in the various rules of the ACHR. Since Brazil has been a state party to the ACHR since 25 September 1992, and accepted the contentious jurisdiction of the IACtHR on 10 December 1998, the Court had jurisdiction to admit and judge the claim regarding "facts subsequent" to the 1998 recognition (i.e., the failure to investigate, prosecute, and punish those responsible; the lack of effectiveness of judicial remedies aimed at obtaining information regarding the facts; the restrictions on the right to access information; the suffering of the next of kin; and the acts of a continuous or permanent nature, as the enforced disappearance of persons).<sup>56</sup>

In its judgment, the IACtHR recognized that the military regime implanted in Brazil was responsible for the systematic practice of arbitrary arrests, torture, executions and enforced disappearances, perpetrated by security forces of the military government.<sup>57</sup> And, in particular, that the extermination of the Guerrilla was part of a systematic and widespread repression, harassment and elimination pattern against political opposition. It was proven before the IACtHR that the victims of this operation had been in state custody – isolated and incommunicable – sometime before their disappearances; and that those same victims were tortured during custody, as was the "*modus operandi* of the State agents in the detentions throughout the region, as well as in other enforced disappearances or arrests of the political opposition in Brazil".<sup>58</sup>

As a required step to impute any accountability, the IACtHR had to face the conventionality of the 1979 Amnesty Law. Recalling that, according to Article 27 of the Vienna Convention on the Law of Treaties 1969 (VCLT), a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty, the IACtHR stated that states which voluntarily contracted international obligations, must comply with their conventional international obligations in good faith:

<sup>56</sup> IACtHR (Judgment) 24 November 2010, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, paras. 15–18.

<sup>57</sup> For Portuguese readers, a very good summary of this IACtHR Judgment is available at A.L.Z. de Moraes, "O 'Caso Araguaia' na Corte Interamericana de Direitos Humanos", 8 *Revista Liberdades* (2011), pp. 95–117.

<sup>58</sup> IACtHR (Judgment) 24 November 2010, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 83.

“[W]hen a State is a Party to an international treaty such as the American Convention, all of its organs, including its judges, are also subject to it, wherein they are obligated to ensure that the effects of the provisions of the Convention are not reduced by the application of norms that are contrary to the purpose and end goal and that from the onset lack legal effect. The Judicial Power, in this sense, is internationally obligated to exercise ‘control of conventionality’ *ex officio* between the domestic norms and the American Convention, evidently in the framework of its respective jurisdiction and the appropriate procedural regulations. In this task, the Judicial Power must take into account not only the treaty, but also the interpretation that the Inter-American Court, as the final interpreter of the American Convention, has given it.”<sup>59</sup>

The IACtHR jurisprudence has consolidated that amnesty laws, which exclude the responsibility of perpetrators of serious human rights violations, are contrary to the obligations established in the ACHR and international law:

“[A]mnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.”<sup>60</sup>

Once the control of conventionality acknowledged the incompatibility of the Amnesty Law with the ACHR, the IACtHR ordered the compliance with certain obligations of research, *ex officio* investigation, trial, satisfaction, guarantee of non-repetition and compensation, by the Brazilian State. The IACtHR also noted that Brazil had not complied with its obligation to properly conform its domestic law with the Convention, which was manifest in the failure to codify the crime of enforced disappearance in Brazilian law.<sup>61</sup> The reprimand held a critic and also had a demanding tone: by commanding the adaptation of domestic law to the international treaties and conventions, the conventionality control established – what could be named – the *Conventions’ express mandate of criminalization*, by which all public powers and

<sup>59</sup> IACtHR (Judgment) 24 November 2010, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para. 176.

<sup>60</sup> IACtHR (Judgment) 24 November 2010, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para. 171.

<sup>61</sup> According to IACtHR’s jurisprudence, the enforced disappearance has a multi-offensive characterization: (a) the deprivation of liberty; (b) the direct intervention of state agents or their acquiescence, and (c) the refusal to acknowledge the detention and to reveal the situation or the whereabouts of the interested person. IACtHR (Judgment) 24 November 2010, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para. 104. The Senate’s Bill No. 245/2011, that intends to codify the crime of enforced disappearance has been approved by the Brazilian Senate on 27 August 2013, but it still awaits the Chamber of Deputies’ and the President’s approval.



national spheres are under obligation to respect the ACHR and to conform their legal norms to it.<sup>62</sup> The vote of *ad hoc* Judge Roberto de Figueiredo Caldas confirmed it:

“National Constitutions must be interpreted, or if necessary, even amended to maintain a harmony with the Convention and with the jurisprudence of the Inter-American Court of Human Rights. In accordance with Article 2 of the Convention, States Parties undertake to adopt measures to eliminate those legal norms and practices of any sort that would violate it; conversely, they also commit themselves to edit legislation and to develop actions conducive to an overall and effective respect for the Convention.”<sup>63</sup>

#### 4. CONCLUSION

Beyond the inaccuracy of the historical, juridical, hermeneutical and functional grounds, the FSC made a major mistake in disregarding international commitments ratified by Brazil. The FSC judges were silent on the 1979 Amnesty Law’s conventionality control. Their majority neglected the obligation to investigate, prosecute and, when applicable, punish grave human rights violations – obligation derived from the acknowledgment of the *jus cogens* as a source of Law.<sup>64</sup> And, once again, the Supreme Court bypassed the discussion on the Law expressions’ hierarchy and the status of international treaties and conventions.<sup>65</sup> In previous opportunities, when judging the constitutional possibility of unfaithful trustee’s arrest, the FSC gave way to the ACHR: these decisions set that Article 7 ACHR did not revoke Article 5 (LXVII) Constitution, but prevent *infra*-constitutional norms from granting it effectiveness; once it was asserted that the ACHR was superior to ordinary laws, however inferior to the Constitution, the arresting of unfaithful trustee remained constitutional, but illegal and unconventional, on account of the ACHR.<sup>66</sup> This ingenious dogmatic manoeuvre puzzled even further the normative and doctrinaire divergence on this issue: international treaties and conventions have been admitted in the Brazilian normative

<sup>62</sup> IACtHR (Concurring opinion of Judge *ad hoc* Roberto de Figueiredo Caldas) 24 November 2010, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, paras. 4–5.

<sup>63</sup> IACtHR (Concurring opinion of Judge *ad hoc* Roberto de Figueiredo Caldas) 24 November 2010, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para. 6.

<sup>64</sup> Article 53 VCLT. The VCLT was incorporated to Brazilian juridical system through the Decree No. 7.030 of 14 December 2009.

<sup>65</sup> For the categorization of international treaties and conventions as forms of Law expression, see L.A. França and F.G. Drummond, “Classificações das fontes de direito penal”, in P. C. Busato (ed.), *Fundamentos de Direito Penal* (Curitiba, Juruá 2013), pp. 229–244.

<sup>66</sup> Federal Supreme Court. *Extraordinary Appeal No. 466.343-SP*. Claimant: Banco Bradesco S/A. Claimed: Luciano Cardoso Santos. Judge Rapporteur: Cezar Peluso. (2008); Federal Supreme Court. *Habeas Corpus No. 87.585-TO*. On behalf of: Alberto de Ribamar Ramos Costa. Petitioner: Alberto de Ribamar Ramos Costa. Claimed: Superior Tribunal of Justice. Judge Rapporteur: Marco Aurélio. (2008).



system as *supra*-constitutional institutes,<sup>67</sup> with a constitutional status,<sup>68</sup> equivalent to constitutional amendments,<sup>69</sup> as *supra*-legal norm<sup>70</sup> and as *infra*-constitutional norm.<sup>71</sup>

The FSC's fault may also result in procedural conflicts. By sustaining the previous ADPF 153 decision, the FSC will bring up an impasse: if state agencies initiate to investigate the acts of those who committed crime against humankind in Araguaia, obeying the IACtHR Judgment, they will violate the FSC decision (what can result in annulment of the proceedings through a direct claim<sup>72</sup> to this Supreme Court); if state agencies remain stagnant, they will violate the IACtHR Judgment, what can lead to an international accountability.<sup>73</sup> This predicament could have been avoided if the FSC had prudently announced a continuance of its decision and awaited the IACtHR judgment; despite the claims' distinction, the procedural adjournment would have been opportune for the conformity of the issue.<sup>74</sup>

A conclusion is yet to come: while the IACtHR judgment is final, not subject to appeal and of immediate implementation,<sup>75</sup> the ADPF 153 is not a *res judicata*, final and unappealable. Because of the above two questions arise. First, was Araguaia's Guerrilla a peculiar event? It can be certainly asserted that what happened in Araguaia was a radical sample, not an isolated episode. Second, is it righteous to blame exclusively the judges for the improprieties exposed by the discussion on the 1979 amnesty? For their juridical inaccuracy, yes; not for their reasons. The FSC votes are a

<sup>67</sup> For instance, the International Criminal Court. See L.F. Gomes and V. de O. Mazzuoli, "Crimes da ditadura militar e o 'Caso Araguaia': aplicação do direito internacional dos direitos humanos pelos juízes e tribunais brasileiros", in L.F. Gomes and V. de O. Mazzuoli (eds.), *Crimes da ditadura militar: uma análise à luz da jurisprudência atual da Corte Interamericana de Direitos Humanos* (São Paulo, Revista dos Tribunais 2011), pp. 49–72.

<sup>68</sup> Article 5 (§2), Constitution of the Federal Republic of Brazil of 1988.

<sup>69</sup> Article 5 (§3), *Ibid.*

<sup>70</sup> See *supra* n. 66.

<sup>71</sup> The international statute becomes an ordinary law, when incorporated in the Brazilian internal law system through approval decrees from the National Congress and the President of the Republic.

<sup>72</sup> Article 102 (I)(l), Constitution of the Federal Republic of Brazil of 1988; Article 13, Law No. 8.038 of 28 May 1990.

<sup>73</sup> The Brazilian Federal Public Ministry displayed a different attitude. After a work meeting, the Public Prosecutor of the Union's 2<sup>nd</sup> Chamber of Coordination and Revision announced, on 21 March 2011: "For this reason, the Federal Public Ministry must implement its constitutional attribution of promoting the criminal prosecution and watching over the government's respect for the human rights ensured by the Constitution (Article 129(I)(II)), for as much as the IACtHR's Judgment subsists, of obligatory compliance, and while the IACtHR's jurisdiction's constitutional acknowledgment act is effective, [...]" This excerpt of Doc. No. 1/2011 can be read in Meyer, *supra* n. 41, p. 288.

<sup>74</sup> A. de C. Ramos, "Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos", in Gomes and Mazzuoli (eds.), *supra* n. 67, pp. 174–225.

<sup>75</sup> There is no need to homologate the IACtHR decision by the Superior Tribunal of Justice, once it is an international judgment and not a foreign one. About the judgment's effects, see Article 67 ACHR; Article 105 (I)(i) Constitution of the Federal Republic of Brazil of 1988. See also Moraes, *supra* n. 57, p. 103.

portrait of the Brazilian society's expectations: they lack consciousness and responsibility.

When one realizes that Brazil discloses a tradition of violence and that there is a vigorous political and cultural rejection in unveiling historical facts and in granting space for memories, these questions evidence the important role that the IACtHR has played in the Inter-American system: the IACtHR has reached a state of art that remedies some States' "politics of forgetting" by giving back to many persons their (once stolen) juridical and qualified status. When the FSC judges return for a final decision on the ADPF 153, they will face an opportunity: to confirm what had been decided and to dismiss the claim, or to reform the votes through the 1979 Amnesty Law's control of conventionality and to admit the claim. Either path will be a great opportunity to ponder how ignoring the past may result in the lack of an important learning process that prevents the repetition of violent practices; and about how lucidity and accountability matter in shaping a commitment to human rights.